

# BURROWES and Company



Barristers and Solicitors

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**Michael Burrowes**  
Principal

### Burrowes and Company

Level 2  
111 Customhouse Quay  
P O Box 24515  
Wellington 6142  
Phone: 04 473 7733  
Fax: 04 471 1121  
mrb@burrowes.co.nz  
www.burrowes.co.nz

## Anti-Money Laundering

In 2009 the Anti-Money Laundering and Countering Financing of Terrorism Act 2009 was passed. The Act seeks to deter money laundering and the financing of terrorism, and to contribute to public confidence in the financial system.

The Act provides:

- requirements for customer due diligence, account monitoring and suspicious transaction reporting;
- risk-based framework to detect and deter money laundering and terrorist financing;
- a regime for supervision, monitoring and enforcement involving three supervisors;
- an enforcement regime, including new civil and criminal offences.

Parts of the law are already in force. Remaining provisions will come into force on 30 June 2013.

### Does the Act apply to your business?

If you are a "reporting entity" then the Act applies to you. Reporting entities include financial institutions (such as banks, super scheme providers and life insurers), casinos, certain financial advisers, and trust and company service providers.

General insurers are excluded from the obligations of the Act at this stage. The Act also allows for some exemptions for certain types of products or transactions that may exclude parts of a business from coverage under the Act. Regulations have been introduced that exclude some sectors notably lawyers, accountants, conveyancing practitioners and real estate agents, government departments, pawnbrokers and the Reserve Bank of New Zealand. The Regulations also provide exemptions for "pure risk-based" life insurance policies. It may be important to obtain advice to confirm whether or not the Act applies to your business and whether you should apply for an exemption.

### Who will be your supervisor?

The Act creates three supervisors, who this is will depend on your business. The Reserve Bank will supervise banks, life insurers and non-bank deposit takers. The Financial Markets Authority will supervise issuers of securities, trustee companies, futures dealers, collective investment schemes, brokers and financial advisers. And the Department of Internal Affairs will supervise casinos and others entities. Firms supervised by the Reserve Bank must continue to observe their existing obligations under other legislation.

### What do you have to do?

Some examples of things you will be required to do are:

- develop an assessment of the money laundering and terrorism financing risks;
- appoint a compliance officer;
- create a programme for vetting and training certain staff;
- risk-based due diligence on your customers and ongoing account monitoring;
- reporting suspicious transactions and robust record keeping.

You will need to work to ensure you comply with the requirements when the Act comes fully into force on 30 June 2013. You may also want to get in touch with your designated AML supervisor so that you can receive information and guidance they are distributing.

### New Regulations

New Regulations have been published that amongst other things:

- Establish transaction thresholds;
- Define the application of simplified due diligence (reduced measures)
- Prescribe specific requirements in relation to anonymous accounts, beneficiaries of trusts and annual reporting.

We recommend obtaining detailed legal advice to see whether and how the AML will affect your business.

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# TPD: PART TIME EMPLOYEES VS FULL TIME

The case of *Manglicmot v The Commonwealth Bank Officers' Superannuation Corporation Limited* was a decision of the NSW Court of Appeal. The case considered the extent of duties imposed on trustees and the interpretation of TPD and whether a person who can only return to work part time is TPD.

M was an employee of the Commonwealth Bank doing clerical work. He suffered a series of injuries rendering him unfit from full time work. He reduced his hours from full time to 15 hours per week, spread over 3 days. In 2003 he accepted voluntary redundancy.

By 2003 the insurer had changed and the scope of M's cover was slightly reduced with a specific exclusion in the new policy for TPD cover if the insured was able to work part-time. The Court held that there was no breach by the trustees in terms of the changes to the policy wording. The Court did however look at whether M was covered under the original policy for part-time work.



The original policy provided coverage if M was "... unable ever to engage in or work for reward in any occupation or work which he or she is reasonably capable of performing by reason of education, training or experience".

