INDUSTRY NEWS

ASIC Report 663 on TPD – Analysis and Implications

Background

In Report 498 (2016), ASIC promised a standalone investigation of TPD after finding an average 16% TPD decline rate, which in their view, was unacceptably high.

That review is now complete and has resulted in report 633 'Holes in the safety net: A review of TPD insurance claims'.

The review involved an investigation of seven life insurers representing 65-70% of TPD market in the target calendar years of 2016 and 2017.

As part of the review, ASIC consulted reinsurers, superannuation trustees, the legal community, consumer advocates and also academics. In addition to this, it collected substantial data from the subject life insurers and commissioned research with 20 consumers who had made TPD claims.

Issues identified by ASIC

ASIC identified four issues that the life insurance industry needed to address, namely:

1. ADL definitions deliver poor consumer outcomes – ASIC suspects that these definitions have 'junk' tendencies.
2. The withdrawn claim rate (12.5%) is too high and unexplained by data. ASIC suspects that the challenging and onerous claims processes are driving up the withdrawn claim rate.
3. Insurers have significant deficiencies in their ability to record and search for relevant claims data. Without data, problems in products and processes will go unnoticed and consumers will suffer.
4. Decline rates for certain insurers and for certain types of TPD claims are higher than predicted decline rates – this may be a sign of unfair claims practices.

ADL - Poor consumer outcomes

ASIC noted that the decline rate for claims under ADL cover (which accounts for 4% of TPD claims) was 60%.

ASIC considered that this was too high and that decline rates above 70% make ADL definitions junk (in this regard, two insurers had decline rates over 70%). It also noted that 89% of ADL claims in the review related to group insurance.

ASIC found that this caused a risk of harm to consumers because:

- most insureds will unlikely be able to make a successful claim;
- yet they still pay the same premium as those with 'any occupation cover';
- vulnerable consumers are most affected because of the 'funnel' effect of ADL. That is, those most likely to get it are casual, contract or seasonal employees; and
- it is unsuitable for a range of common illnesses and injuries such as mental illness and musculoskeletal injuries.

ASIC made the following recommendations for group insurance in response to its concerns, to be implemented by 31 March 2020:

- all insurers and super trustees to review all products with ADL definitions and consider removing them or improving the terms so they have demonstrable value;
- if new terms are to be introduced they must be road tested on various cohorts to show that they are not junk;
- improve data collection on outcomes for ADL claims;
- improve communications with consumers about the type of TPD cover they will receive and warn them when cover

could change to ADL; and

- super trustees must consider ASIC's ADL findings when negotiating new group contracts.

For retail insurance, ASIC recommended that by 31 March 2020 insurers review all ADL definitions and explain why they are staying or how they are being modified.

ASIC's recommendations raise the following implications:

1. Should ADL TPD definitions be removed?
2. Is no cover rather than ADL cover, permissible?
3. Is there an alternative to current ADL cover?
4. Is disclosure of ADL cover enough?
5. Assuming the ADL issue is sorted going forward, what of the past claims?

The report highlighted ASIC's enhanced focus on trustees' insurance strategy/best interest duties in the context of TPD offerings. This balancing exercise requires consideration of phasing out ADL definitions versus pricing impact, and also MySuper requirements versus having no cover.

It also gives rise to a potential increase in disputes for ADL declines. Trustees may therefore need to review the basis upon which ADL TPD definitions were provided to specific cohorts. The report no doubt accelerates the desire for standardisation of TPD definitions.

Withdrawn claims – claims frictions

ASIC noted the withdrawn claim rate was 12.5%. This was an important statistic for ASIC as it is a measure of potential consumer harm. Further, ASIC believes that insurers and trustees are poor at capturing the real reasons for withdrawn claims so the real measure of consumer harm cannot be measured.

ASIC identified frictions in the claims process which likely contributes to withdrawn claims including:

- poor insurer communication;
- the requirement for multiple medical assessments;
- threatening behaviours– including surveillance and allegations of fraud;
- delay;
- 'fishing' for non-disclosure; and
- changes to claims staff.

