

ACT Submission to the National Transport Commission *Motor Accident Injury Insurance and Automated Vehicles* Discussion Paper

Background

The ACT provides the following submission in response to the National Transport Commission's (NTC) *Motor Accident Injury Insurance and Automated Vehicles (MAIAV)* Discussion Paper.

This submission has been prepared by the ACT Treasury in consultation with other agencies that have significant road transport regulation, transport policy and insurance responsibilities in the context of determining appropriate models for regulating autonomous vehicles (AVs). This includes the Justice and Community Safety Directorate; Transport Canberra and City Services Directorate; and the Australian Capital Territory Insurance Authority.

Introduction and General Position

The ACT welcomes the opportunity to provide high level comments on the MAIAV Discussion Paper and to actively working with the NTC to develop an effective, timely and financially viable insurance model for AVs.

The ACT is also engaged with the Heads of Motor Accident Injury Insurance (HMAII) Schemes forum and works in conjunction with other CTP Regulators to develop and inform insurance policy. This process is assisting the ACT in forming its views on the policy options outlined in the MAIAV Discussion Paper.

The ACT considers that AVs should be treated in the same manner as human controlled vehicles. That is, AVs should be covered by CTP schemes to ensure that those unfortunate enough to suffer an injury arising from a motor vehicle accident (MVA) with an AV are provided with supportive treatment and care benefits to assist in their timely rehabilitation and recovery. This will provide the community with confidence that safety-net arrangements are in place as the safe deployment of AVs cannot be 100% guaranteed.

The safe deployment and protection of individuals from personal injury is expected to be particularly pertinent at the earliest stages of AV take-up, where the technology is still being developed and will be operating alongside human driven vehicles. The public will have the reasonable expectation that if human driven vehicles are required to be compulsorily insured, so equally should AVs.

The potential benefits of AVs, including improved traffic flows; increased social mobility; and over-time, reductions in MVA have now been generally accepted. The ACT

considers that national co-ordination is vital for the safe deployment of AVs and supports the work undertaken by the NTC to date.

While supporting the development and uptake of AVs, manufacturers and associated parties must be held accountable when AVs malfunction and do not comply with the road rules. As such, effective mechanisms should be put in place that require manufacturers and 'other parties' (those involved in AV manufacture, supply and delivery - including modifiers, installers, repairers and infrastructure and telecommunications providers) to contribute to the cost of treating personal injuries arising from a MVA involving an AV.

The ACT favours a model where AVs are covered by existing CTP schemes, but where there is a specified recovery rights arrangement which could take several forms. One such option is for CTP insurers (whether privately underwritten or government underwritten schemes) to have recovery rights to pooled funding provided by the manufacturer, automated driving system entities (ADSEs) or 'other parties' of the malfunctioning AV.

Given the complexity of arrangements around product liability (AV malfunction), ensuring that AV manufacturers and other parties are 'on the hook' to pay for personal injuries related to product liability will be challenging. However, an effective and financially viable insurance model for AVs is essential.

NTC Discussion Paper Principles

The ACT supports the overarching principle 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 vehicle controlled by a human driver."

The supporting principles in the Discussion Paper are considered to be appropriate and generally suitable to guide the development of a fair, efficient and sustainable framework to provide MVA insurance arrangements for AVs. Of particular merit are the principles underlying the insurance arrangements that:

- provide reasonable and timely access to compensation in order to promote the speedy rehabilitation and recovery of persons injured by an AV; and
- ensure the model covering personal injuries caused by AVs is fully funded and affordable.

In any insurance model, it is critical that the model minimises potential litigation between insurers and manufacturers / ADSEs; as well as between manufacturers / ADSEs and other parties (as previously defined).

The ACT also endorses the fair and equitable protection of injured parties regardless of the type of vehicle that is involved in an accident. Consistent with the NTC's *Safety Assurance for Automated Driving Systems: Decision Regulation Impact Statement* (November 2018), an ADSE must hold an appropriate level of insurance to cover personal injury and death caused by an ADS.

As there may be a long transition period in the adoption of fully integrated AVs, the proposed principles should not be regarded as immutable, and other principles may be considered necessary or practicable in the future.

In this context, the ACT supports the following additional principles to guide the development of a policy direction and assessment of MVA injury insurance solutions for AVs.¹ A suitable AV insurance model, and the criteria for its assessment, should also:

- encompass *simplicity in model design and administration* as a priority;
- offer *fair and equitable sharing of costs* associated with MVAs caused by AVs across responsible parties;
- be *flexible* – the model should be capable of adjusting to the different stages of the AV industry's development; and
- stimulate *competition in safety innovation* – encourage competition in safety features between AV manufacturers.

