



AUSTRALIAN COMPETITION
& CONSUMER COMMISSION

Agricultural machinery: After-sales markets

Discussion Paper

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Australian Competition and Consumer Commission
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Executive Summary

Context of the discussion paper

Agricultural machinery is a significant capital item for a farm, involving substantial upfront and ongoing costs. This is increasingly the case with advances in computerisation and sophistication of design. Well-informed purchasers and competitive markets are therefore likely to deliver considerable benefits to the agricultural sector.

The Australian Competition and Consumer Commission (ACCC) has had an increased focus on competition and fair trading issues in the agriculture sector since 2015, when its dedicated Agriculture Unit was established. The ACCC has released this discussion paper to inform stakeholders about issues in the agricultural machinery industry. The work behind this discussion paper was initiated in response to concerns raised with the ACCC by stakeholders during the Australian Consumer Law Review,¹ and by the ‘right to repair’ debate occurring in the USA.²

The ACCC has set out to gain a better understanding of how the agricultural machinery industry operates, while focusing on key issues that have come to our attention relating to manufacturer warranties, and servicing and repairs.

Since April 2018, we have consulted with various stakeholders at the farmer, dealer and industry body level about their experiences in relation to purchasing and repairing agricultural machinery. We also sought additional information from manufacturers of several machinery brands commonly sold in Australia. We are grateful to all these stakeholders for the information they have provided.

This discussion paper is intended to inform interested parties about the initial concerns identified, and to assist them in engaging with the ACCC via a survey and submissions in order that the issues can be analysed further.

Key market observations

The discussion paper identifies a number of initial concerns about issues which may be harmful to competition and to purchasers of agricultural machinery. At this stage the ACCC has not formed a view about the prevalence of, or harm stemming from, the issues and practices outlined, or potential breaches of the *Competition and Consumer Act 2010* (CCA), including the Australian Consumer Law (ACL). We have not yet made any specific recommendations, and are also seeking to identify good industry practices which can be encouraged more broadly.

The ACCC is seeking further information and feedback from stakeholders, via a survey and submissions, to better understand the extent of the concerns identified in this discussion paper; specifically that:

1. access to independent agricultural machinery repairs is limited
2. farmers may lack recourse in the event of a problem with their machinery
3. agreements between manufacturers and dealers may limit access to repairs
4. data ownership and management may raise privacy and competition issues.

Access to independent agricultural machinery repairs is limited

There are a number of barriers that prevent machinery purchasers from using an independent business to repair or service their agricultural machinery. Some manufacturers void the machine's warranty if purchasers conduct repairs themselves or use an independent repairer, and in some cases manufacturers provide genuine parts, access to technical information and diagnostic software tools only to authorised dealers.

1 <http://consumerlaw.gov.au/consultations-and-reviews/australian-consumer-law-review>

2 For example, see <https://repair.org/agriculture>

These restrictions may allow manufacturers to charge monopoly prices in order to increase profits for their dealer networks. This may disproportionately affect purchasers in remote areas, as the availability of official repairers and genuine parts may be more limited. Limited availability of authorised repairers may result in delays during critical periods in the season, and result in significant travel and transport costs.

Farmers may lack recourse in the event of a problem with their machinery

Agricultural machinery frequently costs over \$40 000 and is not typically used for domestic or personal use. It is therefore unlikely to be covered by the ACL consumer guarantees, and the purchaser's options in the event of a product fault are usually limited to the manufacturer warranty or paying for repairs themselves.

Manufacturer warranties provide purchasers with some protections, but these are frequently limited and place restrictions on purchasers' access to independent repairers. Additionally, purchasers may be unaware of the limited recourse available to them.

Agreements between manufacturers and dealers limit access to repairs

Dealership agreements may contain terms that unduly place the risks of providing repairs on local dealers, incentivising dealers to reject warranty claims or to limit the service they offer to agricultural machinery purchasers.

Terms in some dealership agreements may prevent dealers competing to provide repair services outside a certain geographic area. The ACCC has heard mixed information about whether dealerships refuse to deal with customers who are located out of the area, or refuse to provide warranty support if they purchased machinery from another dealer.

Data ownership and management may raise privacy and competition issues

Agricultural machinery is becoming increasingly complex in its use of computer systems and data, and most modern machinery now has extensive data collection capabilities. One of the consequences of this is uncertainty in the market around data ownership and control, and rights to data in certain circumstances.

The lack of any clear rights to data may create a barrier to prospective purchasers considering different brands of machinery, because the more data a producer accumulates with a particular brand, the greater the potential cost to change to a different manufacturer in the future. This is in addition to issues regarding interoperability of machinery.

Next steps

The ACCC is seeking further information from market participants via a survey and submissions. The survey will be used to gather information regarding purchasers' experiences with buying and repairing agricultural machinery.

