

Submission to the National Transport Commission

Motor Accident Insurance for Automated Vehicles: Discussion Paper

State Insurance Regulatory Authority

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1. Introduction

This submission is the New South Wales (NSW) State Insurance Regulatory Authority (SIRA) response to the National Transport Commission (NTC) discussion paper *Motor Accident Insurance for Automated Vehicles*.

This submission has been prepared by SIRA in consultation with Transport for NSW, the NSW Department of Justice, the NSW Treasury and iCare NSW. It details SIRA's assessment of the six options outlined in the NTC discussion paper.

SIRA notes that the discussion paper does not seek a decision. It is important to note that this response does not provide a policy position or decision on behalf of the NSW Government.

Given the purpose of the NTC paper is to identify barriers and seek views on options associated with automated vehicle injury insurance, this submission does not articulate a single preferred option, but identifies implications of options for scheme stakeholders, and for the sustainable operation of insurance schemes.

The submission also includes responses to the focus questions identified by the NTC in chapter 2 of the discussion paper.

SIRA commends the NTC for developing this discussion paper and identifying key issues to be resolved regarding personal injury insurance for automated vehicles.

SIRA also notes that the insurance component of automated vehicle reform is only one of several pieces of work currently being managed by the NTC.

2. SIRA Background & Overview

SIRA was established on 1 September 2015 by the State Insurance and Care Governance Act 2015. SIRA is a statutory body and NSW government agency constituted under section 17 of the *State Insurance and Care Governance Act 2015*. It is governed by an independent board. SIRA is an agency within the Finance, Services and Innovation cluster. Its staff are employed by the the NSW Department of Finance, Services and Innovation (DFSI).

SIRA regulates workers compensation insurance and related activities, motor accidents compulsory third party (CTP) insurance and home building compensation in NSW. It also provides some independent dispute resolution services. SIRA approves premium, licensing and policy frameworks for insurers, supervises insurers, and monitors the financial solvency and performance of the three abovementioned

compulsory insurance schemes. SIRA also plays a role in funding, promoting and informing injury prevention in relation to the schemes it regulates.

3. National Transport Commission Automated Vehicles Discussion Paper

Principles

NTC Discussion Paper Principles

The overarching principle put forward by the NTC is 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 are;

- Reasonable and timely access to compensation should continue regardless of the type of vehicle involved in the injury.
- The arrangements should promote transparency and certainty in accessing compensation.
- The arrangements should ensure insurance for personal injuries caused by automated vehicles is fully funded, and affordability is considered, for example by minimising potential litigation between insurers and manufacturers/ADSEs.
- Existing state and territory benefit regimes should not be required to change.
- The arrangements should include an efficient process to access a standard set of reliable and verifiable vehicle crash data.

SIRA generally supports these overarching and supporting principles, as appropriate for guiding the development of policy in addressing motor accident insurance for automated vehicles.

Important outcomes for insurance coverage for AVs include the fair protection of injured parties regardless of the type of vehicle that is involved in the accident. This is consistent with the NTC's *Safety Assurance for Automated Driving Systems: Decision Regulation Impact Statement* (November 2018), which stated that the automated driving system entity (ADSE) must hold an appropriate level of insurance to cover personal injury and death caused by an ADS.

Additional Principles

In collaboration with other motor accident insurance regulators, SIRA has identified a set of additional principles to guide the development of a solution for motor accident injury insurance for automated vehicles. These principles have assisted in guiding SIRA's review of the options outlined in the NTC discussion paper. These include:

- **Simplicity in design and administration** - Prioritise simplicity in the design and administration of any new model for automated vehicle personal injury insurance.
- **Fair and equitable share of costs** - Secure a fair and equitable distribution of the costs associated with motor accidents caused by automated vehicles between manufacturers, automated vehicle owners, traditional vehicle owners, insurers and taxpayers. In any solution design, liability should be assigned to the right entity. That is, the right people should pay for the risk they are putting on the road. Existing CTP schemes should not be taking on more risk without appropriate means to securing the necessary funding to underwrite that risk.
- **Flexible and future proof** - Ensure that the model is flexible and future proof. This means capable of application at different stages of the automated vehicle industry's development and includes the ability of the model to support an initial mixed fleet of automated vehicles and regular vehicles, transitioning to a future state dominated by automated technology. In the short term, this will likely include a small number of automated vehicles operating at lower levels of automation, a low volume of accident data, and the prospect of rapid improvements in the safety of automated vehicles and their ADS. Consideration should be given as to how the proposal can be made technology neutral, so that the scheme does not become outdated, e.g. if future transport modes include alternative technology such as drones.
- **Promote competition and safety innovations:** The model should focus on stimulating competition between automated vehicle manufacturers and ADS developers in terms of vehicle safety.

