



Insurance Commission
of Western Australia

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Mr Geoff Allan
A/Chief Executive
National Transport Commission
Level 3/600 Bourke Street
MELBOURNE VIC 3000

Dear Mr Allan

MOTOR ACCIDENT INJURY INSURANCE AND AUTOMATED VEHICLES

The Insurance Commission of Western Australia (the Insurance Commission) submits this letter in response to the 'Motor Accident Injury Insurance and Automated Vehicles Discussion Paper' (the Discussion Paper) (October 2018).

Other Western Australian State Government entities with an interest in autonomous vehicles were consulted during the preparation of this letter.

The Insurance Commission:

- supports the introduction of automated driving system (ADS) technologies that offer benefits to the community, particularly to improve road safety; and
- agrees that people injured in motor vehicle crashes caused by an ADS should be able to access compensation.

Roles and Responsibilities

The Commonwealth Government is responsible for motor vehicle safety standards, while state and territory governments are responsible for regulating motor accident injury insurance (MAII) schemes, vehicle/driver licensing and the management of road networks.

The Insurance Commission does not endorse any proposal to modify those arrangements.

The United States of America has preserved similar responsibilities and powers between Federal and State Governments to facilitate the introduction of ADS technologies¹.

Liability

Currently, human error is the cause of most motor vehicle crashes and related injuries. Studies have found that at least 90 percent of motor vehicle accidents are caused by human driver error.²

¹ Letter from the National Governors Association to the Committee on Commerce, Science and Transportation: <https://www.nga.org/letters-nga/av-start-act/>

² Smith, Bryant. 2013. *Human Error as a cause of Vehicle Crashes*, Center for Internet and Society at Stanford Law School. <http://cyberlaw.stanford.edu/blog/2013/12/human-error-cause-vehicle-crashes>

MAII schemes were developed to cover the specific risk of human driver negligence causing injury. MAII schemes were not designed to cover vehicle manufacturer negligence and product liability risks.

The Insurance Commission acknowledges that there are limitations in consumer protections under Australian Consumer Law (ACL) covering automotive products and services. However, it is still unclear why the National Transport Commission (NTC) has described ACL and, by inference, product liability as 'out-of-scope' in its discussion paper.

Safety

ADS manufacturers and suppliers will need to gain community confidence in the new and evolving ADS technology.

The Insurance Commission notes the majority of submissions to the NTC's 'Safety Assurance for Automated Driving Systems Consultation Regulation Impact Statement' (RIS) (May 2018) favoured a primary safety duty on automated driving system entities (ADSEs).

However, the NTC did not recommend this option to the Transport and Infrastructure Council of Australian Governments. The absence of the primary safety duty on ADSEs is of concern in the context of decisions about ADSE accountability and liability for injuries caused by ADS technology.

The NTC recommendation for ADSEs to self-certify the safety of their products relies on the goodwill of vehicle companies to supply safe products and respond to problems with their products in a manner consistent with community expectations. This approach may not provide a robust framework to protect the public and governments from ADS product defects causing injury.

In the absence of adequate mechanisms to render manufacturers and ADSEs responsible for injuries caused through product failure, there is little to disincentivise risk taking by companies competing in the automated vehicle market. A clear financial connection to risk is desired to encourage responsible decision making by these entities.

The insurer, IAG, made a submission³ to the Safety Assurance Regulation Impact Statement that recommended the Productivity Commission address this issue:

"Before committing to a self-certification framework, we suggest the macroeconomic costs and benefits are explored by an appropriate body such as the Productivity Commission for government to have a clear picture of the costs and implications of a range of safety assurance systems."

Insurance arrangements

The Insurance Commission acknowledges differences in existing MAII schemes among states and territories, and that people in those jurisdictions are able to make insurance claims for injuries caused by human driver error.

The introduction of automated vehicles into the Australian market should not be seen as policy justification for wider MAII scheme changes or harmonisation of existing schemes. The advent of automated vehicles presents a new set of risks that require new products and solutions to manage them.

³IAG submission to the NTC, 16 July 2018. <https://www.ntc.gov.au/media/1819/safety-assurance-for-automated-driving-systems-consultation-regulation-impact-statement-may-2018-louise-kerkham-iag-jul-2018.pdf>

One purpose of the discussion paper is to seek views on whether existing MAll schemes should be amended to provide cover for injuries caused by an ADS. Amendments to expand MAll schemes to cover injuries caused by an ADS would potentially have motorists providing an unquantified subsidy to multinational vehicle and technology companies.

