

Submission on the National Transport Commissions' Discussion Paper – *Government Access to Vehicle-Generated Data*

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National Transport Commission
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The NSW Young Lawyers Communications, Entertainment and Technology Committee (Committee) makes the following submission in response to the Government Access to Vehicle-Generated Data Discussion Paper (Discussion Paper)

NSW Young Lawyers

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The Communications, Entertainment and Technology Law Committee of NSW Young Lawyers aims to serve the interests of lawyers, law students and other members of the community concerned with areas of law relating to information and communication technology (including technology affecting legal practice), intellectual property, advertising and consumer protection, confidential information and privacy, entertainment, and the media. As innovation inevitably challenges custom, the CET Committee promotes forward thinking, particularly about the shape of the law and the legal profession.

Summary of Recommendations

The Committee has provided submissions on Questions 5, 6, 10, 16, 17 and 18 of the Discussion Paper.

1. **Question 5:** The Committee submits in relation to Question 5 of the Discussion Paper, that the ExVe raises concerns for existing legislation and policy in the areas of cyber security, privacy, competition.
2. The Committee further submits in relation to Question 5 that the priority purpose of government access must be road safety.
3. **Question 6:** The Committee submits in relation to Question 6 of the Discussion Paper that a national data aggregator or trust broker be established.
4. **Questions 10, 16 and 17:** The Committee submits in relation to Questions 10, 16 and 17 of the Discussion Paper that partnership through data exchange between government and manufacturers is essential for road safety, however, reserves comments on other purposes for non-commercial exchange of data, given the evolving definitions of road safety data, and data standards in this space.
5. **Question 18:** The Committee submits in relation to Question 18 of the Discussion Paper that option 3, legislative reform, is the optimal choice, however, that a number of procedural steps and considerations should be met prior to the construction of the legislation.

Question 5

1. The Committee submits that if extended vehicle concept (**ExVE**) is adopted in Australia, it is highly likely that cybersecurity, privacy, competition, and government access issues will arise.

Cybersecurity

2. The Committee considers that cybersecurity issues should be among the highest priority of the concerns addressed by the Commission in relation to the adoption of ExVe. The Committee agrees that the intent of ExVe should be to minimise cybersecurity risks with respect to vehicle-generated data by restricting the point of access to the interfaces as described in the Commission's Discussion Paper.¹ However, this approach means that the vehicle manufacturer's server, the neutral server, as well as each entity connecting through the relevant interface, are the potential points of failure. It is critical that each of these entities institute risk-based cybersecurity controls to prevent unauthorised access to vehicle data. Moreover, under ISO 20077-2, the vehicle manufacturer has responsibilities with respect to designing the ExVe interface(s) and determining the implementation of any ExVe 'functionality'.²
3. Cybersecurity risk for the vehicle itself can be heightened, particularly if its operational systems are not properly segregated from the secure vehicle interface. The Committee would like to flag for the Commission that cybersecurity is a 'core consideration' for vehicle manufacturers,³ as 'automotive technology is advancing rapidly along a path to automation'.⁴
4. In this regard, the Committee strongly supports the ISO 20077 series of standards, which 'contain diverse generic specifications proper to... extended vehicles',⁵ and ISO 20078, which 'includes typical ISO specifications related to ExVe web services'.⁶ Standardisation will help create a barrier against the expansion of cybersecurity risk otherwise caused by fragmentation of software development. This was acknowledged more generally by the OECD when it found that 'appropriate standards and guidelines are... needed to maintain current levels of safety, [and] ensure trust based on enhanced levels of digital security and privacy'.⁷

¹ National Transport Commission, *Government Access to Vehicle-Generated Data* (Discussion Paper, May 2020) 46.

² M McCarthy et al, *Access to In-Vehicle Data and Resources: Final Report* (May 2017) 60.

³ Johannes Deichmann et al, *The Race for Cybersecurity: Protecting the Connected Car in the Era of New Regulation* (Article, October 2019) 2.

⁴ McCarthy et al (n 2) 6.

⁵ McCarthy et al (n 2) 60.

⁶ Ibid 60.

⁷ OECD, *Key issues for Digital Transformation in the G20: Report Prepared for a Joint G20 German Presidency/OECD Conference* (12 January 2017) 72.

Privacy

5. The Commission's definition of 'vehicle-generated data' includes data with respect to the driver,⁸ within the definition of 'personal information' under section 6 of the *Privacy Act 1988* (Cth) (*Privacy Act*). Vehicle-generated data may also include 'sensitive information' under the same legislation,⁹ given the Commission's reference to 'information about... the physical state of the driver'.¹⁰
6. The Committee stresses the need to develop risk-based controls, in line with applicable legislation (including the *Privacy Act*) and industry best practice (perhaps paralleling the *General Data Protection Regulation*¹¹) to protect the privacy of vehicle-generated data. For instance, authorised interfaces with the vehicle manufacturer's server must be end-to-end encrypted.
7. The Committee also calls on the Commission to conduct further consultation on whether vehicle-generated data, prior to being shared through authorised interfaces under the ExVe framework, should be anonymised. The Committee views that anonymisation of data is particularly appropriate given the primary purpose of such sharing the vehicle data discussed should be for road safety purposes. Most of the vehicle-generated data would be 'primarily of a technical nature',¹² making it unnecessary for the data to be linked to the specific driver of the vehicle. The Commission acknowledges the issue of anonymisation when it states in the Discussion Paper that 'only de-identified, technical data is required from the vehicle, which does not require the consent of users to collect and would be difficult to combine with other data to infer personal information from',¹³. The Committee proposes that the process of anonymisation occur even before the point of collection.

