Maurice Blackburn Pty Limited
ABN 21 105 657 949
Level 21
380 Latrobe Street
Melbourne VIC 3000

DX 466 Melbourne
T (03) 9605 2700
F (03) 9258 9600

11 December 2020

National Transport Commission
Level 3/600 Bourke Street
Melbourne VIC 3000

By email: automatedvehicles@ntc.gov.au

Dear Sir/Madam,

We welcome the opportunity to provide feedback in relation to the NTC discussion paper on a national in-service safety law for automated vehicles.

As you will know, Maurice Blackburn has been a regular contributor to the Commission's ongoing work in establishing an appropriate regulatory framework under which vehicles with an Automated Driving System (ADS) might be safely assimilated onto Australian roads.

In all of our submissions, we have agreed that the primary outcome from this process should be to ensure that no person should be worse off, financially or procedurally, if they are injured by a vehicle whose ADS was engaged, than if they were injured by a conventional vehicle. We continue to hold that principle as the basis for our submissions.

In our previous submissions, we have been supportive of the introduction of an overarching and positive general safety duty on those who bring vehicles with ADS to market (ADSEs). We continue to support proposals to extend that general safety duty to those that might play a significant role in ensuring the ongoing safety of an ADS, once it's on the road.

We welcome this consultation, focusing on the potential role of a new in-service regulator, and the compliance and legislative framework which would underpin this role.

In this submission, we do not seek to respond to every question in the discussion paper. Rather, we have identified those where we believe Maurice Blackburn's experience and expertise can add value to the discussion, and have responded to those below.

Responses to Discussion Paper Questions

Question 1: What prescriptive duties under the general safety duty should be included in the AVSL to manage in-service safety risks?

Maurice Blackburn believes that the list of Potential Prescriptive Duties for ADSEs outlined in Table 2 of the discussion paper is comprehensive and appropriate.

Our experience in working with other regimes where '*as far as reasonably practicable*' is the legal test indicates that it provides appropriate cover.

Maurice Blackburn believes that a general safety duty imposing an affirmative duty of care on all parties in the chain of supply to ensure safety '*so far as is reasonably practicable*' would allow Courts to interpret the duty according to standards of safety and technology at the time. This in turn would ensure that safety outcomes continue to improve as a result of technological advances and do not stagnate.

We acknowledge however that during the introductory stages of automated vehicle technology operating on Australian roads, it would likely be of assistance to ADSEs and injured parties seeking to bring a claim for damages to have added clarity regarding what the general safety duty means. This could come in the form of the suggested prescriptive duties. We note that these duties may become unnecessary as case law evolves through litigation in the Court system in years to come.

Question 2: What matters relating to compliance with a general safety duty are better suited to guidance than being prescribed in the AVSL? Should this guidance have legislative force?

Maurice Blackburn offers no specific matters which may be subject to such arrangements. We caution, however, that any industry code of practice must have sufficient external enforceability to be relevant. Voluntary codes of practice, developed and agreed by industry, have proven to be worthless across a number of sectors - such as insurance and banking. They are an inappropriate mechanism for influencing corporate behaviours in matters where consumers' lives and safety are at risk.

The importance of regulatory oversight over such codes cannot be understated. For this reason we would only support the introduction of this form of guidance if it is relied upon merely as an illustration of conformity with the prescriptive duties discussed above.

Question 3: Are existing and proposed regulatory frameworks (state and territory laws, first -supply requirements and general safety duty obligations) sufficient to address third-party interference with an ADS? If not, should interference with the safe operation of an ADS be a specific offence, and how should this offence be enforced?

Maurice Blackburn agrees with the section of 3.5.3 of the discussion paper which reads:

> *At first supply, the ADSE will need to demonstrate safe system design including that its design and verification processes covers safety-critical issues such as unsafe maintenance, repairs, physical modifications and other system failure.*

And

The only party obliged to take positive steps under the general safety duty is the ADSE. However, the duty will require the ADSE taking positive steps to mitigate or address risks arising from third parties.

We believe that this is a fair requirement of ADSEs, under the proposed 'reasonable steps' test.

