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By online submission

Dear Sir/Madam,

Thank you for the opportunity to respond to some of the issues outlined in the Consultation Regulation Impact Statement (RIS) on in-service safety for automated vehicles, dated July 2019.

As you will know, Maurice Blackburn has been an avid contributor to the Commission's ongoing work in establishing an appropriate regulatory framework under which vehicles with an Automated Driving Systems (ADS) might be safely assimilated onto Australian roads.

In all of our submissions, we have agreed that the primary duty from this process should be to ensure 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. We have also argued that separate insurance schemes covering people injured by vehicles operated by an ADS, from non-ADS vehicles would not help achieve that primary duty.

In our previous submissions, we were supportive of the introduction of an overarching and positive general safety duty on those who bring vehicles with ADS to market (ADSEs). In this submission, we support the NTC's proposals to extend that general safety duty to those that might play a significant role in ensuring the ongoing safety of an ADS, once it's on the road.

In our submission to the Safety Assurance for Automated Driving Systems Consultation RIS¹, we made several suggestions, which we believe are applicable for the current inquiry:

- i. That the safety assurance system should reflect that:
 - When system upgrades are installed, the owner of the vehicle should not be able to choose not to install the upgrade; and

¹ <https://www.ntc.gov.au/media/1774/safety-assurance-for-automated-driving-systems-consultation-regulation-impact-statement-may-2018-katie-minogue-maurice-blackburn-lawyers-jul-2018.pdf>

- A testing regime should be embedded to ensure that error-free installation of the upgrade has occurred.
- ii. That the distributor, their service providers and mechanics should need to be licensed to carry out such works.
 - iii. That an onus should be placed on the vehicle owner to periodically ensure that all relevant system upgrades have been actioned.
 - iv. That the NTC should give consideration to what form this regular compulsory verification could take place, such as:
 - A compulsory annual inspection, carried out by an independent and licensed inspector, or
 - As part of the registration process, or
 - As part of regular processes to ensure vehicle roadworthiness.

We are pleased to note that each of these concerns has been addressed in the current RIS.

It is vitally important that a vehicle with ADS is safe when it enters the market. It is just as important to ensure that it is safe until the end of its working life.

In the following pages, we have provided our input into the Questions to Consider, as documented in section 2.2 of the RIS.

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.

Maurice Blackburn is satisfied that the RIS has accurately described the problem to be addressed.

2. Have we correctly identified the parties with an influence on the in-service safety of automated vehicles and accurately described their role? If you identify additional parties, please explain what their role is.

Maurice Blackburn is satisfied that the RIS has accurately identified the parties with an influence on in-service safety of vehicles with an ADS.

We note that A.1.8 places the onus of ensuring that system upgrades have been implemented onto the ADSE. We note that this onus requires that ADSEs:

- Must explain how they will notify registered owners/operators that a safety-critical upgrade has been installed or is available and needs to be installed, and
- Must demonstrate how it will:
 - detect failures to install upgrades (including failures of automatic updates, failures by registered owners/operators to take action when an upgrade is available, or failures in receipt of over-the-air software updates)
 - detect system failures once upgrades are installed, and
 - ensure the ADS is safely disengaged if such failures occur.

We note from section 4.4.1 that a co-existent responsibility for ensuring ongoing in-service compliance of the ADS system rests with both the ADSE and the registered owner. We are

pleased that the RIS recognises that the registered owner has an important role to play in ensuring that relevant system upgrades have been actioned, but that overall responsibility for this rests with the ADSE.

We believe this strikes the right balance, as, particularly during the early introduction of AVs into the market, registered owners may only have a limited understanding of the technicalities of the technology, including software updates. Therefore ADSEs need to be incentivised to actively educate owners and make them aware of this new process which differs greatly from traditional vehicles.

We also note, from section 4.4.1, that:

The safety criterion also requires an ADSE to ensure the ADS is safely disengaged if the registered owner fails to install the update.

Maurice Blackburn is pleased to see that such consequences for inaction have been introduced.

3. Have we accurately assessed each party's influence on the in-service safety of automated vehicles? If not, please provide details.

Please see our response to question 2.

4. Have we accurately described the regulation that already applies to relevant parties that would help ensure the in-service safety of automated vehicles?

Yes.

5. Do you think there are any new risks posed by second-hand ADS components, after-market modifications or the transfer of ownership of automated vehicles, which may not be adequately addressed by existing regulation designed for conventional vehicles?

While understanding that the responsibility for ensuring that the timely installation of software upgrades rests with the ADSE, Maurice Blackburn believes that the responsibilities of previous owners, as detailed in section 4.4.1 may be a bit vague:

A registered owner *may potentially* have an influence on the safety of an automated vehicle at the point a vehicle is sold to a new owner.

The current process outlined in the RIS has owners listed as having a '*moderate influence on in-service safety*', based around the statement in 4.4.1 that:

The registered owner *may* have a role in the installation of software upgrades.

Maurice Blackburn is concerned that these two statements may be underselling the role of the owner in the process. The likelihood of software upgrades *not* involving the owner, at least in the short term, seems overstated. We can envisage circumstances where the inaction of a previous owner (such as that described in the example on page 42 of the RIS) could be the basis for legal action against that previous owner.