Problems and Barriers

The ACT considers that the Discussion Paper accurately identifies the legislative barriers and gaps that may limit the protection afforded by current MAII schemes to injured parties in an ADS accident from accessing fair and equitable compensation benefits.

The paper effectively identifies the key challenges that require resolution in developing a sustainable solution for AV injury insurance. The key challenges centre on the issue of adequate access to compensation for injuries caused by AV technology risks and the consequential financial impact on MAII schemes (if MAII schemes were expanded to include injuries arising from AV technology product faults);

- to date, AV accidents have arisen due to a mix of technology faults and/or human driver error, such as not taking control of the AV after vehicle warnings, which appears to be related to the high proportion of accidents caused by inattention.

The ACT agrees that the successful redesign of MAII schemes to cover AV injuries would need to pay particular attention to ensure that the cost of ADS accidents is borne by those who can control and mitigate the risks – this includes manufacturers, ADSEs and 'other parties'.

The issue of recovery between insurers and other responsible parties, (e.g. manufacturers, ADSEs or software design companies) will require substantial development before an insurance solution for AVs can be agreed. In line with the core principles of the MAIAV Discussion Paper, a priority should be, where possible, to minimise costly legal disputes regarding fault between the parties.

¹ The additional principles have been developed by HMAII Schemes.

Data issues

The MAIAV Discussion Paper has identified numerous issues affecting data collection, access and storage; as well as the need to balance those considerations against the privacy interests of owners, occupants and drivers of an AV.

Accessibility to the data required for the identification of the cause of an accident, and the adequate protection of personal information, are important legal and policy considerations in the development of an AV injury insurance solution. Data access requirements will need to be determined consistently with the requirements of Commonwealth and State privacy legislation.

Whether or not there are gaps in the current processes will be clearer after work to clarify regulatory access to the data is completed in 2019. This work will involve scoping the circumstances in which government agencies should be able to access and use data generated by AVs.

The issue should also be reviewed after fully automated vehicles have been operational for a period and as more relevant accident data becomes available against the background of international policy developments and changes to AV data use.

Mutual recognition of registration issues

A key policy consideration is the development of a regulatory scheme for AVs to enable consistency across jurisdictions and ensure road users are protected in the event of an accident. This is important to encourage the uptake of AVs and their safe deployment.

At present any mutual recognition of registration in other jurisdictions is intended to cover temporary visitors to the ACT. Persons who move permanently to the ACT are expected to transfer their registration within a short timeframe. However, there is an administrative tolerance of about three months for the changeover of registration.

Any arrangements for mutual recognition of registration of AVs, outside the existing framework, should be considered as part of the broader question of a single registration system.

Review of the Options

Favoured Approach

The ACT considers that 'Option 3 - Expand MAII schemes to cover injuries caused by an ADS' with effective rights of recovery against manufacturers (and/or ADSEs and 'other parties') is most likely to deliver outcomes consistent with the additional principles articulated in this submission and in the MAIAV Discussion Paper, as well as operationally.

'Option 5 – benchmarks' may be helpful in guiding the insurance model and arrangements so that there is general consistency across the States in the experience of individuals injured in a MVA involving an AV. That is, for example, in terms of who to submit claims to; the AVs covered; and mutual recognition across States borders. This Option would be helpful in designing the framework for Option 3.

The ACT does not consider that Option 5 would be an effective stand-alone option if, for example, different schemes made CTP coverage compulsory for AVs and others did not.

Analysis of Options

Option 1 - existing legal framework

The ACT **does not** support Option 1 as it clearly does not satisfy the overarching principle that no person should be worse off, financially or procedurally, if injured by an AV.

Under Option 1 persons who are injured by an ADS-controlled motor vehicle may not be able to pursue a claim under the MAll scheme, and in turn may not receive the same benefits as those injured by a human driver. For those not eligible to make a CTP claim, the alternative routes to compensation would only be through litigation and contingent on proving negligence, leading to more costly and less certain outcomes for those injured.

Option 2 - excluding injuries caused by an ADS-controlled vehicle from a MAll scheme

The ACT **does not** support Option 2 as this effectively means that claims and benefits are not available under MAll schemes. This would require injured persons to seek legal recourse against the manufacturer, ADSE or 'other parties' under consumer law or common law to receive compensation. There are significant difficulties with claimants getting compensation under these arrangements.