Maurice Blackburn has noted in previous submissions that there are a number of additional parties who should accept some degree of responsibility under the general safety duty, over the life of the ADS. We suggest that this responsibility would be imposed by further prescriptive duties. For example:

i. The owner of the vehicle must not attempt to prevent the installation of a system upgrade or update;

ii. Despite system upgrades being mandatory, there should be an additional onus placed on the vehicle owner to ensure as soon as reasonably practicable that the system upgrade or update has been installed. This additional duty serves as a double-checking mechanism in the case of any reception/connection issues;

iii. The distributor, their service providers and mechanics should need to be licensed to carry out any in-service works;

iv. Verification of compliance with the above could be administered via:

- A compulsory annual inspection, carried out by an independent and licensed inspector, or
- As part of the registration process, or
- As part of regular processes to ensure vehicle roadworthiness.

While most of the above could come under the ADSE's first supply duties, those elements reflecting the personal choices of the owner (for example, choosing not to install an update, choosing to use an unlicensed mechanic) may require the development of an offence of interfering with the safe operation of an ADS, within state / territory law.

It is our view that even if there was a state / territory law identified which may be interpreted as extending to cover these scenarios, its application to these scenarios may not be entirely certain. Given the importance of managing the risk of unsafe third-party interference, we submit that it is in the public interest to develop such an offence.

In addition, the development of such an offence would likely result in a public discussion piece around what is and what is not allowed in relation to interference with an ADS in a way that is unlikely to occur if an existing regulation or offence was simply considered capable of applying. Development of a new offence makes a clear statement regarding this important safety aspect.

Question 4: Should the law provide a specific defence for Australian ADSE executive officers who rely on information provided by others, like a parent company, when discharging their due diligence duty?

No response to this consultation question.

Question 5: Please provide your views on the transfer of responsibilities for an in-service ADS from an ADSE to a new entity.

- Should an ADSE be able to transfer responsibility for an in-service ADS to a new entity?

- If so, what powers should the in-service safety regulator have for approving the transfer?

Maurice Blackburn notes NTC's proposed approach, as detailed in section 4.4.1 of the discussion paper:

> *The NTC considers that a new entity should be allowed to take on the responsibilities of an ADSE for an ADS.*

And

> *The NTC considers that the importance of having ongoing responsibility for ADSs that affect the safety of road users, and the need for consumers to be protected, warrants a clear process under the AVSL for approving a new ADSE as fit and proper to take responsibility for an in-service ADS.*

We further note the three options noted in section 4.4.1 for how this could be progressed:

- *Option 1: The in-service regulator accredits new entities against the three first-supply obligations.*
- *Option 2: The in-service regulator accredits new entities against the first-supply statement of compliance.*
- *Option 3: The risks of transferring responsibilities to new entities are managed through the general safety duty.*

Maurice Blackburn endorses the NTC's preference for Option 1. From our perspective as consumer representatives in legal settings, the important thing is that there is clarity in responsibility for the ADS at all times, such that if there is a need for remedy following issues with the ADS, it is clear who the defendant in such a proceeding would be. A regime where the in-service regulator assigns civil and criminal liability for an ADS would provide such certainty.

We agree with the statement on page 45 of the discussion paper that:

> *The safety assurance framework for ADSs is premised on there always being an ADSE that is responsible for an ADS.*

We encourage the NTC to ensure that whatever process is adopted for transference of criminal and civil liability, this principle is retained.

Question 6: If there is no new entity to take responsibility for an ADS when an ADSE exits the market, are recall (including disengagement) under the RVSA and recourse under the Australian Consumer Law appropriate measures? Is there any role for the in-service regulator?

We note that where no new entity is willing to take on responsibility for an ADS, the DITRDC may issue a recall of that ADS under the RVSA, and that:

In these circumstances, consumers may seek compensation under Australian Consumer Law.

Maurice Blackburn supports the 'recall' approach as it ensures no vehicle is in operation without a live responsible entity. However we encourage the NTC to ensure that attention is given to how this can be expedited through the agreed process.

Compensation under the Australian Consumer Law ("ACL") must be fair and, insofar as possible, ensure minimal disruption to the consumer. We reiterate our previous submissions that an ASDE must provide evidence that it has a corporate presence in Australia and that it fulfils minimum financial requirements, to ensure remedies under the ACL are enforceable.

Question 7: What should the role of the in-service regulator be for modifications made by an ADSE to an in-service ADS that changes its ODD or the level of automation?

