



Contact officer: Julia Muse
Contact phone: 02 6243 1328

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National Transport Commission
Level 3, 600 Bourke Street
MELBOURNE VIC 3000

Public consultation: in-service safety for automated vehicles

The Australian Competition and Consumer Commission (ACCC) welcomes the opportunity to respond to the National Transport Commission (NTC) consultation Regulation Impact Statement (RIS) on in-service safety for automated vehicles.

Automated vehicles are expected to be deployed on Australian roads as early as 2019 and 2020, and it has been suggested they will bring many benefits to the Australian community. However, these benefits are untested and there is potential for harm in the absence of a specialist regulatory framework for automated vehicle safety.

It is our strong view that relying on existing laws and frameworks to regulate automated vehicles will result in poor safety outcomes for road users, pedestrians and the general public. The ACCC supports a regulatory framework based on a general safety duty enforced by a national specialist regulator.

The national specialist regulator for motor vehicles in Australia is the Department of Infrastructure, Transport, Cities and Regional Development (the Department of Infrastructure). The *Road Vehicles Standards Act 2018* (RVSA) was due to give the Department of Infrastructure increased regulatory powers from December 2019.

However, the *Road Vehicles Standards Legislation Amendment Bill 2019* will delay the commencement of these powers to as late as July 2021. The ACCC has serious concerns that delayed commencement will mean automated vehicles will enter the market before the Department of Infrastructure has the appropriate powers to regulate their safety.

The ACCC recommends that automated vehicles be prevented from entering the market and from operating on Australian roads until there is a robust, national and specialist regulatory framework in place to ensure their safety. This framework should be administered through the RVSA and enforced by the Department of Infrastructure.

The ACCC strongly resists any suggestion that the ACCC is in any way the responsible regulator of automated vehicles, even on an interim basis. We also strongly resist any suggestion that the Australian Consumer Law (ACL) is in any way the appropriate framework to regulate automated vehicle safety.

The ACCC is not the specialist regulator for motor vehicles in Australia, and does not have the technical expertise to regulate the safety of a transport technology like automated vehicles.

Role of the ACCC

The ACCC is a whole of economy regulator that promotes competition and fair trading in markets to benefit consumers, businesses and the Australian community. Our primary responsibility is to ensure that individuals and businesses comply with the *Competition and Consumer Act 2010* (the CCA), which includes the Australian Consumer Law.

One of the ACCC's key roles in administering the CCA is seeking to ensure that consumers can confidently participate in markets. Through the application of the ACL, the ACCC aims to prevent misleading behaviour and unconscionable conduct, and to minimise the risk posed by unsafe consumer goods and product related services.

The urgent need to regulate automated vehicle safety

In the absence of a specific regulatory framework for automated vehicle safety in Australia, the ACCC considers that these vehicles should not be able to enter the market or operate on Australian roads until a robust, national and specialist regulatory framework is in place which specifically addresses in-service safety risks.

Automated vehicles have the potential to create significant safety risks that are unique to an automated driving system. There are several in-service safety risks that may arise, such as technological failure, cybersecurity failure, failed software updates, use of unauthorised third party components and slower driver response times.

Reports indicate that there have been at least five fatalities internationally involving an automated vehicle, including one fatality involving a Level 3 automated vehicle, where the automated driving system had been in control of the vehicle prior to the incident.¹ In this incident, the automated driving system only recognised the pedestrian and flagged the need for emergency braking seconds before impact. Another fatality occurred when the automated driving system failed to recognise a truck crossing a highway as an obstacle and drove into the truck at high speed, killing the occupant on impact.

Incidents such as these demonstrate the serious consequences of an automated vehicle failing to sense a hazard and respond in a timely manner. These issues are in-service safety risks that must be addressed through an appropriate regulatory framework to prevent harm to road users, pedestrians and the general public.

Options for the regulation of automated vehicles

The consultation RIS presents a number of options for the regulation of automated vehicles and seeks feedback on appropriate institutional arrangement to deliver optimal safety outcomes and reduce barriers to entry.

