

13 December 2018



Attention: **Automated Vehicle Team**  
National Transport Commission  
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Dear Automated Vehicle Team,

**Submission to the National Transport Commission Discussion Paper: Motor Accident Injury Insurance and Automated Vehicles ('MAIL').**

The Law Institute of Victoria (the 'LIV') thanks the National Transport Commission (the 'NTC') for the opportunity to provide further submissions in respect of the regulatory issues surrounding the implementation of varying levels of automated vehicles on our roads.

The below is the LIV's response to the NTC's *Motor Accident Injury Insurance and Automated Vehicles, October 2018* discussion paper ('the discussion paper').

**Principles**

While there are a number of specific questions to be addressed, the LIV reiterates its support for the overarching principle that:

*no person shall 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*

Further, it is worth emphasising the five supporting principles which are as follows:

1. Reasonable and timely access to compensation should continue regardless of the type of vehicle involved in the injury;
2. The arrangements should promote transparency and certainty in accessing compensation;
3. The arrangements should ensure insurance for personal injuries caused by automated vehicles is fully funded and affordability is considered;
4. Existing state and territory benefit regimes should not be required to change; and
5. The arrangements should include an efficient process to access a standard set of reliable and verifiable vehicle crash data.

**The options outlined by the NTC**

- Option 1: Rely on existing framework
- Option 2: Exclude injuries caused by an ADS from MAIL schemes
- Option 3: Expand current MAIL schemes to cover injuries caused by an ADS
- Option 4: Purpose-built automated vehicle scheme
- Option 5: Minimum benchmarks
- Option 6: Single insurer

**Scope of Response**

In its response to the discussion paper the LIV will focus on addressing how to improve access for injured victims to MAIL schemes. Rather than specifically evaluating each option, the LIV will comment

on its preferred option before discussing other options more broadly to highlight why they do not currently fit within the principles outlined in the discussion paper and above.

Furthermore, the LIV supports efficient and transparent use of ADS data in civil and criminal investigations with the caveat that data is appropriately limited where possible for privacy protections.

## **LIV Response**

The LIV submits that any of the options outlined must be measured against and reach the standard of the overarching principle and the five supporting principles the NTC has set in the discussion paper.

### LIV's preferred option: Expand the MAII schemes to cover injuries caused by an ADS

In light of the overarching principle, the LIV submits and supports option 3, which is to expand the MAII schemes to include ADS injuries.

As previously submitted by the LIV in its response to the *Changing Driving Laws to Support Automated Vehicles, October 2017*, discussion paper the LIV's perspective in Victoria is to amend the definition of "driver" in the *Transport Accident Act* to include an ADS (when engaged so as to include all levels of automation) and possibly to add a further deemed "transport accident" circumstance in section 3(1A) to avoid any doubt.<sup>1</sup> The LIV also refers to its submission dated 13 July 2016 responding to the NTC's *Regulatory Options for Automated Vehicles: Discussion Paper May 2016*, in which it was suggested that the term "automated vehicle" could be added to the *Transport Accident Act* to include partial, conditional, or high levels of automation.

Although somewhat outside the scope of this discussion paper, the LIV is particularly concerned with the safety of conditional automation in vehicles. For example, studies in the United States have demonstrated that the response time of a driver with level 3 ADS engaged to regain control of a vehicle when alerted by the vehicle has been as high as 2.3 seconds on average.<sup>2</sup> In fact, the longer the driver was distracted, the longer the response time for a driver to regain control of the vehicle. With that in mind, the LIV submits that in order to maintain procedural and financial fairness for injured victims at medium-high levels of automation, expanding the MAII schemes is the most suitable option for the current climate.

Additionally, the LIV's preference is to continue to have an experienced statutory insurer, such as the Transport Accident Commission (the 'TAC'), as the ultimate indemnifier regardless of whether fault lies with a human driver or the ADSE (at any level of automation) so that a potential victim is not prejudiced. The LIV emphasises that a single point of access for individuals is crucial in ensuring that no person is worse off procedurally or financially if an injury is caused by ADS.

In Victoria, the TAC as the relevant indemnifier would have and still retain all recovery rights against the party or parties ultimately at fault, especially where it is the IT system provider, the software producer or provider of any ADS, any manufacturer, supplier and/or parts/supplier manufacturer and so on if that is the case. In the LIV's view, when properly exercised, recovery rights provide sufficient protections for operators and insurers, particularly given we should be seeing a reduction in road accidents in the longer term as a result of the technology due to less claims.<sup>3</sup>

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<sup>1</sup> See *Road Safety Amendment (Automated Vehicles) Bill 2017 (Vic)* for potential definitions in respect of a 'dynamic driving task'.

<sup>2</sup> National Highway Traffic Safety Administration (2015), *Human Factors Evaluation of Level 2 and Level 3 Automated Driving Concept* pp 10.

<sup>3</sup> According to the National Highway Traffic Safety Administration, 94% of accidents are mainly caused by human error. See *Advice on Automated and Zero Emissions Vehicles Infrastructure*, Infrastructure Victoria (October 2018) pp. 86

### *Modification to Option 3: Reinsurance Pool*

The LIV submits that any changes to existing rights of recovery by the TAC need to ensure that the cost of ADS crashes are borne by those who control the risks. Section 4.4.4 of NTC's discussion paper notes an alternative addition to option 3, adding a reinsurance pool to offset some of the risks with governments underwriting the private sector. A reinsurance pool may be feasible if ADSEs are required to maintain ongoing corporate presence and financial accountability in Australia.<sup>4</sup> In principle, it may be a practical solution with respect to reducing government risk, but the LIV recommends some caution.

