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OF AUTOMOTIVE  
INDUSTRIES**

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National Transport Commission  
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Dear Sir

**NTC Discussion Paper – A national in-service safety law for automated vehicles**

Please find attached a submission from the Federal Chamber of Automotive Industries to the above inquiry.

Should you have any questions please contact me on 02 6247 3811.

Yours faithfully

Tony Weber  
Chief Executive

17 December 2020

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FCAI Submission to the National  
Transport Commission on the Discussion  
Paper: 'A national in-service safety law  
for automated vehicles'

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December 2020

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## INTRODUCTION

1. This submission is made by the Federal Chamber of Automotive Industries (**FCAI**), on behalf of itself and its members who distribute passenger motor vehicles, light commercial vehicles and SUVs in Australia. (**Distributors**).
2. This submission is in response to a request for submissions from the National Transport Commission (**NTC**) on a Discussion Paper prepared by the NTC titled 'A national in-service safety law for automated vehicles' (**Paper**).
3. This submission does not address all aspects of the Paper. Merely because the submission does not address a particular aspect of the Paper does not necessarily mean that the FCAI agrees with it.
4. Terms used in the Paper have the same meaning in this submission.
5. There are 3 sections to this submission:
  - Some general comments
  - Responses to some of the specific questions raised in the Paper
  - Some additional matters

## GENERAL COMMENTS

1. Before addressing some of the specific questions in the Paper, the FCAI would like to make the following general points. These points have been made, in part, in our earlier submission on the 'Consultation Regulation Impact Statement - In-service safety for automated vehicles' in August 2019.

Additionally, the FCAI, like all stakeholders in this process, is hindered in making a full assessment of the content of the consultation given that the technology is still evolving and will continue to evolve for many years. Therefore all stakeholders have limited if not negligible experience in AV technology generally and as it might relate to the Australian environment in the future. Consequently, while the following reflects our current views it is difficult to make an accurate judgment about the future of the legislative framework in any detail as the discussion is hypothetical and therefore ongoing consultation in the years ahead is vital. It is essential that the Transport Infrastructure Council recognize this in their considerations.

### **ADSE's will inevitably be the 'manufacturer'<sup>1</sup>**

2. The reality is that the ADSE will invariably, if not exclusively, be the manufacturer of the Automated Vehicle (AV). It is unrealistic to expect any other entity to agree to be the ADSE except perhaps in the unlikely event of an ADS being able to be fitted as an after-market accessory.

### **Consistent with international standards and markets.**

3. Australia is a very small part of the global market and is a passive taker of products and therefore technology. It has a very limited ability to dictate significant changes to products and technology which are unique to Australia. To ensure that Australia is not denied the benefits of AVs, manufacturers of AVs should face the same obligations – both technical and legal – as they face in other major jurisdictions. Different requirements (such as an increased liability burden) in Australia will, at the very least, lead to delays in AVs being made available in Australia and, at worst, mean that the Australian market is simply bypassed.

### **AV's do not pose additional risks**

4. The supposed 'risks' presented by AVs often appear to be overstated. The reality is that they are still vehicles, with motors, travelling along a road – the only difference being that they will in the future be piloted by something much more reliable than a human being.
5. Reference is often made to risks that are unique to AVs such as 'technological failure, cybersecurity failure and failed (or not installed) software updates. The fact is that these risks are already present in vehicles.

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<sup>1</sup> As this term is used in the ACL



6. New cars are already extremely complex. As is often quoted, a new luxury vehicle has nearly 20 times more lines of code in it than a Boeing Dreamliner. Many vehicles already have autonomous driving features, such as automatic parking, speed, and distance control. Many vehicles are already updated by means of software being downloaded remotely. They are already subject to the risk of technology, security, and software failures.
7. It is worth remembering that one of the main reasons AVs are going to be introduced is because of the very fact that there will be orders of magnitude safer than vehicles driven by humans. AV's are being held out as the next step change in reducing the road toll significantly. Yes, there will inevitably be some accidents involving AVs, but these should be viewed in the context of the number of accidents that will be avoided because of the introduction of AVs.