From the outset, the ACCC would like to make clear:

- We do not support Option 1 as this would rely on existing laws and regulatory frameworks, with no specific regulation introduced to address in-service safety risks. This option would not prevent safety risks from emerging and would not assist the government to keep pace with technological advancements.
- We do not support Options 2 and 4 as these options would see responsibility for automated vehicles shared between Commonwealth, state and territory governments, creating potential regulatory gaps, overlaps and inconsistencies, leading to confusion for industry and the general public.

¹ Australian Broadcasting Corporation, 'Uber suspends self-driving car tests after vehicle hits and kills woman crossing the street in Arizona', 20 March 2018, available at <https://www.abc.net.au/news/2018-03-20/uber-suspends-self-driving-car-tests-after-fatal-crash/9565586>.

- We support Option 3 based on our strong view that there is an urgent need for a nationally consistent, specialist regulatory regime to effectively regulate automated vehicle safety, including in-service safety.

Relying on existing laws and frameworks to regulate automated vehicle safety would exacerbate regulatory gaps between regimes, which may lead to adverse safety outcomes in a situation where a vehicle is not captured by certain regulations. This would cause confusion as to the identity of the responsible regulator, which would create delays in safety interventions and increase the compliance and administrative burden on industry. The ability for governments to react and keep pace with technological advancements would also be limited, which in turn would impact on innovation and the ability to address new safety risks as they arise.

The appropriate regulator is the Department of Infrastructure

The ACCC also supports a specific regulatory framework for automated vehicles based on a general safety duty enforced by a national specialist regulator. Due to the technical complexity of automated vehicles and automated driving systems, it is essential that the national regulator is a specialist regulator that has the technical expertise to effectively regulate this new form of transport.

The Department of Infrastructure is already the regulator for motor vehicle safety at the Commonwealth level. The Department should also become the regulator for the ongoing safety of automated vehicles. Its expertise has been acknowledged by transport ministers in conferring responsibility for the implementation and administration of safety criteria for automated vehicles at 'first supply' to the Department.

The Department already administers voluntary recalls for motor vehicles, as well as investigating safety issues and ensuring compliance with the Australian Design Rules. With the commencement of the RVSA, the Department will also have stronger compulsory recall powers and enforcement tools to encourage compliance with motor vehicle safety requirements.

In recognition of the Department of Infrastructure's existing role as the motor vehicle safety regulator in Australia, the ACCC considers that the Department's role should be directly applied to both the 'first supply' and the in-service safety of automated vehicles. The ACCC believes the regulatory framework for this to occur should be established before automated vehicles are able to enter the market and operate on Australian roads.

The ACCC is not the regulator of automated vehicle safety

The ACCC resists any suggestion that it could be the appropriate regulator for automated vehicles, even on an interim basis. The ACCC is a generalist economic regulator and does not have the specialist knowledge or technical expertise to deliver effective outcomes in the place of a specialist regulator.

Consistent with the Government's Statement of Expectations for the ACCC, we seek to avoid duplication of the supervisory activities of other regulators, especially where a specialist regulator exists. In recognition of the Department of Infrastructure's expertise in relation to motor vehicles, we currently refer reports we receive concerning motor vehicle safety to the Department. The same would apply in relation to technically complex automated vehicles and automated driving systems.

With the delayed commencement of the RVSA, the ACCC is concerned that in the absence of stronger enforcement powers for the Department of Infrastructure, there may be an expectation that the ACCC will address safety risks for automated vehicles in the place of

the Department, even though this would be beyond the knowledge, experience and capacity of the ACCC.

Aside from lacking the appropriate expertise, any attempts to meet this expectation would result in resources being diverted away from the ACCC's vital market surveillance and hazard assessment functions for consumer goods and product related services.

Due to the breadth of consumer products available on the market, we must prioritise our regulatory interventions and we cannot address every product safety hazard that comes to our attention. Any additional expectations on the ACCC to act in relation to automated vehicles would diminish our ability to identify hazards in consumer products, which may ultimately lead to adverse safety outcomes for consumers and the general public.