The inclusion of the words "total and permanent" in any definition was important and the Court said that unfitness to work was required without distinction between full time work and part time work other than by regard to the work which the insured was reasonably capable of performing by reason of education, training or experience. There was also evidence that M had ceased work because he accepted redundancy and not because of sickness, illness or injury. The outcome was that there was no cover for M.

## Implication

The claim will be determined on whether the insured is "unfit to work". It is a possible precedent to avoid TPD cover where claimant is still able to work part-time after disablement (but this will depend on the context).

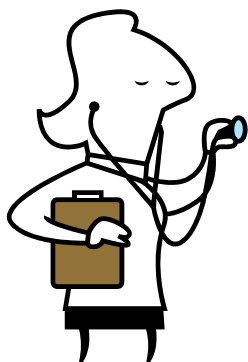
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# CHOICE OF MEDICAL EXAMINER

In *Perry Summerhayes v Australian Super Pty Limited & The Colonial Mutual Life Assurance Society Limited* a recent decision of the Supreme Court of Australia, it was found that life insurers are entitled to have the policy holder examined by a doctor of their own choosing.

## The Facts:

Mr Summerhayes was a member of a superannuation fund which included cover of total and permanent disability. He left his position as an electrician in December 2007 citing psychiatric illness and made a claim with the insurance provider in 2009. The insurer arranged for Mr Summerhayes to be assessed by an independent doctor. Mr Summerhayes refused to attend the appointment.



Proceedings were commenced by Mr Summerhayes alleging that by failing to make a decision in regard to his claim the insurer was constructively declining it.

He sought payment of the total and permanent benefit along with costs and interest. The insurer defended the claim and also applied to the Court for an order compelling Mr Summerhayes to attend the appointment.

## The Decision:

The Supreme Court found that in the absence of an allegation of bias, founded on identifiable facts, or where the doctor was not sufficiently qualified there was no breach of the insurer's duty of good faith when it asked an insured to attend an independent medical examination.

## Implications:

There has been an increase in policy holders objecting to the insurer organising an independent medical examination. These objections are not on the experience or qualifications of the doctor but rather are based on whether the doctor treats patients or only provides medico-legal opinions. *Summerhayes* makes it clear that these are not reasonable grounds for objection (when the objections are unfounded) and life insurers should remember this when seeking the independent medical examination of a total and permanent disability claimant.

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# EXEMPTION OF AUSSIE ADVISERS

The Financial Advisers (Australian Licensees) Exemption Notice 2011 came into force on 1 July 2011. This will exempt Australian-regulated financial advisers from the new financial services regulatory regime until 30 June 2013. Australian financial advisers can therefore continue to service their New Zealand based clients while long term arrangements for mutual trans-Tasman recognition are being developed. The notice will exempt Australian licensees from certain provisions of the Financial

Advisers Act 2008 and the Financial Service Providers (Registration and Dispute Resolution) Act 2008. However, the exemption does provide some limitations. One provision of the Notice states that licensees relying on the exemption should not solicit retail clients in New Zealand. This will ensure that the exemption cannot be used by Australian licensees for business expansion within New Zealand whilst sidestepping full compliance with the FAA and FSPA.

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## INJURY AND DISEASE

*Pass v Gerling Australia Insurance Company Pty Limited* was a decision from the Supreme Court of Western Australia looking at the issue of whether Mr Path's death, which was caused by a blood clot in his artery, was considered an injury as defined by his policy.

### Background:

While Mr Pass was insured he collapsed and was taken to hospital and was pronounced dead. An autopsy revealed he died due to thrombosis in his coronary artery. He had previously presented with chest pains and he had coronary atherosclerosis which had developed over a number of years. It is common for those with coronary atherosclerosis to develop thrombosis.

Mr Pass's wife claimed under the section relating to "personal accident". She argued that Mr Pass's death came under the definition of injury as defined in the section and sought payment of \$250,000. The insurer contended that Mr Pass's death came within an exclusion to the definition of injury, as

consequences of an injury ordinarily described as being a disease and the aggravation of a pre-existing injury are excluded.