Competition

8. The Committee agrees with concerns identified in the Discussion Paper that the ExVe approach is potentially anticompetitive.¹⁴ While seeking to minimise the vehicle's cybersecurity risks, making a server controlled by the vehicle manufacturer the sole point of access for relevant vehicle-generated data poses competition law issues.
9. The European Commission recognises this issue. A vehicle manufacturer which 'exercises control over data generated by the vehicles it manufactures is likely to be in a dominant

⁸ National Transport Commission (n 1) 24.

⁹ *Privacy Act 1988* (Cth) s 6 (definition of 'sensitive information').

¹⁰ National Transport Commission (n 1) 25; *Privacy Act 1988* (Cth) s 6FA(a)(i). See also David Vaile, Monika Zalnierute and Lyria Bennett Moses, *The Privacy and Data Protection Regulatory Framework for C-ITS and AV Systems: Report for the National Transport Commission* (Report, 2 July 2018) 19-26.

¹¹ *Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation)* [2016] OJ L 119/1.

¹² European Automobile Manufacturers' Association, 'What Kind of Data Can My Car Share?', *Car DataFacts.eu* (Web Page, 21 October 2017) <<https://www.cardatafacts.eu/data-can-car-share/>>.

¹³ National Transport Commission (n 1) 77.

¹⁴ *Ibid* 46.

position with respect to the market for services which make use of that data, and which are then offered to owners or users of that make of vehicle'.¹⁵

10. The level of control of the design and implementation process for ExVe, which is given to the manufacturer by ISO 20077-2,¹⁶ exacerbates these concerns. The manufacturer is also advantaged by having direct access to the vehicle-generated data via 'a proprietary on-board application platform', while third party access is second-hand via the manufacturer's server.¹⁷ Third party business models, and the consumer benefit from competitive markets for services that they provide, will depend on manufacturers not exploiting their dominant position in an anti-competitive manner.
11. The Committee agrees with the 'neutral server' approach (as in the EU Data for Road Safety Proof of Concept),¹⁸ namely, 'that data is provided from the car manufacturer's server to another server which is maintained by a neutral service provider'.¹⁹ Third parties seeking to deliver services using the relevant vehicle-generated data would connect to that neutral server.²⁰ However, the Committee stresses the concerns identified by the European Commission with respect to the neutral server approach.²¹ Policy makers would have to legislate a mechanism for the vehicle manufacturer to provide fair access to the vehicle-generated data to the neutral server. This would reduce the need to rely on the manufacturer and party controlling the neutral server contracting only with each other in relation to that access. This is essential where the vehicle manufacturer is in direct competition with third parties for services derived from the data, because the manufacturer would be aware of the data being requested by third parties through the neutral server, giving them an opportunity to restrict that data.²²
12. The Committee calls on the Commission to liaise with the Australian Competition and Consumer Commission on how the neutral server approach could be refined from a competition law and policy perspective. This could include consideration of the involvement of open interfaces as championed by Right to Repair groups.²³

Government Access to Vehicle-Generated Data

13. The Committee directs the Commission to its 2018 submission on 'Regulating Government Access to C-ITS and Automated Vehicle Data'.²⁴ The Committee considers that those submissions are applicable to vehicle-generated data in the ExVe context.

¹⁵ McCarthy et al (n 2) 185.

¹⁶ McCarthy et al (n 2) 60.

¹⁷ Ibid 150.

¹⁸ National Transport Commission (n 1) 46.

¹⁹ McCarthy et al (n 2) 60.

²⁰ Ibid 150.

²¹ Ibid 150-1.

²² McCarthy et al (n 2) 151.

²³ Ibid 46.

²⁴ Eva Lu, Ravi Nayyar and Suzana Livaja, Submission to National Transport Commission, *Regulating Government Access to C-ITS and AV Data* (29 November 2018).

14. The Committee considers that, in parallel with the below submissions on questions 10, 16 and 17, the primary purpose of government access should be road safety data (as appropriately defined).

Question 6

15. The Committee submits that there is value in establishing a national data aggregator or trust broker. Such a policy, which ‘creates a separation of duties from policy and regulatory bodies’,²⁵ would help drive industry and general public confidence in the governance of the data collected and stored by this entity. This recommendation is in keeping with general consumer concerns about government agencies collecting their data, and using and/or sharing it, for purposes for which they have not consented. The Committee recommends that the data aggregator or trust broker either be Transport Certification Australia (‘TCA’), given the analogy with TCA’s existing functions under the National Telematics Framework, or be otherwise modelled closely after TCA.
16. The Committee considers that good data definitions, practices and cooperation between entities would not achieve the same outcome as establishing a national data aggregator. This is because the relevant data would be easier and cheaper to protect if it were stored in one centralised, secure location. Having the storage of data spread across multiple cooperating entities would increase the cost of protecting the data. Additionally, given the creation of multiple potential points of cybersecurity failure this also creates greater risk of the data being compromised or tampered with.

