Submission on Motor Accident Injury Insurance and Automated Vehicles

December 2018

About QBE

QBE Insurance Group (***QBE Group***) is one of the few Australian-based financial institutions to be operating on a truly global landscape, with operations in over 30 countries. As a global insurer, the QBE Group believes that Australia must continually look to refresh its financial and regulatory systems to ensure the nation remains competitive with global financial markets, and attractive to investment.

As a member of the QBE Group, QBE's Australia Pacific Division (***QBE***) provides all major lines of general insurance cover for personal and commercial risk throughout Australia, including compulsory third-party (***CTP***), motor vehicle, product liability and public liability insurance. QBE has a keen interest in the trial and use of automated vehicles, as well as the regulatory challenges and opportunities posed by the changing technological landscape.

Background

At the request of Australian Transport Ministers, the National Transport Commission (***Commission***) is developing a nationally consistent regulatory and policy framework for automated vehicles. This work aims to embrace innovation while ensuring that partially and fully automated vehicles can operate safely and legally on Australian roads.

As part of this work program, the Commission is working with state and territory governments to consider compensation for people killed or injured in a motor vehicle accident involving an automated driving system (***ADS***). QBE supports the Commission's objective to develop a nationally consistent approach, where possible.

Currently, every state and territory in Australia requires registered vehicles to have compulsory motor accident injury insurance (***MAII***) to provide compensation for personal injury or death. These state and territory schemes do, however, vary both in terms of liability (for example, fault or no fault) and benefits. In addition, the National Injury Insurance Scheme (***NIIS***) provides coverage for people who sustain eligible catastrophic injuries, regardless of fault.

In October 2018, the Commission issued the *Motor Accident Injury Insurance and Automated Vehicles* Discussion Paper (***Paper***) to consult on potential reform options. The Commission intends to use feedback provided by stakeholders to develop recommendations for ministerial consideration in May 2019.

Summary of QBE's response

Automated vehicles are expected to offer a much safer driving experience by reducing human error and consequently road-related injuries and deaths. QBE is very supportive of increased road safety and, in principle, supports introducing automated vehicle technology to realise these benefits.

At this stage in the policy-making process, there are, however, many unknowns, including the:

- rate at which automated vehicle technology will become available in Australia, and be accepted by consumers;
- degree to which partially and fully automated vehicles will offer safety benefits beyond vehicles operated only by human drivers;
- final criteria against which automated driving system entities (***ADSEs***) will be required to certify vehicle safety for road-use in Australia;
- extent to which product liability will apply to ADSEs, as suppliers of automated vehicles within the Australian marketplace;
- duties that will attach to non-ADSE entities, including vehicle owners and repairers; and
- types of data that will be collected by automated vehicles (including any mandatory requirements), and the form in which that data will be made available to insurers.

Against this background and given the inherent complexity involved in automated vehicle technology and variability in Australia's MAII schemes, QBE considers that Option 3 provides a sensible transition solution, providing it includes:

- a legislated right of recovery directly against an ADSE, where an ADS is engaged and wholly or partially at fault, beyond existing product liability laws;
- strict ADSE liability for any faults caused by automated vehicle hardware or software failures, to avoid protracted litigation involving multiple parties, which would place upwards pressure on premiums; and
- an efficient and effective data sharing regime.

As automated vehicles progressively overtake human-controlled vehicles in the coming decades, it will however, be very important to revisit whether the scheme adopted during the early phases of the rollout remains suitable, sustainable and efficient.

QBE welcomes the opportunity to respond to the Paper and provides the following more detailed comments, structured by theme.