### The Decision:

The Supreme Court found that as the death of Mr Pass was due to his coronary atherosclerosis it would be considered ordinarily a disease. The court said that whether it would ordinarily be described as a disease would be from the point of view of a non-expert. Therefore, the death of Mr Pass's was not considered an injury as described in his life insurance policy.

### Implications:

The concepts of injury and disease can be similar in their interpretations. Therefore, policy wordings which relate to them should have clear definitions which can properly be understood and reflect the Judge's comments in Court.



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## BARTHOLOMEW V MERCER

The case of *Bartholomew v Mercer* which was heard in the Federal Magistrates Court of Australia was concerned with the decision of an insurer to pay a superannuation death benefit to the parents of a policy holder instead of to the same sex partner.

The policy holder's partner alleges that there was sex and marital status discrimination as the benefit was paid to the parents of the policy holder rather than him as partner. The decision to pay the benefit to the parents was reaffirmed by the Superannuation Complaints Tribunal. Mr



Bartholomew has appealed that decision and the insurer wanted to transfer the case to the Federal Court.

Proceedings are not granted a transfer to the Federal Magistrates Court when there is a associated matter before the Federal Court of Family Court.

The Court rejected the application to transfer the case as the case did not involve questions of such importance that a transfer would be necessary. The Court also found that the case did not require additional resources to those that were already available in the current Court.

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# BOARD OF TRUSTEES V EDINGTON

The full Federal Court in Australia in *Board of Trustees of the State Public Sector Superannuation Scheme v Edington* considered the process of the Superannuation Complaints Tribunal. The court considered the role of the Tribunal when a complaint is made.

Mr Edington claimed the total and permanent benefit under his policy. However it was denied by the insurer on the basis that it resulted from a pre-existing condition which was not revealed to the insurer when the policy was agreed to. Mr Edington complained to the Tribunal in response to being denied the benefit. The Tribunal reviewed the evidence and found that the

decision by the insurer was fair and reasonable. Mr Edington then appealed to the Federal Court.

The Court found that the role of the Tribunal was not to investigate the reasoning process behind the decision of the insurer. The role of the Tribunal was to determine whether the decision was fair and reasonable, not whether the process was fair and reasonable.



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## WHEN IS INTEREST PAYABLE?

*Apostolovski v Total Risk Management* was a Supreme Court decision from New South Wales providing guidance in relation to the fiduciary duties owed while claims are being processed for superannuation benefits.

Mr Apostolovski claimed for total and permanent disability relating to a back injury. The claim was accepted days before the trial. The trial therefore dealt with the issue of what interest was



payable on the benefit. Mr Apostolovski claimed it should be payable from when the claim was made as opposed to the insurer who claimed it should be calculated from when the claim was denied.

The court found that interest should be charged from the point in which a decision could have been reasonably investigated and determined, taking into account the specific facts in this case in relation to the claimants financial pressure.

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## FINANCIAL OMBUDSMAN

*Mickovski v Financial Ombudsman Service Limited* is a recent case from the Supreme Court of Victoria. It challenges a ruling made by the Financial Ombudsman Service which said the complaint made by Mickovski could not be addressed as it fell outside their jurisdiction.

The Financial Ombudsmen Service claimed the complaint was outside their jurisdiction as the complaint was made more than six years after all the relevant facts were known by the claimant.

Mr Mickovski sought judicial review of this decision by the Financial Ombudsmen service. His application was denied by the Court.

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## WELCOME, NICK



Nick Davis has recently joined the firm as a solicitor.

Nick is a graduate of Otago University and has four years post qualified experience. He has worked previously in a litigation role at a Lower Hutt firm before leaving to travel overseas for a year. Nick will be specialising in Commercial Law, including insurance law and resolution of insurance disputes.

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