ASIC made the following recommendations in relation to these issues:

- Insurers and trustees to enhance their voluntary codes to incorporate enhanced obligations around proactive communication, streamlined claims lodgment, daily activity diaries, limiting IMEs, appropriate use of desktop surveillance and documented guidelines for claims staff training;
- By 31 March 2020 insurers should report to ASIC on progress towards implementing recommended changes to claims handling practices;
- Trustees to also review their claims handling procedures;
- Insurers not to enter into inconsistent treaties with reinsurers;
- Financial targets/claims scorecards for claims staff to be removed;
- Claims training needs to be robust enough to handle high turnover rates in staff; and
- ASIC spot checks on certain insurers – reports to ASIC required.

The implications of these recommendations include:

- How will the trustee's role in TPD claims change following REP 633?
- Are there differences between the Court's approach and ASIC's approach on delay?
- Could multiple medical examinations breach the duty of utmost good faith?

The above recommendations raise the following future considerations:

- Reduction in initial claims lodgment requirements and paperwork.
- Claims philosophies may need to address issues such as withdrawn claims.
- Both codes of conduct will be updated to further address claims friction issues identified by ASIC.

- Potential introduction of caps on medical assessments before a decision is made subject to exceptional cases.

Poor Data

The issue with respect to this aspect of the report was that consumer harm cannot be detected in real time. All seven insurers failed ASIC's criteria for 'good data' on TPD claims. The specific issues were as follows:

- too slow in providing data;
- critical data was not in searchable form or not available at all;
- data contained errors;
- no standard definitions for key data i.e. when a claim began etc;
- claims in super – insurers had no data on what occurred before a claim was forwarded to them by the trustee.

ASIC responded to these issues with the following recommendations:

- Insurers to invest in resources to improve quality of data
- Collect data which assists insurers to:
  - Assess conduct risk and consumer harm
  - Better measure reasons for withdrawn claims
  - Product value
  - Consumer satisfaction
  - Claims assessment practices
  - Involvement of third parties

ASIC noted that:

No insurer had a holistic, up-to-date picture of potential consumer harm arising from TPD claims handling and outcomes.

The implication on this is that too much focus has been on claims data, and not enough on membership data. Additionally, it is worth noting the possible benefits of improved data in the context of legislative obligations.

Data will become more important for trustees to establish compliance with SIS and other duties in context of group insurance. It will also become more of a focus in defending litigated and AFCA complaints.

Additionally, ASIC's findings may have impacts on which terms meet the 'reasonably necessary to protect legitimate interests' test for the unfair contracts terms regime.

Decline Rates

ASIC found that some characteristics of claims handling unfairly lead to poorer claim outcomes.

These characteristics were present in increased decline rates – this may be due to claims handling procedures which may be operating unfairly for these claimants (ASIC expressed no concluded view on this):

- Mental health and factures
- Youth
- Age of the policy at claim date
- Delay in lodging claim

Decline rates varied significantly between insurers. TAL had the lowest with 9%, Asteron had 28%.

ASIC's response to the above was to recommend the following:

- All Insurers to undertake a targeted review of a 'statistically significant sample' of declined claims for period 1 January 2016 to 31 December 2018 with the following characteristics:
  - Late notified claims
  - Claims made where the insurer no longer holds the risk for the fund
  - Mental illness claims made by young insureds
- Review claims practices especially those with factors with high decline rates and confirm practices are fair and appropriate.

These recommendations raise the following implications:

- How much weight should be placed on age in assessment of TPD claims?
- Should the difficulties associated with assessing claims lodged late lead to higher decline rates?

They also raise the question of what to consider when

determining an appropriate sample of declined claims for the period 1 January 2016 to 31 December 2018.

ASIC's findings also suggest that there should be an increased propensity for tripartite arrangements for assessment of takeover claims following change of insurer.