Motorists currently pay insurance premiums primarily to insure the risk that human negligence while driving causes an injury. Amending MAll schemes as proposed would have motorists pay insurance premiums to insure the product liability risk, including any negligence, of an ADSE.

The Insurance Commission favours the principle that vehicle manufacturers and the companies that introduce technology on Australian roads should be responsible for the performance of the technology and the cost of personal injury if those products fail.

The Insurance Commission does not support amendments to MAll schemes to provide cover for injuries caused by an ADS.

The recovery of monies from liable parties is inherently problematic for MAll scheme administrators (perhaps more so for compulsory third party schemes underwritten by government). The Insurance Commission's recovery rate of funds from parties liable for the costs of motor vehicle accident injuries is less than 1%.

The difficulties associated with recovery from liable parties are likely to increase if MAll schemes are expanded to cover ADSE product liability. Recovery from motor vehicle manufacturers and ADSEs internationally will add a greater level of complexity to existing recovery challenges. It is difficult to conceive a system that would improve MAll scheme recovery of monies from at-fault drivers who breach insurance conditions, and enable timely and non-litigious recoveries from multinational car manufacturers and technology companies. A better arrangement would be to ensure the responsibility for insurance is directly linked to the source of the risk.

The risks associated with ADS technology and human drivers are fundamentally different. Setting insurance premium rates to cover the disparate risks is best done through the development of discrete insurance products (a new insurance product for injuries caused by an ADS and the retention of existing MAll products to cover driver liability). This would ensure the essential price signal element for automated vehicle risk is maintained.

An example of a completely new risk related to the introduction of automated vehicles on Australian roads is that concerning cyber security. Insurance products are available in the insurance market to cover cyber security attacks. The Insurance Commission procures cyber risk insurance for Government agencies. It does not provide or procure cyber risk insurance as part of the MAll scheme.

IAG identified to the NTC that new insurance products will need to be delivered to cater for new risks:

"The insurance industry monitors and assesses risk on the road in order to offer products that provide protection against that risk to the community. Where there is uncertainty around a risk we need to ensure we have the capital required to meet the costs of potential claims, often long into the future when it comes to bodily injury".⁴

⁴ IAG submission to the NTC, 16 July 2018. <https://www.ntc.gov.au/media/1819/safety-assurance-for-automated-driving-systems-consultation-regulation-impact-statement-may-2018-louise-kerkham-iaq-jul-2018.pdf>

Manufacturers and ADSEs are best able to manage the risks of the products and services supplied. To avoid moral hazard, those who bring ADS products to market must remain liable for the costs of injuries incurred while an ADS is in control of a vehicle. Amending MAIL schemes to accommodate the cost of ADS caused accidents would transfer that liability to motorists and MAIL underwriters.

Automated vehicle manufacturers should therefore ensure they have suitable insurances to cover the risk of their products causing injury when those products are brought to market. These insurance products would need to provide the claims management response expected by the community.

The Insurance Commission supports consideration of implementation models for MAIL that ensure liability for the costs of personal injuries remains with the party responsible for causing those injuries, whether human driver or ADSE.

The Insurance Commission supports the NTC view that automated vehicles must come with insurance. That insurance should be structured to provide broadly consistent compensation to injured individuals in the relevant jurisdiction.

Whether the relevant MAIL scheme or the automated vehicle's insurance pays compensation to an injured party would be determined based on whether the ADS or human driver was in control at the time injuries occur.

In addition to the overarching position set out by the Insurance Commission in this letter, responses to specific questions posed in the discussion paper are provided in **Attachment 1**.

Sincerely



ROD WHITHEAR
CHIEF EXECUTIVE

Attachment 1 - Response to Consultation Questions – Motor Accident Injury Insurance and Automated Vehicles Discussion Paper

Chapter 1: Context

1.7 Principles

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

Overarching Principle

The proposed overarching principle is supported providing its sole intent is to ensure that injured parties are provided access to compensation regardless of whether they sustain injuries in an accident involving a human driver or in a vehicle controlled by an automated driving system.

Support for this principle does not indicate support for the pursuit of harmonisation of Australian MAII schemes. The principle should also reflect a commitment to ensure that the responsibility for the cost of personal injury due to product failure lies with Automated Driving System Entities (ADSEs) and their insurers.