Maurice Blackburn notes the options detailed in section 5.3.1 of the discussion paper, for how modifications to ADSs may be regulated:

- *Option 1: The in-service regulator has a regulatory approval function for in-service modifications*

- *Option 2: The risks of in-service modifications to an ADS are managed through the general safety duty*

Maurice Blackburn agrees with the proposed approach:

> *The NTC considers that it is preferable for the in-service regulator to have a function to approve modifications that may be carried out to ADSs that are in service.*

A change in ODD or level of automation is a significant change that fundamentally alters the operation of the vehicle and we consider it appropriate that the regulator has oversight of such alterations.

Question 8: How should in-service modifications made by parties other than an ADSE to vehicles to make them automated vehicles be managed? Consider:
- vehicle manufacturers modifying vehicles to become automated vehicles while in service
- businesses that supply and install aftermarket ADSs
- individuals installing aftermarket ADS kits.

Maurice Blackburn notes the three options provided in section 5.4.3 of the discussion paper, to regulate in-service modifications by vehicle manufacturers and ADS businesses:

- *Option 1: Approval of the ADS through the first-supply regulator.*

- *Option 2: Approval of the ADS by the in-service regulator.*

- *Option 3: Accreditation of the vehicle manufacturer or commercial ADS installer by the in-service regulator against the three first-supply obligations.*

Maurice Blackburn agrees with Option 1. This option ensures that the implementation of an ADS will be regulated via the first-supply approval process. In our view, the first-supply

approval process is the most extensive and therefore the option that will ensure better safety outcomes.

In relation to installation and use of aftermarket ADS kits by individuals, we agree with the statement in the discussion paper which says:

> *Given the potential safety risks, the NTC considers that it should be an offence for parties other than the ADSE, those authorised by the ADSE or those authorised by the first-supply regulator or in-service regulator to install an ADS.*

Question 9: Are there any gaps in the regulation and proposed regulation of in-service modifications that the NTC has not identified? Are there other options that should be considered?

We note that Chapter 5 of the discussion paper does not purport to address the situation of a non-ADSE party, such as a repairer, making modifications to an in-service ADS where those modifications do not change the ADS's level of automation. However we make the following comments regarding this issue.

We refer to section 5.2.1 of the discussion paper. We note that Transport Ministers considered that it was not necessary to propose additional regulation under the AVSL to regulate those parties at this stage. However we suggest that an accreditation process should be implemented.

As noted above, from our perspective as consumer representatives in legal settings, it is crucial to ensure that there is clarity regarding who has responsibility for the ADS at all times, so that lines of accountability for safety are clearly delineated and no gaps arise. This also ensures that if there is a need for remedy following issues with the ADS, it is clear who the defendant in such a proceeding would be.

A situation where there is more than one defendant (ADSE, mechanic, distributor) is highly problematic. Under those arrangements, defendants may be able to prolong proceedings through arguments about levels of liability, protracting consumer access to appropriate remedies.

We therefore suggest that any modifications to an ADS that do not change its level of automation or expand beyond the ODD should be done only by a service provider accredited by the ADSE. This ensures a level of responsibility is maintained by the ADSE for repairs and changes made to the vehicle which may impact upon its safety. Where injuries occur, the injured party's claim will therefore not fall "between the cracks" of responsibility between the repairer and the ADSE.

Question 10: Do you agree that the additional functions the NTC has identified may need to be undertaken by the regulator to ensure in-service safety?

- ***Reporting***
- ***Crash investigations (for enforcement, with a specialist agency like the ATSB to undertake no-blame investigations)***
- ***Accreditation***
- ***Regulatory approvals***

Yes.

We believe it would be appropriate for the regulator to have an important role to play in each of the above functions.

Question 11: Accreditation provides an alternate pathway for an entity to enter the market. Are there other purposes for which accreditation should be used in the in-service framework?

No response to this consultation question.

Question 12: Do you agree with the functions the regulator is likely to perform in the initial phase following commencement of the AVSL?

Yes.

We agree that the functions listed in section 6.4.1 are appropriate initial tasks for the regulator.

Question 13: Are the proposed compliance and enforcement powers proportionate to meet the objective of safely operating automated vehicles in Australia?

Yes.

Please see our response to Question 25 for specific feedback on enforcement powers in relation to data security.

Question 14: Do you consider that the in-service regulator should have any of the following powers?

