



AUSTRALIAN COMPETITION
& CONSUMER COMMISSION

Agricultural machinery market study

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Australian Competition and Consumer Commission
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Executive Summary

This report provides the findings and recommendations from the Australian Competition and Consumer Commission's (ACCC) market study into agricultural machinery markets.

Agricultural machinery is a significant capital item for many farm businesses, involving substantial upfront and ongoing costs. This is increasingly the case with advances in computerisation and sophistication of design. This evolution in the design of agricultural machinery has brought substantial benefits such as increased efficiency and farm productivity, but also some new challenges.

This study examined markets for the direct sale of agricultural machinery, as well as those for after-sales services, such as repairs. Within these markets, there is a wide range of different product, service and geographic markets.

The ACCC has examined competition issues, such as access to after-sales markets, and fair trading issues, such as the operation of warranties, in these markets.

Based on this analysis and the issues raised, a key concern arises in after-sales markets for agricultural machinery service, parts and repairs. The ACCC's primary concern is that access to, and competition within, after-sales markets can be limited by:

- **Warranty restrictions:** Manufacturer warranties can impact competition for servicing and repairs, and create barriers to entry in repair markets by discouraging the use of independent repairers.
- **Technological restrictions:** Restrictions on access to the software tools, technical information, service manuals and parts held by manufacturers can limit competition in after-sales markets.

In addition, a key emerging issue is the control over, and use of data. Some voluntary measures have been adopted by the industry to increase machine interoperability and to improve transparency in relation to how data is used. These are positive developments, and further improvements would facilitate competition and enable informed decisions by purchasers.

A significant issue raised in this market study is arrangements that assign an 'area of responsibility' or 'prime marketing area' to an agricultural machinery dealership. While these arrangements have the potential to dampen competition, at this stage, the ACCC has not obtained evidence that indicates that such arrangements are likely to substantially lessen competition.

Based on its findings, the ACCC's recommendations and future action are primarily targeted at promoting competition in after-sales markets and increasing transparency in relation to the information available to purchasers of machinery at the earliest practical opportunity in the sales process and before the point of sale.

After-sales markets

Access to remedies when faults occur with machinery, and access to after-sales markets, were major concerns identified in this market study.

Warranties

Purchasers raised the operation of warranties as a key concern. Agricultural machinery is a significant investment. In most circumstances, a purchaser's primary recourse if there is a fault with agricultural machinery is the manufacturer's warranty.

The consumer guarantees generally don't apply to machinery purchases

The consumer guarantees in the Australian Consumer Law (ACL) offer a range of protections for purchasers of consumer goods and services. They apply to products purchased by businesses in some circumstances. However, the ACL is unlikely to apply to most purchases of agricultural machinery, as these are of a high-value and not normally used for personal, domestic or household purposes. A number of submissions called for the consumer guarantees to be expanded so they apply to agricultural

machinery. For example, submissions from the National Farmers' Federation (NFF) and Victorian Farmers' Federation suggested that there is often unequal bargaining power between purchasers and multinational manufacturers, and contrasted purchases of agricultural machinery with typical business-to-business transactions. While acknowledging this, the ACCC considers that industry-specific measures, rather than the broad protections offered by the consumer guarantees for lower value purchases, will better address competition issues in agricultural machinery markets.

Many warranties have significant limitations

The ACCC heard from purchasers who had experienced significant costs, losses, delays and other difficulties when seeking remedies for faults that had arisen with their machinery. This included a large proportion of survey participants who had had a warranty claim rejected. Stakeholders emphasised the costs involved in running an authorised dealership and responding to warranty claims. However, other parties submitted that current protections provided by manufacturers' warranties are not sufficient considering the cost and complexity of most machinery.

While the ACCC acknowledges that warranties are voluntary protections offered by manufacturers, they contain a number of limitations that can result in substantial losses to purchasers in the event of a fault with machinery. These include:

- Limiting manufacturers' liability for income losses and other losses caused by problems with their machinery. In some cases, this could prevent purchasers from pursuing legal claims relating to losses that would otherwise be available outside of the warranty. The ACCC considers such terms could potentially be unfair contract terms within the meaning of the Australian Consumer Law.
- The short length of some warranties given the cost and expected life of machines.
- Requiring purchasers to incur travel, transport and freight costs associated with obtaining repairs, even in circumstances where the fault or defect was not caused by the purchaser.

The limitations of warranties are often not fully understood by purchasers

Survey results indicated that purchasers lacked confidence in their ability to understand manufacturers' warranties. Less than one third of participants said they were 'very confident' (4%) or 'confident' (26%) that they understand their warranty and, in particular, which categories of repairs or servicing are and are not covered by their warranty.

Several stakeholders suggested that there should be requirements for improved plain language oral and written disclosure of the terms and extent of warranties, at the time of purchase. By contrast, the manufacturing sector reported that warranties are clear and transparent. However, despite some efforts by the manufacturing and retailing sectors to increase purchaser understanding of warranty terms and conditions, the level of purchaser understanding of, and engagement with, warranty conditions appears to be low.

The ACCC considers that the obligation to engage with warranties is important for both sellers and buyers of agricultural machinery. It is important that purchasers consider and understand the warranty at or before the time of sale to ensure that both parties are clear about their rights and obligations. The ACCC recommends that manufacturers and dealers ensure that warranties are clear and transparent, and provide a plain English explanation of warranty terms and conditions, including key limitations, at the earliest practical opportunity in the sales process and before the point of sale. In addition, the ACCC considers manufacturers should set out a dispute resolution process in their warranties, to make purchasers aware of how warranty disputes will be resolved.

The ACCC will develop simple guidance materials to assist purchasers of agricultural machinery to understand their business and consumer rights.

Access to tools, technical information and parts

Modern agricultural machinery increasingly utilises complex computerised systems that rely on embedded software to function, leading to increased productivity and innovation. However, a consequence is that repairing agricultural machinery can require access to the software tools, technical information and service manuals held by manufacturers.

Nearly half of survey participants reported that they (or an independent repairer they had engaged) had limited or no access to diagnostic software tools to carry out servicing and repairs. These restrictions can impact competition in after-sales markets regardless of whether or not machinery is under warranty, by limiting the ability of independent repairers to participate in these markets. The manufacturing and retailing sectors argue that such restrictions are necessary to maintain safety standards.

Access to independent repairs has been an important issue in a number of markets, both in Australia and overseas. The Productivity Commission is currently conducting an inquiry into right to repair issues. In May 2018, the Government announced plans to introduce a mandatory motor vehicle service and repair information sharing scheme to increase competition in motor vehicle after-sale markets. The Competition and Consumer Amendment (Motor Vehicle Service and Repair Information Sharing Scheme) Bill 2021 was introduced to the House of Representatives in March 2021. Under the scheme, the definition of a vehicle does not include farm machinery. However, a rule-making power has been included to enable other vehicle types to be brought into the scheme in the future. The Australian Government has noted that further consultation would be needed in order to consider including agricultural machinery in the scheme.¹

Manufacturers and dealers have an incentive to restrict customers' ability to use independent repairers as such restrictions increase the revenue they generate in after-sales markets. Limiting access to necessary tools and technical information, and forcing customers to rely on authorised dealers for servicing and repair work, limits competition in after-sales markets, likely results in higher costs for owners of agricultural machinery, and therefore reduces the overall efficiency of these markets. These restrictions reduce independent repairers' ability to compete in after-sales repair markets, regardless of whether or not machinery is within warranty. These restrictions can also lead to poorer outcomes for purchasers. For example, purchasers who cannot quickly have equipment repaired risk significant financial loss in certain circumstances.

