

26 August 2019

National Transport Commission
Attn: In-service safety for automated vehicles
Level 3, 600 Bourke Street
Melbourne VIC 3000

Dear National Transport Commission

Consultation RIS: In-service safety for automated vehicles

Thank you for the opportunity to provide a submission on the Consultation Regulation Impact Statement (**Consultation RIS**) on how to ensure automated vehicles are able to operate legally on Australian roads and support their safe operation once they are on roads ('in-service').

The Australian Institute of Company Directors (**AICD**) has a membership of more than 44,000 including directors and senior leaders from business, government and the not-for-profit sectors. The mission of the AICD is to be the independent and trusted voice of governance, building the capability of a community of leaders for the benefit of society.

The AICD acknowledges that automated vehicles have the potential to provide a significant range of benefits to Australian society, including new business opportunities. However, they also pose a number of novel and challenging regulatory issues for Australian governments to grapple with.

Accordingly, the AICD supports the implementation of new regulatory frameworks to address in-service safety for automated vehicles.

Given the AICD is not an expert on autonomous driving technology or its regulation, we have limited our comments to question 8 of the Consultation RIS, namely whether a safety duty should apply to the executive officers of an Automated Driving System Entity (**ADSEs**).

Although we have not commented on how the regulation of in-service safety of automated vehicles should be implemented, the AICD does support a nationally consistent framework in order to avoid differing laws applying in each state and territory.

Should a general safety duty be applied to directors?

As set out in the Consultation RIS, the definition of ADSE executive officer has the same meaning as officer has in relation to a corporation under section 9 of the *Corporations Act 2001* (Cth) (the **Corporations Act**). The definition, therefore, captures directors of ADSEs.

The Consultation RIS notes that executive officers within an ADSE may have a major influence on the in-service safety of automated vehicles as they can independently make decisions that directly affect the design or maintenance of an ADS. Consequently, it is suggested that a general safety duty should apply to ADSE executive officers.

Existing legal framework is fit for purpose

The AICD acknowledges the important role that directors have in ensuring the safe operation and performance of any product or service that an organisation produces or delivers. Where directors have breached the law or been complicit in a company breach, including of their fiduciary duties, they should be held accountable. The AICD, however, is not supportive of a specific safety duty being applied to directors of ADSEs for the reasons outlined below. In particular, we would disagree with the assertion in the Consultation RIS that “ADSE executive officers may have insufficient incentives under Australian corporations laws to ensure in-service safety risks are addressed due to competing priorities”.

Each director of an Australian company is already bound by duties to the company, including duties to act with care, skill and diligence. To discharge these duties, directors need to familiarise themselves with new laws and implement frameworks to manage new risks and ensure compliance. Accordingly, directors of Australian ADSEs are bound to perform a crucial oversight and risk management role in relation to ADSE’s compliance with new regulatory frameworks.

Directors also have a duty to act in good faith and in the best interests of the corporation. As set out in the Consultation RIS, in the context of ADSs, this duty will typically require directors to take steps to protect the ADSE from reputational risk or exposure to litigation arising from an unsafe ADS product.

Further, directors can be held liable (both criminally and civilly) for conduct connected with breaches of existing laws relevant to ADSs including consumer laws, automotive product safety laws, work health and safety laws and heavy vehicle national laws.

Importantly, directors will consider a range of interests in making decisions, and providing safe products is core to exercising their duty of care, skill and diligence and acting in the best interests of the corporation. Consumer protection and work health and safety laws work together with these directors’ duties to help mitigate against the risk that directors might adopt a narrow, short-term pursuit of profit.

Finally, director liability can also be established through accessorial liability (which refers to the imposition of liability on a director on the basis of their involvement in culpable conduct by the company) or “stepping stone liability” (which describes the imposition of liability for a breach of directors’ duty on the basis that a director failed to prevent a foreseeable risk of harm to the interests of the company by exposing the company to a breach of law).

Accordingly, in our view, the existing director liability regime (as described above) is well-tested, widely understood and indeed flexible enough to accommodate new technologies, including ensuring the in-service safety of ADSs. Clear evidence needs to be produced that there are gaps in the existing legal framework before legislation is introduced to impose new grounds of director liability.

Distinction between board and management

While directors and the board have many responsibilities, including to develop the company’s strategy and to ensure that the organisation develops and implements systems, processes and procedures to enable it to comply with its legal, regulatory and industry obligations, directors are not responsible for the day to day operations and decisions of corporations. As Commissioner Hayne commented in the final report of the Royal

Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, "The task of the board is overall superintendence of the company, not its day-to-day management."

Boards would not generally make independent decisions that directly affect design or maintenance of products, and it is critical that the role of the board and the delineation between the roles and responsibilities of the board and management be maintained.

We are concerned that this distinction may have been blurred in the Consultation RIS.

General safety duty vs prescriptive safety duty

As stated above, the AICD's position is that the existing legal framework is fit for purpose. However, should a safety duty be introduced to apply to directors, the AICD considers that a general safety duty is appropriate (as opposed to a prescriptive one). This is on the basis that any such duty is consistent with and based on the duty of care found in the model work health and safety laws.

The AICD supports 'principles based' regulation and is opposed to more prescriptive requirements being imposed on directors unless there is a compelling justification. The focus of such regulation is on whether a party has achieved the regulation's purpose (i.e. in-service safety of automated vehicles), as opposed to whether a party has satisfied prescriptive requirements, which may evolve with technological advances.

It is the responsibility of the board and senior management to determine how best to identify risks and develop solutions to address the in-service safety of automated vehicles. This is appropriate and there is no need for such prescriptive requirements as set out in Appendix B of the Consultation RIS which risks a passive 'tick a box' approach being taken.

In the interests of consistency, we would support the relevant regulator being the sole enforcer of any general safety duty, as is the position currently under work health and safety laws. For completeness, we also note that a cause of action may also be available to individuals who are injured under the common law tort of negligence.

Next steps

We hope our comments will of assistance when considering this specific area of law and policy as it relates to ADSs.

If you would like to discuss any aspect of this submission further, please contact Christie McGrath, Senior Policy Adviser at cmcgrath@aicd.com.au.

Yours sincerely



CHRISTIAN GERGIS
Head of Policy