Supporting Principles

The proposed supporting principles do not reflect the legal principle and community expectation that manufacturers and suppliers should be responsible for the performance of products and the cost of personal injury if those products fail.

1.8 Problems

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

No. The problems identified are based on the premise that motor accident injury insurance schemes (MAII) “*may act as barriers to accessing compensation for personal injuries or death caused by an automated driving system*”.¹ MAII schemes were not designed to cover vehicle manufacturer negligence, product liability, and cyber security risks.

The National Transport Commission (NTC) Motor Accident Injury Insurance and Automated Vehicles Discussion Paper (Discussion Paper) describes Australian Consumer Law (ACL) for consumers injured by products and services as ‘out-of-scope’.² It is unclear why this is the case.

Chapter 3: Barriers

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

No. The regulatory regime to provide for ADSEs to deliver insurance to compensate injured parties should be identified. This should include identification of the statutory obligation for ADSEs to have insurance to allow people injured in crashes caused by the ADS to seek compensation.

Chapter 4: Options

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

Yes. Further research is required to identify the regimes for an injured person to seek compensation if injured by a vehicle controlled by an ADS.

¹ National Transport Commission – Motor Accident Injury Insurance and Automated Vehicles Discussion Paper, page ii.

² National Transport Commission – Motor Accident Injury Insurance and Automated Vehicles Discussion Paper, page 9.

The benefit of introducing a new insurance product in addition to existing arrangements, is that it could build on MAll schemes rather than altering those schemes.

The risks associated with ADS technology and human drivers are fundamentally different. Setting insurance premium rates to cover these disparate risks is better suited to discrete insurance products (e.g. a new product for product liability potentially delivered by private insurers (the ADS product), and the retention of existing MAll products to cover accidents involving human driven vehicles). In this way, the essential price signal element for each discrete risk can be applied more successfully.

This option has not been included in the NTC Discussion Paper, but it should be.

The insurer, IAG, made a submission to the NTC identifying that new products will need to be delivered by the private sector for the new risk:³

“The insurance industry monitors and assesses risk on the road in order to offer products that provide protection against that risk to the community. Where there is uncertainty around a risk we need to ensure we have the capital required to meet the costs of potential claims, often long into the future when it comes to bodily injury.”

The IAG submission⁴ to the NTC also recommended the Productivity Commission address the cost and implications of automated vehicles.

The Insurance Commission considers that development of new insurance products to cover new risks associated with automated vehicles (including cyber risk) should be undertaken in order to progress the introduction of automated vehicles on Australian roads.

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? If so, please explain how it would work.

The policy principles are not comprehensive. CTP schemes were not designed to cover vehicle manufacturer negligence, product liability and cyber security risks. Therefore, Option 2 has the most merit. However, Option 2 requires amendment.

Option 2 should be amended to reflect the development of new insurance products to cover the new risk of ADS caused injuries. That new ADS insurance product could be sold by commercial insurers to automated vehicle manufacturers or the suppliers of the technology.

The amended Option 2 would ensure that vehicle manufacturers and companies that introduce technology on the roads remain responsible for the performance of the automation technology and the cost of any injury that technology may cause.

Option 2 could also be amended to reflect the outputs of necessary further research into changes required to existing legislative regimes covering product liability and manufacturer negligence.

Option 5 proposes national benchmarks. National benchmarks could be agreed for the scope of insurance cover attached to automated vehicles.

³ IAG submission to the NTC, 16 July 2018, <https://www.ntc.gov.au/media/1819/safety-assurance-for-automated-driving-systems-consultation-regulation-impact-statement-may-2018-louise-kerkham-iag-jul-2018.pdf>

⁴ IAG submission to the NTC, 16 July 2018, <https://www.ntc.gov.au/media/1819/safety-assurance-for-automated-driving-systems-consultation-regulation-impact-statement-may-2018-louise-kerkham-iag-jul-2018.pdf>

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

The criteria have also been drafted on the basis that MAll schemes should be amended to cover automated vehicle manufacturer negligence and product liability risks. MAll schemes were not designed to cover vehicle manufacturer negligence, product liability and cyber security risks.

