

26 August 2019

Attn: In-Service Safety for Automated Vehicles
National Transport Commission
Level 3/600 Bourke Street
Melbourne VIC 3000

Submitted online: www.ntc.gov.au

In-Service Safety for Automated Vehicles

The Insurance Council of Australia (ICA) welcomes the opportunity to provide feedback on the National Transport Commission's *Consultation Regulation Impact Statement* paper (the Consultation Paper).

The ICA is the representative body of the general insurance industry in Australia¹. Insurance Council members provide insurance products including motor vehicle insurance and compulsory third party insurance.

The ICA supports measures to reduce in-service safety risks. Gaps in dealing with potential in-service safety risks could negatively impact consumer confidence in the automated vehicle market. Providing greater confidence may encourage the take up of new Automated Driving System (ADS) technology into the marketplace and the realisation of its benefits sooner.

In our attached answers we submit that as much as possible, current recovery mechanisms should be relied on and gradually changed as experience warrants. Current recovery mechanisms give policy holders a clear pathway to compensation from an insurer for loss suffered from a negligent party. Likewise, insurers are experienced in the process of recovery from negligent parties.

However, we agree that a general safety duty to ensure the safe operation of an ADS may have merit. It may, for example, create certainty through the provision of a clear path to recover from an Automated Driving System Entity (ADSE) while also promoting management

¹ The Insurance Council of Australia is the representative body of the general insurance industry in Australia. Our members represent about 95 per cent of total premium income written by private sector general insurers. Insurance Council members, both insurers and reinsurers, are a significant part of the financial services system. June 2019 Australian Prudential Regulation Authority statistics show that the general insurance industry generates gross written premium of \$48.4 billion a year and has total assets of \$128.4 billion. The industry employs about 60,000 people and on average pays out about \$151.4 million in claims each working day.

Insurance Council members provide insurance products ranging from those usually purchased by individuals (such as home and contents insurance, travel insurance, motor vehicle insurance) to those purchased by small businesses and larger organisations (such as product and public liability insurance, professional indemnity insurance, commercial property, and directors and officers insurance).

of in-service safety risks. We propose that if the duty proceeds, that there is a review of its operation 2-3 years after implementation. This will provide the necessary platform to consider whether the general duty is achieving its purpose and whether any changes are necessary.

If you would like to discuss any of these matters further please do not hesitate to contact Fiona Cameron, General Manager Policy, Consumer Outcomes at fcameron@insurancecouncil.com.au or 02 9253 5132.

Yours sincerely,



Robert Whelan
Executive Director & CEO

Attachment: Answers to National Transport Committee (NTC) Consultation Questions

1: To what extent has the consultation RIS fully and accurately described the problem to be addressed, including the in-service safety risks? Please provide detailed reasoning for your answer.

The ICA welcomes the Transport and Infrastructure Council's agreement to require ADSEs to provide evidence against a set of safety criteria before obtaining approval to supply an ADS in Australia.

We note the NTC is concerned that as this requirement does not extend to safety risks that may arise while the vehicle is in-service, or to any other parties beyond the ADSE, that safety risks may not be adequately mitigated. The Consultation Paper points out that due to the limitations of the existing regulatory tools, ADSEs and other relevant parties may not internalise all social costs associated with ADS crashes.

Insurers already play an important role providing compensation for injured road users under CTP schemes, indemnifying a policy holder for property damage, and exercising the right of subrogation to recover from negligent parties. ICA's previous submission to the NTC on motor accident injury insurance schemes (MAII) proposed that the current MAII schemes be extended to injuries caused by an ADS, and this has been accepted by the Transport and Infrastructure Council. MAII schemes that are extended to include all ADS vehicle accidents automatically provide a framework to allow relevant parties to internalise costs associated with ADS crashes through higher premiums and the risk of litigation/recovery from insurers.

6: Do you think the parties with an influence on in-service safety are sufficiently covered by Australia's current legal frameworks?

We note in the Consultation Paper the NTC considers that, under existing regulations, ADSEs, ADSE executive officers, remote drivers, fallback-ready users and repairers are not provided with sufficient obligations and incentives to ensure the in-service safety of AVs. The ICA queries whether the NTC has considered the role of insurers in commencing actions and recoveries against negligent parties. The ICA submits that existing laws in which insurers currently operate across Australia already influence safety outcomes. A legislated general safety duty for ADSEs and their executives may support the operation of the current regime. We propose that if the duty proceeds, that there is a review of the operation of the general duty 2-3 years after its implementation. This will provide the necessary platform to consider whether the general duty is achieving its purpose and whether any changes are necessary.

As outlined in our previous submission on MAll schemes and automated vehicles, we do not believe that current recovery mechanisms present a barrier for injured parties and insurers with respect to autonomous vehicles. Importantly, an injured party would receive compensation from the insurer without the significant costs of litigation against negligent parties.