- ***Recall powers***
- ***Power to suspend the operation of an ADS until a safety issue is resolved by the ADSE***
- ***Power to permanently suspend an ADSE from operating its ADS. In what circumstances would such a suspension be warranted?***

Yes.

We agree that the powers detailed in section 7.3.2 of the discussion paper are appropriate for the regulator.

Questions 15 to 24:

No response to these consultation questions.

Questions 25 to 29:

In relation to access to data and information, and the issues addressed in Chapter 10 of the discussion paper, Maurice Blackburn makes the following general points:

Maurice Blackburn supports processes which ensure *a consumer-centred approach* to any decisions related to access to data and information.

The collection of data and information by the regulator should be restricted to that which is to be used for safety purposes. Maurice Blackburn believes that data and information collection by the regulator should only be permissible in circumstances where the end beneficiary of the data collection is the general public, not government agencies or commercial interests who stand to benefit from the data collection.

Under this stipulation, the following could be seen as outcomes of data collection which benefit the general public:

- Using the data where a public safety imperative exists;
- Demonstrating potential faults in automated systems;
- Providing proof of who was in control of a vehicle at the time of an accident; or
- Informing investigations that remove a dangerous vehicle or driver from the roads.

Under this stipulation, the following would NOT be seen as outcomes of data collection which benefit the general public:

- The collection of data for insurance purposes;
- The use of historical/unrelated data to deny insurance claims;
- The access to data, or seeking to engage in data matching by unrelated government departments or agencies – e.g. the ATO, Centrelink or Border Force; or
- The commercialisation of data – the collection of data to on-sell to other institutions.

Enforcement should not be the primary purpose for the collection of data or information by the regulator. If data and information were to be utilised for enforcement purposes, this would very likely lead to a reduced willingness of consumers to adopt newer technology with improved safety outcomes.

A process for external evaluation/review, to determine whether access to data is in the general public's best interest, would need to be developed and implemented.

In particular, we see the *ownership* of data as central to this discussion. In any consideration of access to/collection of data and information, consumer privacy and trust in the process should be at the forefront.

Public interest should drive any decisions as to what data is collected and shared.

As noted in previous submissions, we believe that the core issue here is the lack of trust that consumers have with government and industry to not misuse data. This is well captured in the NTC's Discussion Paper on Government Access to Vehicle Generated Data[1] where it says:

> *The vehicle industry is also reluctant to share data with governments due to concerns over the breadth of purposes it could be used for, particularly because*

[1] https://www.ntc.gov.au/sites/default/files/assets/files/NTC%20Discussion%20Paper%20-%20Government%20access%20to%20vehicle-generated%20data_0.pdf; p.19

many agencies hold roles both as regulators and transport system operators. Industry reluctance is founded on valid concerns of government use of data detrimentally impacting on them or their customers. This could include enforcement or compliance action, inadvertent release of commercial intellectual property and customer privacy.

We are reminded of parallels between this discussion and that surrounding the release of the COVID Safe App. The uptake for that program never achieved the targets set by the government. Privacy is reported as a major reason for people refusing to download the app.[2] Obviously, some sort of social licence needs to exist between the data collector and the consumer in order for them to engage in these data sharing projects. The disappointing uptake seems to indicate that a lack of trust will trump the worthiness of the cause.

In response to the poor uptake, the Federal Government needed to provide legislated assurances[3] that:

- The data was depersonalised/anonymised;
- The data would not be used to 'track' individuals;
- Breaches of user consent would lead to harsh penalties;
- There would be strict, legislated restrictions as to who could access the data;
- The data could not be on-sold for other purposes;
- There were legislated privacy protections[4] in place.

Maurice Blackburn urges the NTC to bear in mind the issues associated with de-identified data. There have been a number of high profile cases[5] where de-identified data has been published, only to be re-identified thereby resulting in a major privacy breach.

This risk has real-world consequences for consumers. Consider an example of a domestic abuse survivor whose abusive partner is able to track their partner's movements through vehicle data. The risks of not getting this right can be enormous.

It is said that data is the new currency.[6] If this is the case, the data generated by automated vehicles would have significant monetary value.[7]

This brings forward questions of data ownership. Maurice Blackburn urges the NTC to consider whether the road user or vehicle owner – those whom the data is about – *should* have some degree of ownership and therefore control of the data via 'opt-out' data access mechanisms.