Questions 10, 16 and 17

17. The Committee submits that road safety data should be considered the primary purpose for which the Commission seeks to exchange data with industry. The Committee agrees with the reasoning stated in section 6.5.2 of the Discussion Paper.²⁶ Further, the Committee notes, road safety data would help inform the development of transport networks.
18. The Committee considers that road safety should be adopted as the priority for developing use cases for government use of vehicle-generated data. Road safety is directly beneficial to communities, and the development of these use cases in partnership with vehicle manufacturers can support increased, dynamic road safety.²⁷
19. Partnership between government and manufactures is crucial given that manufacturers have access to vehicles, which are the source of a major portion of road safety data. Such data when used in partnership can, for instance, help drive ‘more dynamic [policy and safety] responses’ to evolving ‘travel patterns and vehicle use’.²⁸ The Committee calls on the Commission to observe the European Union’s Data for Road Safety Proof of Concept with a view to potentially modelling Australian policymaking after it.

²⁵ McCarthy et al (n 2) 60.

²⁶ National Transport Commission (n 1) 76-7.

²⁷ Ibid 83.

²⁸ Ibid 19.

20. The Committee is in favour of the Commission's proposed 'principle of non-commercial sharing or exchange'.²⁹ The Committee does not seek to provide views on what data other than for the purposes of road safety can be exchanged on non-commercial terms. This is because Australia is in the earlier phases of the policy process for vehicle-generated data. Concrete cost-benefit analysis of the use cases identified in Commission-run workshops still need to be carried out.³⁰ Policy makers have not yet defined road safety data, let alone conducted further consultation on 'requirements' and 'data standards'.³¹ Agencies are still assessing what sorts of data they need to access and it is not 'clear what kind of data would be exchanged as part of road safety'.³² In the Committee's view, it is more important that these tasks be completed before policy makers consider expanding the categories of data that can be exchanged.

Question 18

21. The Committee submits in favour of option 3, legislative reform, subject to that reform being enacted after the following has been addressed:

- Appropriate progression of the Australian policy process with respect to vehicle-generated data. Such progress should be gauged by factors including the agreement of relevant stakeholders on key definitions (such as of 'road safety data') and best practices;
- Appropriate delineation of the type(s) of vehicle-generated data that government would require access to, and establishment of concrete use cases for thorough regulatory sandboxes, with a focus on road safety data and access for road safety purposes;
- Creation of data exchange standards, vetted by TCA and other relevant transport agencies after consultation with all relevant stakeholders;
- Creation of a framework for future exchange of data between government and industry after consultation with all relevant stakeholders;
- Creation of a national data aggregator or trust broker for vehicle-generated data, this entity either being TCA or otherwise modelled closely after TCA (please see the Committee's response to Question 6 above); and,
- Conduct of other necessary consultation with stakeholders for the creation of robust, necessary, and proportionate legislative reform.³³

22. The output of the above should inform the drafting of legislative reform under option 3 and help ensure the enactment of proportionate and targeted reform.

²⁹ Ibid 71, 83.

³⁰ Ibid 10.

³¹ Ibid 83.

³² Ibid 83.

³³ Ibid 86; Some of the bullet points in this list are (in part) drawn from the list under 'This option could result in'.

23. The Committee recommends progressing option 3 because it is in favour of regulatory strategies creating explicit statutory obligations with regard to vehicle-generated data. The issues identified in the Committee's response to Question 5 can be extended to vehicle-generated data more generally. The Committee also shares the Commission's reasoning with regards to the benefits of option 3.³⁴
24. The Committee agrees with the Commission that legislation should not be enacted prematurely, but recommends that it be enacted after obtaining (in addition to the points listed above) 'a clear understanding of the potential uses and benefits of vehicle-generated data,' and, of 'who would be regulated for each purpose and which is the best regulatory instrument to achieve this'.³⁵
25. In relation to the Commission's championing a 'market-based solution', the Committee seeks to draw the Commission's attention to the value of a co-regulatory approach, under which stakeholders including industry, civil society and academics develop the reform in cooperation with the Commission. The reform would then be legislated by Parliament to provide greater regulatory certainty to all stakeholders.³⁶ Industry codes of conduct enacted under section 51AE of the *Competition and Consumer Act 2010* (Cth) are examples for the Commission to consider more generally in deciding the final form of legislative reform under option 3.

Concluding Comments

NSW Young Lawyers and the Committee thank you for the opportunity to make this submission. If you have any queries or require further submissions please contact the undersigned at your convenience.

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³⁴ National Transport Commission (n 1) 89.

³⁵ Ibid 88.

³⁶ See Glen Hepburn, *Alternatives to Traditional Regulation* (OECD Report, 2006) 35 for a definition of co-regulation.