### **Safety, Consistency and Clarity**

8. The legislative framework dealing with AVs should be guided by three overriding principles:
  - Safety
  - Consistency
  - Clarity
9. Safety - The FCAI recognizes that while AVs will be significantly safer than vehicles driven by humans, there remains a real fear within the community about the perceived safety of AVs. It will be important to allay these fears as quickly as possible. To do so, the principal of perceived safety must be paramount. This might mean in some instances accepting that other principles – such as for example, market competition – become secondary, at least for now.
10. Consistency - All parties involved in the operations of AVs should be treated consistently. ADSEs have been identified as the main party responsible for the safety of their ADS's and have onerous obligations imposed on them. Other parties who impact on the safety of AVs should also face similar obligations and be treated the same way. These include parties who modify ADSs (assuming they are allowed to do so), parties who install ADSs after the first supply and parties responsible for aspects of the infrastructure that AVs interact with when travelling.
11. Clarity – Substantial investments will need to be made to bring AVs to the market and realize their undoubted benefits. These investments will be stifled if the legislative landscape is unclear. In this regard, the FCAI recognizes the important efforts being made by the NTC to explore all of the issues involved in the introduction of AVs to Australia and the work being done to ensure that the legal regime is clear.

## RESPONSES TO SPECIFIC QUESTIONS

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

- 1.1. Given that the general safety duty as we currently understand its inclusion on the Automated Vehicle Safety Legislation is, as it says, general, the FCAI sees some benefit in there being some minimum prescriptive requirements to support a general safety duty. These could provide further clarity to the ADSEs without limiting the scope of the general safety duty.
- 1.2. The minimum specific requirements will have to be carefully considered. There will be a fine line between the requirements being, on one hand, so prescriptive as to be limiting, and on the other hand, being so general as to be meaningless.
- 1.3. Some of the examples provided in Table 2 of the Paper seem to err on the side of being too general. For example: *'The ADSE must ensure, so far as is reasonably practicable, that systems are developed, used and maintained to carry out the general safety duty'*, seems to be stating the obvious. On the other hand, *'The ADSE must notify the in-service regulator and users of any systemic safety issues affecting the ADS'*, makes sense.

### **2. 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?**

- 2.1. The FCAI sees some benefit in the NTC's suggestion that the in-service regulator for automated vehicles, in collaboration with industry, could develop industry codes of practice to establish standards and procedures for the ADSE to identify, analyse, evaluate and mitigate risks associated with meeting its obligations under the general safety duty.
- 2.2. This suggestion would allow for some flexibility to address issues as they arise and for industry to be consulted so that the codes are meaningful.
- 2.3. This is subject to one comment: if the codes of practice are to have the force of law, they need to be drafted as if they are pieces of legislation – that is carefully and precisely. There have been a number of instances where codes of practice, which have the force of law, have been drafted in a supposedly 'user friendly' way but have had the opposite effect. The lack of precision has made it very difficult for those who are bound by the code to be sure of their obligations.

### **3. 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?**

3.1. Interfering with the safe operation of an ADS is a serious matter and should be treated accordingly. The ADSE cannot be expected to be responsible for any such interference and it needs to be made clear that any person who does interfere should be subject to an appropriate sanction. To ensure uniformity across the States and Territories as well as to highlight the serious nature of the matter, interfering with the safe operation of an ADS should be a specific offence.

**4. 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?**

4.1. The FCAI is strongly of the view that the law should provide for such a specific defence.

4.2. As pointed out in the Paper (and in this submission) most ADSEs in the Australian market will be the local arm of a global corporation or parent company. In most cases, these ADSEs will not have been involved in the design or manufacture of the ADS hardware or software and the Australian executive officers will have little or no ability to influence the design or manufacture of an ADS. Given this, a defence of 'reasonable reliance' on what the overseas manufacturer has provided by way of substantiating information is warranted.

