INSURANCE COUNCIL OF AUSTRALIA

12 December 2018

Attn: Automated Vehicle Team
National Transport Commission
Level 3/600 Bourke Street
Melbourne VIC 3000

Discussion Paper: Motor Accident Injury Insurance and Automated Vehicles

The Insurance Council of Australia (ICA) welcomes the opportunity to provide a submission to the National Transport Commission (NTC) on motor accident injury insurance and automated vehicles. We also thank the NTC for recently meeting with the ICA and its members on the discussion paper.

The ICA is the peak representative body of the general insurance industry in Australia and represents about 95% of total premium income written by private sector general insurers. Our members underwrite Compulsory Third Party (CTP) schemes in New South Wales, Queensland, South Australia and the ACT and manage claims in the Northern Territory.

The ICA recognises that the advent of automated vehicles has the potential to bring many benefits to road users including increased safety and greater convenience. It will revolutionise the way people travel and may completely change the nature of vehicle ownership. With the continued improvements in automated driving system (ADS) technology and with ADS vehicles already on the road around the world, it is timely for Commonwealth and State Governments to consider how such a revolutionary innovation can be facilitated through the legal framework.

In particular, it is important that current statutory motor accident injury insurance (MAII) schemes can respond to injuries caused by an ADS. The ICA agrees that it is of paramount importance that a person injured by a vehicle with an ADS has timely access to treatment, care and financial support. The Australian community expects as a matter of fairness that no one is disadvantaged because they were injured by an ADS and not a human driver.

The ICA submits the best approach is minimal change to current MAII schemes with gradual change as more practical experience is gained. Changes should only be made if the current legal framework and mechanisms for recovery fail to respond to the challenges of ADSs. Many of the complex changes to MAII schemes contemplated in the NTC paper may be beneficial, but at this early stage and with no claims experience and data, it is difficult to fully anticipate how current MAII schemes or significantly reformed MAII schemes as proposed in the NTC paper will operate when vehicles at different levels of automation increasingly comprise a greater proportion of vehicles on the road.

In this regard the ICA proposes that Option 3 of the discussion paper is the most suitable model through which reform should be implemented. As we detail later in the submission, at this early stage we believe existing MAII schemes have the framework necessary for people to have timely access to treatment, care and financial support and should merely be expanded to cover injuries caused by an ADS. We believe this approach will also enable ADS entities and other potentially liable parties to be held to account. With greater

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experience, minor changes to the law may be needed to ensure that there is a legislated right of recovery for insurers against an ADS entity (ADSE). This gradual approach avoids over-complicating reform and will provide a level of stability and certainty to road users, insurers and other potentially liable parties.

The ICA's response to relevant consultation questions is set out in the attachment. We note that some of our members may be providing their own submissions to this discussion paper. We thank the NTC for the opportunity to contribute to this consultation process. Our members look forward to continuing to work with the NTC to ensure that injured road users are provided with equitable outcomes regardless of the type of vehicle involved in the accident.

If you have any further questions, please contact Fiona Cameron, General Manager Policy, Consumer Outcomes at fcameron@insurancecouncil.com.au or 02 9253 5132.

Yours sincerely

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INSURANCE COUNCIL OF AUSTRALIA

ATTACHMENT: ICA RESPONSE TO CONSULTATION QUESTIONS

Chapter 1: Principles

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

The NTC proposes that reform should be guided by 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 ICA agrees with this primary principle, but adds that this principle should be clarified so that it is clear that a person injured by an at-fault person also should not be worse off or likewise better off under a scheme than a person injured by an ADS.

For example, it may be an unfair outcome if an inadvertent consequence of the principle was that a common law option for autonomous vehicles in jurisdictions arose where a no-fault scheme or a hybrid scheme exists, thus adding a layer of complexity and inefficiency.

There ought to be equity both ways. Regardless of whether a person is injured by an ADS or by a human driver, they should be able to access an equivalent level of support, and should not be advantaged or disadvantaged over other road users.

The ICA believes any contemplated reform should ensure that the MAII scheme remains flexible, with incremental change as greater experience with claims involving ADS vehicles is gained.

The ICA has no objections to the other listed principles but notes that minimising potential litigation between insurers and manufacturers/ADSEs (Principle 3) and transparency and certainty in accessing compensation (Principle 5) are also important. The ICA also believes that the principles should be more customer focussed, and emphasise that reform should aim to ensure an injured person has easy and timely access to treatment, care and recovery support.

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

The NTC has identified that MAII laws do not contemplate an ADS as 'driving' a motor vehicle and therefore a person injured in an ADS crash may not recover under current MAII schemes. The ICA agrees that any definitional barriers in the law to MAII schemes encompassing a person injured by an ADS should be addressed.

The NTC has also identified that even if an ADS were deemed as 'driving' the motor vehicle, it may be difficult under fault based schemes to apply negligent liability to an ADS. The ICA agrees that this is also a key challenge under fault based schemes (see answer to Question 5). The outcomes for injured road users should be of paramount importance in considering any reform. In the ICA's view, road users should be able to access an equivalent level of

support, both financial and procedural, regardless of whether or not they are injured by an autonomous vehicle.

