



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

12 December 2018

Dear Automated Vehicle Team

Discussion Paper on Motor Accident Injury Insurance and Automated Vehicles

Thank you for the opportunity to make a submission in relation to your Discussion Paper on Motor Accident Injury Insurance Arrangements for Automated Vehicles.

General observations

Self-driving cars are expected to significantly improve road safety, by reducing or eliminating the 94% of serious road accidents that are caused by human error or dangerous human choices.¹ Even so, accidents will still happen, for example accidents caused by deficiencies in automated driving technologies. Indeed, this causal factor is likely to increase as these technologies assume greater responsibility for driving tasks.

People who are injured in an accident caused by a self-driving vehicle will need to be able to obtain timely compensation.

As you have concluded, there is considerable uncertainty as to whether Australia's existing motor accident injury insurance schemes will provide compensation for injuries arising from accidents caused by an automated driving system (ADS). And although injured people who are not eligible to access compensation under these schemes may be able to claim compensation via alternative causes of action such as negligence, product liability laws and contract, they will face delays and greater upfront expense in obtaining compensation via these mechanisms.

The Heads of Australia's Motor Accident Injury Schemes have suggested 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". As an overarching principle, this is sensible. But there are multiple ways of achieving this overarching principle, and other objectives that should be considered in determining the best solution.

¹ Singh, S. (2015, February). Critical reasons for crashes investigated in the National Motor Vehicle Crash Causation Survey. (Traffic Safety Facts Crash - Stats. Report No. DOT HS 812 115). Washington, DC: National Highway Traffic Safety Administration.



In November 2016, Australia's Transport Ministers resolved that:

- state and territory governments should undertake a review of compulsory third-party and national injury insurance schemes to identify any eligibility barriers to accessing these schemes by occupants of an automated vehicle or those involved in a crash with an automated vehicle; and
- subject to the review of insurance schemes, each state and territory government amends its compulsory third-party insurance schemes in close consultation with each other and industry; and that resulting reforms are nationally consistent wherever possible.

The problem with this resolution is that it defined the scope of the review too narrowly. The resolution seems to assume the solution is to amend the existing motor accident insurance schemes to remove any eligibility barriers, and that the review should therefore focus on identifying those barriers.

There is a fundamental problem with this assumed solution. The existing schemes are funded via premiums paid by vehicle owners - usually the primary driver of the vehicle. This was appropriate when the schemes were designed to cover the legal liability of human drivers to people who suffer injury as a result of their driving.

If existing motor accident injury insurance schemes are simply amended to remove eligibility barriers to people who suffer an injury due to a deficiency in a vehicle's automated driving system, the schemes will end up covering not only the legal liability of at fault human drivers, but also the liability of wrongdoers who have failed to take appropriate steps to ensure the ADS is safe and fit for its purpose.

If the schemes are going to cover the risk of the ADS being deficient, then the cost of doing so should be borne by those who can best control this risk, i.e those involved in the design, manufacture, installation, maintenance and operation of the ADS.

You have identified a number of other solutions, including three that meet the 'no worse off' principle, and distribute the funding burden more fairly and efficiently. These include:

- Option 3A: Expand the existing motor accident injury schemes to cover injuries caused by an ADS, but also create a reinsurance pool funded by parties who could be responsible for a deficient ADS
- Option 4: Establish a new purpose-build automated vehicle scheme that mirrors the existing motor accident injury insurance schemes in terms of accessing compensation, treatment, care and other support, but that is funded by parties who could be responsible for a deficient ADS
- Option 5: Establish agreed minimum benchmarks in terms of eligibility, coverage and benefits for personal injuries caused by a deficient ADS, that could be implemented by each state and territory in different ways, to suit the circumstances of the relevant state or territory (similar to how the National Injury Insurance Scheme is implemented), and is funded by parties who could be responsible for a deficient ADS

These other solutions are not without their own difficulties. For example, determining the respective premium contributions of the various parties that could be responsible for a deficient ADS will be complex, particularly initially when the risks associated with each party are not well understood. Also, the history of the motor accident injury insurance schemes in our states and territories suggests that it will be too difficult for all states and territories to reach agreement on option 4, and that option 5 may be a more feasible way of achieving a degree of uniformity for injured persons, vehicle owners and the



ADS industry. But option 5 risks offending the no worse off principle, if the minimum benchmarks for AV crashes differ from those applying to human driven crashes.

Accordingly, we believe option 3A presents the best solution and suggest that you give it further consideration.

We now respond to each of your specific questions.

1. Do you agree that the proposed principles are suitable? Should there be additional or different principles?

We support 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.

However, we don't believe the proposed supporting principles place sufficient emphasis on the need to develop funding arrangements that are both efficient and fair.

As mentioned above, the existing schemes are funded via premiums paid by vehicle owners - usually the primary driver of the vehicle. This was appropriate when the schemes were designed to cover the legal liability of human drivers to people who suffer injury as a result of their driving.

If the existing schemes are simply amended to remove eligibility barriers to people who suffer injury due to a deficiency in a vehicle's automated driving system, they will end up covering the liability of wrongdoers who have failed to take appropriate steps to ensure the ADS is safe and fit for its purpose.

If the schemes are going to cover the risk of the ADS being deficient, then the cost of doing so should be borne by those who can best control this risk, i.e those involved in the design, manufacture, installation, maintenance and operation of the ADS.

Finally, we don't see the justification for the proposed supporting principle that exist in State and Territory benefit regime should not be required to change.

2. Do the problems identified cover the key challenges of personal injury and automated vehicles? Are there other problems that we should consider?

We agree that you have identified the eligibility barriers within the existing motor accident injury insurance schemes.