The ACCC considers that competition in after-sales markets would be improved if independent repairers have access to tools and parts on fair and reasonable commercial terms. While acknowledging the unique nature of agricultural machinery markets, alignment with broader right to repair schemes will enable the development of a scheme that fits with the approach for the broader economy. It will also enable the development of an approach that recognises the legitimate commercial interests of manufacturers and dealers. The ACCC therefore recommends that agricultural machinery:

- be included as part of any broader right to repair scheme introduced in Australia
- be considered for inclusion in the motor vehicle service and repair information sharing scheme at the first review of the scheme.

Data use

Modern agricultural machinery increasingly utilises or relies on computer systems to function as intended, and many agricultural machines now have extensive data collection capabilities. This data is both 'machinery data', such as engine operating speeds and times, and 'production data', such as crop yield data collected by combine harvesters. The value of production data, in particular, increases over time as data from multiple production years is accumulated.

Enhanced machinery interoperability can promote competition

Over half (60%) of survey participants said interoperability or potential data loss would influence their decision when buying data-capable machinery. A number of submissions raised concerns about a lack of interoperability between brands or between older and newer machinery. The lack of interoperability of machinery software and collected data increases switching costs and creates the potential for 'proprietary lock-in'. This may reduce purchaser choice, and can reduce competition and overall market efficiency.

1 Competition and Consumer Amendment (Motor Vehicle Service and Repair Information Sharing Scheme) Bill 2021, Explanatory Memorandum, 13 [1.45].

Information received by the ACCC indicates that manufacturers are taking steps to improve the compatibility of data systems embedded in their equipment with data systems in other machinery brands. In addition, some agricultural machinery owners are also aware of how they can transfer data from one brand of machinery to another. The ACCC considers that an industry driven solution to the risk of data-associated 'lock in' is preferable to regulation if this can be achieved. In this context, the ACCC recommends that manufacturers continue to ensure their products are compatible with International Organization for Standardization (ISO) data standards to allow a greater degree of interoperability. In addition, the ACCC recommends that information about machine and data interoperability be provided in plain English at the earliest practical opportunity in the sales process and before the point of sale.

Purchasers lack clarity about the use of data

Survey results suggest purchasers of agricultural machinery believe they receive too little information about their rights in relation to data at the point of sale. For example, almost half (48%) reported receiving no information about their data rights when purchasing their newest piece of machinery. Given the importance of machine and production data as an asset, this creates uncertainty among purchasers about the value and use of their data.

The rights associated with the control and use of data generated from farm machinery and other sources on farms is an important emerging issue. This is reflected by the NFF's release of the *Australian Farm Data Code*. The purpose of the Code is 'to inform the policies of service providers who manage data on behalf of farmers'.

The ACCC has found that many purchasers do not understand the circumstances under which manufacturers can aggregate, share and benefit from data generated by purchasers' machinery. Greater transparency on these issues would enhance purchaser confidence and enable purchasers to understand the value of the data they are producing when purchasing machinery. As such, the ACCC recommends that greater clarity be provided to purchasers at the earliest practical opportunity in the sales process and before the point of sale about how their data will be used.

Given voluntary industry efforts to address data issues are at an initial stage, the ACCC does not consider that regulation should be considered at this time. The ACCC notes submissions calling for the application of the Consumer Data Right (CDR) scheme to data generated by agricultural machinery. While the ACCC does not propose there is a need for immediate regulation, the application of the CDR may be a viable option in the future that could be considered as the Australian Government continues to apply the CDR to additional sectors.

Recommendations and ACCC action

Recommendations

1. **The ACCC recommends that agricultural machinery be considered for inclusion in the motor vehicle service and repair information sharing scheme.**

The ACCC considers that work regarding how agricultural machinery could be incorporated into the scheme should commence with a view to it being considered for addition at the first review of the scheme.

The scope of the motor vehicle service and repair information sharing scheme would not enable it to address all issues that exist in machinery markets, such as access to replacement parts. As such, broader right to repair pathways should also be pursued.

2. **The ACCC recommends that agricultural machinery be included as part of any broader right to repair scheme introduced in Australia.**

This will enable right to repair issues in agricultural machinery markets to progress in line with markets in the broader economy. The details of the issues that should be addressed under any right to repair scheme are discussed in chapters 4 and 5.

The ACCC considers that future Australian right to repair legislation could include provisions that require manufacturers to:

- grant access to diagnostic software tools and OEM parts to independent repairers on commercially reasonable terms ('duty to deal').
 - require that a sufficient supply of parts be readily available in Australia for a defined period from the date of the sale agreement
 - provide purchasers with information regarding how long a certain software system will be supported.
3. **The ACCC recommends that manufacturers and dealers provide clear and concise information to purchasers about warranties at the earliest practical opportunity in the sales process and before the point of sale.**

This information should include a one-page statement about the terms and key limitations of the warranty and should set out a clear process for resolving disputes over warranty claims.

4. **The ACCC recommends that manufacturers and dealers provide information to purchasers about data issues at the earliest practical opportunity in the sales process and before the point of sale.**

This should include:

- information about machinery interoperability
- explaining how purchasers can access and transfer their data
- a statement about how the manufacturer will use data captured by the machine, including options which allow purchasers to 'opt out' of schemes that would share or aggregate the data.

5. **The ACCC recommends that manufacturers continue to adopt ISO data standards to promote interoperability between brands of machinery.**

The ACCC acknowledges that some manufacturers are adopting measures which would increase the interoperability of the data generated by their machinery with that generated by other brands, and considers that improvements in interoperability will improve the performance of agricultural machinery markets.

ACCC action

1. **The ACCC will develop guidance materials to assist purchasers of agricultural machinery to understand their business and consumer rights.**

This guidance material will be available to industry by the end of 2021.

The ACCC will continue to monitor issues in agricultural machinery markets after the release of this report, including in relation to the adoption of these recommendations.

Conduct of the market study

The ACCC commenced this self-initiated market study in order to gain a better understanding of competition issues in agricultural machinery markets.

In February 2020 the ACCC released the *Agricultural machinery: After-sales markets Discussion paper* which identified a number of initial concerns about issues which may be harmful to competition in agricultural machinery markets. These included that:

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

The ACCC sought information from a wide range of sources to inform this report. As this was a self-initiated market study, the ACCC did not have powers to compel information from parties. However, the ACCC received very positive responses to requests for information from industry participants and, in particular, in response to the ACCC's purchaser survey. The ACCC:

- received 44 submissions in response to the discussion paper from across the industry
- received 335 responses to its purchaser survey
- met with a range of interested parties at different levels of the supply chain
- issued voluntary information requests to a number of businesses, to obtain information and documents, such as contracts.

The detailed results of the purchaser survey have been published as a separate report.

