



THE LAW SOCIETY  
OF NEW SOUTH WALES

Our ref: InjuryComp:PWml1255570

6 February 2017

Mr Paul Retter AM  
Chief Executive Officer  
Att: Automated Vehicle Team  
National Transport Commission  
Level 15/628 Bourke Street  
Melbourne VIC 3000

By email: [nbolsin@ntc.gov.au](mailto:nbolsin@ntc.gov.au)

Dear Mr Retter,

**National guidelines for automated vehicle trials – discussion paper**

Thank you for the opportunity to provide a submission in response to the discussion paper dated November 2016.

The Law Society of NSW made a submission to the National Transport Commission in response to the issues paper entitled 'Regulatory barriers to more automated road and rail vehicles', dated 24 March 2016. This submission is enclosed.

The Law Society supports the development of National Guidelines for automated vehicle trials. As indicated in our previous submission, the Law Society would advocate for laws across all Australian states and territories to be uniform in their approach to autonomous vehicles so consumers are aware of their rights and entitlements irrespective of where the vehicle travels.

As you are aware, the NSW government is currently proposing to reform the NSW motor accidents CTP insurance scheme. The Law Society would prefer not to comment further on automated vehicle trials until the CTP reform process has concluded. That said, we note that it is important for the appropriate infrastructure, technology and software to be fully developed before automated vehicle trials take place.

We look forward to the opportunity to comment on this matter further in the future.

Should you have any questions or require further information, please contact Meagan Lee, Policy Lawyer, on (02) 9926 0214 or email [Meagan.Lee@lawsociety.com.au](mailto:Meagan.Lee@lawsociety.com.au).

Yours faithfully,

Pauline Wright  
**President**

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24 March 2016

Mr James Williams  
Manager Policy – Compliance and Technology  
National Transport Commission  
Level 15, 628 Bourke Street  
MELBOURNE VIC 3000

Dear Mr Williams,

**Regulatory barriers to more automated road and rail vehicles – NTC Issues Paper**

The Law Society of NSW is pleased to provide a submission in response to the Issues Paper dated February 2016. This submission will address the issues raised in section 8.1 with respect to the liability of drivers, manufacturers and service providers.

**1. Technological Advances**

Motor vehicle manufacturers are progressively introducing increasing levels of automated driving controls. A truly autonomous vehicle can perform all safety and navigation functions at any point during a journey, including driving and parking, without human intervention, using advanced computer technologies. It has been well publicised that Google and Apple are working on full autonomous vehicle technology. Google<sup>1</sup> in particular has made significant advances in their autonomous vehicle testing and has logged 1.8 million miles, primarily in California, at a rate of approximately 10,000 miles per week on public streets<sup>2</sup>. In South Australia vehicle manufacturers have been authorised to use South Australian roads for the purpose of testing automatic technology in real life conditions. However, it is noted that manufacturers are likely to offer different automated functions and the market is expected to have vehicles with a variety of automated functions for many years.

The key point of difference between different automated driving functions is whether a human driver is responsible for monitoring the automated vehicle system and/or is required to intervene to ensure the vehicle can come to a safe stop, for example, should there be some sort of system failure.

The Australian driverless vehicle initiative (“ADVI”) outlines that autonomous vehicle technology will be developed in stages with the ultimate goal of having completely

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<sup>1</sup> Google have a webpage dedicated to the progress of their self driving car project – <https://www.google.com/selfdrivingcar/>.

<sup>2</sup> <<http://static.googleusercontent.com/media/www.google.com/en//selfdrivingcar/reports/report-0515.pdf>>.



driverless vehicles exist on our roads<sup>3</sup>. These stages are:

0. *No automation* (driver does everything manually)
1. *Driver assistance* (driver does the majority of tasks)
2. *Partial automation* (some automated functions but hands must remain on the wheel)
3. *Conditional automation* (all aspects of driving are automated but must be ready to take control when prompted)
4. *High automation* (driver no longer needed, can still drive if desired)
5. *Full automation* (the steering wheel and driver seat are no longer required)

## 2. Current legal framework

The Law Society agrees that legislation and common law principles of liability that would govern a motor vehicle accident involving an automated system failure are well-established. The Law Society also accepts that the issue of who is liable in a motor vehicle accident may become more complex, for instance, with the interrelationship between the automated technology and human beings in partial control of some vehicles and other issues foreshadowed below.