This further engagement with market participants may lead to a range of outcomes, such as:

- increased knowledge and awareness for purchasers of agricultural machinery regarding their rights under the ACL and CCA when engaging with manufacturers and retailers of agricultural machinery
- opportunities for the ACCC to make recommendations and/or to work collaboratively with industry and/or governments to develop solutions to any identified barriers to competition or other industry practices
- ACCC action to address any conduct in the industry that raises concerns under the ACL and CCA.

Process for providing feedback

The ACCC invites your views by way of [a survey](#) for purchasers of agricultural machinery, [written feedback](#), and telephone conversations. The ACCC has already contacted, and will continue to directly contact, some market participants to request specific information.

This discussion paper is intended to assist interested parties to draft any submissions they may wish to make. The discussion paper contains:

- key industry issues identified by the ACCC
- issues on which we are seeking comment
- information about how to make a submission.

Submissions

Interested parties should provide submissions by 5 April 2020.

Please provide your submission via the [ACCC consultation hub](#).

If you would like to provide information over the phone or if you have any questions, please contact agriculturalmachinery@acc.gov.au, or:

Emily Barlow
Ph: (02) 6243 1010

Survey

Purchasers of agricultural machinery are encouraged to complete the survey by 5 April 2020.

The survey is available via the [ACCC consultation hub](#).

Confidentiality

Treatment of submissions generally

All information contained in submissions and their source, may be referred to, relied upon or reproduced in part in the ACCC's reports or other outputs from this work, which will be public documents. However, the ACCC will not publish the submissions in full on the ACCC's website.

The ACCC is mindful that commercial sensitivities may be present in this industry and recognises that some interested parties may wish to make a confidentiality claim over certain information provided in their submission. Confidential information might include the source of the information (for example, your identity or the identity of a third party) or the content provided.

The ACCC will not treat a submission as confidential unless a confidentiality claim is made over all or part(s) of the submission.

The ACCC will also accept anonymous submissions.

Confidentiality claims

If you have concerns about the disclosure of certain information in your submission, you may make a confidentiality claim over all or part(s) of your submission. Any information which you consider confidential should be provided in a separate document to your main submission and should be clearly marked as “confidential” on each page.

The fewer anonymous submissions and confidentiality restrictions placed on submissions in response to this discussion paper, the better the ACCC can test information provided and reach accurate conclusions about the market. Therefore, we ask that information you claim confidentiality over be genuinely of a confidential nature and not otherwise publicly available. We request that you provide reasons in support of your claim, to assist the ACCC to better understand your claim and assess the information you provide.

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For further information on the ACCC’s treatment of confidential information, please refer to the ACCC/ AER Information Policy available on the ACCC [website](#).

Industry competition and consumer issues

The issues discussed in this paper are a guide to assist stakeholders to understand the potential competition and consumer concerns raised with or identified by the ACCC within the agricultural machinery industry.

The questions in this discussion paper are broadly mirrored in the survey released alongside the discussion paper, and have been drafted in the expectation that the responses to them will assist the ACCC to understand these issues. The ACCC does not consider the issues or questions raised in this discussion to be conclusive or exhaustive. The ACCC encourages interested parties to raise other issues relevant to the agricultural machinery sector. When making a submission, the ACCC encourages interested parties to provide specific information, including data and documents, in support of their submissions.

Background

A substantial proportion of agricultural machinery and equipment sold in Australia is imported, mostly from the US and Germany.³ Local manufacturers tend to be smaller companies that specialise in a particular type of agricultural equipment and parts.⁴

Major manufacturers of agricultural machinery and equipment sold in Australia include:

- John Deere, based in the US and with a number of facilities across the US, South America and Europe
- Case IH, with facilities in the US and Austria
- New Holland, with facilities in the US, Canada and Mexico
- CLAAS, with facilities in Germany and France
- Massey Ferguson, with facilities in France, Italy, Brazil and the US
- Kubota, with facilities in Asia, the US and more recently France.

Case IH and New Holland are subsidiaries of CNH Industrial (CNHIA).⁵ John Deere and CNHIA are the largest sellers of agricultural machinery in Australia.⁶ The Massey Ferguson brand is owned by global agriculture company AGCO.

After-sales markets

The after-sales market for agricultural machinery refers primarily to the market for servicing and repairing agricultural machinery and the market for replacement parts. Agricultural machinery manufacturers and dealers are usually active in both the supply of agricultural machinery and of after-sales service and parts.

Most manufacturers of agricultural machinery sell their machines through authorised dealerships. Authorised dealerships are businesses which have a franchise or 'dealer agreement' with a manufacturer. This agreement gives them the right to act as a primary seller of the manufacturer's equipment and authorised replacement parts and as a provider of authorised servicing and repairs, usually within a defined geographical area.

Independent repairers are repairers who operate outside manufacturer-authorised supply chains and in competition with authorised dealers. Independent repairers are frequently dependent on authorised businesses to access the information, data, tools and parts required to repair and service machines.