The NTC paper highlights that one of the problems with current MAII schemes is that they are generally designed to cover injuries caused by a human driver rather than product faults and therefore a significant redesign of MAII schemes is needed so that the appropriate liable parties bear the cost of ADS crashes.

As discussed below, other than definitional barriers preventing current MAII schemes from encompassing injuries caused by automated vehicles, the ICA has not identified any obvious barriers that current recovery mechanisms available to insurers present with respect to product liability and automated vehicles. Importantly, for a consumer, their claims process should not change. If they are injured, they should continue to be compensated by the insurer. The insurer under its right of subrogation would continue to pursue the manufacturer at-fault behind the scenes.

However, we recognise that greater experience may show otherwise and current schemes may need to be modified so that there is a clear party that an insurer can seek recovery from in the event of an injury caused by an automated vehicle.

As greater ADS experience is gained, recovery mechanisms can be reviewed to ensure they remain appropriate and fit for purpose.

Chapter 3: Barriers

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

The ICA acknowledges that barriers may arise if existing MAII schemes are applied to vehicles with an ADS due to the definition of a driver or uncertainty around whether an ADS is capable of negligence. Nonetheless, the ICA submits that at such an early stage, problems should not be pre-empted and major changes to MAII schemes should not yet be developed. Instead, we suggest that a more prudent approach would be for schemes to respond in accordance with real experience and information gathered. This will facilitate incremental change, subject to the experiences of each state, and allow schemes to respond appropriately to needs as they arise.

The ICA agrees with the NTC's statement that 'having an identified legal entity with responsibilities for the ADS will help insurers in actions for damages resulting from an ADS crash due to a defective or unsafe ADS.'

We note the NTC's third recommendation in the Changing Driving Laws to Support Automated Vehicles policy paper that at conditional, high and full automation, the ADSE is responsible for compliance with dynamic driving task obligations. As we note below (see answer to Question 5), issues may arise in those intermediate stages where the ADS has increasing responsibility for some driving tasks but the human operator is still deemed responsible for the vehicle. As these issues emerge they will require careful consideration.

Chapter 4: Options

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

The ICA submits that research alone is not enough at this stage. The experience of automated vehicles operating under MAII schemes needs to be observed along with ongoing monitoring of the schemes' ability to manage these claims. The ongoing monitoring of ADSEs by an appropriate national entity will be required to ensure that current MAII schemes adequately respond to any issues and challenges that may emerge.

Question 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? Is so, please explain how it would work.

The ICA believes that Option 3 without a recovery pool best meets the policy principles outlined in Chapter 1 and is the ICA's preferred option. Current MAII schemes should be modified so that injured people have access to compensation and benefits regardless of whether the injury was caused by an ADS or a human driver.

By implication, we do not support Option 1 and Option 2. Our position on Option 4, 5 and 6 is detailed below (see answer to Question 9, 10 and 11).

Where an injury is caused by an autonomous vehicle, the injured road user should continue to be able to claim under the CTP policy attached to the vehicle. The insurer will continue to pay benefits to the injured person as currently occurs. Under the right of subrogation, the insurer is able to pursue the automated vehicle manufacturer. The automated vehicle manufacturer in turn is able to pursue other potentially negligent parties such as manufacturers, software developers, communications providers and infrastructure owners.

As experience of automated vehicles increases, it is possible that there may need to be legislated right of recovery against an ADSE. Whilst at this early stage, we believe current recovery mechanisms work, it is an important principle that insurers are able to recover from an ADSE where any part of an autonomous vehicle contributes to an injury.

We suggest there should be a domiciled ADSE that the insurer has a right of recovery against, which in turn can seek recovery from other negligent parties such as manufacturers, software developers, communications providers and infrastructure owners. Whilst the determination of liability may be difficult (though this can be greatly aided by access to data: see answer to Question 12 below), what is important is that litigation and recovery from negligent parties does not constitute an undue burden on a claimant; it should continue to happen behind the scenes for the consumer. Ultimately, the insurer should continue to bear the burden for recovering from a negligent party as they have the resources to pursue the action.

Having an identifiable entity to sue avoids potential litigation complexity for an insurer as they can simply commence action against a single ADSE deemed liable. This will prevent protracted litigation that would add costs and delays to the MAII scheme.

Ideally, a road user should be agnostic as to the nature of the vehicle that gave rise to the injury. From their point of view, their pathway to recover if injured by an ADS should be identical to if they were injured by a vehicle controlled by a person. The injured road user isn't prejudiced by the fact that MAII schemes may not specifically deal with product liability as currently it is sorted out by insurers 'behind the scenes'. The only relevant factor for a claimant seeking benefits should be the fact that they are injured, regardless of the type of vehicle that caused the injury.