Option 3 - expand MAll schemes to cover injuries caused by an ADS

The ACT **supports** Option 3 with an effective, specified recovery rights arrangement which could take several forms.

A recovery rights arrangement (suggested Option 3a) could take the form of a pool funded by AV manufacturers, ADSEs, and other parties, and would be accessible by insurers to provide for the treatment, care and rehabilitation of parties injured in an AV MVA. As part of this framework:

- a 'recovery rights pool' could be developed at a State level (less populous States could combine with larger States to form larger pools to achieve economies of scale), or at a national level; and
- claims could be handled by existing CTP insurers / governments to provide ease of access for claimants and continuity of service (no change to the current arrangements that the public is familiar with).

Alternatively, but possibly a more difficult option to put in place, is a recovery rights arrangement (suggested Option 3b) that could take the form of an AV owner taking out additional AV policy insurance with a separate external insurer (an Australian or possibly multinational insurer) which covers the AV manufacturer (or ADSE or other party) for a malfunctioning AV. The CTP insurer could have right of recovery to claim costs for the personal injury from the external insurer (as part of the insurance policy) when the AV caused the accident:

- again, claims could be handled by existing CTP insurers / governments to provide ease of access for claimants and continuity of service.

Option **3b**, which relies on private external insurers, may be more difficult to introduce than Option **3a** given that a number of CTP schemes are government run and underwritten.

The ACT CTP Regulator is working with all other HMAII Schemes to explore these and other approaches in more detail. As such, they are proposals in development only at this stage.

A recovery rights option best meets the overarching principle and supporting principles; would be the easiest model for claimants to understand; offers the most efficient means to protect injuries from MVAs involving an MVA; and can be financially viable / self-supporting.

Careful implementation of this option, particularly in relation to attribution of and the mechanisms for the recovery of costs across the relevant parties, should ensure that the financial sustainability of the CTP insurance scheme is not compromised.

Option 4 – a purpose-built AV Scheme

The ACT **does not** support Option 4 which sees a purpose-built scheme being established to ensure there is an accessible claims process for people injured by AVs. This could be a National scheme, or a State scheme designed to mirror existing MAII scheme arrangements in each jurisdiction. This raises significant policy questions that need to be worked through. The complexity and potential administrative burden of implementing this option given the time constraints of the NTC's reform program would exclude this solution as being feasible at the present time.

The interaction between the MAII scheme and purpose built AV scheme would need to be very clear, given the potential to create disputes and confusion for injured persons who would need to determine how a vehicle was being driven before making a claim.

The ACT agrees with the NTC that this option is better suited to a time when highly and fully automated vehicles form the greater part of the national fleet, as administrative costs of operating a scheme for a relatively small number of AVs operating during the initial period of operation is likely to be disproportionately high.

Option 5 – minimum benchmarks

Option 5 **may be helpful** in guiding the insurance model and arrangements so that individuals injured in a MVA with an AV face some consistency across the States.

The following minimum benchmarks could be used to guide the implementation of any solution:

- injured people only have to deal with one insurer;
- there is a recovery mechanism which ensures that those in control of the risk pay for it;
- the scheme is compulsory for AVs; and
- there is an automatic right of recovery against AVs.

Option 6 - Single insurer

The ACT **does not** support Option 6 given:

- the additional work required to develop such arrangements;
- the fact that this option is a radical re-think of the way insurance is provided in Australia;
- it would involve a significant change for how insurance is provided in government run CTP schemes; and
- that this approach is unlikely to be resolved in time to meet the NTC's stated objectives of end-to-end regulatory reform by 2020.

Conclusion

The ACT is committed to actively working through the HMAII Schemes forum, and in conjunction with the NTC, to develop an effective, timely and financially viable insurance model for AVs.

The central criteria articulated in the MAIAV Discussion Paper are appropriate for assessing the options that have been provided, and cost and complexity of implementation are key factors that should also be considered in evaluating the options, and designing an effective insurance model going forward.

The ACT favours a model where AVs are covered by existing CTP schemes, but where there is a specified recovery rights arrangement which could take several forms. One such option is for CTP insurers (whether privately underwritten or government underwritten schemes) to have recovery rights to pooled funding provided by the manufacturer, ADSEs or 'other parties' of the malfunctioning AV.