

21 December 2020

Automated Vehicle Team

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

By email: automatedvehicles@ntc.gov.au

Dear Sir/Madam,

LIV response to NTC Discussion Paper dated October 2020: *A national in-service safety law for automated vehicles*

The Law Institute of Victoria (LIV) thanks you for the opportunity to respond to the NTC Discussion Paper dated October 2020: *A national in-service safety law for automated vehicles* (the Discussion Paper).

The LIV has previously provided responses to the work of the National Transport Commission (NTC) in forming an appropriate regulatory framework for the assimilation of vehicles with an Automated Driving System (“ADS”) onto Australian roads.

The LIV maintains its previously stated position that it is essential to guarantee that no person would be worse off if they are injured by a vehicle whose ADS was engaged, than if they were injured by a conventional vehicle.

The LIV supports the imposition of a primary general safety duty on those introducing vehicles with ADS (“ADSEs”) to market. The LIV continues 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.

In this submission the LIV responds to those questions in the Discussion Paper to which it is able, based on the expertise of its members.

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?

The LIV considers that the list of Potential Prescriptive Duties for ADSEs contained in Table 2 of the discussion paper is suitable.

The LIV’s view is 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 contemporaneous standards of safety and technology, and will guarantee that safety outcomes continue to improve as a result of technological advances.

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?

The LIV cautions against voluntary codes of practice and considers these are unsuitable instruments, particularly when safety is in issue. The LIV considers compliance issues require legislative weight.

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?

The LIV notes 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.

The LIV's view is that these are reasonable obligations for ADSEs under the proposed 'reasonably practicable' test.

The LIV considers there are additional parties upon whom some levels of responsibility for ongoing safety fall. These responsibilities should be imposed by prescriptive duties.

The LIV submits that the following additional responsibilities should be imposed:

1. the owner of the vehicle to ensure system upgrades or updates are installed as soon as reasonably practicable; and
2. the distributor, their service providers and mechanics should be required to be licensed to carry out any works.

Compliance could be governed by mechanisms such as a compulsory annual inspection, or as part of the registration process or as a part of a regular means to test the vehicle remains roadworthy.

The LIV considers a specific offence should be created to cover the potential of interference with the safe operation of an ADS.

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?

The LIV notes the NTC's proposed approach 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.

There are three options in section 4.4.1 for how this could be advanced:

- *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.*

The LIV supports Option 1. The LIV considers it is essential that there be transparency in the accountability for the ADS at all times. A system where the in-service regulator establishes civil and criminal liability for an ADS would provide such assurance.

The LIV supports 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.

The LIV considers it is a fundamental requirement that this is the basis of the regulation. The LIV encourages the NTC to ensure that whatever process is adopted for transference of criminal and civil liability, this tenet is preserved.

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?

The LIV's view is that if there is no new entity which 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.

The LIV's view is that any compensation under the Australian Consumer Law ("ACL") must be fair, and aim for the least interference to the consumer.

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?

The LIV notes the three options provided in section 5.3.1 as to how modifications to ADSs may be regulated.

The LIV supports the proposal:

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.

Alterations to the ODD or level of automation are considerable modifications that may profoundly vary the operation of the vehicle. The LIV's view is that it is appropriate for the regulator to have supervision 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.

The LIV notes the three options provided in section 5.4.3:

- *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.*

The LIV supports Option 1. The first-supply approval process is the most wide-ranging and thus would warrant highest safety outcomes.

The LIV also agrees with the proposition in the Discussion Paper that “*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 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

The LIV agrees with these propositions.

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

The LIV's view is that the functions listed in section 6.4.1 are appropriate duties for the regulator.

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

The LIV agrees with this proposition.

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?

The LIV agrees the powers in section 7.3.2 of the Discussion Paper are appropriate for the regulator.

Questions 25 to 29:

The LIV considers the regulator's collection of data should be restricted to what is required for safety purposes. The data collection should be permitted only to benefit the general public, and not third parties.

Such benefit could encompass:

- use of data for public safety
- revealing prospective faults in automated systems
- proving who was in control of a vehicle at the time of an accident
- investigations to remove a dangerous vehicle or driver from the roads

The LIV submits that the data should not be used for other purposes, such as for insurance purposes, data matching by unrelated government departments or agencies, enforcement purposes or the on-selling of data for commercial purposes.

The LIV submits further that collected data must be de-identified. There is no need to retain personalised data if it is collected principally for safety purposes. The LIV submits it is important to collect the minimum amount of data necessary to deal with an identified use.

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

The LIV strongly supports a nationally consistent approach subject to the proviso that existing State-based rights and entitlements are not eroded; and the over-arching principle that no person should be worse off if injured by a vehicle operating its ADS than if injured by a conventional vehicle.

If you have any queries please contact Irene Chrisafis, Senior Lawyer and Privacy Officer, Litigation Lawyers Section by telephone on 03 9607 9386 or by email at ichrisafis@liv.asn.au.

Yours faithfully,



Sam Pandya
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