The proposed principles

QBE supports and welcomes the role of the proposed principles developed by the heads of MAII schemes in defining the goals of policy reform and the parameters for model selection. We make the following suggestions in relation to the proposed principles:

- Given the complexity of the transition to automated vehicles and the inherent risks involved, QBE believes it is important that regulations, supporting systems and guidelines are developed with public safety as the top priority. Safety could be explicitly prioritised by including a principle along the lines of the following statement (taken from page 40 of the Paper): *'Personal injury insurance arrangements must seek to optimise safety outcomes by incentivising manufacturers, ADSEs and others in the automated vehicle supply chain to prioritise safety'*.
- We believe it is important for the overarching principle to be two-directional, or to apply both ways. That is, individual schemes should not discriminate based on the cause of injury – a person should receive the same financial and procedural benefits regardless of whether the injury was caused by a vehicle controlled by another human or by an ADS.
- We agree with the inclusion of 'procedurally' in the overarching principle. It is important that those injured in a motor collision – regardless of the cause – have a clear and accessible pathway to lodge a claim and access support.
- Regarding Principle 5, QBE is very supportive and considers an efficient process to access a standard set of reliable and verifiable data to be critical. We provide further comment on data access later in our response.

Options for reform

The Paper looks at six potential options for reform (not necessarily mutually exclusive). In essence, these options involve:

1. relying on the existing legal framework;
2. excluding injuries caused by an ADS from MAII schemes;
3. expanding MAII schemes to cover injuries caused by an ADS;
4. creating a purpose-built automated vehicle scheme;
5. setting minimum national benchmarks for anyone injured in an ADS crash; and
6. amending MAII laws to allow private insurers to provide personal injury and property damage under a single policy.

The first three options are based around existing MAII schemes, with the last three options proposing new approaches. At this stage, the Commission has identified Option 3 as best meeting its assessment criteria. It considers that Options 1 and 2 are unlikely to meet community expectations, and notes that while Options 4, 5 and 6 are all viable options, they would require significant further work to develop.

QBE's preferred approach – Option 3

As outlined above, we consider Option 3 – expand existing MAII schemes to cover injuries caused by an ADS – to be the most workable and pragmatic approach. At this stage in the evolution and adoption of automated vehicle technology, this would:

- take advantage of the existing regulatory framework, making the process as clear and simple as possible for injured parties; and
- continue to link injury insurance with registration processes, which guarantees that all registered vehicles are adequately insured.

In future years, we believe the ongoing suitability of expanded MAII schemes will need to be revisited as technology evolves, new vehicle ownership models emerge, and a quantitative understanding of the safety benefits of automated vehicle technology is established.

If the Commission ultimately recommends Option 3, there would be considerable benefit in developing a supplementary discussion paper that canvasses implementation options (and the issues discussed below) in a more granular manner.

Collecting and setting premiums

To ensure MAII schemes continue to be appropriately funded and for ease of administration, we consider injury insurance should continue to be linked with the vehicle registration process in all states and territories. Under this approach, premiums would continue to be paid by vehicle owners on a 'per vehicle' basis; regardless of whether the vehicle has an ADS fitted.

We agree with the Paper's proposition that the entity most able to manage the risk should be responsible for the cost of damages, if the risk eventuates. In our view, where an ADS is engaged and at fault this responsibility clearly rests with the ADSE. We also agree that premiums should align to risk as assessed. For these reasons, insurers would require a clear and certain legal right of recovery against ADSEs when an ADS is engaged at the time of the accident and contributes to it (we comment further on recoveries below). Direct recovery will also ensure financial consequences for ADS failure aligns with design ownership and control.

Future premiums for automated vehicles would be calculated using relativities determined through claims costs, net of all recoveries. Recovery information should also be disclosed to regulators for transparency and to facilitate scheme oversight. We believe this approach will strike an appropriate balance between the desire to maintain a simple and workable premium collection system, with the need to ensure that ADSEs contribute fairly, and directly, to the scheme where appropriate.

To support this approach, we suggest two new premium variables be added to existing rating factors: the level of automation (Level 3, Level 4 etc.); and the vehicle's Operational Design Domain (***ODD***). This would allow regulators and insurers to continue to identify vehicles by type (passenger vehicle, bus, taxi, etc.), while also allowing premiums to be adjusted based on claims experience and recoveries. It also avoids the creation of a significant number of new premium classes, which could create practical and administrative complexities.