The ACL is not the appropriate framework to regulate automated vehicles

The ACCC resists any suggestion that the ACL is the appropriate legislative regime to regulate the ongoing or in-service safety of automated vehicles. The consumer product safety powers contained in the ACL are limited in their application and do not cover the field, and generally only allow for post-market intervention.

The ACL does not place a pre-market obligation or general safety duty on suppliers to ensure products are safe before they are sold, meaning that suppliers would not be obliged to eliminate or mitigate safety risks of automated vehicles. The lack of a general safety duty on suppliers would be particularly problematic because the safety risks associated with automated vehicles may not become apparent for some time.

With a novel technology where the benefits are untested and the risks are largely unknown, relying on reactive and post-market consumer product safety powers under the ACL would result in poor safety outcomes for road users, pedestrians and the general public.

Other provisions of the ACL, such as the consumer guarantees and defective goods regime, may also be ineffective in regulating automated vehicle safety. These provisions only provide consumers with a right to seek a remedy from a supplier, subject to certain legislative thresholds. These remedies must be sought on an individual basis through courts and tribunals, and would not be available to address systemic or widespread safety issues across an entire fleet of automated vehicles.

Relying on the ACL could also result in significant regulatory gaps. The consumer product safety provisions of the ACL are limited in their application to consumer goods and product related services. Consumer goods are defined as goods for 'personal, domestic or household use', and product related services are defined as services relating to the supply of consumer goods, such as the installation, maintenance, repair, cleaning, assembly, and delivery of consumer goods.²

While the vehicle itself may (in some cases) be a consumer good, in most cases, the ACL will not apply to automated vehicles used for a commercial purpose such as delivery or fleet vehicles, heavy vehicles such as trucks, vehicles used for an agricultural purpose such as tractors, or other forms of transport such as marine vessels, aircraft and rail.

It is also not clear whether the ACL would apply to all aspects of an automated driving system, which may fall outside the definition of a consumer good or product related service,

² ACL section 2(1).

such as software updates, sensor and data processing abilities, the connection service to the network or server, or any cybersecurity service or features.

If a safety hazard were to arise in an automated vehicle or an aspect of the automated driving system that is not a consumer good or product related service, it is unlikely that regulatory intervention could occur under the ACL. This would result in some vehicles or components being excluded from regulation or government intervention, which would not be an acceptable outcome for road users, pedestrians and the general public.

In the absence of specific regulation for automated vehicles, there will be a significant lack of regulatory protection at the Commonwealth level. State and territory regulatory frameworks may also not be well equipped to address this shortfall and mitigate widespread or ongoing safety concerns across all classes of automated vehicles.

Specific regulation for safety is required to ensure improved safety outcomes, reduced compliance burdens on industry and limited jurisdictional differences between regimes that may increase the time taken to respond to safety issues.

The need for a general safety duty

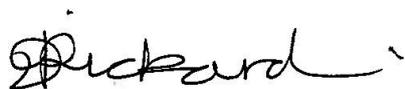
The ACCC strongly supports Option 3, which would introduce a new in-service general safety duty for automated vehicles, enforced through Commonwealth law by a national regulator, so long as that regulator is a specialist regulator, such as the Department of Infrastructure.

The ACCC is supportive of Option 3 as it promotes national consistency and allows a proactive approach to be taken to address safety risks as they arise. A general safety duty will encourage suppliers to address future risks that may not be immediately apparent. Imposing a primary safety duty on the Automated Driving System Entity is the most effective way of achieving optimal safety outcomes over the lifespan of an automated vehicle.

Next steps

If you would like to discuss any aspect of the ACCC's submission, we would be happy to arrange a meeting. Please contact Neville Matthew, General Manager, Consumer Product Safety Branch on 02 6243 1066 or at neville.matthew@acc.gov.au.

Yours sincerely



Delia Rickard
Deputy Chair