The role of the ACCC

The ACCC is an independent Commonwealth statutory authority whose role is to administer the *Competition and Consumer Act 2010* (CCA), including Schedule 2 of the CCA, which is the Australian Consumer Law. The competition laws in the CCA prohibit cartel conduct, resale price maintenance and acquisitions that would have the effect or be likely to have the effect of substantially lessening competition in any market. The CCA also prohibits anti-competitive agreements, misuse of market power and exclusive dealing, with these conducts only unlawful where a substantial lessening of competition test threshold is met. The Australian Consumer Law contains laws to protect consumers, and also includes laws relating to fair trading between businesses, such as misleading or deceptive conduct, unconscionable conduct, unfair contract terms and consumer guarantees.

The ACCC focuses on taking action that most promotes the proper functioning of Australian markets, protects competition, improves consumer welfare and stops conduct that is anti-competitive or harmful to consumers. This includes undertaking market studies to support competition, consumer and regulatory outcomes. Outcomes of these studies can include recommendations for voluntary industry or regulatory change, as well as education regarding and enforcement of existing legislation and regulations.

ACCC approach to recommendations

Competitive, informed and (when necessary) well-regulated markets lead to lower prices, better quality products and services, and more choice. This market study has identified a number of issues in the agricultural machinery industry which may cause markets to be less competitive and well informed as is desirable. Existing regulatory arrangements in the CCA cannot fully address many of the concerns raised.

When assessing issues identified through market studies, the ACCC considers a spectrum of options. A suite of regulatory tools and approaches are often needed to address significantly harmful practices. The ACCC considers that industry driven changes are preferable to added regulation where they can be effective.

The ACCC's framework for considering the best means of addressing these challenges is:

1. Can the harms be addressed by existing laws through ACCC action?
2. If ACCC action is not possible, can existing competition and fair trading laws be improved to address these harms?
3. If existing laws cannot be improved, are more substantial reforms required and if so, should they be focused on a particular industry or have economy wide effect?
4. Are there problems that fall outside the scope of competition and fair trading laws?

In considering reform options for the sector, the ACCC recognises that while competition and fair trading legislation should seek to protect against significant detriment, unnecessary intervention can add costs for market participants and can dampen innovation. The ACCC's recommendations take these considerations into account, while targeting the harms identified in the industry.

1. Overview of agricultural machinery markets

Key points:

- The market for agricultural machinery is substantial, with industry revenue in the billions of dollars. The spare parts market also forms a significant revenue stream.
- Agricultural machinery manufacturers and dealers are usually active in both the supply of agricultural machinery and of after-sales service and parts. Independent repairers operate in competition with authorised dealers, outside manufacturer-authorised supply chains.
- Authorised dealers typically supply both primary and secondary (after) markets, whereas independent repairers supply just the after (repair and servicing) market.
- Survey responses indicate that purchasers prioritise customer service, ease of servicing or repair, and reputation or past experience with the brand over machinery prices and warranty terms.
- While the majority of purchasers sought quotes from multiple dealers and for more than one brand of machinery, survey results indicate that interoperability was a barrier to consumer choice, and that not all purchasers could obtain quotes from all dealers that they approached.

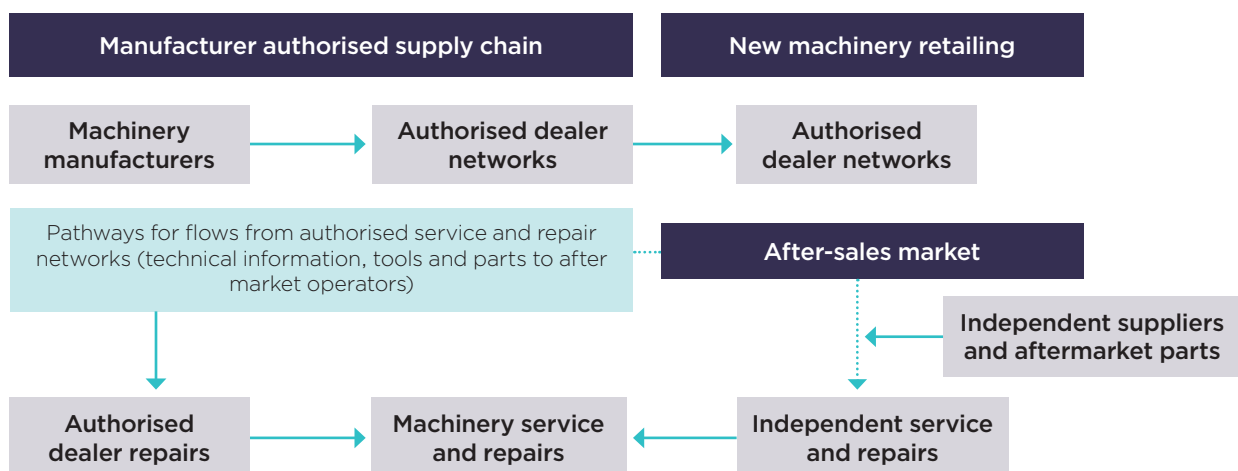
1.1 Agricultural machinery markets

1.1.1 There is a primary market for agricultural machinery and a secondary market for its servicing

In the agricultural machinery sector, 2 general markets can be defined – the market for purchasing machinery or ‘the supply market’ (primary market) and the market for servicing, repairs and replacement parts commonly referred to as the ‘after-sales market’ (‘secondary market’). These are substantial markets for the sale, repairs and servicing of high-capital items.

Figure 1.1 outlines the relationship between these various elements of the industry. Within the primary market, competition is likely to take place within specific product categories (for example, tractors of a particular horse power or combine harvesters) and within geographic regions.

Figure 1.1 New agricultural machinery retailing and aftermarket industry overview



Most manufacturers 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 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.

The after-sales parts market includes markets for Original Equipment Manufacturer (OEM) or 'genuine' parts, as well as third-party replacement parts. Parts for agricultural machinery form a significant revenue stream for the industry, with the market value being close to that for tractor sales or planting and harvesting equipment.²

OEM parts are usually supplied through manufacturer-authorised distributors, authorised dealers and resellers. Authorised dealers typically use OEM parts when servicing and repairing machinery. Some dealers and manufacturers also sell OEM parts directly to consumers and other repairers. Many machines will have third-party, non-OEM or 'non-genuine' parts markets, particularly for consumable or standard components like bearings, hoses, belts and tyres.

1.1.2 Cost of agricultural machinery

Some types of agricultural machinery have become increasingly expensive to both purchase and repair because of greater computerisation and sophistication of design. While this machinery may offer increased productivity and better overall value to purchasers, it is likely to be a significant capital investment. In 2014, the Grains Research and Development Corporation estimated that, based on an analysis of farms in the Wimmera Mallee region of Victoria, machinery capital amounts to approximately 11% of farm income on average, with machinery repairs amounting to a further 6%.³

The NFF's submission highlighted that the vast majority of agriculture businesses (96%) generate under \$2 million in annual revenue, while the cost of a combine harvester has increased from less than \$100,000 to approximately \$600,000 since 1990.

An example of the increase in machinery costs can also be seen in sales of tractors with engines greater than 90kW (see box 1.1 for an overview of sales). The average nominal price of these tractors has increased by 64% over the last 10 years (figure 1.4). However, figure 1.4 also shows that nominal prices have not increased equally across the market; tractors in the 30-60kW market have only increased marginally, and in the 30KW market, prices haven't increased at all. The scope of this market study has not extended to drawing conclusions regarding the reasons for this.

