

EXECUTIVE OFFICE



Contact officer: Neville Matthew
Contact phone: (02) 6243 1066

23 Marcus Clarke Street
Canberra ACT 2601

GPO Box 3131
Canberra ACT 2601

tel: (02) 6243 1111

www.accc.gov.au

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

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ACCC submission in response to the National Transport Commission's discussion paper on a national in-service safety law for automated vehicles

The Australian Competition and Consumer Commission (ACCC) welcomes the opportunity to respond to the National Transport Commission's (NTC) discussion paper on a national in-service safety law for automated vehicles.

We also welcome agreement by ministers of the Transport and Infrastructure Council in June 2020 to work towards establishing a single, national approach to regulating automated vehicles when they are on public roads, including a national regulator and a national law, supported by a general safety duty.

The ACCC continues to hold the views expressed in our previous submissions to the NTC in response to its 2018 consultation on motor accident injury insurance and automated vehicles, and its 2019 consultation Regulation Impact Statement on in-service safety for automated vehicles. We continue to advocate for a robust, nationally consistent regulatory framework for automated vehicles that is based on a bespoke law and general safety duty that applies for the full life cycle of an automated driving system.

The careful and considered design of this new framework and the underpinning Automated Vehicle Safety Law (AVSL) provides a real opportunity to implement best practice in regulatory design, including clearly defined roles and responsibilities for regulators and minimal overlap and duplication with existing regulatory regimes. We believe this is best achieved by having a national in-service regulator with specialist oversight of all automated vehicle related issues, and a full suite of graduated recall, compliance, and enforcement powers that facilitate regulatory responses proportionate to risk.

Under such a well-defined and purpose built framework, the ACCC would have very limited involvement in the regulation of automated vehicles beyond the provision of general consumer protections in certain limited circumstances. However, we are concerned that the discussion paper contemplates a much greater regulatory role for the ACCC than is necessary or appropriate, including recalls of after-market modifications, compensation for loss of automated functionality, and a statutory cause of action for persons injured by a breach of the general safety duty.

The ACCC considers that the AVSL must provide the in-service regulator with a full range of powers including a statutory cause of action for injured persons. In our view this is crucial to ensuring an effective end-to-end regulatory framework for automated vehicles that has the capacity to address all safety issues across the supply chain and life cycle of an automated vehicle.

Where regulatory effect is sought to be achieved through a patchwork of existing provisions it creates supplier confusion and business uncertainty, and unnecessarily increases compliance costs. It makes it harder to explain and build consumer confidence for road users and the general public. Any requirement for ongoing interagency coordination also increases overall costs to government.

Role of the ACCC and the ACL

The ACCC is a whole of economy regulator that promotes competition and fair trading in markets to benefit consumers, businesses and the Australian community. Our primary responsibility is to ensure that individuals and businesses comply with the *Competition and Consumer Act 2010* (the CCA), which includes the Australian Consumer Law (ACL).

One of the ACCC's key roles in administering the CCA is seeking to ensure that consumers can confidently participate in markets. Through the application of the ACL, the ACCC aims to prevent misleading behaviour and unconscionable conduct, and to minimise the risk posed by unsafe consumer goods and product related services.

Consistent with the Government's Statement of Expectations, the ACCC seeks to avoid duplication of the supervisory activities of other specialist regulators, and considers whether outcomes could be achieved by using existing legislation administered by another regulator.

Recall powers

The ACCC continues to strongly advocate that the national in-service regulator should have access to a full suite of recall, compliance, and enforcement powers, to address safety issues arising in automated vehicles and automated driving systems in use on Australian roads.

The discussion paper proposes that the in-service regulator would work with the first-supply regulator to initiate recalls under existing powers contained in the *Road Vehicle Standards Act 2018* (RVSA). However, due to their specialist knowledge and technical expertise, the in-service regulator would be best-placed to administer recalls, rather than relying on the powers of the first-supply regulator. Having multiple regulators working together to initiate recalls would create unnecessary complication and lead to potential delays in addressing safety risks. It could also lead to increased confusion to consumers and industry, and increased compliance costs for every automated driving system entity (ADSE). Alternatively, the Department of Infrastructure, Transport, Regional Development and Communications (Department of Infrastructure) could be both the first-supply and in-service regulator.

The lack of recall powers for the in-service regulator also creates the potential that the ACCC would be expected to support the management of recalls in certain circumstances, for example, if one or more supplier is not taking sufficient action or there is a serious threat to safety. The ACCC is not the appropriate regulator for managing the recall of automated vehicles or automated driving systems, as the ACCC lacks the specialist knowledge and expertise of the in-service regulator to track emerging issues in relation to these complex products. Any expectation on the ACCC to act in relation to automated vehicles would also diminish our ability to identify hazards in general consumer products, which may ultimately lead to adverse safety outcomes for consumers and the public.

After-market modifications to vehicles by parties other than ADSEs

The ACCC considers that after-market modifications of automated vehicles could present a significant safety risk. We support the recommendation that it should be an offence for parties, other than the ADSE or those authorised, to install most after-market modifications. It is imperative that modifications meet in-service safety requirements and that careful consideration is given to potential safety risks before any modification is authorised. The party responsible for a modification must also be accredited to ensure they are competent and qualified to effectively and safely perform the modification.