4.3. The FCAI refers to the example provided for in the Paper: a local director should be able to rely on information from the parent company relating to the safety of the ADS if the director believes, on reasonable grounds, that the information is reliable and competent. In these circumstances, the local director should be found to have exercised appropriate due diligence and as such, should not be exposed to the risk of being prosecuted if the ADSE of which they are a director, breaches the general safety duty.

4.4. The only way to ensure that this defence is available is for it be enshrined in legislation.

**5. 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?**

5.1. The FCAI's starting position is that an ADSE must have maximum flexibility to deal with its business as it sees fit. This includes being able to dispose of its business and any associated liabilities (like the general safety duty) without unnecessary restrictions. Of course, this should not be to the detriment of the on-going safety of ADSs.

5.2. Consistent with this, the FCAI agrees with the NTC that option one is preferable. That is, the in-service regulator would accredit the new entity as the ADSE for the ADSs while in service if it were satisfied that it could meet the following obligations:

- It must have a corporate presence in Australia; and
- It must provide evidence of its current financial position, its grounds for claiming it will have a strong financial position in the future and the level of insurance held; and
- It must outline the ADS data it will record and how it will provide the data to relevant parties.

In addition, those safety criteria that applied to the vehicle at the time of first supply which may vary over time (e.g., compliance with relevant road traffic laws) would also fall as obligations to the transferee.

5.3. The issue is somewhat more complicated if an ADSE simply ceases to operate, or more likely, is placed into liquidation or receivership. If this were to occur, the on-going liabilities associated with the general safety duty owed by the ADSE might prevent it from being sold. This would mean that there would be ADSs operating in the Australian market with no ADSE responsible for them. The Paper does not propose a solution to this, other than perhaps for the vehicles fitted with the ADSs to be removed from the road.

5.4. The FCAI is of the view that it is unfair to punish consumers for what is, in effect, a failure of the in-service regulator to either properly assess the financial viability of the ADSE when it applied for accreditation, or a failure to adequately monitor the ADSE. If vehicles have to be removed from the road, then the owners should be compensated for the loss they will suffer. This compensation should be paid by the in-service regulator – i.e. the Commonwealth Government.

**6. 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?**

6.1. For the reasons set out in paragraphs 5.3 and 5.4, the FCAI is of the view that if ADS's are to be recalled or 'disengaged' then their owners should be compensated by the Commonwealth Government.

**7. 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?**

7.1. The FCAI agrees with NTC's preferred approach: that the in-service regulator should approve modifications that may be carried out to ADSs that are in service. However, the approval should only be required where the modifications that are proposed by the ADSE would be significant enough to require a variation to its type approval or a new type approval if those modified ADSs were to have entered the Australian market for the first time.



7.2. If an ADSE had to go through a formal regulatory approval for minor upgrades this would, in all likelihood, mean that only major upgrades would be contemplated – limiting market take-up and therefore societal benefit.

7.3. Minor upgrades would not be unprotected as the ADSE would still be subject to the general safety duty.

**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 that supply and install aftermarket ADSs**

There is no reason to distinguish between these parties – they should all be treated the same. They should be required to seek approval through the first supply regulator as they will need to be registered as the ADSE. In doing so they should be assessed in the same way and subject to the same responsibilities as the ADSE of a vehicle that was first supplied as an AV.

**9. in-service modifications that the NTC has not identified? Are there other options that should be considered?**

9.1. There is an important issue which is not addressed in the Paper. It is not so much a gap in the regulations as a gap in the general safety duty: who owes the general safety duty when a modification to an ADS is made by someone other than the original ADSE?

9.2. As we understand it, the NTC proposes that there can only ever be one ADSE per ADS (and therefore only one entity owing a general safety duty). It should not be the original ADSE because they have no control over the modification. This leaves the modifier. In the FCAI's view, this is appropriate: the modifier should be responsible for the modified ADS. This means the modifier should replace the original ADSE and accordingly should owe the general safety duty.

9.3. The FCAI recognizes that this means that even if a modifier makes a relatively minor modification, it would be required to 'take over' the responsibility for the whole ADS. The FCAI recognizes that this raises some concerns but sees only one alternative: to prohibit modifications being undertaken by anyone other than the ADSE. This will reduce the risk of unsafe or unauthorized modifications being made and ensure that there is a clear line of sight to the one party responsible for the in-service ADS – the ADSE.