NTC Discussion Paper Options: Review

SIRA considers that Options 3, 4, 5 and 6 have the potential to be effective solutions. However, given the practical requirements of achieving the goal of end-to-end regulation by 2020, and considering the agreed upon principles to guide automated vehicle injury insurance, Options 3 and 5 are considered the most likely to deliver outcomes consistent with the principles.

The following sections detail SIRA's analysis of each of the options. For options 3 and 5, additional commentary has been included to outline potential implementation and operational issues for consideration.

The selection of a preferred option should be supported by analysis of regulatory impact, including costs and benefits. SIRA also suggests a post implementation review to assess progress, and evaluate inter jurisdictional performance.

Option 1: Rely on Existing Legal Framework

NTC Discussion Paper Extract

Depending on the circumstances of the crash, MAll [Motor Accident Injury Insurance] schemes may or may not provide coverage. Under this option, available causes of action for anyone injured in an ADS crash include making a claim under existing MAll schemes, under the Australian Consumer Law (ACL), in contract law for breach of contract or in negligence based on a breach of a duty of care.

SIRA Position: Does Not Support

Under the *Motor Accident Injuries Act 2017* (the Act), an insurer under a compulsory third party policy indemnifies the owner of the motor vehicle, or any other person who at the time drives the motor vehicle, against liability for the death or injury of a person which is caused by the fault of the owner or driver of the vehicle.

The existing statutory arrangement is not sufficiently broad, and people who are injured by a motor vehicle that is under the control of an ADS may not be able to pursue a claim under the Act, and in turn receive the same benefits as those injured by a vehicle with a human driver. Option 1 does not satisfy the overarching principle that no person should be worse off, financially or procedurally, if injured by an Automated Vehicle.

The NSW CTP legislation was not developed to cover autonomous vehicles, and would need to be amended to do so.

A key design feature of the NSW CTP scheme is its focus on returning injured people to health and the benefits structure that underpins that focus. For those not eligible to make a claim under the CTP scheme, the alternative routes to compensation through litigation are contingent on proving negligence and in participating in litigation where there may be a high level of asymmetry between vehicle manufacturers and injured people.

There are a number of provisions in the Act that may fail to take suitable account of the technology shift to automated vehicles and ADSs, and thereby lead to different outcomes for the injured person. The lack of clarity around legislative entitlements in

these circumstances is likely to cause significant cost increases in the scheme as interested parties litigate to determine eligibility.

The Act provides for a compulsory insurance scheme. An insurer under a compulsory third party policy indemnifies the owner of the motor vehicle or any other person who at the time drives the motor vehicle against liability in respect of the death or injury to a person caused by the fault of the owner or driver of the vehicle

Definition of Driver

The Act refers to driver and owner, particularly in regard to 'fault' and 'negligence' in determining liability for a claim and the associated damages payable. The definition of 'driver' does not contemplate the operation of an ADS:

***Driver** means a person driving a motor vehicle, and includes:*

(a) a person riding and operating a motor cycle, and

(b) a person for the time being in charge of a motor vehicle.

This may lead to an exclusion of coverage for a person injured by a vehicle which does not have a driver at the point in time of the accident.

Definition of Motor Accident

The definition of motor accident, includes for an accident which is as a result of a defect in the vehicle: It is uncertain whether an ADS failure could be defined as a defect in the sense indicated by the Act.

***Motor accident** means an incident or accident involving the use or operation of a motor vehicle that causes the death of or injury to a person where the death or injury is a result of and is caused (whether or not as a result of a defect in the vehicle) during:*

(a) the driving of the vehicle, or

(b) a collision, or action taken to avoid a collision, with the vehicle, or

(c) the vehicle's running out of control, or

(d) a dangerous situation caused by the driving of the vehicle, a collision or action taken to avoid a collision with the vehicle, or the vehicle's running out of control.