With respect to the ODD, ensuring a level of consistency between how different manufacturers design and specify ODDs is desirable, given they will play a critical role in defining the conditions in which specific automated systems are able to operate, including road types (sealed or unsealed), speeds, and environmental conditions (day or night, weather conditions). This could be done by adopting international standards, or through the safety assurance system.

Recovery right of insurers where an ADS is 'at fault'

Where an ADS is in control and causes or contributes to an accident, it will be imperative for insurers to have a clear legislated right of recovery against the single ADSE. We consider existing laws will be inadequate for insurers pursuing recovery for damages paid (or likely to be paid) under a MAII scheme. For example, while section 138 of the Australian Consumer Law (***ACL***) provides that a manufacturer is liable for damages if it supplies goods with a safety defect that cause an injury to someone, under existing laws:

- insurers may be required to commence actions against the vehicle manufacturer and multiple software or hardware parts suppliers for a single accident;

- multiple actions would either make recovery economically unviable or add unacceptable friction costs to each such claim under the scheme; and
- the ACL will not apply if:
  - the ADSE falls outside the definition of 'manufacturer';
  - the vehicle's owner falls outside the definition of 'consumer', which is likely to define a much narrower class of people than those eligible for benefits under MAII schemes; or
  - the vehicle was first supplied more than 10 years ago.

The express right of recovery should also allow insurers to recover directly from the ADSE where the 'fault' is caused by the ADS. The right could also facilitate recoveries for motor property insurance (discussed further below). The definition of an ADSE should also include entities that retrofit non-automated vehicles with automated systems, for example, 'mule' vehicles currently used in automated vehicle trials.

This would create a clear recovery pathway where an ADS is partially or wholly at fault. If properly designed, this will support the overarching principle and assist to avoid protracted disputes between insurers, ADSEs, and component manufacturers that would otherwise add unworkable delays and friction costs to the scheme. This is critical as higher friction costs place upwards pressure on premiums in privately underwritten schemes and cause significant issues for underfunded government schemes that rely on tax revenue to subsidise any losses.

Importantly, a direct recovery pathway would, along with the safety assurance system, also encourage ADSEs to prioritise holistic vehicle safety through proper design, testing and after-sales care. ADSEs would be free to pursue other entities in the vehicle supply chain as they do today. These secondary recoveries would not affect primary scheme insurer recoveries. Given the long tail nature of MAII schemes, any time limits applying to insurer recovery actions would require careful consideration.

The recovery right would be supported by the obligations recommended in the Commission's Decision Regulation Impact Statement for a safety assurance system, released in November 2018. The Commission has recommended applicants for self-certification be required to provide evidence of:

- a corporate presence in Australia; and
- their current financial position, grounds for claiming they will have a strong financial position in the future and the level of insurance(s) held.

To facilitate an efficient recovery process, parties that may be involved in liability determinations and primary recoveries would need to agree a set of minimum standards covering the exchange of information, timeframes for providing information, a mechanism for liability determination (i.e. barometer of responsibility), an efficient dispute resolution process, and an undertaking to act in good faith. One option for implementing this could be a Code of Conduct. The Code could be explicitly recognised by the regulatory regime in each jurisdiction but remain an industry code so that it could be updated promptly as required and as technology evolves.

Accountability from other entities

We note the Commission intends to undertake a further body of work in 2019 to consider the duties attaching to other entities that may be relevant to the chain of causation. These entities potentially include telecommunications providers, governments, private entities, servicers and repairers (both ADSE-controlled and independent) and vehicle owners.

This work is important and will be essential to inform participants about the adequacy of the legal framework as it relates to these entities.

As outlined above, however, we consider that a single recovery right for insurers against the ADSE is both logical and sensible given the need to transact liability outcomes under each scheme efficiently and avoid protracted multi-party, multi-outcome, litigation.