3 IBISWorld, *Industry Report C2461 Agricultural Machinery Manufacturing in Australia*

4 IBISWorld, *Industry Report C2461 Agricultural Machinery Manufacturing in Australia*

5 IBISWorld, *Industry Report F3411 Farm and Construction Machinery Wholesaling in Australia*

6 IBISWorld, *Industry Report F3411 Farm and Construction Machinery Wholesaling in Australia*

The after-sales parts market includes the market for both Original Equipment Manufacturer (OEM) or 'genuine' parts, as well as third-party replacement parts. 'Genuine' parts are original manufacturer parts and are usually supplied through manufacturer-authorized distributors, authorized dealers and resellers. Authorized dealers typically use 'genuine' parts when servicing and repairing machinery. Some dealers and manufacturers also sell 'genuine' parts directly to consumers and to other repairers. Many machines will have third-party, non-OEM parts markets, particularly for consumable or standard components like bearings, hoses, belts and tyres. These non-OEM parts are usually significantly cheaper than genuine parts, but are not available via authorized dealers. Not having access to non-OEM parts can increase the cost of using authorized dealers to repair or service a machine.

Agricultural machinery is expensive and purchaser rights are limited

Partly because of greater computerisation and sophistication of design, some types of agricultural machinery have become increasingly expensive to both own and repair. Some of the increases in costs may be due to the development of more sophisticated and efficient machines that can offer increases in productivity and better overall value to purchasers.

Agricultural machinery has a high upfront cost to farmers who may be in a relatively weak position to negotiate with manufacturers and dealers. In addition, the rights and protections available to farmers in relation to faults or failure of agricultural machinery are quite limited.

Goods sold for a price under \$40 000 or that are of the kind ordinarily acquired for personal or domestic use are sold subject to certain non-excludable consumer guarantees under the ACL. The ACCC understands that the price of most agricultural machinery exceeds \$40 000, and that larger or specialised machines can have a price which exceeds \$700 000. In addition, agricultural machinery is not ordinarily acquired for personal or domestic use. Consequently most agricultural machinery purchases are not covered by the ACL consumer guarantees⁷, and, as a result, purchasers will usually have to rely on the manufacturer's warranty in the event of a defect or fault.

Warranties are voluntary promises about what a purchaser can expect from a good or service in terms of its quality and characteristics, or the remedies available if they experience a problem. A manufacturer's warranty is usually provided upon the sale of agricultural machinery. Some manufacturers also provide an option to purchase an 'extended warranty' to extend the period of coverage.

It is important to understand that the terms and conditions of the manufacturer's warranty define the obligations of the manufacturer and the rights of the purchaser in the event of fault or failure of agricultural machinery, and purchasers will usually not have the protection of the ACL.

Agricultural machinery is increasingly computerised and complex

Modern agricultural machinery utilises complex, computerised systems that rely on embedded software to function. This technology has enabled greater productivity and innovation in some agricultural industries, but has also raised competition and privacy concerns.

Recent models of agricultural machines also gather significant amounts of data during their operation. This data can include both machinery performance data (for example, engine hours, operating temperature, oil levels), and farm production data (for example, crop yields, spray volumes, area sown). This data can be of great value to both manufacturers and purchasers, and some farms have adopted sophisticated practices to use this data to increase their productivity.

However, increased computerisation may also be exacerbating the difficulty that farmers face switching to new manufacturers. The ACCC has heard concerns that, as a result of the digital systems present in modern agricultural machinery, the longer a purchaser uses a particular brand of machinery, the more they have to lose in terms of their historical data if they switch to another brand.⁸ If this is a barrier to switching brands it could be negatively affecting competition in the market.

⁷ At the October 2018 Consumer Affairs Forum meeting, ministers agreed to raise the threshold to \$100 000. The ACCC understands that this increase would capture more agricultural machinery, but that the majority of purchases will still not be covered.

⁸ Mick Keogh, Farm Policy Journal Vol 14 No 4

New Car Retailing Industry market study

Many of the issues in this Discussion Paper were considered in the ACCC's [New Car Retailing Industry market study](#), in the context of the new car retailing industry. This market study was initiated in response to a number of concerns raised with the ACCC and other fair trading agencies related to the new car retailing industry, including issues about consumer guarantees and warranties, and access to technical information for servicing and repairing new cars.