This could allow for inclusion of coverage in circumstances where the ADS was deemed to be defective in causing or not avoiding an accident, however whether or not this is the case would likely be decided through litigated disputes.

No Fault Accidents

The CTP scheme allows for accidents not caused by the owner or driver of any vehicle involved in the accident. Part 5 of the Act sets out the relevant provisions in relation to no-fault motor accidents.

'No-fault motor accident means a motor accident in the State not caused by the fault of the owner or driver of any motor vehicle involved in the accident in the use or operation of the vehicle and not caused by the fault of any other person.'

Option 2: Exclude Injuries caused by an ADS from MAll Schemes

NTC Discussion Paper Extract

The MAll laws would be amended to exclude accidents/injuries caused by an ADS. Anyone injured by an ADS would not be able to use the MAll schemes to seek compensation for their injuries.

SIRA Position: Does Not Support

In comparison with Option 1, Option 2 provides more clarity for injured people regarding their eligibility to make a claim under the CTP scheme. This will help to mitigate against automated vehicles increasing costs within the scheme, but does not meet the fundamental principle that no person should be worse off (or better off), financially or procedurally, if injured by an automated vehicle.

Requiring injured people to seek legal recourse against the manufacturer under consumer law or common law to receive adequate compensation would remove a key social support framework at a time when it is most needed.

The exclusion of automated vehicles from the NSW CTP scheme would be difficult to manage for those vehicles which can be used in both autonomous and non-autonomous modes. Consideration would need to be given as to whether a dual insurance policy was necessary or if there were alternative mechanisms for providing personal injury cover for those injured by level 1 to 4 vehicles when operated by a human driver.

Option 3: Expand MAll schemes to cover injuries caused by an ADS

NTC Discussion Paper Extract

Under this option, the MAll laws would be amended to remove barriers to accidents/injuries caused by ADSs. Injured people would have access to compensation and benefits regardless of whether the injury was caused by an automated vehicle whose ADS was engaged.

SIRA Position: Supports

Option 3 provides an effective solution to protecting the rights of injured people. Effective implementation of this option is crucial in ensuring that the financial sustainability of the compulsory third party insurance scheme is not compromised.

Key challenges with incorporating these vehicles into the current scheme include how they will be identified and how costs can be attributed to the appropriate parties without increasing legal costs and disputes. Determination of fault is likely to be a significant factor in the potential to increase costs in the scheme and the selection of any option would need to take account of this. Because of this, SIRA is of the view that automated vehicles should be treated differently in the scheme than non-automated vehicles, particularly in the mechanisms available to recover costs.

This option may provide that an injured person deals with an insurer with experience in managing claims within the NSW CTP scheme to ensure that they have the same rights and benefits as a person injured by a vehicle driven by a human driver. It may also provide that an injured person does not have to determine who is in control of the vehicle before making a claim.

Designing a solution to account for this is particularly challenging, whilst there is limited data on the potential real impact these vehicles might have on the nature and frequency of motor vehicle accidents.

The effectiveness of existing arrangements in enabling the recovery of cost of damages from appropriate parties would be tested by the unique challenges posed by automated vehicles and the fact the specifics of their operation are largely unknown at this stage.

SIRA is considering several possible solutions which will meet these criteria including the creation of a re-insurance pool specific to automated vehicles.

Operational Considerations

Consideration needs to be given to how the key elements of the existing scheme works. This includes:

- Considering whether all levels of automated vehicles should be treated in the same way, or whether lower levels of automation align more closely with non-automated vehicles.
- Future proofing for related disruptive technology.
- How these new requirements apply to current technology such as automated parking, automated braking and cruise control etc.
- How these vehicles will be identified in any insurance scheme, e.g. through a new class?

Option 4: Purpose-built automated vehicles scheme

NTC Discussion Paper Extract

Under this option, a purpose-built scheme would be established to ensure there is an accessible claims process for people injured by automated vehicles. It could be a national scheme, or a state and territory scheme designed to mirror existing MAlI scheme arrangements in each jurisdiction.

SIRA Position: Do Not Support

The introduction of a parallel personal injury scheme for autonomous vehicles has the potential to create confusion for injured people, who would need to determine how a vehicle was being driven before making a claim.

The interaction between the two schemes would need to be clear but would raise the potential for disputes over liability.