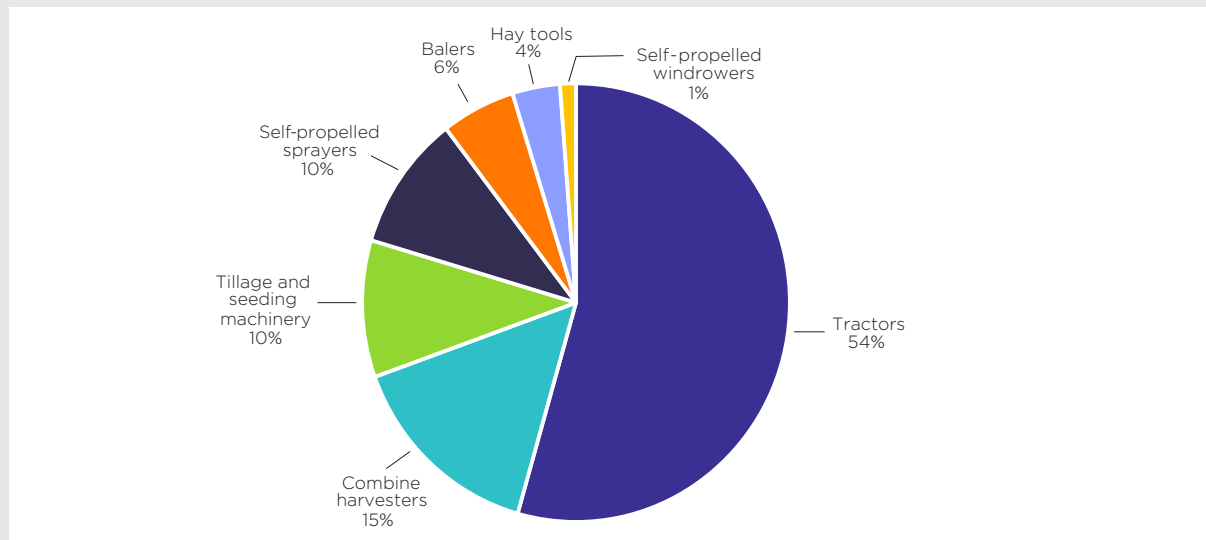
2 IBIS World Industry at a Glance - F3411 Farm and Construction Machinery Wholesaling in Australia <https://my.ibisworld.com/au/en/industry/f3411/products-and-markets>.

3 Grains Research & Development Corporation, *Business Management Fact Sheet - March 2014*, 5 (www.grdc.com.au/FBM-MachineryInvestmentAndCosts).

Box 1.1 Agricultural machinery sales in Australia

In 2019, sales of major new machinery lines totalled \$2.34 billion.⁴ Figure 1.2 shows how this is broken down by different types of machinery.

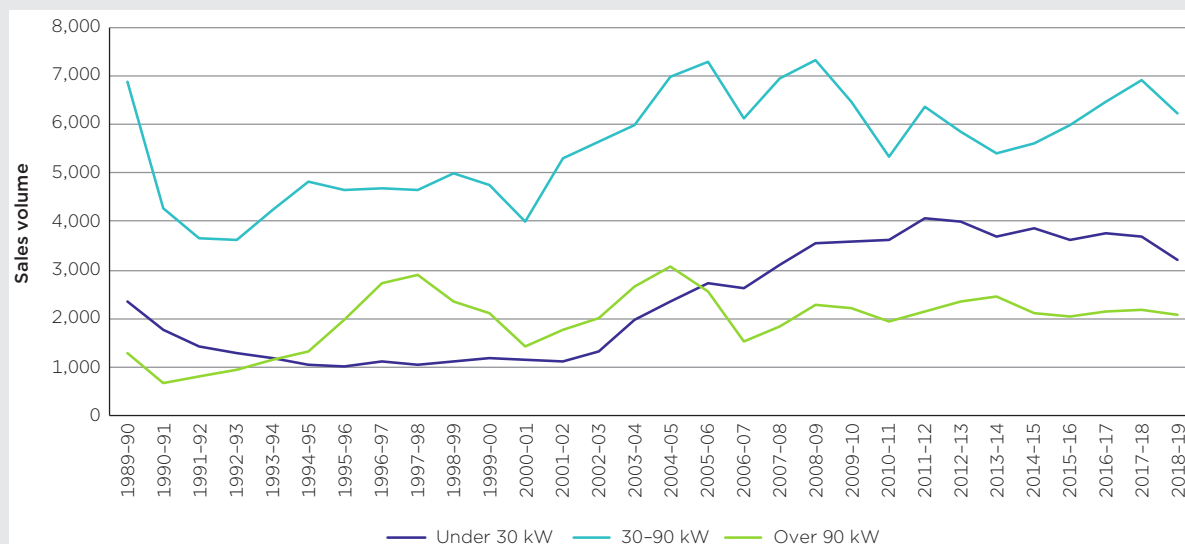
Figure 1.2 Major machinery lines as estimated share of total sales (2019)



Source: ACCC analysis of 'The State of the Industry - 2019 Tractors and Machinery Report July 2020', Agriview Pty Ltd.

In 2019, approximately 54% of machinery sales in Australia were tractor sales. New tractor sales in Australia have generally increased over the past decade, with 12,075 units sold in 2017.⁵ 2019 saw a slight decline in the number sales to 11,037 new units attributed in part to the drought across parts of Australia. The last time there were continuous sales of in excess of 10,000 units was between 1979 and 1985.

Figure 1.3 Australian tractor sales by size and sales volume



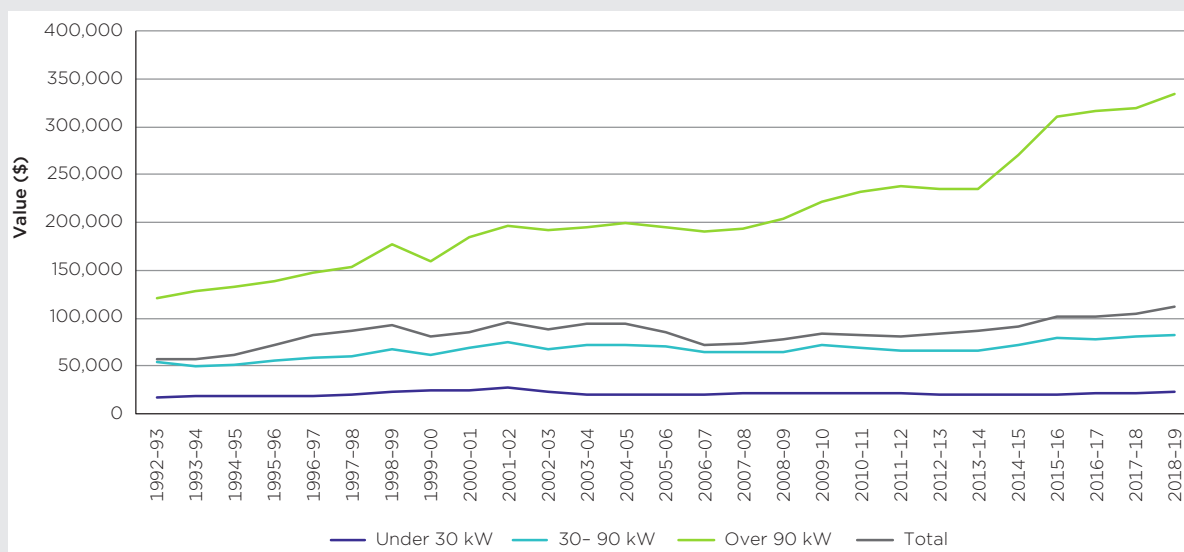
Source: ABARES 2020, Agricultural commodity statistics 2020, Australian Bureau of Agricultural and Resource Economics and Sciences, Canberra, December. CC BY 4.0. <https://doi.org/10.25814/RVJ-PY73>.

