



Law Council  
OF AUSTRALIA

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*Legal Practice Section*

# Motor Accident Injury Insurance & Automated Vehicles

National Transport Commission

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## About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2018 Executive as at 1 January 2018 are:

- Mr Morry Bailes, President
- Mr Arthur Moses SC, President-Elect
- Mr Konrad de Kerloy, Treasurer
- Mr Tass Liveris, Executive Member
- Ms Pauline Wright, Executive Member
- Mr Geoff Bowyer, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

## About the Section

The Legal Practice Section of the Law Council of Australia was established in March 1980, initially as the 'Legal Practice Management Section', with a focus principally on legal practice management issues. In September 1986 the Section's name was changed to the 'General Practice Section', and its focus broadened to include areas of specialist practices including Superannuation, Property Law, and Consumer Law.

On 7 December 2002 the Section's name was again changed, to 'Legal Practice Section', to reflect the Section's focus on a broad range of areas of specialist legal practices, as well as practice management.

The Section's objectives are to:

- Contribute to the development of the legal profession;
- Maintain high standards in the legal profession;
- Offer assistance in the development of legal and management expertise in its members through training, conferences, publications, meetings, and other activities.
- Provide policy advice to the Law Council, and prepare submissions on behalf of the Law Council, in the areas relating to its specialist committees.

Members of the Section Executive are:

- Ms Maureen Peatman, Chair
- Mr Michael James, Deputy Chair
- Mr Geoff Provis, Treasurer
- Mr. Philip Jackson SC
- Ms Tanya Berlis
- Ms Christine Smyth
- Mr Mark Cerche
- Dr Leonie Kelleher OAM
- Ms Peggy Cheong

## Introduction

1. This submission has been prepared by the Law Council of Australia's National Insurance Lawyers Group (**the Committee**), which is a committee of the Legal Practice Section of the Law Council of Australia.
2. The Committee is grateful for the opportunity to provide this submission to National Transport Commission (**NTC**) regarding the *Motor Accident Injury Insurance & Automated Vehicles* Position Paper (**Position Paper**).

## Question 1

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

3. The Committee agrees with the overarching principle that no person should be worse off financially or procedurally if they are injured by a vehicle whose automated driving system (**ADS**) was engaged, rather than by a vehicle controlled by a human driver.
4. The community decided some time ago that a driver-controlled vehicle driven on a road requires compulsory insurance to ensure that if the driving of that vehicle causes injury to a third party, then the third party will have effective remedies, either by way of no-fault benefits or damages, or both.
5. In contrast, insurance against liability for property damage caused by the driving of a motor vehicle is not compulsory. There are numerous occasions when a person whose vehicle or other property is damaged by the fault of the driver of a motor vehicle has no effective remedy because the at fault driver has no insurance and no ability to pay for repairs and other loss caused by the collision.
6. Any motor vehicle, because of its size and weight, and the speed at which it may travel, has potential to cause great harm. That is likely why the community has decided that at least in respect of personal injury, insurance against liability for such injury arising from the use of a motor vehicle should be compulsory.
7. The risk is no different in respect of an automated vehicle (**AV**) and insurance requirements should be the same. Insurance against liabilities arising from the use of an AV should be compulsory in order to ensure that any person injured as the result of the use of a motor vehicle operating with an ADS engaged has both access to:
  - the same no-fault benefits as they would have if injured through the use of a normal vehicle; and
  - an effective remedy against a person who is negligent in the use of the ADS in the circumstances in which it is used.
8. Likewise, the Committee supports the proposed supporting principles, including supporting principle 5 that arrangements should include an efficient process to access a standard set of reliable and verifiable vehicle crash data.
9. At present, most vehicles are fitted with 'black boxes' which record data at the time of a motor vehicle collision. However, only limited persons have access to the software necessary to extract that data. Further, as noted below, the Committee is suggesting that other sensors and data collection should enable determination of who was in charge of an AV at the time of a crash, and most importantly, whether it was a human driver or an automated vehicle system (**AVS**) which caused the crash.