---

[2] https://theconversation.com/70-of-people-surveyed-said-theyd-download-a-coronavirus-app-only-44-did-why-the-gap-138427

[3] See for example https://www.theguardian.com/australia-news/2020/may/04/government-releases-draft-legislation-for-covidsafe-tracing-app-to-allay-privacy-concerns

[4] https://www.legislation.gov.au/Details/C2020A00044

[5] See for example: https://ovic.vic.gov.au/mediarelease/information-commissioner-investigates-breach-of-myki-users-privacy/; https://www.oaic.gov.au/privacy/privacy-decisions/investigation-reports/mbspbs-data-publication/; https://pursuit.unimelb.edu.au/articles/the-simple-process-of-re-identifying-patients-in-public-health-records

[6] See for example https://www.forbes.com/sites/michelleevans1/2018/03/12/why-data-is-the-most-important-currency-used-in-commerce-today/#6603545354eb

[7] We note the estimates provided by McKinsey and Company in section3.2.3 of the Discussion Paper.

Consumers need assurances that the regulator, the government and industry will resist the temptation to monetise the collected data.

Maurice Blackburn believes that unless similar protections are afforded for data and information collected from automated vehicles as were legislated for the COVID Safe App, the willingness to share that data may be difficult to obtain.

A key focus for the regulator should be that there is no need to retain personalised data, if it is collected primarily for safety purposes. It is important to collect the minimum data necessary to address an identified use. Where this can be done with de-identified data, then that should be prioritised.

Question 30: Do you agree with the differences outlined between the legislative implementation approaches? Which approach will best achieve the reform outcomes?

Maurice Blackburn makes the following general points about the legislative approaches described in Chapter 11.

Maurice Blackburn agrees with the call for the national consistency and the complementary law approach described in Chapter 11. This approach minimises the risk of derogations and improves efficiency of necessary timely amendments required due to evolving technology.

Vehicles are supplied on a national basis and, if an ADS had a safety defect, then it would make sense for that defect to be prosecuted uniformly across Australia by either the proposed regulator or private parties (such as in a class action proceeding) without the potential for the regulatory framework or content of the statutory duty to diverge in each state or territory. The Australian Consumer Law works well as complementary law.

Specific Notes on Chapter 3.

We include some further thoughts below regarding issues raised in Chapter 3 which are not referred to in the discussion paper questions.

We refer to section 3.8 regarding a statutory cause of action. We note that the NTC considers it is premature to recommend a statutory cause of action until it is shown that negligence, state and territory motor accident injury insurance schemes and the Australian Consumer Law are insufficient.

Maurice Blackburn notes that where someone is injured by the breach of a statutory duty, it is of vital importance that the injured party is able to recover damages that result from the breach.

We refer to the co-existence of causes of action in negligence alongside breaches of workplace health and safety law in the worker's compensation jurisdiction. In this area claims are often brought for damages which plead a breach of duty of care (negligence) and a breach of OHS regulations. This highlights that it is not incongruous for the two causes of action to be available to an injured person to ensure appropriate pathways to compensation.

While we note there may be remedies available via other legal frameworks such as the ACL consumer guarantees, the ACL's product liability provisions and by pursuing an action for breach of contract, we note the difficulties associated with relying on existing legal

frameworks previously identified by the NTC in its discussion paper, *Motor Accident Injury Insurance and Automated Vehicles October 2018.*[8]

We note the NTC's concerns regarding access to justice; namely that negligence litigation can be "*risky and stressful for the injured person*" particularly due to the possible "*significant power imbalance*" between the parties.[9]

For the above reasons, we submit that a statutory cause of action should be available to injured parties in addition to existing remedies immediately and not only upon further review. This is particularly the case where one might suggest that there is a greater risk of accident and injury in the early introductory stages of this new technology and therefore the introduction of this technology is exactly the time when we must ensure access to damages for breach of duties.

Please do not hesitate to contact us if we can further assist with the Commission's important work.

Yours faithfully,

Katie Minogue
Senior Associate
Maurice Blackburn Lawyers
(03) 9784 6155
KMinogue@mauriceblackburn.com.au

Tamara Wright
Associate
Maurice Blackburn Lawyers
(03) 8102 2160
TWright@mauriceblackburn.com.au

[8] https://www.ntc.gov.au/Media/Reports/(3D0D6112-D6C5-2D02-8858-EC8607A3F65D).pdf, section 4.2
[9] RIS p.84