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

To a degree.

We agree generally with the potential difficulties and barriers identified in sections 5.3 to 5.6 of the RIS in relation to the possible avenues through which parties with an influence on in-service safety may be held to account. Maurice Blackburn submits, however, that it is crucial that where possible road users, being those who may be injured by the unsafe operation of an ADS, are able to pursue reasonable damages for their injuries.

Whilst we note there may be remedies available via other legal frameworks such as the ACL consumer guarantees, the ACL product liability and by pursuing an action for breach of contract, we note the difficulties associated with relying on existing legal frameworks previously identified by the NTC in its discussion paper, *Motor Accident Injury Insurance and Automated Vehicles October 2018*.²

We note that the NTC has considered that actions in negligence may well be brought against parties such as ADSEs, their executives, component manufacturers, remote users, fallback-ready users and repairers³. We agree that it is possible to envisage a number of factual scenarios which may result in complex legal argument and litigation.

Maurice Blackburn believes, however, that similar to other emerging bodies of law, it would be most appropriate for the Courts to be permitted to consider these complex legal issues and deliver legal precedent regarding these detailed scenarios.

If litigation does occur and if it appears that additions to the legal framework are required in order for injured persons to fairly access compensation, then it is our submission that further consideration of this matter should be had at that stage.

We note the NTC's concerns regarding access to justice; namely that negligence litigation can be "*risky and stressful for the injured person*" particularly due to the possible "*significant power imbalance*" between the parties.⁴

We refer to the NTC's policy paper, *Motor Accident Injury Insurance and Automated Vehicles August 2019*, where the NTC formed the view that the preferable course of action would be to expand existing motor accident injury insurance schemes to provide cover for ADS-caused injuries.⁵ The NTC has acknowledged that further work will be required regarding indemnification.⁶ However in light of this policy approach, we submit that due to the planned involvement of existing state and territory road accident insurers in ADS-caused injuries through the expansion of motor accident injury insurance schemes, we believe that injured parties would therefore not be adversely affected in relation to any opportunities currently available in their state or territory for early resolution of their road accident compensation claim.

We refer to our submission to the NTC discussion paper, *National Guidelines for Automated Vehicle Trials (November 2016)*, where we noted that in Victoria protocols have been implemented to ensure fair and efficient administration of the Victorian road accidents compensation scheme.

² [https://www.ntc.gov.au/Media/Reports/\(3D0D6112-D6C5-2D02-8858-EC8607A3F65D\).pdf](https://www.ntc.gov.au/Media/Reports/(3D0D6112-D6C5-2D02-8858-EC8607A3F65D).pdf), section 4.2

³ Ref RIS section 5.4.3, 5.4.4, 5.4.5

⁴ RIS p.84

⁵ [https://www.ntc.gov.au/Media/Reports/\(70E5881A-1E58-DC34-6C15-73AAFADC29A0\).pdf](https://www.ntc.gov.au/Media/Reports/(70E5881A-1E58-DC34-6C15-73AAFADC29A0).pdf), chapter 3

⁶ See for example [https://www.ntc.gov.au/Media/Reports/\(3D0D6112-D6C5-2D02-8858-EC8607A3F65D\).pdf](https://www.ntc.gov.au/Media/Reports/(3D0D6112-D6C5-2D02-8858-EC8607A3F65D).pdf), section 3.6

These protocols facilitate efficient resolution of road accident compensation claims when compared to other types of compensation claims. Maurice Blackburn submits that the NTC should look to that scheme as a possible model for adoption elsewhere.

The NTC has consistently reinforced the nationally agreed principle that “*no person should be worse off, financially or procedurally, if they are injured by a vehicle whose automated driving system was engaged, than if they were injured by a vehicle controlled by a human driver.*”⁷ We are satisfied that so long as the areas of change already identified by the prior extensive work of the NTC continue to be considered and pursued, theoretically there should be no additional risk or cost to an injured claimant simply as a result of the involvement of an ADS.

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?

Yes.

Our experience in working with other regimes where ‘as far as reasonably practicable’ is the legal test indicates that it provides appropriate cover.

A risk of setting a static safety standard is that in an industry where we expect technology to rapidly improve, safety standards will become outdated. For example, right now we expect automated vehicles to be *at least as safe* as traditional vehicles. However in 10 years’ time it would be reasonable for society to expect more than this – perhaps they should be *significantly safer* than traditional vehicles.

Maurice Blackburn believes that a general safety duty imposing an affirmative duty of care on all parties in the chain of supply to ensure safety ‘so far as is reasonably practicable’ would allow Courts to interpret the duty according to standards of safety and technology at the time. This in turn would ensure that safety outcomes continue to improve as a result of technological advances and do not stagnate.

This standard would be consistent with similarly worded duties appearing in other Australian safety schemes.

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

Maurice Blackburn endorses the perspective of the NTC, as outlined in section 6.9.7 of the RIS, that:

- *A general safety duty should apply to both ADSEs and their executive officers, and potentially repairers.*
- *Any general safety duty may need to be supported by additional prescriptive rules to best achieve the regulatory objective.*

We would also argue that clear ramifications for breaches of the duties should be spelled out in the legislation.

