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2 August 2017

Attention: **Automated Vehicle Team**  
National Transport Commission  
Level 15/628 Bourke Street  
Melbourne VIC 3000

Dear Automated Vehicle Team,

**Submission responding to the National Transport Commission Discussion Paper: Regulatory options to assure automated vehicle safety**

The Law Institute of Victoria ('the LIV') thanks the National Transport Commission ('the NTC') for the opportunity to provide further submissions on the regulatory options surrounding the trialling and implementation of varying levels of automated vehicles on our roads and assurance about their safety for all road users and proximate parties.

The LIV submits that the government must ensure that consumers owning, sharing or using automated vehicles who are injured or who suffer other financial loss as a consequence of automated vehicles, are properly protected by any proposed safety assurance regime, particularly by the preservation of the full spectrum of insurance rights.

The LIV's response to the NTC's *Regulatory options to assure automated vehicle safety in Australia, Discussion Paper June 2017* ('the discussion paper') follows.

**Scope of Response:**

Whilst the discussion paper outlines a number of specific questions for feedback, the LIV proposes to limit its response to addressing the following fundamental questions:

- Whether there is a need for explicit regulation of automated driving functions, over and above existing transport and consumer laws; and
- If so, what form should this take?

**Response:**

The LIV submits that its previous submissions identify a clear need for the implementation of a new layer of regulation for automated vehicles. For example, as it stands from a Victorian perspective, in the absence of regulation clear deficiencies would arise in respect of protections of statutory and common law rights as regulated by the *Transport Accident Act 1986* (Vic) and detection of contravention and enforcement of criminal laws. Having identified that, we turn to the question of what form such tailored regulation should take.

**The preferred regulatory option of those identified by the NTC:**

The LIV notes that at pages 37-38 of the discussion paper the NTC has identified 8 assessment criteria against which the regulatory options for safety assurance of automated vehicle functions

should be evaluated. In considering which regulatory option would be preferable from the LIV's perspective, the paramount criteria we have identified are:

- Safety, including ongoing safety over the lifespan of the vehicle as well as certainty about responsibility for testing, validating and managing safety risks; and
- 1.
- Accountability and probity, including transparency of decision-making and the existence of an entity to be legally liable for the automated driving system.

With respect to the second criteria the LIV refers to its previous submission to the NTC's discussion paper *Clarifying Control of Automated Vehicles*. The LIV reiterates its view that "a human driver [operating an autonomous vehicle] cannot escape liability and the standards should remain that of a reasonable driver having proper control of a vehicle and exercising a degree of skill and care expected of a competent and experience driver, to be determined objectively."

The LIV has taken the above position in view of the gravity of risk posed to all road users (and potentially others) by the introduction of new technology in the form of automated vehicles.

The LIV notes that the NTC has identified at pages 20 and 65 that Germany has implemented steps to introduce a pre-market approval model. In the face of the unfortunate decline in the vehicle design and manufacturing industry in Australia, it may well be instructive to look to nations with very advanced industries and those countries equipped with the resources, knowledge and experience to support the implementation of regulatory mechanisms when dealing with new age automotive technologies.

The LIV would generally support Option 3: Pre-market approval (pp. 62 – 69 of the discussion paper) as, notwithstanding the potential creation of delay in implementation and the resource-intensive nature of this model, it is the model which would arguably provide the highest level of certainty for government and consumers in respect of safety and accountability.

The LIV is concerned that other options, such as those geared towards self-certification, may contain an inherent conflict of competing duties, given the vested interests of manufacturers and industry generally in seeking to gain commercial advantage in the race to deliver the first approved vehicles on the market; the necessity to reduce costs in compliance; and the desire to reduce regulatory hurdles.

The LIV also highlights concerns about the ongoing upkeep and maintenance of driverless vehicles. Currently it is considered an owner's responsibility to maintain their car in a safe and roadworthy condition. The LIV notes that Option 3 contains ongoing provisions for the assurance of the ongoing safety of automated vehicles through the provision of periodic roadworthiness and statements of compliance, whereby the Government could act on safety-critical event data required to be provided as part of an ongoing approval process.

Although this is, on balance, probably an option that lends itself to a long-term state, the LIV's view is that it is important to set the foundations now for what is to become the future of vehicular travel in Australia.

The LIV agrees with the findings of the NTC that a safety assurance regime will be best achieved with collaboration of State, Territory and Federal Governments.

In the alternative, the LIV notes that Option 4: Accreditation (pp. 70-79) also potentially satisfies the core elements of most concern to the LIV (noted above).

### **What is “Safe”?**

The LIV suggests that governments should aim for a safety outcome that is ‘significantly safer’ than conventional vehicles and drivers. With consideration given to the projected safety enhancements of automated vehicles, it would in the LIV’s view be perverse if the expectation was not that automated vehicles must be safer (whether “materially”, “significantly” or otherwise) than existing vehicles.

However, it would be outside of the LIV’s scope of expertise to make submissions regarding assessment and quantification of the safety of automated driving systems.

Broadly, the LIV is drawn to the dichotomy identified by NOVA Systems (as summarised by the NTC at pp. 29 – 32 of the discussion paper) between the present measure of “safe” in retrospectively assessing the ‘road toll’ versus a forward-looking approach measuring probability of failure, and the conclusion that the latter is, on balance, a better model in terms of reflecting a broader definition of “safe”.

The reality is that the application of the present yardstick in retrospectively assessing impact on the ‘road toll’ and then determining whether automated vehicles are indeed “safe” would take many, many years of on-road mileage.

The quantification of a more encompassing concept of “safe” noted above would inherently be difficult. With time of course, the LIV considers it would be appropriate to utilise a combination of the retrospective ‘road toll’ assessment of road safety outcomes with a newer probability of failure as measures against an acceptable scope to determine the assessment of “safe”.

The LIV supports, in principle, the proposal to develop a legislated primary safety duty for relevant parties, so long as the primary duty serves to complement the overall regulatory assurance regime. However, consideration should be given to how a primary safety duty may apply over the service life of an automated vehicle, especially with respect to servicing, modification and repair.

There is an identified need for any proposed primary duty to be sufficiently flexible to allow the adaptive use of an automated vehicle. The LIV refers to the representations made by the Heavy Vehicle Industry Australia at the ‘Regulatory options to assure automated vehicle safety’ workshop held on 5 July 2017, at which it was noted that vehicles often need to undergo substantial modifications throughout their service life. The LIV submits that a primary duty of care that is in line with the model *Work Health and Safety Act 2011* (Cth) may be sufficiently broad to encompass the ongoing service, modification and repair of an automated vehicle without imposing excessively onerous regulatory obligations on a relevant party.

The LIV again thanks the NTC for the opportunity to provide further submissions in respect of this discussion paper

Please contact Irene Chrisafis, Senior Lawyer, on (03) 9607 9386 ([ichrisafis@liv.asn.au](mailto:ichrisafis@liv.asn.au)), or me on (03) 9607 9367 ([nwallace@liv.asn.au](mailto:nwallace@liv.asn.au)) if you wish to discuss these matters further.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Nerida Wallace", with a long horizontal flourish extending to the right.

Nerida Wallace  
**Chief Executive Officer**  
Law Institute Victoria