In our view the in-service regulator (options 2 and 3), as opposed to the first-supply regulator (option 1), should have responsibility for regulating after-market modifications, consistent with our general position that the in-service regulator should have oversight of all regulatory issues relating to the in-service safety of automated vehicles.

However, as stated above, the in-service regulator must also have access to a full suite of recall, compliance, and enforcement powers to support the functions of authorising modifications and accrediting parties responsible for installing them. Alternatively, the Department of Infrastructure's suite of compliance and enforcement powers under the RVSA, specifically those for recalls, should extend to after-market products and modifications.

The discussion paper identifies that after-market easy-to-install kits are already available for purchase in Australia to modify conventional vehicles to give them automated functions. This unregulated market creates an extremely high risk, which needs to be addressed swiftly by the Department of Infrastructure to prevent the potential for unintended consequences.

Given the high risk of after-market modifications, it may be appropriate for the in-service regulator to introduce additional safety standards that provide specifications for the safe installation and operation of automated vehicles with after-market modifications, over and above the safety requirements of the general safety duty. This framework could be similar to mandatory safety standards administered by the ACCC for specific classes of high-risk consumer products, which need specific additional regulation in addition to the general provisions of the ACL.

Further, it needs to be clear where liability lies and who is responsible in the event of fault or injury caused by an automated vehicle with after-market modification. If an authorised installer carries out after-market modifications, or an entity carries out after-market modifications in accordance with a safety standard as described above, that entity should bear the onus of responsibility and liability in the event of fault or injury.

Compensation for consumers if an ADSE exits the market

The ACCC understands that a key safety assurance principle of the AVSL is that there is always an ADSE responsible for an automated driving system. The discussion paper identifies a key risk in the event that an ADSE becomes insolvent or ceases operations and there is no other ADSE to assume responsibilities.

Under these circumstances, the discussion paper suggests that a recall could be issued under the RVSA, which could involve temporarily or permanently disengaging the automated driving system. It is also proposed that a consumer could seek recourse under the ACL for any loss of automated function from disengaging the automated driving system. Given the severity of this outcome and the potential detriment to consumers, it is imperative that requirements on an ADSE at first-supply are such that only those entities with a very low risk of insolvency and likely to be long-term participants, are approved.

In the event of an unforeseen or unavoidable market exit where there is no ADSE responsible and an automated driving system must be disengaged either temporarily or permanently to ensure safety, the consumer guarantee provisions of the ACL may apply for any loss of use of an automated driving system. However, the ACCC does not consider the ACL to be appropriate for providing recourse to consumers because consumers would be required to enforce their rights individually against a trader in a court or tribunal for financially significant claims and the onus would be on the consumer to seek compensation.

The ACCC also does not have a role in enforcing the consumer guarantees. Our role is to educate and provide advice to consumers about how to exercise their rights. If there is widespread harm we are able to take action using other enforcement tools (i.e. if there has been misleading and deceptive conduct or unconscionable conduct).

Consumers could seek a remedy (e.g. repair, replacement or refund) if the automated vehicle was not of acceptable quality or fit for purpose. However, if an ADSE is insolvent it may be impossible to obtain any remedy. Further, barriers limiting access to justice mean that in many cases consumers do not seek to enforce their rights through courts or tribunals due to associated costs and the need for legal representation.

If an automated vehicle is no longer supported and it is unsafe to operate, the ACCC agrees that the overall need to ensure safety for road users is stronger than the rights of consumers to enjoy goods. However, to protect the rights of consumers it might be necessary for additional requirements under the AVSL in the event there is no responsible ADSE, such as a requirement that all automated vehicles can operate manually if an automated driving system is disabled or becomes unsafe. Alternatively the automated driving system could be returned to a base-level safe operating mode or complex automated functions could be deactivated leaving a baseline level of automation that is safe to use. Market solutions could also be used such as ADSE insurance or third party intermediary service providers for continued support of an automated driving system in the event of insolvency.

Statutory cause of action

The ACCC does not support using the ACL as an 'interim' cause of action for persons injured by a breach of the general safety duty by an ADSE. We continue to hold the view that relying on the ACL to compensate persons injured in an accident involving an automated vehicle would be impractical, inefficient and enormously costly, and would result in unjust and inconsistent outcomes for injured persons and the wider community.

The approach of relying on the ACL as a stop-gap until problems with the regulation of automated vehicles emerge is not consistent with the approach agreed by Ministers for having a single, national approach to regulating automated vehicles. It is also inconsistent with the design principles in the discussion paper that 'there is minimal overlap and duplication with existing regimes'.

Accordingly, the ACCC strongly recommends that the AVSL should provide a statutory cause of action for injured persons. This would allow a more direct avenue for an injured party to pursue the ADSE for a breach of the general safety duty, or a group of people to seek compensation via a class action for loss or injury due to the same breach of the safety duty. It would also make it easier for an injured party to take action against responsible entities such as the ADSE or the authorised installer in the event an after-market modification leads to loss or damage.

Next steps

If you would like to discuss the ACCC's submission, we would be happy to arrange a meeting. Please contact Neville Matthew, General Manager, Risk Management and Policy, Consumer Product Safety Branch, on 02 6243 1066 or at neville.matthew@acc.gov.au.

Yours sincerely



Mick Keogh
Deputy Chair