⁷ See for example: [https://www.ntc.gov.au/Media/Reports/\(70E5881A-1E58-DC34-6C15-73AAFADC29A0\).pdf](https://www.ntc.gov.au/Media/Reports/(70E5881A-1E58-DC34-6C15-73AAFADC29A0).pdf), p.8

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

Maurice Blackburn supports the statement in section 6.9.8 of the RIS that says:

It seems reasonable that if a general safety duty approach were chosen, the duty should apply at all times the ADS is engaged. This would also simplify the regime, so that the same obligation applies at all times, and a regulator does not have to first determine whether the incident occurred on public roads before investigating an ADS safety failure.

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?

Maurice Blackburn submits that where someone is injured by the breach of a statutory duty, it is of vital importance that the injured party is able to recover damages from the breachee.

Such a right helps to ensure that negative externalities of the injury are internalised by the breachee – in other words, that they bear the cost of their breach.

Further, Maurice Blackburn is concerned that if such a cause of action was not open to injured parties, then this would damage the acceptance of AV technology within the broader public.

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’?

Maurice Blackburn draws a parallel between this and the work which NTC is currently doing in relation to driver distraction. We believe that we need to get away from prescriptive road rules which individually nominate rules or actions which need to be followed, in favour of moving toward broader requirements based on the desired outcomes.

We encourage the NTC to continue to push for legislative regimes that are future focused, and are flexible enough to respond to advances in technology.

We agree with the notion set out in section 7.9 of the RIS is that substantial compliance with existing Road Rules may be suitable as a transitional arrangement, while specific driving rules for ADSs are developed.

12. What approach to regulating the dynamic driving task for ADSs most efficiently achieves safe outcomes? Please provide reasons.

No response to this question

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?

No response to this question

14. Have we accurately described the scope of the regulatory task? Please provide data and evidence where possible to support your answer.

No response to this question

15. Have we accurately captured the benefits of the regulator being:
a. a government body or an independent body?
b. a national body, or state and territory level bodies?
c. an existing body or a new body?

No response to this question

16. What are your initial views on how the regulator should be funded?

No response to this question

17. Have we adequately and accurately captured the key legislative implementation models for in-service safety of automated vehicles?

Yes.

18. Do you think there are any transitional or constitutional issues that could arise when Australia establishes a national law for automated vehicles? If so, please explain what the issues are, and if they differ depending on the legislative implementation model used.

No response to this question.

19. Have we accurately described how each option could work, as well as the advantages and disadvantages of each option?

Yes.

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

Maurice Blackburn notes that the options with the highest net benefits, according to PwC's cost/benefit analysis, are Options 3 and 4. We agree with this assessment.

We believe that the NTC should rule out Option 1 (the management of in-service safety through existing state-based regulatory frameworks). As demonstrated in Table 6, page 118 of the RIS, this option will not solve the problems discussed and articulated in the RIS.

We believe that Options 2a and 2b (the implementation of prescriptive or general safety duties, overseen by state/territory regulators) are preferable to Option 1. We do, however, believe that the case for moving away from prescriptive safety duties (Option 2a) is well documented in the RIS.

Additionally, as noted in our response to Question 7, we believe that the biggest risk associated with adopting a static safety standard is that in an industry where we expect technology to rapidly improve, safety standards will quickly become outdated.

We believe that Option 3 (a single national regulator enforcing a general safety duty through Commonwealth law) is workable, but that this model has drawbacks:

- That the establishment of a new national authority will have a significant resourcing impact
- That the removal of existing state/territory responsibilities to a national legislative framework will not be an easy thing to transact
- That the harmonisation of state/territory processes into a national legislative framework can create a 'race to the bottom', where the state/territory model with the lowest standards will become the national standard. The creation of federal law, where state/territory law currently exists, will inevitably lead to a 'lowest common denominator' approach to negotiations.
- That the implementation of an 'additional' layer of federal law has the potential to create overlap (or gaps) with state/territory coverage.

We believe that Option 4 (a single national regulator enforcing a general safety duty through state/territory law) is workable, and doesn't have the same drawbacks as Option 3.

We believe that Option 4 has advantages over Option 3 because it would not result in such a fundamental shift to Australia's approach to road safety. Road safety is currently legislated on a state/territory basis, with allowances for national consistency where appropriate. There seems to be comfort and acceptance of this amongst the general public, and Option 4 would allow for that comfort and acceptance to extend to AVs.

Option 4 combines the benefits of a national regulator with the ability for states/territories to make amendments according to their local circumstances.

Accordingly, we would be pleased to support either Option 3 or 4 as preferable to Options 1 or 2. And we would argue that Option 4 would be the easier of the two to implement.

21. Is there another option, or combination of options, which could more effectively address the problem statement? In particular, please consider whether there is a preferable combination of the elements of each option (governance arrangements, duties, legislative implementation)

No

As always, we congratulate NTC on the methodical and comprehensive nature of the analysis contained within the RIS.

Please do not hesitate to contact us if we can further assist with the Commission's important work.



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