10. It will be necessary to deal with privacy principles in relation to data collection, but this is an issue already dealt with in other countries, such as Italy, where there is legislation to permit the collection and use of data from black boxes. The Committee also notes that the principles are consistent with the way in which various countries are dealing with the development of automated vehicles.

## Question 2

### **Do the problems identified cover the key challenges of personal injury and automated vehicles? Are there other problems that the NTC should consider?**

11. A number of countries are moving towards readiness for automated vehicles, including Australia. The top-ranking countries, according to the 2018 Automated Vehicles Readiness Index released by KPMG in January 2018 are:

- (i) The Netherlands;
- (ii) Singapore;
- (iii) United States of America;
- (iv) Sweden; and
- (v) United Kingdom.

12. Trials for automated shuttle buses are occurring in Australia in:

- (a) South Australia with the flex automated shuttle bus; and
- (b) Western Australia with the Royal Automobile Club of Western Australia's (**RAC WA**) intelli-car and intelli-bus trials.

13. Honda, Toyota and Hyundai have announced an intention to have Level 4 self-driving cars by 2020. Ford expects to have a fully automated vehicle by 2021. Volvo aims to replace short-haul flights with the 360C that will drive whilst a person sleeps.

14. However, car manufacturing in the future will not be so much about the tyres and the brakes as the technology inside the car, namely the sensors and the algorithms.

15. Although ADS technology is expected to continue to improve, trials to date have revealed deficiencies in ADS technology and highlighted likely difficulties for the future. For example:

- September 2016 – the first fatality from an AV vehicle (Tesla). The crash killed the vehicle's driver;
- September 2016 – Google's automated vehicle was involved in an accident when it could not stop in time when a regular vehicle passed a red light;
- March 2017 – an Uber vehicle crashed in Arizona;
- May 2018 – a mobilised self-driving car ran a red light in Jerusalem;
- May 2018 – Google's Waymo self-driving vehicle was involved in a crash in Arizona; and
- September 2018 – a self-driving car owned by Apple was involved in an accident.

16. The real issue is that driving will occur at different levels of automation, at least during the development of ADSs and, in particular, Level 5 ADSs. At present, if a collision occurs involving a motor vehicle which is driven by a driver, then liability for the collision will fall either on the driver, or on someone involved in the manufacture or servicing of that motor vehicle, if it is due to a fault with the motor vehicle and not the driving of the motor vehicle.
17. The situation with ADSs will be different. If a collision occurs, it will be necessary to determine whether it was caused by the:
  - owner/user of the vehicle;
  - producer of the vehicle or the installed software and algorithms;
  - manager and collector of information and data shared by the vehicle; and/or
  - supplier of the vehicle's maintenance and services.
18. Although motor accident injury insurance schemes, such as those that exist at present, can deal with the liability of an owner/user where the collision is caused by human driving, this is not so in relation to the operation of an ADS vehicle. Definitions of terms such as 'driver' and 'motor vehicle' will need close attention and new definitions might be required. There are a number of defined terms that would not be applicable or require amendment or clarification. A term such as 'vehicle running out of control', used in a number of current schemes, would potentially not permit access to the schemes if a collision was caused by an ADS.
19. Issues related to production standards, installed software and algorithms, and management and collection of information and data shared by vehicles, as well as the maintenance and service of ADS vehicles, would normally fall to be considered under the product liability laws of the Australian Consumer Law (**ACL**). However, there is a concern that defective product claims may be met with a statutory defence that the state of scientific and technical knowledge at the time when the product was put into circulation was not such as to enable the existence of the defect to be discovered.
20. There is also an issue of cyber security and hacking of software – for example, the question arises as to who is to be liable if a crash is caused by intentional interference with software that is operating a vehicle.

### Question 3

**Has the NTC accurately identified the key gaps & barriers in legislation? Are there other gaps or barriers that the NTC should consider?**

21. The Committee is of the view that the NTC has accurately identified the key gaps and barriers in legislation and is also of the view that standard national legislation would be beneficial.
22. A question, however, arises as to whether the deliberate hacking of software would come within a definition of a vehicle running out of control.
23. Further, causation questions will arise in circumstances where there are multiple causation issues, such as where a defect in software results in a human driver intervening to attempt to avoid a collision, but in doing so the driver acts negligently in a way that might be seen as contributing to an ensuing crash.