**10. 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?**



10.1. **Reporting** – FCAI agrees that high level reporting should occur however it will be important to ensure that the level of reporting by ADSEs is proportionate and not overly onerous. We agree that an appropriate level of reporting may well contribute to public confidence, but this needs to be balanced against the risk that the reporting will be used in a sensationalist and unbalanced way, as has been the case in some overseas markets. This could unjustifiably undermine public confidence.

10.2. **Crash investigations (for enforcement, with a specialist agency like the ATSB to undertake no-blame investigations)** – FCAI agrees that this would be a useful addition. The FCAI believes that the threshold used by the National Transportation Safety Board (NTSB) in the United States would be useful: it investigates *'significant crashes likely to impact the public's confidence in highway transportation safety, generate high public interest, or highlight national safety issues'*.

10.3. **Accreditation** – Whilst FCAI is supportive of the ability to transfer ADSE responsibilities, we do not agree that the criteria for doing so should be any different to the requirements required at first supply – whether this is through an accreditation process or otherwise.

10.4. **Regulatory approvals** – As the FCAI has said earlier in this submission:

- any party – other than the original ADSE - seeking to install an ADS into an in-service vehicle, should be treated in exactly the same way and have the same responsibilities as the ADSE of the original ADS.
- Any ADSE seeking to modify its ADS, should require the approval of the in-service regulator where the modifications that are proposed would be significant enough to require a variation to its type approval or a new type approval if those modified ADSs were to have entered the Australian market for the first time.
- Consideration should be given to only allowing the original ADSE to modify its ADS.

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

11.1. The FCAI is of the view that the proposed compliance and enforcement powers are proportionate to meet the objective of safely operating AVs in Australia. Those powers include:

- Improvement notices
- Directions to act
- Infringement notices

- Formal warnings
- Enforceable undertakings
- Injunctions.

11.2. Having the powers is one thing; using them consistently and proportionately is another. A transparent compliance and enforcement policy would be helpful in this regard.

**12. Question 14: Do you consider that the in-service regulator should have any of the following powers? (1) Recall powers; (2) Power to suspend the operation of an ADS until a safety issue is resolved by the ADSE; and (3) Power to permanently suspend an ADSE from operating its ADS. In what circumstances would such a suspension be warranted?**

12.1. The FCAI acknowledges the perceived safety risks associated with AVs (although it repeats the point that this appears to be somewhat overstated or should be placed into perspective against the prospect of an individual controlling the vehicle). To mitigate these risks, the FCAI is of the view that the in-service regulator should have the following powers:

12.1.1. **Recall Powers** - The FCAI does not agree that the in-service regulator should have recall powers. There should only be one party that has recall powers – the first supply regulator. If the in-service regulator also has a recall power, there is a real risk that there is a fragmenting of the responsibilities to carry out for recalls.

12.1.2. **The power to suspend the operation of an ADS until a safety issue is resolved by the ADSE.** This should only be available if the safety issue is serious and there is imminent danger to people. As this is tantamount to a recall, this power should sit within the first supply regulator. In addition, this power should be subject to a robust, speedy review.

12.1.3. **The power to permanently suspend an ADSE from operating its ADS.** This should be available only if there is an on-going serious and imminent danger to people and after there has been a full judicial process. This power does not need to be exercised quickly as presumably the regulator will have already suspended the operation of the ADS. The permanent suspension could be lifted if the ADSE was able to demonstrate that its ADS no longer represented a serious and imminent danger to people.

**13. Question 19: How should ADSEs advise on their ADS's interaction with roadside enforcement agencies? Should the AVSL require the ADSE to provide a law enforcement interaction protocol to the in-service regulator and/or roadside enforcement agencies?**

13.1. The FCAI understands the need for ADSEs to, on certain occasions, provide data to enforcement authorities. However, the laws around this need to be clear. For example, it needs to clearly spell out the circumstances in which information must be provided, what information must be provided and in what capacity the ADSE is providing the information. Of equal importance is the need to be clear that the ADSE has no liability to the ADS owner or the enforcement agency if it provides the information.