⁴ ACCC analysis of 'The State of the Industry - 2019 Tractors and Machinery Report July 2020', Agriview Pty Ltd.

⁵ *ibid.*

Particularly for tractors over 90kW, the average nominal price per unit has increased significantly over time (figure 1.4).

Figure 1.4 Australian tractor sales by average price (nominal terms)



Source: ACCC calculation derived from ABARES 2020, Agricultural commodity statistics 2020, Australian Bureau of Agricultural and Resource Economics and Sciences, Canberra, December. CC BY 4.0. <https://doi.org/10.25814/RVVJ-PY73>.

1.1.3 Purchaser experiences with buying and selecting machinery

The ACCC’s purchaser survey sought information from purchasers regarding their ability to negotiate with dealers when investing in a new machine. We also sought to gain an understanding of purchasers’ ability to ‘shop around’, or the level of competition between brands and dealerships. The results of these survey questions on purchasers’ experiences obtaining quotes are illustrated below (figures 1.5 and 1.6)

Figure 1.5 Purchaser experiences with seeking quotes from multiple dealers

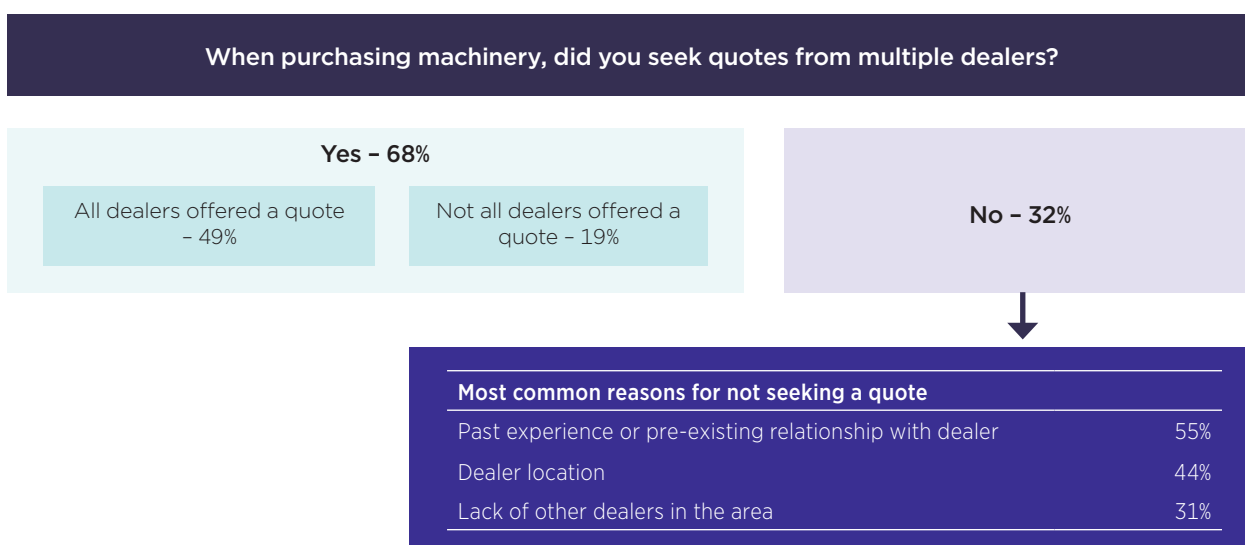
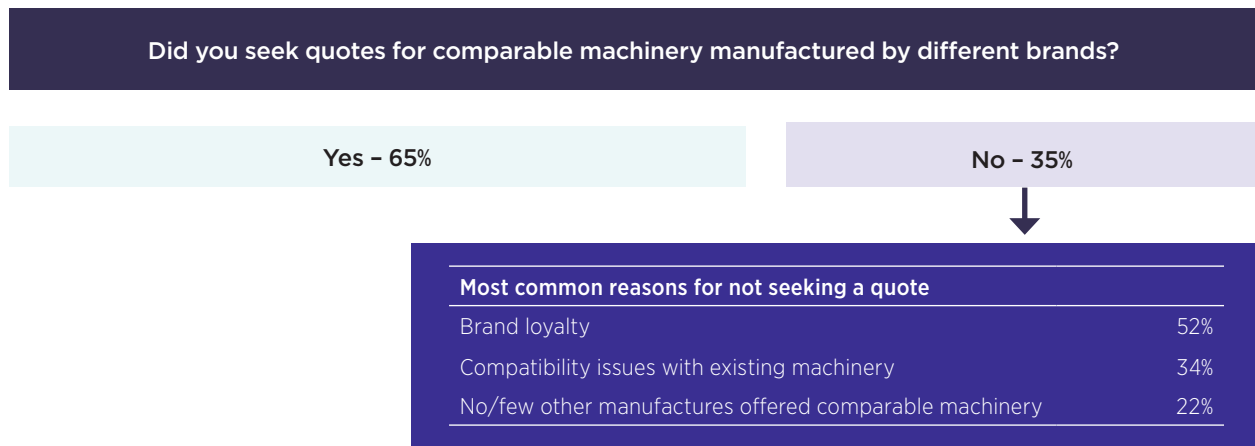
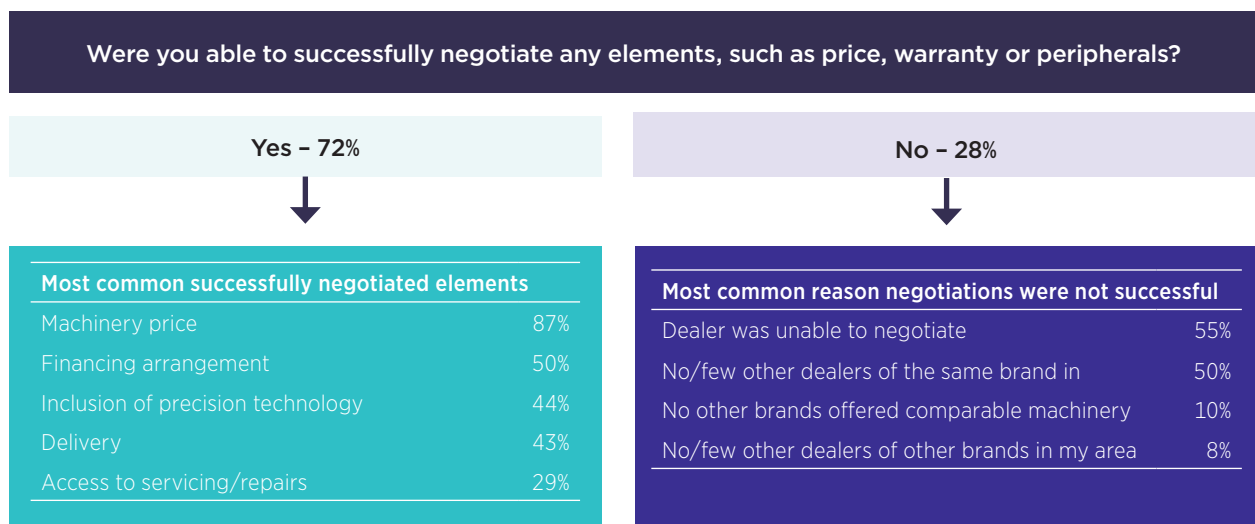