One assessment criterion is “*Will the option send an appropriate price signal to those responsible for the safe operation of automated vehicles to obviate product/system/technology failures and risks?*”. The risks with ADS technology and human drivers are fundamentally different. Each risk would be best covered by a separate insurance product priced to reflect risk.

If MAll schemes were amended to cover liabilities for multinational vehicle companies covered by (Option 3), this would prevent any price signal reaching those responsible for the safe operation of the technology (the manufacturers). However, Option 3 suggests “*one policy can provide cover for ADS and human driver*”⁵ requiring the motorist to bear the cost of the risk of the ADS product failure. This would represent motorists paying a subsidy to insure multinational vehicle and technology companies. That outcome is undesirable and does not meet community expectations that companies would be responsible for the cost of products that cause injury.

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. A human driver is best able to manage the risk of an accident occurring while driving, which is why there is an existing insurance policy to cover driver negligence (CTP insurance) when the driver fails to manage that risk.

The automated vehicle manufacturer or supplier of the ADS technology is best able to manage the risk of an accident occurring when the ADS is engaged (as the human driver is not driving).

Discrete insurance products should cover each of the two distinct risks, where either the ADS or the human driver causes the accident.

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

Different insurance products should respond to injury claims depending on who is responsible for the accident.

If the human driver is in control (ADS not engaged), the existing CTP insurance policy should respond. It is expected that CTP insurance policies will respond in most instances for crashes of automated vehicles up to Level 3.

If the ADS is in control (human driver not driving), a new ADS insurance policy should respond to cover vehicle manufacturer negligence or product liability risks. It is expected the ADS insurance policy would respond in most circumstances for Level 4 and 5 automated vehicle crashes (when the ADS is engaged).

⁵ National Transport Commission – Motor Accident Injury Insurance and Automated Vehicles Discussion Paper, page 49.

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.

Option 3 is not supported as it proposes that MAll schemes be amended to cover automated vehicle manufacturer negligence and product liability risks. Option 3 proposes the motorist pay an insurance premium to cover these risks, which would represent a subsidy to multinational vehicle and technology companies.

Amending MAll schemes to accommodate the cost of ADS product failure would transfer that liability to motorists and CTP insurers, including those owned by government, where those schemes are underwritten by them. This would also require MAll insurers to pursue litigation against multinational vehicle and technology companies to recover costs paid by MAll insurers for events caused by the product/technology. It is the Insurance Commission's view that government underwritten CTP insurers should not underwrite private sector risk when products can be obtained to cover these risks.

Recovery rights and litigation would be avoidable for MAll insurers if there is a new automated vehicle insurance product. Insurers will be able to determine responsibility among themselves depending on whether the ADS was engaged at the time of the crash or not.

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 MAll schemes and caps or thresholds.

A new national automated vehicle scheme is not supported. A national scheme could be justified in the event of market failure. In this case, the broader market has not been asked to provide insurance products to cover injuries caused by VS.

The Insurance Commission is aware that commercial insurance outside MAll schemes has been procured to support ADS trials in Australian jurisdictions.

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

Option 5 is not supported in its entirety, as it does not adequately reflect that existing MAll schemes were designed to provide cover for driver negligence and that the new risk of the ADS in control of the vehicle requires a new insurance product.

There may be some merit in state and territories agreeing minimum benchmarks for automated vehicle cover provided by a new ADS insurance policy that covers the risk of the technology causing injury. Benchmarks could set standards for making a claim, assessment of a claim and access to early medical and treatment supports for the injured person which could be applied to new or existing products at the discretion of each jurisdiction.

Chapter 5: Data and registration

5.3 Data issues

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 critical data required to assess liability after an accident is whether the ADS was engaged at the time of the accident.

5.4 Registration issues

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?

Vehicle owners in Australia purchase a motor injury insurance policy and a property insurance policy. Two policies are attached to most vehicles in Australian roads. So different types of insurance already attach to a vehicle.

A mature system of mutual recognition of registration and insurance systems between Australian jurisdictions already exists. That system would continue as automated vehicles appear on Australian roads.

The existing arrangements for motor injury insurance cover in each state and territory insure parties for liability incurred anywhere in Australia. A new ADS insurance policy to cover automated vehicle manufacturer negligence, product liability risks and cyber security should follow those arrangements. It is the business model of insurers to design products to cover the risk of an event occurring, and there are multiple examples of liability, personal injury, property and travel policies that provide cover irrespective of the location of the incident.