## Question 4

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

24. Australia is not the only country grappling with these issues. All the countries identified above as the key countries moving towards readiness for automated vehicles have had to deal with these issues. The Committee is aware that the Motor Vehicle Working Party of the International Insurance Law Association (**AILA**) is working together with ASTIN (a 'Section' of the International Actuarial Association) on terms of reference in relation to automated cars and insurance. The aims of that Working Party are to:
- (a) identify the risk structure and role of all the players in order to identify other ways to address various claims or risk of automated cars;
  - (b) consider possible regulations of the motor insurance market and its influence for the business environment, including passengers, human drivers (if any), owners of vehicles, insurance companies, car makers, third parties and others; and
  - (c) consider possible changes in motor insurance contracts in terms of:
    - (i) exclusion clauses;
    - (ii) pricing;
    - (iii) the possibility to realise a form of smart insurance contracts; and
    - (iv) data flow from vehicles to insurers.
25. These considerations seem to be exactly the issues being dealt with by the NTC. This is not surprising in view of the fact that countries throughout the world are all dealing with the fact that automated vehicles will be a reality in the near future, and that trials are occurring throughout the world (including the development of ADS cities, such as is occurring in Israel). The Committee suggests that the NTC liaise with the AILA and the head of the Motor Vehicle Working Party in relation to information they are collecting on these issues.
26. At the same time, whilst it is not within the scope of this inquiry to consider the financial viability of motor accident injury insurance (**MAII**) schemes, the reality is that with the development of ADS vehicles, fewer people will own their own vehicle. It has been predicted that no more than 40 per cent of people will own their own vehicle in the future. ADS vehicles will operate like Uber vehicles do now, such that anyone requiring to travel in a motor vehicle will simply be able to request an ADS vehicle to collect them and take them to where they need to go. This may impact upon the viability of various options being put forward in this discussion paper.

## 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.**

27. Under the current regimes across Australia, the owner of a motor vehicle pays for compulsory third-party insurance as part of the registration of the motor vehicle. This insurance covers the liability of the driver and/or owner of the vehicle in respect of personal injury caused by the driver and/or owner of the vehicle, or the vehicle running out of control.
28. The Committee considers that the preferred option is Option 3 with the suggested addition of a reinsurance pool funded by compulsory contributions from Automated Driving Systems Entitles (**ADSEs**) and other parties involved in automated vehicle manufacture, supply and delivery, including modifiers, installers, repairers and infrastructure and telecommunications providers.
29. The Committee is of the view that limitations on damages, including thresholds and caps, could still remain a matter to be dealt with at the State and Territory level, on the basis that different cost bases
30. The Committee considers that limitations on damages, including thresholds and caps, could still remain a matter to be dealt with at the state and territory level, on the basis that different cost bases in the various states and territories warrant differentiation in those areas.
31. The Committee also supports the principle that premiums should be calculated specifically for automated vehicles to ensure there is no cross-subsidisation between automated vehicles and non-automated vehicles. Potential accidents caused by ADS failures should not result in increased premiums for drivers of non-automated vehicles or *vice versa* if automated vehicles prove to be significantly less risky than regular vehicles.
32. The Committee accepts the need for insurers to have the right to recover the costs of ADS crashes from at-fault third parties. The Committee is of the view that to minimise the difficulty of proving causation and establishing liability in collisions involving an ADS, it will be necessary that automated vehicles are fitted with additional devices to determine whether and at what point human intervention has occurred in the control of the ADS. This could be in the nature of sensors on controls, fingerprint recognition before a human driver can take control of an ADS, or even continuous video of the control systems of the ADS to determine whether a human has intervened in the control of the ADS and at what point. This information would then be recorded by a black box, in the same way that information is now recorded on speeds immediately prior to, and at the time of, an accident. Legislation would be required to ensure that information would be readily available to anyone seeking to recover for injury caused by a collision involving an ADS.
33. If the information collected indicated the collision was caused or contributed to by an ADS malfunction, then there should be a deeming provision and reversal of onus. These would operate such that the entity responsible for the ADS malfunction would be deemed liable to reimburse the MAIL scheme which pays out compensation to an injured third party, unless that entity could demonstrate on the balance of probabilities that the ADS malfunction did not contribute to the third party's injuries.