We also agree with your identification of the problem that arises out of the schemes being designed to cover injuries caused by human error rather than product fault. This gives rise to the funding problem associated with the NTC's preferred solution to the other problem. We believe further consideration should be given to other solutions that better address the funding problem.

3. Have we accurately identified the key gaps and barriers on legislation? Are there other gaps or barriers that we should consider?

Yes, we believe you have accurately identified the key gaps and barriers in the existing motor accident injury insurance legislation. We are not aware of other gaps or barriers that you should consider.



4. **Is more research needed before a preferred option can be selected? If so, what research?**

We believe further consideration should be given to option 3A. The key issue to be resolved is how to determine the respective premium contributions of the various parties that could be responsible for a deficient ADS. Perhaps the resolution of this issue can be outsourced to private sector reinsurance providers?

5. **Which option best meets the policy principles outlined in Chapter 1? Is there another option not referred to in this paper that would better meet these principles? If so, please explain how it would work**

We prefer option 3A, ie option 3 but with a reinsurance pool funded by parties who could be responsible for a deficient ADS.

We don't consider option 4 to be practically feasible given the history of the motor accident injury insurance schemes in each State and Territory to date. We expect it will be too difficult for all states and territories to reach agreement on this option.

Option 5 risks offending the no worse off principle, if the minimum benchmarks in terms of eligibility, coverage and benefits for personal injuries caused by an ADS crash are different to those that apply to a crash caused by human driver error.

6. **Other criteria sufficient for assessing the options? Are there alternative or additional criteria that you think should be considered?**

We agree with the importance placed on the first criterion.

Your second criterion is a subset of the first criterion and can be omitted.

Your third criterion is only necessary because you have included option 1 and option 2 as options that should be assessed. In our view, neither of these options addresses the key issue and so are not real options.

We think greater importance should be placed on your fourth criterion. This criterion could also be expanded to deal with fairness, as well as efficiency.

Your last criterion doesn't appear to have resulted in any differentiation between the different options and so could be disregarded.

We also note your assessment of the options does not separately assess option 3A. If option 3A was separately assessed, it would become your preferred option as it would score high across your first four criteria.

7. **Do you agree that the entity most able to manage the risk should be responsible for the cost of damages if the risk eventuates?**

Yes, as a general principle.

8. **Should different insurance models be used depending on the level of vehicle automation (conditional, high or full automation)?**

We don't see any justification for such an approach within your discussion paper.

9. If you support option 3, are current rights of recovery for insurers sufficient? If not, please indicate what additional rights or powers would be required and why?

We support option 3A. Under this option, the basis on which the CTP insurer can claim from the reinsurance pool will become critical.

10. If you support option 4, please provide details on how a purpose built scheme would work, including fault, governance, interaction with common law and existing MAII schemes and caps all thresholds

We don't support option 4. The history of the motor accident injury insurance schemes in each State and Territory suggest that the prospects of securing the necessary agreement from all States and Territories to make this option doable are remote.

11. If you support option 5 how could the minimum benchmarks be defined?

We don't support option 5 because it suggests that the agreed minimum benchmarks in terms of eligibility, coverage and benefits for personal injuries caused by an ADS crash will be different to the minimum benchmarks for crashes caused by human driven vehicles. This would offend the no worse off principle.

12. Are existing legislative and non-legislative processes sufficient to access automated vehicle data for the purpose of establishing liability relating to a personal injury claim involving an automated vehicle? If not, what additional powers would be required and why?

No, existing processes are not sufficient.

We note the Transport Ministers have decided that the safety assurance self-certification process should require the ADS entity (ADSE) to outline the ADS data that the ADSE will record and how it will provide the data to relevant parties, including how the ADSE will ensure:

- the vehicle can provide road agencies and insurers with crash data
- relevant parties (including police) receive information about the level of automation engaged at a point in time if required
- individuals receive data to dispute liability (for example, data showing which party was in control to defend road traffic infringements and dispute liability for crashes) when the individual makes a reasonable request.

The decision of the Transport Ministers assumes that the ADSE will own the data, or have the right to collect and share the data. While this assumption is probably correct (given the current contract terms under which vehicles are sold), there are serious questions as to whether this is how it should be.

Under Australia's property laws, the owner of the vehicle will own any data that the vehicle generates, unless the vehicle owner agrees otherwise. But purchasers of new vehicles are now routinely asked to agree otherwise. Contracts for the sale of new vehicles typically provide that the data that the vehicle generates will be owned by (or irrevocably licensed to) the manufacturer even though ownership of the vehicle is transferred from the manufacturer to the purchaser. The ability of consumers to negotiate alternative purchase terms is limited, and most have no practical choice but to agree.



But it doesn't have to be this way. In the US, legislation has been passed that provides that any data in a vehicle's event data recorder is the property of the owner or lessee of the vehicle. The same law also prohibits a person, other than the owner or lessee of the motor vehicle, from accessing data recorded or transmitted by such a recorder unless the owner or lessee consents (or the data is retrieved pursuant to a court order, or for specific purposes authorised by the legislation, such as an investigation by the transport safety regulator, an emergency medical response to a crash, or for traffic safety research).

Returning control of crash data to the owner or lessee of the vehicle would also enable the owner or lessee to comply with any obligation it might have under any insurance contract to provide such data to the insurer.

The Transport Ministers should consider whether Australia needs new laws to enable vehicle owners/lessees to access crash data and data needed to dispute liability for traffic infringements.

13. **If different types of insurance attached to automated vehicles in different States and Territories, does this create difficulties for mutual recognition of registration to continue? If so, how should this be addressed?**

Potentially. A reinsurance pool funded by the parties who could be responsible for a deficient ADS should address this issue.

We hope you find this submission helpful. We would welcome the opportunity to discuss it with you.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Owen Hayford', written in a cursive style.

Owen Hayford
Partner, Legal