Figure 1.6 Purchaser experiences with seeking quotes for comparable machinery by different brands



The majority of participants indicated that they had sought quotes from competing brands, and, from multiple dealers within the same brand. Brand loyalty was a significant factor for those who did not seek quotes from competing brands. Responses also indicate that at least some purchasers had limited options available, in part owing to a lack of alternative dealers within the brand, or comparable machinery sold by other brands. Similarly, results suggest that a lack of interoperability between different brands of machinery may lead to situations where purchasers are ‘locked in’ to that brand.

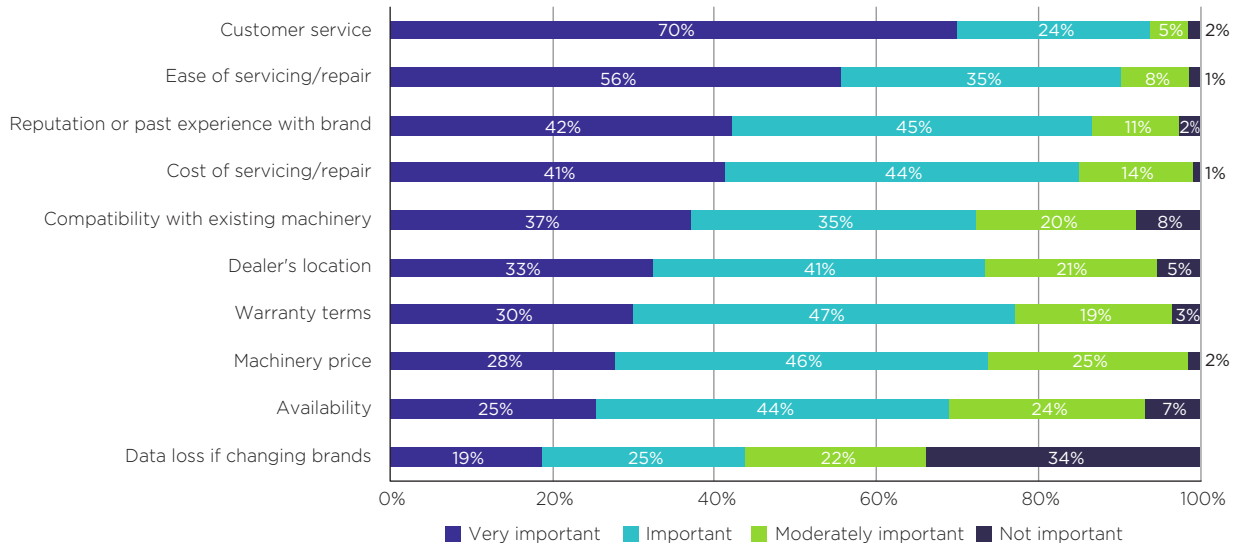
Figure 1.7 Purchaser experiences with negotiating



While the majority of survey participants indicated that they were able to negotiate elements of their purchase (figure 1.7), the findings suggest that they lack bargaining power in at least some product or regional markets. The purchaser survey also asked participants about the importance of a number of factors when considering which brand of machinery to purchase. These included price, warranty terms, customer service, ease of servicing or repair, costs of servicing or repair, dealer’s location, availability, reputation or past experience with the brand, compatibility with existing machinery, and data loss if changing brands.

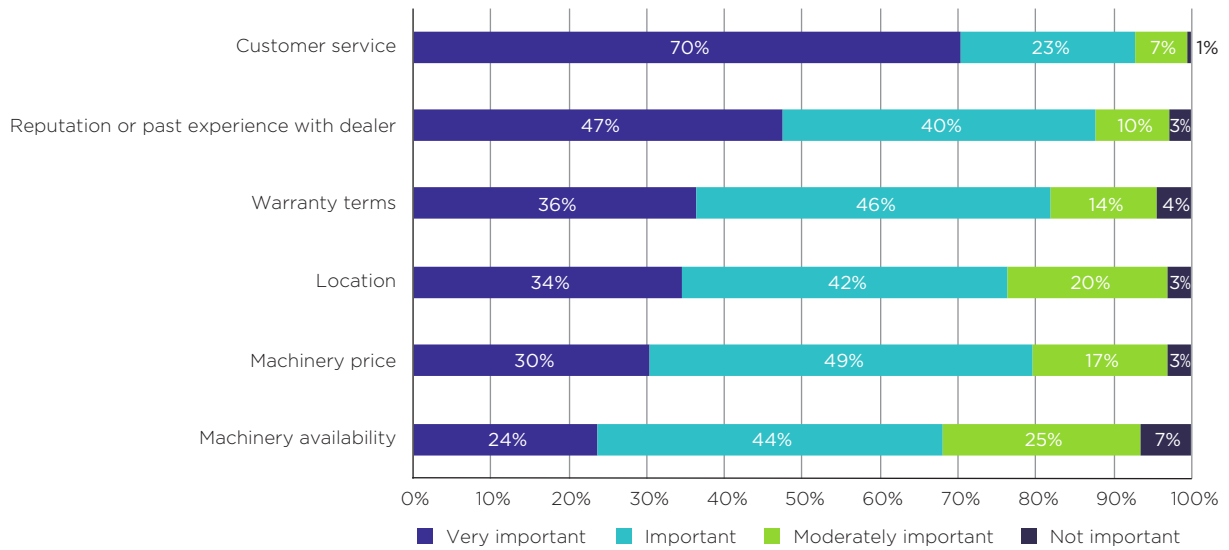
Survey responses indicate that customer service, ease of servicing or repair, and reputation or past experience with the brand outweigh machinery price and warranty terms (see figure 1.8).

Figure 1.8 Importance of various factors when considering which brand of machinery to purchase



The purchaser survey also asked participants how important a number of factors were when considering from which dealer to purchase machinery. These included price, warranty terms, customer service, dealer's location, availability, and reputation or past experience with the brand (figure 1.9).

Figure 1.9 Importance of various factors when considering from which dealer to purchase the machinery



Note: Numbers may not total to 100% owing to rounding.