The creation of a duplicate state based scheme would be necessary to meet the key principles, and costs associated with administering those schemes would likely be prohibitively high, particularly against a small fleet of automated vehicles.

There may be benefits in consolidation of personal injury insurance schemes to close gaps rather than further fragmentation to create more products for every emerging hazard or risk.

Option 5: Minimum Benchmarks

NTC Discussion Paper Extract

Under this option, national benchmarks would be agreed for the scope and coverage of anyone injured in an ADS crash. The National Injury Insurance Scheme is an example of this type of approach. Jurisdictions would retain the responsibility and flexibility to deliver the minimum requirements in the way that best suits their situation.

SIRA Position: Supports

SIRA supports the definition of a series of minimum benchmarks which will guide the implementation of solutions in different jurisdictions. These minimum benchmarks could be used to ensure that differences between schemes across the State and Territories do not become more pronounced with the introduction of automated vehicles. This will allow it to implement Option 3 which would meet the principles outlined by the NTC.

Minimum Benchmarks

SIRA would like to propose that any minimum benchmarks could include the following:

- Injured people only have to deal with one insurer.
- Injured people have access to the same rights and benefits in NSW regardless of the ADS status.
- There is an automatic right of recovery to indemnify the insurer for loss incurred through the payment of a claim resulting from an accident caused by an ADS, against the companies capable of managing safety risks associated with their operation.
- There is a recovery mechanism which ensures that those in control of the risk pay for it to enable the right of recovery.
- The scheme is compulsory for automated vehicles.

Option 6: Single Insurer

NTC Discussion Paper Extract

The MAll laws would be amended to allow for private insurers to provide fully comprehensive motor accident insurance (cover for property damage and personal injury) under a single policy covering all liabilities for automated vehicles.

SIRA: Does Not Support

SIRA supports increased competition in the CTP insurance market in NSW, particularly where it has the potential to provide competitive, sustainable and fair pricing of risk. There are significant complexities in managing a mixed fleet of vehicles both automated, non-automated and with the ability to switch between these modes. To

meet the key principles, this option would have to be implemented for all vehicles covered by the motor accidents scheme not just automated vehicles.

This is a significant multi-jurisdictional program of reform which is unlikely to meet the NTCs stated objectives of end to end regulatory reform by 2020 and has the potential to fail to provide for suitable personal injury cover in the event of a motor accident involving automated vehicles in the interim period.

4. Submission Focus Questions

The answers below are responses to the focus questions identified in Chapter 2 of the NTC discussion paper. Some of these answers have already been partially or fully addressed in the preceding sections.

Principles

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

The overarching principle and supporting principles identified in the NTC discussion paper are generally suitable. However, the equitable application of the overarching principle could be enhanced by the following proposed amendment

*No person should be **better or** worse 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 additional principles outlined by SIRA in Section 3 (above) are also important to ensure development of a fair, effective and sustainable approach to future injury insurance arrangements for automated vehicles. The principles provide additional specificity to those set out in the NTC discussion paper. The adoption of these additional principles could augment and enhance the NTC proposed principles.

Problems

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

The problems identified in the paper effectively raise the key issues requiring resolution to successfully develop a workable solution for automated vehicle injury insurance. There is additional work that will need to be undertaken to determine how the final option will be implemented to ensure that key principles are upheld in the delivery of a

revised scheme, however the problems identified have effectively initiated that discussion.

The issue of recovery between insurers and other responsible parties, such as manufacturers, Automated Driving System Entities (ADSEs) or software design companies, will require substantial development before an insurance solution for automated vehicles can be agreed upon. To ensure that the core principles of the NTC paper are upheld, it will be a priority to minimise costly legal battles over fault between these parties. The solution design, regardless of which option is selected, will need to address this clearly and in detail.

Barriers

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

The paper accurately identifies the legislative barriers that may limit the protection afforded by CTP schemes to injured parties should an automated vehicle cause harm or damage.

Options

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

The option set does not require more research to select a preferred policy direction, however a regulatory impact statement including cost and benefit analysis would be useful. The options are well defined, and provide a viable and broad set of alternatives for how to structure automated vehicle injury insurance across Australian jurisdictions.

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?