34. The Committee also supports the concept of a reinsurance pool but goes further in its views on this issue. It considers that it must be secured such that there is a guarantee that any entity who is liable for ADS malfunction will have sufficient funds to reimburse the MAIL scheme be paid out to an injured third party.
35. The Committee also supports the proposed recovery process whereby the third party is only required to deal with a single CTP insurer who administers the claim and, if appropriate, seeks recovery from the reinsurance pool.
36. It will be necessary to deal with the issue of cyber security risks and hacking and who should be responsible if a collision results from hacking of software in an ADS. The Committee agrees with all the positives of a reinsurance pool.
37. The Committee is also of the view that the negatives suggested in Table 8 in relation to the operation of a reinsurance pool can be dealt with by ensuring that contributions to the reinsurance pool by the various entities responsible for the ADS are risk-related.
38. Existing product liability legislation, certainly on a Federal level in the ACL, is likely to be unsatisfactory because of the likelihood that manufacturers of vehicles of software will seek to rely upon the scientific knowledge defence. A strict product liability regime, such as exists in state and territory sale of goods legislation would ensure that those responsible for ADSs bore the liability rather than the MAIL scheme that is paying the injured third party.

## Question 6

### **Are the criteria sufficient for assessing the options? Are there alternative or additional criteria that you think should be considered?**

39. The Committee considers that it may be appropriate in respect of ADSs to amend the legislation in the ACL to exclude the defence of scientific knowledge at the time the goods are supplied. Automation of vehicles is an ongoing and developing area and will continue to develop for many years. Manufacturers are aware of this and should not have the benefit of a stated scientific knowledge defence. In the Committee's view, liability in that respect should be rebuttably strict. If the manufacturers and suppliers are willing to take the benefit of selling automated vehicles (at various levels), then they should bear the burden associated with doing so.
40. The only other factor is the likelihood that the development of ADSs will result in fewer people owning their own vehicle and relying upon either shared vehicles or use of ADSs provided by a company, in the way that Uber does now. This is likely to have an impact on the premium pool and the amounts available to meet claims when they occur.

## Question 7

### **Do you agree the entity most able to manage the risk should be responsible for the cost of damages if the risk eventuates?**

41. The Committee endorses this principle. It suggests that the legislation could be amended to replace the term 'driver' with the term 'operator' and that term could be drafted to include everyone in the operation of the ADS, depending on its level, namely:
  - owner/user;

- producer of the vehicle or installed software and/or algorithms;
- managers and collectors of information and data shared by the vehicle; and
- suppliers of the vehicle's maintenance and services.

42. In the Committee's view, the liability should then fall to be determined by who was 'in control' of the vehicle at the relevant time and who is responsible for causing the collision. The Committee refers to some of the suggestions above for determining that issue in relation to ADSs which allow for the intervention of a human driver at some part in the journey.

## Question 8

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

43. The Committee is of the view that different insurance models should not be used depending on the level of vehicle automation. This would be too complex and interfere with the right of an injured third party to effectively recover damages where they are injured by the operation of an ADS.

## 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.**

44. The Committee refers to its suggestion above that manufacturers and suppliers of ADSs should not be entitled to the benefit of the state of scientific knowledge defence in the ACL or any similar defences.

45. There should also be a proper regime of limitation of actions, such as exist presently, both in respect of claims by injured parties and also recovery claims by insurers against the reinsurance pool for ADS entities. The Committee also refers to its suggestion for a reversal of onus in respect of collisions caused by ADSs.

## 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 MAIL schemes and caps and thresholds**

46. Not applicable.

## Question 11

**If you support option 5, how should the minimum benchmark be defined?**

47. Not applicable.

## Contact – NILG Committee

48. For further comment or clarification on any of the matters raised in this submission please contact Andrew Sharpe, Chair, National Insurance Lawyers Group on (T) 02 9018 9915 or at (E) [asharpe@meridianlawyers.com.au](mailto:asharpe@meridianlawyers.com.au).