A reinsurance pool as currently suggested by the NTC appears, in the LIV's view, unlikely to ensure the costs of personal injuries from ADS crashes are borne by those who can control the risks.<sup>5</sup> More specifically, it does not necessarily directly hold accountable those responsible for the defect. The LIV submits that this may require 'faultless' parties who have never contributed to any defect causing an accident to contribute to the pool. The LIV also considers the system in the United Kingdom (as highlighted in the discussion paper at 1.9.1) where insurers can limit their liability if ADS was tampered with or updates not installed or updated by the insured worthy of exploration. The LIV is currently of the view that this concept requires further development before further consideration is undertaken.

The LIV submits further that a reinsurance pool as currently suggested by the NTC, is unnecessary in the longer term. In the LIV's view, if the insurance pool continues to be funded by motor vehicle registration the premiums will inevitably grow the insurance pool in any event, as the number of accidents and claims decreases in the longer term. This will secure the ongoing viability of existing schemes and provide sufficient provision for any recovery action.

### Other Options

The LIV considered the five other options and submits that they are not currently in accordance with the overarching and supporting principles of the discussion paper, and adds the following comments:

- As the NTC comments at 1.8.1 of the discussion paper, different schemes exist in each state and territory and injured victims may find themselves with reduced entitlements and compensation purely based on the location of their accident. The LIV agrees and submits that as a principle, partial uniformity for access to compensation in relation to ADS crashes (as outlined briefly in option 5: minimum benchmarks) is preferential without eroding an individual's right under current MAII schemes in any state/territory.
- Additionally, the LIV agrees with the NTC that in most jurisdictions, individuals may not have access under current MAII schemes for ADS crashes. The LIV notes and agrees with the NTC that if individuals do not fall into the current MAII schemes (or they are specifically excluded as opined in option 2) they will likely need to rely on existing contract, consumer (ACL), or the tort law framework. The LIV is concerned that this may lead to unfair and less predictable outcomes for injured persons as well as increased complex litigation. Furthermore, in Victoria the amount of damages payable is significantly altered if ADS crashes are not within the current TAC framework.

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<sup>4</sup> We refer to the LIV's submission responding to the *Safety Assurance for Automated Driving Systems: Consultation Regulation Impact Statement* (July 2018).

<sup>5</sup> National Transport Commission, *Motor Accident Injury Insurance and Automated Vehicles* (October 2018) pp 20.

- In its submission dated 9 June 2017 responding to the NTC's paper on *clarifying control of automated vehicles* discussion paper, regarding liability for ADS crashes, the LIV noted that it will be of the utmost of importance to determine who is in 'control' of the vehicle at the relevant time. The LIV remains of the view that responsibility resting with the human 'driver' will continue to promote the safe operation of vehicles and discourage unsafe behaviours like: driver inattention, lax attitudes towards injury and mortality, and absolute reliance on an operating system. If any accident raises questions regarding liability between a human or ADS, the complexities of employing two concurrent MAII schemes would not, in the LIV's opinion, maintain the current level of procedural fairness, efficiency, or financial security in Victoria. The LIV submits that having a single insurer for injured victims (irrespective of whether an ADS or human error causes the crash) should be retained in Victoria, and that the TAC should remain as that single insurer. To exclude injuries caused by an ADS as canvassed in options 2 & 4 is likely, in the LIV's view, to create additional delays for access for injured victims to any MAII scheme.
- The LIV acknowledges that moving towards a purpose-built scheme may be a long-term option as the fleet becomes predominantly high level/full automation vehicles. Some studies and commentators estimate that by 2040 only 50% of new car sales will be autonomous vehicle sales with high levels of automation,<sup>6</sup> while others predict over 94% will be autonomous car sales.<sup>7</sup> Until we understand the impact of high level/full automated vehicles on our roads, the LIV urges caution with building a scheme solely for automated vehicles at this point in time.

## Data and Registration

The LIV points to its response to the NTC's *Regulating Government Access to C-ITS and Automated Vehicle Data, Discussion Paper, October 2018* in which the LIV submitted that the types and breadth of data likely to be available from automated vehicles will need specific legislation to ensure that privacy is protected. However, the LIV also noted that road safety and law enforcement agencies will need access to such data for liability or criminal investigations.

The LIV submits that transparent, timely, and consistent access to data for injured persons is critical to ensure that no person is "worse off" financially or procedurally under future MAII schemes. As previously submitted, it may be potentially dangerous to allow 'industry' to be the sole controller of crucial data in MAII schemes. Balance is required between allowing industry to collect, manage data capture, and preserve data with governmental oversight and access to that data as part of civil proceedings.

Problems arising with registration of vehicles are outside the scope of the LIVs expertise, however, given the LIV's preferred option, it may be that national uniformity and consistency is important to ensure interstate recognition.

The LIV again thanks the NTC for the opportunity to provide further submissions in response to the discussion paper. If copies of previous LIV submissions referred to are required, please let us know and we will provide them.

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<sup>6</sup> Litman, T (2018), *Autonomous Vehicle Implementation Predictions: Implications for Transport Planning*. Victoria, BC: Victoria Transport Policy Institute. Accessed at: <https://www.vtpi.org/avip.pdf> (November 2018)

<sup>7</sup> Munster (2017), *Auto Outlook 2040: The rise of fully autonomous vehicles*. Loupventures. Accessed at: <http://loupventures.com/auto-outlook-2040-the-rise-of-fullyautonomous-vehicles/> (November 2018)

If you would like to discuss this matter further please contact Irene Chrisafis, Senior Lawyer, Law Institute of Victoria by telephone on 9607 9386 or via email at [ichrisafis@liv.asn.au](mailto:ichrisafis@liv.asn.au).

Yours faithfully

A handwritten signature in blue ink, appearing to be 'Belinda Wilson', written over a light blue horizontal line.

Belinda Wilson  
President  
Law Institute of Victoria