One of the primary legal issues<sup>4</sup> brought about by autonomous vehicle technology is "who is at fault" if the owner, operator or driver is not in control of the vehicle at the time the collision occurs. The issues paper sets out briefly the areas of law that may come into operation in a motor vehicle accident involving an autonomous vehicle. Product liability would be of particular significance.

The Australian Consumer Law ("the ACL") was introduced in 2011 and is a national law relating to consumer protection and product liability. It is a schedule to the *Competition and Consumer Act 2010* (Cth). Although the ACL is a primary source, product liability law in Australia remains comprised of both common law and statute.

The causes of action available to a person who suffers loss or injury that is caused by a product include:

1. Action for breach of contract
2. Action for breach of the warranties implied into consumer contracts by state Sale of Goods legislation
3. Action in negligence
4. Statutory cause of action against suppliers under Part 5-4 Division 1 for breach of the "consumer guarantees" introduced by Part 3-2 Division 1 of the ACL
5. Statutory cause of action against manufacturers (and importers) of goods under Part 5-4 Division 2 of the ACL for breach of "consumer guarantees" introduced by Part 3-2 Division 1 of the ACL
6. The statutory code under Part 3-5 of the ACL for dealing with "defective" goods which cause injury or loss
7. The "unfair practices" / "misleading or deceptive" provisions in Part 2-1 and Part 3-1 Division 1 of the ACL

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<sup>3</sup> ARRB Group, *The Australian Driverless Vehicle Initiative - Summary of levels of automation* <<https://www.arrb.com.au/admin/file/content2/c7/ARRB%20%20%205%20Levels%20Automation%20-%20Infographic%20-%20VO5.jpg>>.

<sup>4</sup> A further legal issue is privacy, specifically how information will be used by vehicle manufacturers. Driverless vehicles will require real time information recording, which will inevitably be transmitted to vehicle manufacturers who will use the information for secondary purposes including for advertising and sale to third parties.

A person who is injured in a motor accident because of a defective product may not be the person who purchased it and would have no claim in contract against the manufacturer.

Before the introduction of the relevant provisions of the ACL (and previously the *Trade Practices Act 1974*) claims against the manufacturer for product liability were necessarily based on the law of negligence. Under this tort the manufacturer of the product owes a duty of reasonable care to avoid injury being suffered by those using the product and "bystanders" who the manufacturer should reasonably have foreseen may be injured by the product. The law of negligence has significant limitations but these have been overcome to a degree by Part 5-4 Division 2 and Part 3-5 of the ACL, which improves the ability of plaintiffs to bring actions against manufacturers for product liability.

The ACL contains statutory rights of action against a manufacturer for persons who suffer injury or loss caused by the manufacturer's defective goods. It imposes liability on the manufacturer of "defective goods" that cause injury, loss or damage, avoiding problems associated with pursuing such claims in tort (foreseeability) or contract (privity). A person who suffers injury because of a safety defect in goods is entitled to be compensated by the manufacturer for the amount of loss suffered. To establish liability the plaintiff must prove the existence of the safety defect in the goods, the fact that the injury has been suffered and the causal connection between the defect and the injury. There are a number of statutory defences to claims under this part of the ACL.

In addition to the above bases of liability, statutory liability may be imposed on the manufacturer under the "misleading or deceptive conduct" provisions.