In the vast majority of situations, an injured person under current MAll schemes, or in situations of motor vehicle damage, the owner would not need to personally recover from a negligent party and bear the associated costs. These costs would be covered under the relevant car insurance policy or MAll schemes.

CTP insurers also have a right of subrogation to recover from negligent parties who are responsible for causing or contributing to a motor vehicle accident. While the determination of fault may be complex, it is important to note that insurers have the experience and resources to undertake appropriate recovery against a negligent third party.

We note the NTC's concern that 'it is unclear how far an ADSE's duty of care to employees and other parties under WHS laws would extend once an ADS has been in-service for several years...It is not clear whether an ADSE has an obligation to provide guarantees against safety risks that emerge while an automated vehicle is in-service.' We acknowledge this uncertainty, and as outlined below, believe a legislated general safety duty applying to ADSEs may have merit.

7: Do you think that a general safety duty to ensure the safe operation of the ADS 'so far as reasonably practicable' is appropriate to address the safety risks?

As stated above, the ICA believes a legislated general safety duty on an ADSE and their executives to ensure the safety of the ADS so far as reasonably practical may have merit. However, the ICA suggests the most suitable approach is to work largely within the existing legal framework and build on it gradually as experience may require.

It has been noted by the NTC that there is uncertainty as to whether a duty of care under general law would currently apply to an ADSE.

A general duty would align with the ICA's previously submitted view that an insurer should have a legislated right of recovery against a domiciled ADSE and we therefore support the decision of the Transport and Infrastructure Council to require ADSEs to have a corporate presence in Australia. A legislated general duty owed by an ADSE and their executives could provide a clearly defined party from which insurers can recover where negligence has resulted in injury to road users. It could also ensure that the ADSE bears financial risk and is further incentivised to ensure that any safety risks that the vehicle in its in-service stage poses are mitigated.

Should experience indicate that a general duty to ensure the safety of the ADS 'so far as reasonably practical' is too high a threshold to hold an ADSE to account as the primary party to bear the burden of mitigated safety risks, it may be necessary to consider a legislated right of recovery against a domiciled ADSE that extends to the in-service stage of an autonomous vehicle. A legislated right of recovery would have the benefit of simplifying potentially

complex litigation by giving an insurer a right of action against a single ADSE and the ADSE can in turn seek recovery from other negligent parties.

A general duty would be preferable over more prescriptive duties at this early stage as it would provide the flexibility needed to deal with any situations arising from further experience with automated vehicles. It would give the emerging automated vehicle industry flexibility in how they manage risks, help to minimise regulatory burden and encourage innovation. It would allow the courts to develop the nature of the duty owed by ADSEs and their executives with more experience. If more prescriptive rules are needed, these can be introduced having regard to more practical experience of automated vehicles when risks are better understood.

We also submit that should experience show a high volume of disputes, a statutory dispute resolution process could be considered. This process could sit alongside the ordinary litigation process and provide a quick and efficient mechanism for disputes between insurers and ADSEs, leading to lower litigation costs and ultimately lower costs for consumers.

The ICA also emphasises that data provision would be central in ensuring that liability is clearly located, in order to appropriately address in-service safety risks. We note that the NTC has recognised the importance of ensuring that an appropriate data access legal framework is in place in order to determine liability. We submit that ADSEs should have data recording and sharing requirements and insurers should have access to this in-service data. This could help to indicate which party had control of the vehicle at time of the accident and lead to a more efficient recovery process. Further, as infrastructure improves for effective automated vehicle use, we propose that insurers should have access to environmental and infrastructure data. Effective access to data will mean in-service safety risks are better understood and mitigated.

We request the NTC consider the role that current MAII schemes and insurance generally can play in ensuring parties that have influence over mitigating in-safety risks are incentivised and obligated to do so. Relying largely on the existing framework has the benefit of ensuring that in the in-service stage of the vehicle, the path for recovery for those injured due to negligence and compensation for property damage remains largely unchanged and therefore more predictable.

8: If a general safety duty were introduced, which parties should it apply to?

The ICA agrees that if a general safety duty is introduced, it should apply to an ADSE and its executives.

The ICA believes that the general safety duty does not need to extend to other parties such as repairers as they would be covered under general law. Currently, if there is negligence on the part of a repairer, the determination of their liability would occur through the ordinary course of litigation. This litigation would usually be undertaken by an insurer under the right of subrogation.

9: If a general safety duty were introduced, should it apply on public and private land (such as residential driveways)?

The ICA agrees that the safety risks an ADS poses on private land should also be addressed by the general safety duty, if introduced. The ICA notes that the boundary between public and private roads is different in each jurisdiction. The NTC should consider seeking to align the rules in each state or at least have the duty apply to private roads as per the definition in a particular state.

10: Should people injured by breaches of the general safety duty have a cause of action, or should the ability to enforce a general safety duty be limited to a regulator?