The market study found that independent retailers, who are not authorised or affiliated with manufacturers, have limited access to technical information and parts used for the servicing and repair of new cars. Additionally, a number of other findings were made which may be of relevance to agricultural machinery markets, although at this stage the ACCC has not formed a view about whether this is the case. These findings included:

- Markets for the supply of aftermarket services in the car industry are less competitive as a result of factors including:
 - the ability and incentives of car manufacturers and their dealers to impede competition in profitable aftermarkets by controlling access to necessary inputs such as the technical information needed to repair and service a new car
 - high switching costs once consumers purchase a particular brand or make of car.
- Consumers are not receiving balanced information about their rights at the point of sale of a new car and many consumers face difficulties in understanding the application of the consumer guarantees to their purchase and the distinction between consumer guarantees and warranties.
- Commercial arrangements between manufacturers and dealers can constrain and influence the behaviour of dealers in responding to complaints.
- Manufacturers and authorised dealers generally earn higher profit margins from aftermarket services than from new car sales.
- High margins are earned on supply of spare parts and there is limited competition to supply certain spare parts for repair and service.
- Parts prices should be considered within a broader context of supply of new cars and other aftermarket services. However, the ACCC has no evidence that competition in the primary market eliminates the potential detriment to consumers from higher parts prices.

Some of the market study findings concerned consumer guarantee protections under the ACL. As outlined above, these protections generally do not apply to agricultural machinery.

Access to independent agricultural machinery repairs is limited

Key points

- There are a number of barriers that prevent purchasers using an independent repairer to repair or service their agricultural machinery.
- Some manufacturer warranties restrict purchasers from engaging independent repairers during the warranty period and purchasers risk losing their warranty if they do.
- Most manufacturers restrict access to technical information and diagnostic software tools that are necessary to repair their machinery.
- Some manufacturers supply genuine parts exclusively to authorised dealers.

Stakeholders have raised concerns with the ACCC about some agricultural machinery manufacturers restricting the use of independent repairers or penalising purchasers who have used third parties to work on their machinery. These include concerns regarding manufacturers:

- restricting access to diagnostic tools and information, repair information and machine parts to their authorised dealers
- voiding a machine's warranty if the purchaser uses an independent repairer
- refusing to cover repairs undertaken by an independent repairer under warranty.

The ACCC is also aware that some manufacturers will not reimburse warranty repairs undertaken by an independent repairer.

The ACCC understands that these practices apply to varying degrees in the agricultural machinery industry, depending in part on the brand of machine and type of repair.

The ACCC considers that manufacturers and dealers may have an incentive to restrict customers' ability to use independent repairers and non-genuine parts. By forcing customers to use authorised dealers and genuine parts, manufacturers could charge inflated prices for their parts and services and deny purchasers access to cheaper, more available services and parts. This could allow manufacturers to charge monopoly prices for replacement parts and increase the profits of their dealer network.

Such restrictions would be likely to particularly affect purchasers in remote areas, as the availability of official repairers and genuine parts may be more limited. These restrictions may also result in delays to repairs during critical periods in the season, or significant travel and transport costs to get machines repaired.

Purchasers face restrictions in using independent repairers

Agricultural machinery usually comes with a manufacturer's warranty that offers some protection to purchasers in the event of a defect. Subject to conditions set out in the warranty, a manufacturer, or their associated dealer, will generally repair a machine still under warranty at no direct cost to the purchaser.

The ACCC has heard concerns that the terms of manufacturer warranties restrict the ability of purchasers to use an independent servicer or repairer for their machines or to service or repair the machines themselves. Warranty terms may also restrict the use of non-genuine parts while the machine is under warranty.

A number of major manufacturers have provided the ACCC with a copy of their template warranty provided to purchasers of agricultural machinery. An ACCC review of these warranties has found:

- warranty terms typically specify that warranty repairs must be carried out by authorised repairers using genuine parts
- warranties typically do not allow for purchasers to be reimbursed for servicing or repair of their machinery if they do not use an authorised dealer and genuine parts
- some warranties expressly state that the warranty is subject to purchasers having their machinery serviced and repaired by an authorised dealer using genuine parts.

The ACCC has heard that timely repairs are extremely important for stakeholders who require machinery to be functional in key periods. If warranty restrictions prevent purchasers from obtaining timely repairs, this could be particularly problematic when:

- purchasers are located far away from an authorised dealer and an independent repairer is more conveniently located
- a purchaser has the skills to conduct the repair themselves if they could access the parts
- a machine breaks down during a particularly important period in the season and an authorised repairer is not immediately available.

The ACCC has heard from purchasers who are dissatisfied with the service offered by authorised repairers. These purchasers have reported that authorised dealers are more expensive or employing mechanics who have less experience than local independent repairers.

The ACCC is particularly concerned about the potential for manufacturers to refuse to honour warranties for machines that have been repaired by a third party, but develop a fault unrelated to that repair. Voiding a warranty in these circumstances is a particularly strong disincentive to the use of independent repairers, and there appears to be no reasonable basis for manufacturers do so.

Manufacturers have told the ACCC that these warranty terms are necessary to ensure repairs preserve the quality and safety of the machinery. While the ACCC acknowledges this concern, it notes that the risk of voiding the warranty is present irrespective of whether the quality and the safety of the machine is affected.

The ACCC understands that some manufacturers will generally permit use of independent repairers and non-genuine parts when carrying out minor maintenance and non-warrantable repairs (such as for damage due to normal wear and tear) without voiding the warranty.