These would be causes of action available to a plaintiff injured in an accident caused solely by, for example, a faulty computer system in a fully automated vehicle. However, in a partially automated vehicle there may be circumstances where it can be alleged that the driver was negligent in his or her response to the product failure. Depending on whether the plaintiff is, for example, a driver or passenger in another car or a pedestrian, there would be issues of joint liability or contributory negligence.

Other potential difficulties can also be envisaged when considering an autonomous motor vehicle accident from a public/product liability perspective. First, the age of the vehicle is relevant. "The average life expectancy of a motor vehicle is about eight years or 150,000 miles (roughly 241,000 km)"<sup>5</sup> noting that some vehicles can "go on for about 15 years"<sup>6</sup>. It is difficult to perceive however how a vehicle manufacturer would be held solely liable in an accident scenario where the autonomous vehicle is 20 years old, particularly when factors such as servicing, use of the vehicle and general wear and tear are taken into consideration. This will potentially lead to complex legal battles involving multiple defendants such as the vehicle owner, the car manufacturer/software provider, mechanics who service the vehicle and councils who fail to maintain roads.

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<sup>5</sup> The United States Studies Centre at the University of Sydney, *How digital infrastructure can substitute for physical infrastructure*, <[http://ussc.edu.au/ussc/assets/media/docs/publications/1507\\_Digital\\_Infrastructure\\_Report.pdf](http://ussc.edu.au/ussc/assets/media/docs/publications/1507_Digital_Infrastructure_Report.pdf)>.

<sup>6</sup> *Ibid* 9.



There are also a number of circumstances where it is foreseeable that autonomous technology may fail due to circumstances beyond the control of the vehicle, leaving the person who sustains injury, through no fault of their own, without appropriate legal recourse. For example:

1. If the on-board computer was infected with a computer virus, due to an error of the vehicle manufacturer or owner and the relevant person could not be identified.
2. If the GPS satellite/on-board navigation system fails due to environmental interference such as a thunderstorm.

Globally, legislators have been grappling with how to adapt existing vehicle laws to accommodate the advancements in autonomous vehicle technology. The absence of appropriate regulation and legislation in this area is believed to be slowing the progression of such technologies into mainstream production.

The Law Society notes that the South Australian government has attempted to deal with the issue temporarily through the Motor Vehicles (Trials of Autonomous Technologies) Amendment Bill 2015, which requires any company engaging in an autonomous vehicle trial in South Australia to have public liability insurance to indemnify and protect the owner, driver or operator against death or bodily injury. This approach would be difficult to adopt in NSW where public/product liability matters are determined in Court while the vast majority of compulsory third party ("CTP") disputes are currently determined within the Claims Assessment and Resolution Service ("CARS"), part of the State Insurance Regulatory Authority (see below).

### **3. NSW Motor Accidents Scheme**

As the Issues Paper notes, states in Australia, including NSW, have third party personal injury schemes funded through compulsory third party insurance. In the typical motor vehicle accident caused by an at fault driver the plaintiff's claim in NSW would be dealt with under this scheme.

The NSW CTP scheme is a modified common law scheme with no-fault extensions. Unlike traditional common law schemes, alternative dispute resolution mechanisms are legislated and the majority of motor accident compensation disputes proceed to a statutory tribunal, CARS, before a claimant is entitled to commence Court proceedings. Public product liability cases by contrast are determined in the Court system.

A number of issues would arise for a claimant in NSW trying to pursue a claim involving a vehicle which was operating in either high or full automation modes:

- (1) They are unable to establish fault on behalf of the owner or driver of the motor vehicle pursuant to Section 3A of the *Motor Accidents Compensation Act 1999* ("MACA") as a result of the vehicle software being in control of the vehicle.