The ICA agrees that the general safety duty should have a cause of action and should not be limited to a regulator. This is because ordinarily, an insurer will have a right of subrogation to litigate against negligent parties. Under a legislated general duty, insurers would have the right to recover against a defined entity whose negligence gave rise to the insured's injury. Allowing for private litigation rather than merely relying on the regulator will help to keep premiums down, as the insurer can recover the cost where the insured is the innocent party.

11: Do you think there should be specific driving rules for ADSs like the Australian Road Rules or would it be sufficient to simply require them to 'drive safely'?

The ICA has been unable to determine a preferred approach out of the 4 listed options as each has notable issues such as placing onerous monitoring burdens on the ADSEs, likely leading to either automated features being disabled or monitoring/recall costs being passed onto the vehicle purchaser.

The ICA recommends that the solution implemented must be harmonised internationally and nationally, but retain a level of flexibility to ensure that the relevant road rules that apply to vehicles and human drivers in a given jurisdiction must also apply to an ADS when performing the dynamic driving task. This is especially important in the short to medium term where human drivers and conditionally automated vehicle ADSs will interchange and interact regularly within a mixed fleet and multi-modal environment.

Whilst the NTC notes the challenge of monitoring amendments in eight jurisdictions, we do not anticipate this is an impossible task given there is appropriate support. Currently, navigation apps are able to identify changes in speed limits in different states. The burden on ADSEs and related consumer impacts could be mitigated, and greater safety benefits obtained if a central regulator conducted the jurisdictional monitoring task. The regulator would provide the information to ADSEs and check the compliance of the ADSE's response during the self-certification process against the NTC's recommended first-supply principles including:

- Safety Criteria 4: Comply with relevant road traffic laws – including any variations in each state and territory; and amendments to the relevant road traffic laws when they come into force; and

- Safety Criteria 9: Verifying the Australian road environment – the applicant must demonstrate how it has considered the Australian road environment in designing, developing and verifying the ADS, which could include outlining the process for verifying the response of the ADS to the Australian road environment such as interaction with road signs in various states and territories.

The ICA notes that if recalls were the interim tool used to enforce compliance with these principles, then early communication of these expectations and jurisdictional variations and checking by the national regulator would likely reduce the number and impact of recalls on consumers.

The ICA recognises the opportunity for Option 1 to be a long-term solution, but notes it will take considerable time to develop and implement so may not be suitable in the short-term.

The ICA also agrees that an ADSE should be required to report any breaches of the road rules to a national regulator, and breaches by an ADS must be enforceable across jurisdictional boundaries.

13: What functions and powers does the regulator need to effectively manage in-service safety? Would these differ depending on whether the regulator is enforcing a general safety duty, or only prescriptive duties?

The ICA supports the creation of a national regulator in order to help create public confidence during the introduction of automated vehicles in Australia. The ICA agrees that the regulator should have monitoring powers and enforcement powers. For instance, a national regulator could compel a software update where data gathered by the regulator shows trends with a particular defective ADS. If experience shows that particular safety features and software upgrades are needed, a national regulator could require reporting from ADSEs that such features have been installed.

Of particular interest to the ICA is the role the regulator should play in gathering and sharing data as well as monitoring trends in the use and safety of AVs so that risks are identified. We are pleased that the NTC has indicated that ADSEs will be required to record and share data with relevant parties. We submit that the regulator should ensure that insurers are able to access the data for the purposes of determining risk and determining liability.

The NTC notes that transforming a common law duty into a legislative duty would provide the ability for a regulator to enforce compliance and that this would provide an incentive for ADSEs and other parties to ‘maintain a reasonable level of risk awareness.’ The ICA believes there is merit to this. However, the ICA also submits that incentives for parties with influence over the in-service safety of AVs already exist, whether through market incentives or through the operation of general law. We note that under the Road Vehicles Standards Act, the minister responsible will have the power to issue recall notices involving AVs and ADS components, as well as to issue recalls for safety purposes or non-compliance with national road vehicle standards. This, combined with the duties owed, whether under general law or a legislated duty, which provide an incentive for ADSEs to ensure the safety of their vehicles, should provide a good framework for mitigating safety risks posed by AVs. As much as possible, current in-service governance arrangements for conventional vehicles should be relied upon, with additional powers only added if experience shows they are necessary.

20: Which option most effectively addresses the problem statement? Please consider your answer in conjunction with the PwC cost-benefit analysis.

The ICA has argued that current governance arrangements and law should continue to be relied upon and changed as experience is gained with the use of AVs.

However, we acknowledge the inefficiency that nationally inconsistent safety approaches and different state regulators across jurisdictions would create. It would create potentially differing duties and could lead to being a barrier for the entry of AVs.

Therefore, the ICA's preference is that if duties are to be legislated, they should be done via the introduction of a new in-service general duty enforced by a national regulator, either via Option 3 or 4. A general duty allows for flexibility, as discussed previously. Further, a national regulator as opposed to several state regulators is desirable, given the small amount of AVs that will initially be on the road. A national regulator could create consistency from the beginning, providing greater confidence to the market.