Challenges with alternative approaches

We support the Commission's view that Options 1 and 2 are not viable approaches and provide the following comments on Options 4, 5 and 6.

Option 4: Establish a purpose-built automated vehicle scheme

At this stage in the development and take up of automated vehicles, we believe a purpose-built scheme would not offer any significant advantages compared to expanding existing MAII schemes. It would be challenging for both injured road users and insurers, as it would involve navigating between state and territory MAII schemes, and purpose-built automated vehicle schemes. Additional complexities would arise where a vehicle is able to move between automated and non-automated modes (Levels 3 and 4). Finally, it would be expensive to operate until the number of automated vehicles on Australian roads reaches a critical mass.

Option 5: Agree minimum benchmarks for an ADS scheme

If agreed minimum benchmarks were used to implement our preferred version of Option 3, we would potentially support this option, depending on the details of the principles agreed. If a separate scheme for those injured by a vehicle controlled by an ADS was proposed under this option, we would not be supportive for the reasons outlined under Option 4 above.

Option 6: Combine personal injury and property damage cover into a single product

Given the availability of automated vehicle technology in the Australian market is in its early stages, we do not presently support a combined injury and property damage cover. While this option may help to assist addressing non-insurance in the motor property market, the complexities associated with its implementation make this option less viable in the short term. These complexities include:

- the market impacts of requiring insurers to provide a combined policy;
- the extent to which property insurance premiums and benefits would be regulated;
- whether the requirement would also apply to non-automated vehicles; and
- whether the combined policy would be a pre-condition to registration.

Additionally, unlike MAII schemes that require legislative change to incorporate automated vehicles, non-statutory property cover can be adjusted by insurers without government intervention to effectively operate for autonomous vehicles.

We do, however, strongly support consideration of the impact of automated vehicles on motor property insurance and comment further on this below.

Issues for further consideration

We also raise the following issues for specific consideration and consultation:

Data retention and access

The success or otherwise of injury insurance for automated vehicles will hinge heavily on the efficacy and effectiveness of data capture and sharing arrangements.

Decision Regulation Impact Statement

QBE has participated in the Commission's consultation process for a safety assurance system for automated vehicles. The Commission's Decision Regulation Impact Statement recommends applicants ensure the vehicle monitors and stores data in a standardised, readable and accessible format – including in relation to the level of automation at a point in time, and that this information can be provided to third parties, including insurers.

We also note the following comment in the Decision Regulation Impact Statement:

> We acknowledge feedback from some stakeholders that the [data recording and sharing] criterion should introduce more specific data recording and sharing requirements on ADSEs and that these requirements should be legislated. We note that the criterion covers many of the specific issues raised by stakeholders but does not require ADSEs to collect a specific set of data elements or to provide access to data in a specific way. This aims to ensure that requirements are not more onerous than in international markets and provides flexibility to ADSEs to innovate and align with international requirements. There are not currently clear international standards, but we anticipate they will be incorporated into ADRs as they are finalised. This includes requirements being developed by the UNECE to cover the data storage system for automated driving. (Pages 67-68)

Important additional considerations from an insurance perspective

We agree with the Commission's view that given the relatively small size of the Australian market, data storage and sharing requirements will be heavily influenced by processes in train internationally, and that adopting international requirements will be more feasible than creating a bespoke model for the local market. We are, however, of the view that despite the many unknowns, there are some data-related considerations that could inform current thinking where one or more vehicles involved in an accident has an ADS fitted:

- *Minimising liability disputes:* The overall objective should be to leverage the benefits afforded by the data produced by ADS technology to minimise disputes and friction costs.
- *Express legal obligation:* The number of entities who may conceivably control access to data following an accident is broad, and includes ADSEs/manufacturers, software providers, hardware providers, insurers, vehicle owners, and repairers. Depending on how the data is stored, there will need to be a clear legal obligation on these parties to provide access to data when certain 'triggers' are met (see below). If the ADSE or manufacturer is always able to access the data, it would be logical for the obligation to apply to them to avoid handling by multiple parties.
- *Fast access to data:* Insurers and injured parties (and their representatives) will require access to data shortly after the accident occurs to facilitate the determination of liability in at-fault schemes. Even in no-fault schemes, insurers will still require data to determine whether to commence recovery action against an ADSE.
- *A streamlined sharing process:* Regardless of whether the data is exchanged directly between parties or held centrally – for example by an independent or government entity, the process should be as efficient as possible.
- *Accessible formatting:* Consistency in data formats will facilitate accessibility.
- *Secure from tampering:* Processes should minimise opportunities for data tampering.
- *Clear triggers for data access:* Further consideration is required, but one option is the German approach, which provides that data should be shared when a vehicle fitted with an ADS is involved in an accident causing injury, and the data is necessary for asserting, satisfying or defending claims resulting from an accident.
- *Clarity about the data to be shared:* At a minimum, for Level 3 and 4 vehicles, the data should include the vehicle's control mode and ODD, any requests for the driver to take control and the outcome of that request. Ideally, this information would also include information about any manoeuvres the ADS took around the time of the accident, and where available, information about the actions of any external people, animals or vehicles.

Roadworthiness

Related to the Commission's work on a safety assurance system, there could be some benefit in implementing a roadworthiness system to verify the post-sale safety of automated vehicles on a routine basis. Automated vehicles may be more likely to cause accidents as they age, given their inherent complexity and reliance on functioning components (such as sensors) and software.

For example, New South Wales (***NSW***) currently has a system in place to test vehicle safety after the point of sale. Light vehicles more than 5 years old require a safety check before registration can be renewed. The NSW Government maintains a list of Authorised Inspection Stations across the State. Given the complexity of automated vehicles, inspections may need to be undertaken more frequently, and could include a requirement that the vehicle has been serviced in accordance with the manufacturer's requirements.

Property insurance

While the Commission's Paper is primarily focussed on injury insurance, we are strongly of the view that it would be advantageous for governments to apply relevant insights gained from consultations on injury insurance schemes to motor property insurance. Most vehicle accidents cause property damage without bodily injury. However, many incidents causing bodily injury can also cause property damage. In these instances, a common approach to ADSE liability for both bodily injury and property damage would be highly preferable. In addition, property insurance premiums can be a significant cost for many motorists and underinsurance is already an issue in the motor property market. This is likely to be

exacerbated with the increased use of automated vehicles, given the cost to repair is also likely to increase, due to the complex technology involved in these vehicles.

If a person suffers property damage caused by a vehicle that does not carry property insurance, they may be covered by their own insurer, who may then seek recovery from the uninsured party. If, however, the person suffering damage is not insured, they will have to decide whether to pursue the driver of the uninsured vehicle. Even if ultimately successful, the process can be stressful, costly and time-consuming for all parties. Unfortunately, some motorists also mistakenly believe their compulsory third-party injury cover also protects them from third party property damage claims.

Earlier in our submission we proposed a direct right of recovery against ADSEs to ensure the financial consequences for ADS failures are borne by those with design ownership and control, and to prevent unnecessary friction costs entering the scheme. We also believe it will be critical for the right of recovery to also extend to motor property insurance. As with bodily injury, this will avoid protracted and complex litigation with multiple parties, including manufacturers and supply chain participants. Importantly, it will also make recovery actions across bodily injury and property damage events consistent and cost-effective by reducing recovery costs, which would otherwise affect premiums. For uninsured members of the public, the imperative for a direct right of recovery is even stronger, as they may lack the resources and know-how to pursue an effective recovery action.

Further information

Once again, QBE appreciates the opportunity to respond to the Paper.

Please do not hesitate to contact QBE's General Manager, Government Relations and Industry Affairs, Kate O'Loughlin, at kate.oloughlin@qbe.com or on (02) 8275 9089, if you would like to discuss any aspect of this submission.