

# **Submission to National Transport Commission Discussion Paper: Motor Accident Injury Insurance and Automated Vehicles**

## **Background**

The South Australian Department of Treasury and Finance (DTF) welcomes the opportunity to make a submission to the National Transport Commission (NTC) concerning its Discussion Paper (DP) entitled 'Motor Accident Injury Insurance and Automated Vehicles' (MAII).

DTF has consulted with the South Australian (SA) CTP Regulator (Regulator) in the preparation of this submission. The Regulator was represented on the NTC Working Group comprising representatives nominated by the Heads of Motor Accident Injury Schemes (HMAIS) with whom NTC consulted in the preparation of the DP.

The SA Government supports the work being undertaken by the NTC in readiness for the introduction of automated vehicles (AV) from January 2020. The views expressed in this submission are departmental-based and do not necessarily represent the final position of the SA Government.

While the DP specifically excludes consideration of the financial sustainability of MAII Schemes, including costs of premiums, key issues of importance to DTF include any adverse impact on CTP premiums. Therefore, DTF notes and welcomes NTC's intention to seek the views of agencies such as the Australian Prudential Regulation Authority, as well as the Productivity Commission.

DTF acknowledges the release of the NTC Discussion Paper on 'Regulating Government Access to C-ITS and Automated Vehicle Data'. DTF will not make a separate submission to NTC on this Discussion Paper but will comment on aspects of data access for MAII in this submission.

## **Key issues of Importance**

The key issues of importance arising from the 2020 introduction of AVs (Levels 3 to 5 as defined by the Society of Automotive Engineers International Standard J3016) are to:

- ensure that all AV deployment on our roads is subject to the highest safety regulation and scrutiny
- ensure, during any trial period, all AVs must have adequate personal injury insurance protection that extinguishes exposure of the SA CTP Scheme through the Nominal Defendant
- mitigate any adverse impact on CTP premiums, including the need to maintain affordability of CTP premiums and financial stability of CTP insurers
- preserve community rating of CTP premiums
- mitigate catastrophe risk related to AVs including funding mechanisms arising from any event such as cyber attacks
- ensure persons injured by AVs receive identical levels of care and treatment to those injured by conventional vehicles.

## Key Principles

DTF agrees with the overarching principle detailed at Clause 1.7 of the DP, as well as the five supporting principles. However, it is recommended that the overarching principle be amended to state that:

*No person should be worse off, **or better off**, financially or procedurally, **in the relevant jurisdiction**, if they are injured by a vehicle whose ADS was engaged, than if they were injured by a vehicle controlled by a human driver.*

The words 'or better off' are added to support the injured person having the same rights to benefits and/or compensation regardless of whether it was an AV or a conventional vehicle involved, i.e. the rights should be no worse or better for either vehicle use. The 'relevant jurisdiction' is added to reflect that any model to support the introduction of AVs must work within the current existing personal injury entitlements of each state or territory.

## Preferred Option

Option 3 to expand existing MAlI Schemes to accommodate the introduction of Level 3 to 5 AVs is preferred. The benefits of Option 3 are:

- ensuring injured persons have access to existing MAlI benefits and/or compensation regardless of whether the injury was caused by an AV whose Automated Driving System (ADS) was engaged or not
- avoiding the need to determine as part of the liability determination whether the Automated Driving System (ADS) was engaged or not at the time of the accident
- enabling the injured person to deal with the usual insurer in their jurisdiction, thereby avoiding the injured person having to deal with the manufacturer or any other ADS entity, whether located in Australia or overseas
- ensuring that the single entity handling the claim of the injured person is experienced in claims management and is subject to MAlI regulatory oversight.

Option 3 presents as the most practical approach. It will reduce disruption to existing MAlI Schemes. During the AV transition phase from 2020, it is anticipated that it may take decades for level 5 fully automated vehicles to be available extensively for private use. Option 3 will accommodate both the emerging technology and the accrual of MAlI Scheme experience including gathering of actuarial data required for accurate CTP premium pricing.

## Recovery Rights

Option 3 is preferred on the basis of utilising existing rights of recovery by MAlI Schemes against the ADS entity or any at-fault third parties. As identified in the DP, rights of recovery currently exist under product liability laws, essentially in negligence, contract and under Australia Consumer Law. Whether rights of recovery should be pursued by an insurer, whether in a private or government underwritten MAlI Schemes, involves largely commercial decisions having regard to a number of factors. Experience over time will determine whether these existing rights will remain adequate or an alternative model will have to be developed.

It may be necessary to ensure legislative rights of recovery, using existing legal mechanisms, against an ADS entity if there are deficiencies with current definitions relating to 'manufacturer' and 'consumer'. This may require further collaborative review, as there should be uniformity and consistency.

NTC suggests at Clause 4.4.1 of the DP that to avoid the complexities of proving causation and establishing liability in recovery actions, a national reinsurance pool from compulsory contributions from all parties who could contribute to an ADS malfunction may be established. This option is not supported at present. Further consideration is necessary to ensure any secondary level of insurance arrangement is easy to administer and operationally efficient.

### **Legislative Changes**

To support Option 3, a clear legislative framework is required to ensure national consistency in MAII Schemes to cover both human and non-human vehicle control.

### **Data Issues**

Knowing whether the ADS system was engaged at the time of the accident will be critical in the event of an insurer seeking recovery against the ADS entity. While such data could be sought under the existing court processes for orders or subpoenas to produce such information, this may prove slow and costly and impede CTP insurers' ability to seek recovery from the responsible ADS entities.

It is proposed that issues relating to data access be monitored over time to determine whether existing mechanisms to access data remain adequate or require legislative intervention.