If a light touch approach is adopted there will be greater certainty, efficiency and transparency for road users as their path to recovering compensation for an injury will remain largely unchanged. We also note that the transition to a society where the vast majority of road users will be travelling in fully autonomous vehicles will be progressive. The MAII framework should remain flexible, with incremental change as problems arise and are identified with more certainty with greater experience as the number of autonomous vehicles increase on the road.

There may be a concern that expanding MAII schemes to include injuries caused by an ADS may unfairly shift the cost from the manufacturers to others such as insurers and create moral hazard. In response to this problem, the NTC has proposed the creation of a recovery pool where contributions are made by potentially liable parties. The ICA believes this has some merit but can potentially be complex (see answer to Question 9). We consider a legislated right of recovery against the ADSE for any faults associated with the ADS may address this issue and help to ensure that financial risk aligns with control, as the ADSE would have incentive to ensure that the whole of the vehicle is fit for purpose.

There will be frictional issues at the intermediate stages as vehicles increase in automation. Particularly in at-fault schemes where negligence is required for an insured to recover, the intermediate levels of automation pose issues if humans are still deemed legally responsible, but the ADS has assumed a greater responsibility for the driving task. The ICA submits further thought needs to be given as to how to minimise these friction issues. The ICA believes that there is a need to continually review the operation of MAII schemes, with ongoing research and learning as greater experience is gained with increasing usage of autonomous vehicles.

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

The ICA is satisfied with the criteria put forward for assessing the options.

Question 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. The ICA considers that current recovery mechanisms enable entities most able to manage the risk to be held to account and incentivised to minimise the risk. The insurer can sue the manufacturer and the manufacturer in turn can sue other liable parties. However,

increasing experience of automated vehicles on our roads may show the current legal framework to be inadequate in holding the entity most able to manage the risk responsible. If this arises a legislated right of recovery may rectify this (see answer to Question 5 and Question 3).

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

The ICA does not believe that different insurance models should be used depending on the level of vehicle automation. This could create friction and introduce unnecessary complexity. Ultimately, multiple models of insurance could undermine the NTC's principle of reasonable and timely access to compensation regardless of the type of vehicle involved in the injury.

Question 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 ICA expects that the current laws governing rights of recovery will be adequate. If any new issues arise, these laws can be revisited and amended according to challenges that may emerge.

The ICA considers a recovery pool is not required at this time. While an ADSE importing a vehicle could be required to contribute to a pool, it would be difficult to determine an equitable way to calculate the necessary contributions of potentially liable parties, particularly with little to no data and claims experience in a situation where the majority of the market involves vehicles with an ADS. However, the ICA is open to exploring how this option would operate in practice.

With regards to Option 6, the ICA believes that this could be explored at a later date, but is not required at the present time. Insurers should be able to adapt motor property cover to suit the automated vehicle market.

Question 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 or thresholds.

The ICA does not support Option 4, as this would create a layer of complexity that is unnecessary at this early stage in the adoption of automated vehicle technology. Injured claimants may be uncertain about which scheme to access. We believe that expanding current schemes will create greater certainty for claimants. We also note that under current schemes, the total number of claims that involve product liability are a very small percentage. Whilst there will be accidents that involve vehicles with an ADS, it is anticipated that there will be less injuries as time goes on.

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

The ICA believes that Option 5 may have some merit once further experience is gained. Minimum benchmarking would help ensure that there is consistency in a minimum level of benefits and treatment regardless of which jurisdiction a road user is injured in. Further work would need to be undertaken with all Australian jurisdictions.

Chapter 5: Data and registration

Question 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?

The ICA considers access to data to be of primary importance in ensuring that any MAII scheme is efficient and premiums kept low. The ICA agrees with the NTC's Safety Assurance for Automated Driving Systems: Consultation Regulation Impact Statement proposal that data recording and sharing requirements be imposed on relevant ADSEs. Of particular importance is the need for individuals and insurers to receive data to consider liability. The concerns with determining liability with a large group of potential at-fault parties such as the software developer, the manufacturer, the telecommunications provider or the road infrastructure can be simplified with access to an automated vehicle's data. Access to data will make the recovery process more timely and efficient for insurers and this will mean lower premiums for road users. We propose that providing access to relevant data for determining liability should be a condition for importing and selling automated vehicles in Australia.

We also agree with the approach taken in Germany. As noted by the NTC 'The German Road Traffic Act…requires an autonomous vehicle to have a data recording device that records the vehicle's control mode and any instances of a request by the vehicle for the driver to take control. The data must be stored for six months, or three years in the event the vehicle has previously been involved in an accident.' This requirement for data retention can help with the frictional issues discussed above. Whilst there is a six month requirement to store data under the German approach, timeframes would need to be considered within the context of Australian jurisdictions where there are divergent time limits to submit a claim.

Any data requirement should mean that insurers are able to access it in a timely manner that doesn't impede the claims process, in order to determine liability involving an ADSE efficiently.

Question 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?

Challenges may arise if different types of insurance attach to automated vehicles in different jurisdictions, however Option 3 is the option most likely to minimise any issues arising from mutual recognition.