#### **3A General restrictions on application of Act**

- (1) This Act (including any third-party policy under this Act) applies only in respect of the death of or injury to a person that is caused by the fault of the owner or driver of a motor vehicle in the use or operation of the vehicle and only if the death or injury is a result of and is caused (whether or not as a result of a defect in the vehicle) during:

- (a) The driving of the vehicle, or

- (b) A collision or action taken to avoid a collision, with the vehicle, or
  - (c) The vehicle's running out of control, or
  - (d) A dangerous situation caused by the driving of the vehicle and collision or action taken to avoid a collision with the vehicle, or the vehicle's running out of control [emphasis added].
- (2) As the software or vehicle failure will have been caused as a result of human design error, the accident may not fall within the definition of a blameless motor accident pursuant to Section 7A of MACA as the accident will have been caused 'by the fault of another person'.

**7A Definition of "blameless motor accident"**

In this Division:

*blameless motor accident* means a motor accident not caused by the fault of the owner or driver of any motor vehicle involved in the accident in the use or operation of the vehicle and not caused by the fault of any other person [emphasis added].

- (3) The current CTP scheme would not provide coverage, meaning that the injured person would be required to sue the car manufacturer for compensation. This creates a complex situation for injured people where there are two different motor accident compensation schemes operating in NSW (CTP or public/product liability, with eligibility being determined by the type of vehicle involved in the accident).

**4. Possible Solutions in NSW**

There are a number of possible solutions which could be considered by the NSW Government, including:

Expansion of the Blameless Accident Provisions

- (1) Maintain the structure of the current CTP scheme (ie liability admitted in CARS and liability denied in Court)
- (2) Include a definition of 'autonomous vehicle' in MACA, either at Section 3 or Part 1.2 Division 1 of MACA
- (3) Expand the definition of 'Blameless Motor Accident' to include an accident involving a vehicle operating in autonomous mode at the time of collision, making CTP the sole cause of action where injury has occurred (ie removing public/product liability against the car manufacturer)
- (4) Amend the premium determination guidelines to include a compulsory levy to be paid for by car manufacturers, reducing the premium motorists need to pay if they are insuring an autonomous vehicle; or
- (5) Establish a sharing agreement that includes car manufacturers, allowing CTP insurers to recoup the costs of an accident caused by an autonomous vehicle to offset the cost in CTP premiums.

However, it would be unreasonable for car manufacturers to be liable for autonomous vehicles for an indefinite period of time. Legislators, car manufacturers and scheme stakeholders would need to determine the age at which an autonomous vehicle



insurance premium transfers totally to a motorist. An example may be after 10 years, subject to the vehicle not being added to the written off vehicle register.

#### Hybrid Fault and No Fault Schemes

- (1) Maintain the structure of the current CTP scheme (ie liability admitted in CARS and liability denied in Court)
- (2) Where non-autonomous vehicles are involved in an accident, traditional principles of negligence would need to be established.
- (3) Where an autonomous vehicle is responsible for an accident, the vehicle itself could be deemed to be both the 'driver' and the 'negligent' party so that the CTP insurance coverage would extend to the occupants of the 'at-fault' autonomous vehicle and also any injured third parties.

As the addition of fault based compensation may increase premiums over time, car manufacturers would be expected to contribute a levy each year based on rating criteria such as the number of vehicles on the road, the outcomes of safety ratings such as the Australasian New Car Assessment Program ("ANCAP"), the number of collisions on NSW roads and the extent of the injuries caused.

The introduction of autonomous vehicles onto Australia roads, while hopefully resulting in an overall reduction of accidents, will potentially lead to complex liability disputes and insurance coverage issues. There will be complexities arising from the interplay with state CTP schemes which will need to be addressed. The Law Society has raised some of the potential problems and solutions for the purposes of further discussion and consideration. The Law Society would advocate for laws across all Australian states and territories to be uniform in their approach to autonomous vehicles so consumers are aware of their rights and entitlements irrespective of where the vehicle travels.

Should you have any questions arising from this submission please contact Leonora Wilson, the policy lawyer for the Injury Compensation Committee on 9926 0323 or [Leonora.Wilson@lawsociety.com.au](mailto:Leonora.Wilson@lawsociety.com.au).

Yours sincerely,



**Gary Ulman**  
President