2. Competition in agricultural machinery markets and the ‘right to repair’

Key points

- Agricultural machinery markets include those for the direct sale of machinery, as well as markets for after sales services, parts and repairs.
- Competition in agricultural machinery markets is impacted by structural factors, such as the geographical dispersion of purchasers, and strategic barriers, such as restrictions on independent repairers.
- The cost of repairs and quality of service offered by repairers is influenced by the strength of competition between authorised dealers and independent repairers.
- The ACCC has identified factors that limit access to, and competition within, after-sales markets. Right to repair movements are emerging in many markets across the world to address these types of concerns, and in Australia, the right to repair is the subject of a Productivity Commission inquiry.
- Agreements between manufacturers and dealers are likely to require changes due to the proposed reforms to the business to business unfair contract term legislation.

2.1 Introduction

Through this market study, the ACCC received feedback on competition issues regarding markets for agricultural machinery and markets for after-sales services, namely access to parts, service and repairs. Within these markets, there is a wide range of different product, service and geographic markets. In addition, competition can occur at different levels of the supply chain, such as between manufacturers or between dealers. The level of competition within these markets will vary based on the particular characteristics of each market.

Analysing the level of competition in a market typically requires an in-depth assessment of a range of factors. These include structural indicators (including market concentration and barriers to entry), as well as the conduct of participants (including the responsiveness of firms' to their competitors product and service offerings), and market outcomes (including trends in prices and profit margins). In agricultural machinery markets, an assessment of competition would also require considering these dynamics across a large number of regional markets.

This market study has considered the competitive dynamics in primary markets at a very general level only. This is because this is a self-initiated market study and therefore has been conducted without compulsory information gathering powers. As a result, the ACCC's observations and findings are based on analysis of information provided by industry participants on a voluntary basis, and publicly available sources of information.

The ACCC has, however, identified a number of barriers to access to, and competition within, after-sales markets. Purchasers place a high value on customer service and ease of servicing when they purchase machinery. Despite this, purchasers can face barriers to accessing timely and cost effective repairs and maintenance for the machinery they have already purchased. ‘Right to repair’ movements are emerging in many markets across the world to address these types of concerns. As such, considering competition issues in after-sales markets is a key focus of this market study.

2.2 The importance of competition and the ‘right to repair’

2.2.1 Competition and efficient markets

Competition is an important driver for efficiency because it provides firms with strong incentives to be more efficient than their rivals, reduce their costs, innovate, and to supply the products and services that consumers want. Competition can be restricted by barriers that restrict market entry by new competitors, such as the costs of capital for designing and manufacturing equipment, or complexities associated with establishing a dealership network in regional areas. Competition can also be impeded by high switching costs that reduce the propensity of purchasers to switch brands.

2.2.2 Right to repair in an international context

The term ‘right to repair’ describes a purchaser’s ability to repair faulty goods, or to access competitive sources of supply of repair services. This may include repairs by a manufacturer, a third-party, or a purchaser completing repairs themselves, with access to replacement parts and repair information.

Access to choice of repairers has been a prominent topic of debate for farm machinery and for consumer products more broadly, in many countries in recent years. This has been reflected in a range of right to repair policy initiatives, including an industry wide agreement regarding access to motor vehicle repairs in the United States. In a similar vein, farmers in the United States have initiated a right to repair movement to get access to the information necessary to repair their machinery.

Manufacturers and dealers in the United States agreed to make a series of diagnostic and repair tools available to owners of tractors and combine harvesters by 1 January 2021.⁶ John Deere submitted to the ACCC that legislators in the United States had declined to enact Right to Repair legislation on the basis of this industry commitment, and the fact that farmers and independent repairers have access to the necessary parts, tools and resources to perform their own repairs. John Deere submitted that these principles largely also apply to Australia. However, the Repair Association, a group in the United States whose mission is to advocate for repair-friendly policies, argues that the new US arrangements still fail to deliver necessary rights to owners of agricultural machinery in the USA.⁷ The ACCC also notes that some US states have in fact introduced Right to Repair bills pertaining to agricultural machinery so far in 2021.⁸

The primary legislation regulating the sharing of information and data to repair and service cars in the EU is known as Euro 5 Regulation, which has been in effect since March 2010.⁹ This requires manufacturers to provide all operators, both independent and those within the manufacturer’s distribution and dealer networks, access to the technical information necessary to repair and service their cars.

In 2013, these regulations were extended to make repair and maintenance information (RMI) for agricultural machinery more widely available. They require that manufacturers provide unrestricted and standardised access to RMI for agricultural and forestry vehicles, such as tractors, trailers and towed equipment, to independent operators through websites using a standardised format in a readily

6 <https://r2rsolutions.org/right-to-repair-legislation/>; but see also Nathan Proctor, ‘Farmers and legislators channel rural frustration as they push for tractor Right to Repair’, US PIRG, 19 February 2021, <https://uspig.org/blogs/blog/usp/farmers-and-legislators-channel-rural-frustration-they-push-tractor-right-repair>.

7 Repair Association, *Major Ag Associations Support the Right to Repair*, <https://www.repair.org/agriculture>, viewed 15 April 2021.

8 See e.g. *SB461 Farmers Right to Repair Act* (Arkansas); *SB374 Agricultural Equipment Fair Repair Act* (Florida); *S67 An act relating to creating a right to repair agricultural equipment* (Vermont); see also Nathan Proctor, ‘Half of U.S. states looking to give Americans the Right to Repair’, US PIRG, 10 March 2021, <https://uspig.org/blogs/blog/usp/half-us-states-looking-give-americans-right-repair>.

9 Regulation (EC) No. 715/2007 available at <http://data.europa.eu/eli/reg/2007/715/oj>.

accessible and prompt manner. It must also be provided in a manner which is non-discriminatory when compared to the provisions given or access granted to authorised dealers and repairers.¹⁰

Submissions made to the ACCC pointed to legislation in Canada that applies to agricultural equipment manufacturers. A number of Canadian provinces have passed pieces of legislation¹¹ that require manufacturers to supply repair parts for up to 10 years after a product is retired. An example is the Farm Implements Act of the province of Ontario, which, among other things: ¹²

- requires that for every new farm implement sold, parts must be available for 10 years after the sale
- defines emergency spare parts as parts needed when an implement breaks down during its season of use. The distributor must supply these spare parts within 3 working days, or else may have to cover half the cost of renting replacement equipment
- provides for conflict resolution for all disputes about issues that are covered by the Act.

2.2.3 Right to repair in Australia

In Australia, the Treasurer has asked the Productivity Commission¹³ to assess the costs and benefits of a right to repair and the impact that regulatory or policy changes could have on market offerings for repair services and replacement products. The Productivity Commission published an issues paper for the inquiry in December 2020.¹⁴

In this issues paper, the Productivity Commission notes that:

‘enabling a right to repair in Australia may involve various policies, such as a requirement for manufacturers to make repair information and tools available to third party repairers, or to produce spare parts for a certain period.’

The Productivity Commission also explains that:

‘A key issue in the debate about a right to repair is how to balance the benefits and costs to consumers, suppliers and manufacturers. Proponents say that a right to repair will lead to increased competition in repair markets, greater consumer choice, and improved environmental outcomes due to less resource use and waste. Manufacturers and some suppliers raise concerns about consumer safety, data security risks, the quality of repairs, and the protection of their intellectual property.’

The ACCC made a public submission to this inquiry.¹⁵

10 European Agricultural Machinery Association, *Repair & Maintenance Information*, https://www.cema-agri.org/index.php?option=com_content&view=article&id=103:repair-maintenance-information-rmi&catid=11&Itemid=153, viewed 15 April 2021.