The ACCC is concerned that restrictions on the use of independent repairers and non-genuine parts could adversely affect competition in the market for providers of agricultural machinery repair services. When purchasers are limited to using certain businesses to service or repair their machinery, this may result in the purchasers paying a higher price for repairs and services, as well as reduce the number of services and repairs for which independent repairers can compete.

Independent repairers compete on more than just price, including by making themselves available during peak periods in a season or outside normal business hours. By limiting the viability of independent repairers, these restrictions may be having a number of indirect detrimental effects on purchasers.

The ACCC recognises the need for manufacturers to control for risks, including fraud or poorly completed repairs, as part of providing a warranty for their product. The ACCC also acknowledges that a manufacturer cannot carry the risk of poorly conducted repairs by non-authorised independent repairers. The ACCC's primary concern is whether the restrictions are reasonable and necessary to achieve a balance between the needs of purchasers and commercial considerations of manufacturers.

Diagnostic software tools, technical information, and service manuals

Repairing agricultural machinery can also depend on having access to the software tools, technical information and service manuals held by manufacturers. The ACCC is concerned that manufacturers and their dealers are controlling access to diagnostic, service and repair materials, limiting the ability of independent repairers to compete in the provision of after-sales services.

Concerns have been raised with the ACCC about purchasers being unable to repair machines during peak periods in the season because they are reliant on dealer authorised repairers.

Several manufacturers have informed the ACCC that restrictions on accessing diagnostic software are necessary to ensure machinery complies with relevant safety and environmental regulations. They have also stated that software is the product of significant investment and restrictions are necessary to protect their intellectual property and commercial interests.

Manufacturers have also informed the ACCC that these restrictions are unlikely to limit an independent repairer from carrying out repairs in most cases, and largely prevent software modification.

The ACCC notes that there is a current legislative process and accompanying consultation in relation to similar issues for the independent repairer market for consumer motor vehicles.⁹ Some concerns in the agricultural machinery market differ from those in the consumer motor vehicle market. Purchasers of agricultural machinery may be better informed and more conscious of relevant safety and environmental regulations than an average consumer, so providing access to the relevant information

⁹ A consultation paper on general principles for a possible model for a mandatory scheme for access to motor vehicle service and repair information was released in early 2019. The next step in the formal consultation process is anticipated to be public consultation on draft legislative provisions. More information is available at <https://treasury.gov.au/publication/p2019-30661>.

may be more appropriate in relation to agricultural machinery. Conversely, in some circumstances, the potential consequences of unsafe or environmentally non-compliant agricultural machinery may be greater than is the case for a consumer motor vehicle.

The ACCC is seeking further information on:

- whether current limitations on independent repairers accessing diagnostic, service and repair materials is a barrier to them competing for business in the after-sales services market
- whether concerns about possible breaches of safety and environmental regulations are a necessary and reasonable justification for restrictions on access to data and diagnostic tools by independent repairers of agricultural machinery.

‘Genuine’ parts are restricted to authorised dealers

The ACCC has received information indicating that some manufacturers require the installation of genuine parts in their machines and can employ a number of methods to enforce this requirement. This includes voiding the machine’s warranty or causing the machine to stop working when a machine’s computer cannot verify the part as a genuine part. Even without these consequences, some agricultural machinery will have specialist parts that are not available through third parties.

The ACCC’s review of the industry confirms that some manufacturers exclusively supply genuine parts to their dealerships. While the impact of these restrictions is limited when machinery is under warranty, as most replacement parts should be provided free of charge, the restriction can affect the after-warranty repair market.

When genuine parts are necessary for the operation of machinery, limiting these to authorised dealers will limit the ability of independent repairers to compete with authorised dealers in providing repair and maintenance services.

Manufacturers and dealers have told the ACCC that they sometimes restrict access to parts due to concerns relating to security or protection of intellectual property. The ACCC recognises that in some cases there may be legitimate reasons to limit access to certain parts to authorised dealers. However, where this limitation has an anti-competitive purpose or effect, manufacturers are at risk of contravening the CCA.

There are questions about these issues in the survey. In addition, if you would prefer to make a submission, the ACCC would appreciate feedback from farmers, independent repairers, dealers, and other interested parties on:

1. Restrictions in manufacturer warranties which limit repair to authorised dealers and genuine parts during the warranty period
2. Manufacturers’ restrictions on access to technical information and diagnostic software tools
3. Differences in prices between genuine parts, and comparable quality non-genuine parts.

When providing feedback, you may wish to comment on:

- a. Examples of the types of work which purchasers and independent repairers can perform without affecting the warranty, and examples of work which require an authorised dealer to avoid voiding the manufacturer’s warranty
- b. Examples of the types of work which cannot be performed by an independent repairer, even outside the warranty period, due to inability to access parts, service manuals or diagnostic tools
- c. Examples of costs or quotes comparing the price of work carried out by authorised dealers with that of independent repairers
- d. Any impact (in terms of cost, delay or economic loss) which have resulted from either restrictions on independent repair work during the warranty period or restrictions on access to technical information.