As outlined earlier in the submission, Option 3 and Option 5 best meet the core principles outlined in chapter 1 of the discussion paper. This is because these options are best placed to protect injured people, minimise differences in treatment between people injured by automated and non-automated vehicles, and provide the most effective basis for supporting other priorities within the scheme such as financial sustainability and consistency across jurisdictions.

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

The central criteria provided for assessing the options are largely appropriate for assessing the options that have been provided, cost and complexity of implementation should be considered in evaluating options.

As discussed earlier in the submission, some additional principles have been provided in Section 3 to provide additional detail to the primary considerations outlined by the NTC. The primary criteria however remain the experience and outcomes for injured people making claims in Australian schemes, and the financial sustainability of those schemes.

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?

The entity capable of managing the risk, that is the entity most capable of responding to incentives to improve safety and reduce risk, should be the entity that is responsible for that risk in the event of people being injured. To achieve this there will need to be a system put in place that allows for that party to be held accountable. However, it is a priority that this system of dispute resolution is designed in a way that ensures litigation does not create excessive disputes, including negative personal impacts and legal costs within CTP schemes.

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

In the immediate future, a single insurance model for automated vehicles with different levels of automation may be the most efficient way to protect injured people. It is likely that as the level of vehicle automation progresses toward level 5, then there will be a corresponding change to the CTP insurance market. It is likely that the scheme will require further amendment as the automated vehicle market develops. The proposed principle of future-proofing supports this idea. From its outset, a revised automated vehicle insurance arrangement should envisage staged amendments based on the evolution of the technology and its use on Australian roads. While the insurance model itself may not substantially change, it is likely that at the very least there will be incremental amendments to the way that automated vehicles are insured as the number of vehicles operating at higher levels of automation increases.

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.

The right of recovery will need to be developed in such a way as to limit a negative effect on scheme costs. This is closely associated with the idea that the party that has control over the risk should bear the risk.

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 MAll schemes and caps or thresholds.

Option 4 may provide an effective solution if implemented correctly, the complexity and potential administrative burden of implementing this solution given the time constraints of the program of work mean that this solution is unlikely to be appropriate at the present time. This is also the case because the administrative cost and efficiency of operating a scheme for the relatively small number of automated vehicles operating during the initial period of their introduction on Australian roads is likely to be disproportionate. As the automated vehicle industry develops further, options for insurance may need to be revised as the risk profile of the vehicle fleet evolves with changing vehicle ownership and operating models.

A weakness associated with Option 4 is that it would not yield the potential benefits of consolidation of personal injury insurance schemes to close gaps such as economies of scope and scale and reduced dispute rates. Rather it would increase complexity and inefficiency through further fragmentation.

11: If you support option 5, how should the minimum benchmarks be defined?

SIRA supports a set of strategic minimum benchmarks as discussed in the options analysis, these may include:

- Injured people only have to deal with one insurer.
- Injured people have access to the same rights and benefits in NSW regardless of the ADS status.
- There is an automatic right of recovery to indemnify the insurer for loss incurred through the payment of a claim resulting from an accident caused by an ADS, against the companies capable of managing safety risks associated with their operation.
- There is a recovery mechanism which ensures that those in control of the risk pay for it to enable the right of recovery.
- The scheme is compulsory for automated vehicles

Data issues

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

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

In determining fault and resolving other claims disputes, the types of data accessed and the contexts in which it is capable of being accessed will need to be strictly controlled, to ensure third parties are not given access to an excessive or inappropriate amount of personal data.

Notwithstanding cybersecurity risks, the AV operating environment should also provide opportunities for real time data provision via telematics and artificial intelligence tools for sophisticated analysis of risk, leading to transformative models for calculating the fair price of risk, determining the cause of the incident leading to injury and informing safer design.

Registration issues

13: If different types of insurance attach 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?

The differences already existing between jurisdictions do not act as a barrier to interjurisdictional coordination and recognition of CTP schemes. There will be complexity in developing a workable solution that is effective across all jurisdictions, however insofar as a generally agreed upon set of minimum requirements is established, whether through integration into CTP schemes or independently of CTP schemes, there should be no substantial barriers to mutual recognition of registration.

5. Conclusion

The introduction of autonomous vehicles has the potential to be a significant disruptor to the operation of personal injury schemes. SIRA looks forward to working with the NTC in the development of its plan for its automated vehicle injury insurance reform package and would be pleased to provide further information to assist.