**14. Question 20: Do you agree that when a breach of road traffic laws occurs and: (1) the ADS is engaged; or (2) a roadside enforcement agency forms a reasonable belief that the ADS was engaged at the time of the breach, that the incident should be treated as a potential breach of the general safety duty and not handled through the infringement system for human drivers?**

14.1. The FCAI agrees with this.

**15. Question 21: Do you agree that when a breach of a road traffic law occurs and a roadside enforcement agency forms a reasonable belief that the remote driver was in control of the vehicle at the time of the breach, that the incident should be referred to the in-service regulator and not handled through the infringement system for human drivers?**

15.1. The FCAI agrees with this, with a more detailed understanding of what a reasonable belief is and the processes put in place for re-allocation back to the driver should the investigation and evidence show that the ADS was not responsible or in-control.

**16. Question 22: Do you agree that when a breach of road traffic laws occurs and: (1) it is unclear to a roadside enforcement agency which entity is in control of the vehicle at the time of a road traffic law breach; or (2) a road safety camera detects a road traffic law breach that the infringement notice be issued in the first instance to the human driver or registered owner/operator with a process to nominate the ADS or remote driver as the driver if required?**

16.1. The FCAI agrees with this.

**17. Question 28: Do you agree that a specific power authorising collection, use and disclosure of personal information is required in the national law and in state and territory legislation?**

17.1. The FCAI is of the view that there should be a specific power. A lot of data will be generated by ADSs, some of which will be personal and possibly sensitive. As such, the right to collect, use and disclose the information along with appropriate limitations and responsibilities needs to be clearly spelt out.

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

- 18.1. Consistency in the law, at least in so far as it regulates and impacts on ADSEs, is paramount. This is best achieved by the Commonwealth relying on its corporations and communications heads of power to enact an AVSL. As noted in the Paper, under the Constitution, the Commonwealth's powers are limited which means that a state and territory law approach will have to 'fill the gaps'. The FCAI agrees with this approach.

## SOME ADDITIONAL MATTERS

### 1. It is not just the ADSEs

- 1.1. Automated vehicles do not operate in a vacuum. ADSEs can control many aspects of their ADSs and can implement many mitigation strategies but AVs will interact with many other aspects of the driving environment – roads, road signs and telecommunications to name a few. For the AVs to be able to operate safely, these other aspects also need to be safe – they need to be properly designed, controlled, and maintained by the parties responsible for them.
- 1.2. These other parties therefore should be subject to the same legal regime as ADSEs. They should owe a general safety duty (which might need to be recast slightly) and their executive officers should be personally liable for breaches of their company's safety duty.

### 2. Repairers

- 2.1. FCAI acknowledges that in June 2020, Infrastructure and Transport Ministers agreed that existing state and territory legislation for repairers could, with some amendments where necessary, accommodate the new risks presented by AVs. The FCAI is of the view that this decision was premature and requires further consideration. The Ministers' decision seems to ignore the fact that repairers can have a substantial impact on the operation of an AV, even if they are not directly repairing the ADS.
- 2.2. To further compound the problem, in many instances the repairs will be undertaken by independent automotive repairers who as it currently stands are not required to be trained, registered, or licensed in most States and Territories. In addition, they are free to choose replacement parts that are sourced from non-verified suppliers.
- 2.3. Given the responsibilities imposed on ADSEs, it would be completely unconscionable for ADSEs to have in-service responsibilities in these circumstances. The FCAI suggests that the decision of the Ministers need to be reconsidered.

### Private Imports of ADS equipped vehicles

Currently under the Road Vehicle Standards Act, Specialist and Enthusiast Vehicles (SEVS) are able to be imported under Ministerial discretion.

FCAI contends that any importer, who imports vehicle(s) with an ADS under this scheme must comply with all aspects of ADS and ADSE requirements in line with the three obligations and eleven safety criteria as required for the first supply regulator.