Farmers may lack recourse in the event of a problem

Key points

- Agricultural machinery is a significant investment and a purchaser's recourse for faults is usually limited to the manufacturer warranty or paying for the repairs themselves.
- Manufacturer warranties provide purchasers with some protections, but these protections are limited and manufacturers have significant discretion on how to apply them.
- Purchasers may be unaware of their warranty's limitations.

The ACL is Australia's national law for fair trading and consumer protection, and provides a number of protections in the event that there is a problem with a good or service. One of these protections is a number of 'consumer guarantees' that require goods to be of acceptable quality and perform as expected.

For goods purchased after 1 January 2011, the consumer guarantees under the ACL apply to:

- goods that are sold, hired or leased for prices under \$40 000, or
- goods priced over \$40 000 when goods of that kind are typically used for personal, domestic or household purposes.

However, the consumer guarantees under the ACL do not apply to:

- goods that are acquired with the purpose of re-supply
- goods that are acquired for the purpose of using them up or transforming them:
 1. in the course of a process of production or manufacturing in trade or commerce
 2. in the course of repairing or treating other goods or fixtures on land.

At the October 2018 Legislative and Governance Forum on Consumer Affairs, federal, state and territory ministers voted to increase the \$40 000 threshold to \$100 000. As of the time of publishing this discussion paper, the federal government has not introduced legislation implementing this change.

Agricultural machinery frequently costs over \$40 000 and is not typically used for domestic or personal use, and purchasers are therefore not likely to be protected by the ACL consumer guarantees. Even if the value threshold is increased to \$100 000, a significant percentage of agricultural machinery purchases will not be covered by the consumer guarantees. The ACCC understands that, in most circumstances, a purchaser's primary recourse in the event of a fault with their machine is the manufacturer's warranty.

The ACCC is concerned that purchasers of agricultural machinery may not be fully aware of the terms of the manufacturer's warranty and the sale agreement at the time of sale. Even where purchasers are aware of these terms, the terms will usually form part of a standard form agreement which does not give purchasers scope to negotiate.

Purchaser engagement with warranty terms and conditions may be low

The ACCC understands that the level of purchaser engagement with the terms and conditions of their warranty may in many cases be quite low. This means some purchasers have been surprised to discover that a fault developed by a machine within the warranty period is not covered by the specific terms of the warranty. In some circumstances, this could be because the purchaser has used an independent repairer to service their machine and this has voided their warranty.

A purchaser who does not understand their warranty will not consider and account for all relevant risks in their decision to purchase a machine. If a purchaser understands the machine warranty, they can take into account the potential likelihood and cost of a defect as well as the likelihood of the warranty covering the repair. A lack of engagement also reduces the incentive for manufacturers to provide a more generous warranty as a way to compete, as purchasers will not adequately account for it in their purchasing decision.

Lack of engagement may be partly due to the complexity of warranty documents. The ACCC has reviewed warranties from a number of manufacturers, and these documents frequently use legal terms and language that may not be understood by many purchasers.

In the survey accompanying this discussion paper there are a number of questions intended to gauge purchaser understanding and engagement with warranties offered, and the extent to which purchasers consider warranty coverage in their purchasing decision. The ACCC encourages parties wishing to make a standalone submission to also provide information and evidence relating to these issues.

Warranties are not commensurate with consumer guarantees

In most circumstances, the manufacturer warranty is the sole protection available to purchasers against agricultural machinery faults. Manufacturer warranties will generally fall short of protections that are available to consumers under the ACL consumer guarantees. For example, most manufacturer warranties place restrictions on using independent repairers and non-genuine parts.

By contrast, purchasers can use independent repairers to repair goods covered by the ACL consumer guarantees without affecting their statutory rights against the manufacturer, dealer or supplier. If the good later develops a fault that is unrelated to the repair, the consumer guarantees still apply in relation to that fault.

The ACCC has identified the following key differences between rights provided by most manufacturer warranties and statutory rights under the ACL consumer guarantees:

- Purchasers are not reimbursed for the travel or transport costs involved in repairing machinery even when it is otherwise covered by warranty. This includes the travel costs involved in having a dealership repairer visit the location where the machinery is stationed, and the costs involved in transporting machinery to the dealer's premises. The ACCC understands that costs can be significant where farms are in remote locations.
 - Under the ACL consumer guarantees a purchaser has a right to seek damages for losses related to a good's failure to meet the consumer guarantees, and in some circumstances the dealer or supplier may have to collect the goods from the customer, at their own expense.
- Manufacturer warranties reviewed by the ACCC limit their liability for any consequential losses for defective parts or workmanship. Farmers can incur significant financial losses when machinery is not functioning during key parts of the season and have no way to recover those losses. This also removes an incentive for manufacturers to make repairs available in a timely fashion during peak operational periods.
 - Under the ACL consumer guarantees a purchaser has a right to seek damages for consequential losses related to a good's failure to meet the consumer guarantees.
- Some clauses in the warranty documents provide significant manufacturer or dealer discretion as to whether repairs are covered under the warranty.
 - Under the ACL consumer guarantees a supplier, dealer and/or manufacturer cannot contract out of or limit the requirement that goods sold meet the consumer guarantees.
- Purchasers have no rights in relation to the repair of machinery defects outside the warranty period.
 - The consumer guarantees apply for a reasonable period of time. This can be longer than the manufacturer's warranty provided with the good.
- Purchasers have limited direct rights against the dealer or supplier of the machine. As manufacturer warranties do not necessarily cover components manufactured by different companies, purchasers may have to pursue separate warranty claims with various manufacturers rather than through the dealer.
 - Under the ACL consumer guarantees a consumer can seek a remedy from either the supplier, dealer or manufacturer. Dealers or suppliers are obliged to provide a remedy (i.e. refund, repair or replacement) when there is a fault. However, in relation to manufacturers, the ACL consumer guarantees are limited to a claim for damages.

- Warranties can be made invalid if purchasers or dealers do not complete mandatory administrative requirements.
 - The consumer guarantees cannot be contracted out of (i.e. limited, restricted or modified) by suppliers, dealers or manufacturers.

The ACCC would appreciate feedback on:

1. Terms in manufacturer warranties which limit purchasers' ability to seek recourse and full compensation for faulty equipment.

When providing feedback, you may wish to comment on:

- a. The type of equipment purchased, its cost and its features
- b. Instances where purchasers have been charged for travel and transport costs in connection with repairing faulty equipment
- c. Experiences with any delays in repair
- d. Examples of losses incurred (economic or otherwise) as a consequence of faulty equipment and delays in repair
- e. Examples of instances where purchasers have been unreasonably refused repairs, either during or outside the warranty period
- f. Administrative requirements necessary to fulfil a warranty claim, and whether these are overly burdensome or complicated
- g. The process of explaining warranty terms at the point of sale, and the customer's experience of this
- h. The ability of purchasers to negotiate with dealers in relation to the warranty, or where dealers offer a warranty additional to the manufacturer warranty.

Agreements between manufacturers and dealers may limit access to repairs

Key points

- Contracts between manufacturers and dealers may limit the ability for local dealers to provide repairs.
- Dealership agreements may contain terms that unduly place the risks of providing repairs on local dealers.
- Some dealership agreements may prevent dealers competing to provide repairs to a manufacturer's machine outside a certain geographical area.

Dealership agreements between manufacturers and dealers contain a number of terms that may constrain the ability for dealers to offer a remedy to purchasers, in the event of machinery fault or failure. Dealers are faced with the challenge of balancing their obligations to purchasers, safeguarding their own financial interests and maintaining a long-term commercial relationship with their manufacturer. The ACCC has identified a number of practices and contractual obligations that are of potential concern:

- Manufacturers exclude travel and transport costs when calculating reimbursement due to dealers, even when machinery is under warranty. These costs become the responsibility of the final customer when defective parts or workmanship is an issue and the equipment is still under warranty. Dealers may choose to absorb these costs, or face the burden and risk of pursuing them from customers.
- Manufacturers place the responsibility on dealers to provide and pay for staff training and ensure they are providing all relevant information to purchasers. The ACCC understands that many manufacturers do not monitor whether purchasers are informed about warranty terms.

- While dealer agreements reviewed contain terms addressing the procedures to follow in the event of warranty claims, these policies focus on rights under the manufacturer's warranty rather than consumer rights under legislation (to the extent that these apply, see page 11).

The ACCC is concerned that such clauses may impact on the service which purchasers receive from dealers.

Geographical restrictions on dealerships may limit competition for repairs

The agreements between manufacturers and dealers frequently assign an 'area of responsibility' or 'prime marketing area' to a dealership. These arrangements assign a geographical area in which the dealer is the primary seller of the manufacturer's products, and provider of authorised servicing and repairs.

Manufacturers have informed the ACCC that the purpose of assigning dealers a specified geographic area is not to restrict competition, but to ensure dealerships have adequate business to remain viable. However, the ACCC has heard concerns about dealerships refusing to deal with customers who are located out of the area, or refusing to provide warranty support if they purchased machinery from another dealer.

The effect of these restrictions may be that dealers are able to charge higher prices or provide lower quality after-market goods and services than would be possible in the absence of these restrictions.

Dealership agreements may contain unfair contract terms

The ACCC has identified a number of terms in manufacturer or dealer documents regarding the supply and repair of agricultural machinery that may raise concerns under the unfair contract terms protections in the ACL.

The unfair contract terms protections apply to standard form contracts where at least one of the parties is a small business (employs less than 20 people) and where the upfront price payable under the contract is no more than \$300 000, or \$1 million if the contract is for more than 12 months. If a court finds a term to be unfair, the court can declare that term to be void and unenforceable.

Standard form contracts are those prepared by one party to the contract where the other party has little or no opportunity to negotiate the terms. This is sometimes referred to as being offered on a 'take it or leave it' basis. Potentially unfair terms include those which:

- enable one party (but not another) to avoid or limit their obligations under the contract
- enable one party (but not another) to terminate the contract
- penalise one party (but not another) for breaching or terminating the contract; or
- enable one party (but not another) to vary the terms of the contract.

The ACCC has reviewed a number of dealer agreements and notes that some terms they contain may be unfair contract terms. However, given the price of agricultural machinery the ACCC anticipates that the upfront price payable under a small business contract will be above the relevant threshold in a significant number of cases.

The government recently undertook a review of the unfair contract terms legislation (UCT review), including the existing value threshold. The government is now seeking feedback on options to enhance the unfair contract term protections. The ACCC encourages stakeholders to provide the government with relevant input on this through the consultation page on the Treasury website.¹⁰

¹⁰ For more information see: Enhancements to Unfair Contract Term Protections, <https://consult.treasury.gov.au/consumer-and-corporations-policy-division/enhancements-to-unfair-contract-term-protections/>. Submissions close 16 March 2020.

The ACCC would appreciate feedback on:

1. Concerns about terms in agreements between manufacturers and dealers, particularly those which are potentially unfair or which limit competition between dealerships
2. Whether manufacturer and dealer agreements would be covered by the existing unfair contract term legislation.

When providing feedback, you may wish to comment on:

- a. Examples of terms in dealership agreements which impact on dealers' ability to reimburse purchasers for faulty equipment
- b. The monetary value of dealership agreements
- c. Examples of instances where purchasers have been denied a quote for a product, or denied service on the basis that they are located outside the dealership's area of responsibility, or on the basis that machinery was purchased from another dealership.

Data ownership and management may raise privacy and competition issues

Key points

- Agricultural machinery is becoming increasingly complex in its use of computer systems and data.
- There is significant uncertainty in the market around data ownership, control and rights to data in certain circumstances.
- The lack of any direct right to data may create a barrier to prospective purchasers considering different brands of machinery.

Modern agricultural machinery increasingly utilises or relies on computer systems to function as intended and with all the efficiency upgrades that this technology enables. As a result, most modern machinery now has extensive data collection capabilities. This data is both 'machinery data', such as data on running time and engine oil levels, and 'production data', being data detailing things such as crop yield in certain areas. This data can significantly improve the performance and utilisation of machinery by enabling real-time monitoring, scheduling routine maintenance and allowing remote immobilisation. However, the increased use of data in agricultural machinery may also raise competition and data ownership concerns.

The ACCC understands that many modern agricultural machines are designed to work more effectively with other pieces of machinery from the same brand, termed 'interoperability'. There can be significant barriers to another brand's agricultural machinery being able to access the same systems and data.

The ACCC is concerned that this may have the effect of 'locking' producers into a particular brand of agricultural machinery. If a prospective purchaser has invested heavily in the technology and systems to make better use of the data available to them, loss of that data would be a significant cost associated with a decision to change brands. Production data is more valuable the more seasons it covers, as it allows a producer to control for seasonal variance, operation error and other data fluctuations. Consequently, the more data a producer accumulates with a particular brand, the greater the potential cost to change to a different manufacturer in the future.

The ACCC is also concerned that most purchasers are unaware of the contractual terms governing the rights to data collected by machines. Data collection and ownership is governed by End User Licensing Agreements (EULA) that a purchaser will agree to during setup of the software in their machines. These EULAs can be dozens of pages long and presented in a way that makes it highly unlikely that a user will read them. A CSIRO survey found that 74 per cent of farmers say they have little or no knowledge

about the terms of EULAs regarding their data.¹¹ This raises questions about the information provided to purchasers at the time of sale regarding the extent of their rights.

The ACCC is seeking more information on

- The impact of existing data accumulation and transferability on a prospective buyers' consideration of which brands they may purchase
- Purchasers' understanding of their rights with respect to data collected by their machines, including their right to access and use that data.

The ACCC would appreciate feedback on:

1. The collection and uses of data as it relates to agricultural machinery

When providing feedback, you may wish to comment on:

- a. Privacy concerns regarding manufacturer-retained rights over machine and production data
- b. How data rights and interoperability limits impact the ability to switch between manufacturers/ brands of farm machinery and/or associated data collection and monitoring sensors and consoles.

¹¹ Leanne Wiseman and Jay Sanderson, Accelerating Precision Agriculture to Decision Agriculture, 14, <https://www.crdc.com.au/sites/default/files/P2D%20Legal%20Dimensions%20-%20Griffith%20USC%20Final%20Report.pdf>.



AUSTRALIAN COMPETITION
& CONSUMER COMMISSION