11 Alberta, *Farm Implement and Dealership Act*, available at <https://www.qp.alberta.ca/documents/Acts/F07.pdf>; Manitoba, *Farm Machinery and Equipment Act*, available at <https://web2.gov.mb.ca/laws/statutes/ccsm/f040e.php>; Ontario, *Farm Implements Act*, <https://www.ontario.ca/laws/statute/90f04>; Saskatchewan, *Agricultural Implements Regulations*, available at <https://publications.saskatchewan.ca/#/products/360>. All have similar provisions in relation to repair.

12 See <https://www.ontario.ca/laws/statute/90f04>; Ontario, *How the Farm Implements Act Protects You*, Ministry of Agriculture, Food and Rural Affairs, 2009, available at <https://collections.ola.org/mon/23007/294253.pdf>.

13 The Australian Government’s independent research and advisory body on a range of economic, social and environmental issues affecting the welfare of Australians. Further information on the Productivity Commission can be obtained from the Commission’s website (www.pc.gov.au).

14 Productivity Commission, *Right to Repair Issues Paper*, 2020, <https://www.pc.gov.au/inquiries/current/repair/issues>.

15 ACCC submission to Productivity Commission, February 2021, available at https://www.pc.gov.au/___data/assets/pdf_file/0007/272662/sub106-repair.pdf.

2.3 Competition in agricultural machinery markets

2.3.1 Competition in markets for the sale of agricultural machinery

There are several markets for the sale of agricultural machinery, including specific markets based on particular products and regions. This report has considered a range of general indicators of competition in these markets drawn from information provided by industry participants and public sources. However, as noted above, a detailed examination of competitive dynamics in specific markets would require a range of additional information, and is not possible within the scope of this market study.

Information assessed by the ACCC indicates that the manufacturing sector of the agricultural machinery supply chain is concentrated. Generally speaking, there is a small number of manufacturers that sell agricultural machinery through authorised dealers to a large number of purchasers.

Major manufacturers of agricultural machinery and equipment sold in Australia usually participate in both the primary (new machinery sales) and secondary (machinery servicing, parts and repairs) markets. These major participants include John Deere, Case IH, New Holland, CLAAS, Massey Ferguson and Kubota. John Deere is a subsidiary of Chamberlain Holdings Limited. Case IH and New Holland are subsidiaries of CNH Industrial Australia Pty Ltd (CNHIA), a wholly owned subsidiary of CNH Industrial NV. John Deere and CNHIA are the largest wholesalers of agricultural machinery in Australia.¹⁶ The Massey Ferguson brand is owned by global agriculture company AGCO.¹⁷

The level of market concentration is likely to be higher in some regions or product markets than in others. Most agricultural machinery is manufactured to perform specific functions, and highly specialised machinery is unlikely to have many close substitutes, leaving purchasers with a limited range of buying options in some cases. An example of this is the market for cotton balers, which has only one supplying manufacturer in Australia.¹⁸

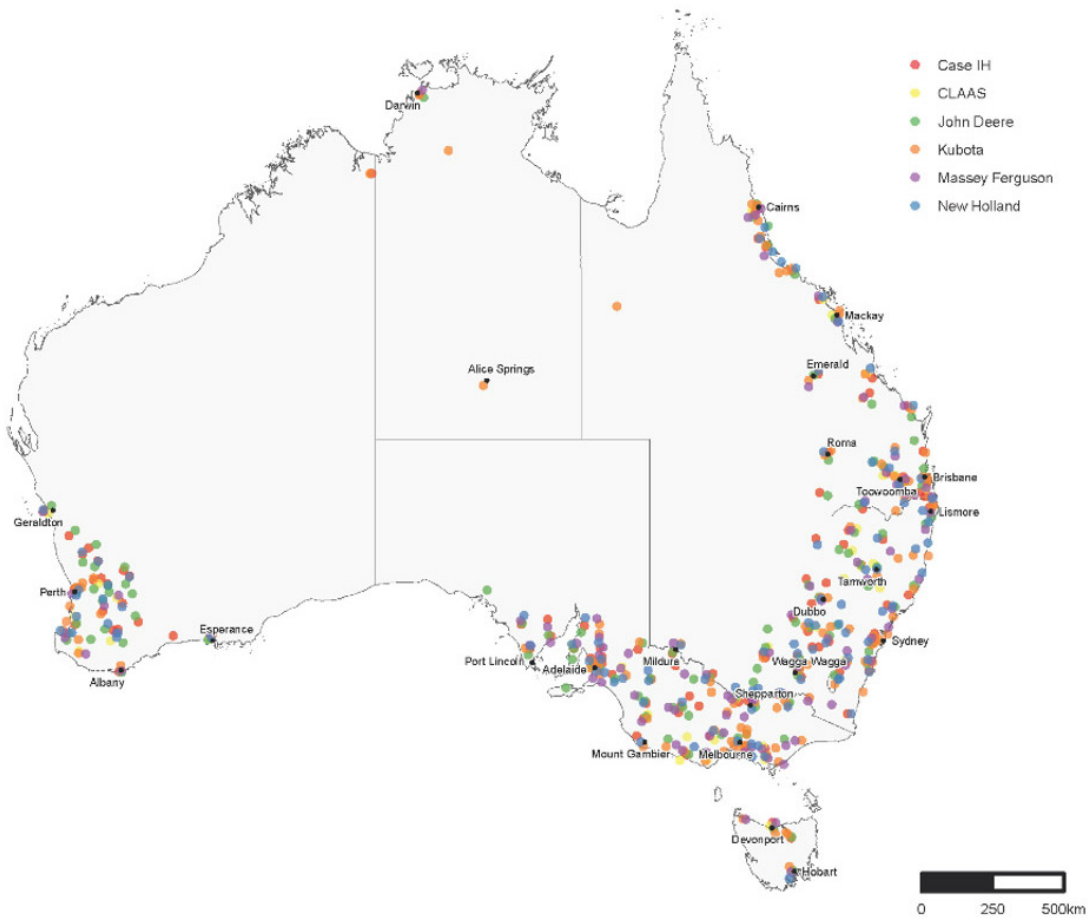
Further, as purchasers of machinery are typically based in rural and remote locations, some areas may not be able to support enough dealerships to allow purchasers a variety of choices. As shown in figure 2.1, the number of brands and dealers varies between regions. One submission argued that machinery manufacturers and their associated dealers hold monopolies in some regions. In other regions, a number of options are available.

16 IBIS World Industry at a Glance - F3411 Farm and Construction Machinery Wholesaling in Australia, October 2020, <https://my.ibisworld.com/au/en/industry/f3411/products-and-markets>, p. 34-35.

17 AGCO, *Our Brands*, <https://www.agcocorp.com/brands.html>, viewed 15 April 2021.

18 See e.g. [Farmers driving 'right to repair' issue as legislative battle unfolds in US - ABC News](#); [Small town manufacturer hopes to wrap up the international competition - ABC News](#); [Round bale revolution abounds | The Land | NSW](#).

Figure 2.1 Dealer locations for agricultural machinery manufacturers



Source: Publicly available information on websites of Case IH, CLAAS, John Deere, Kubota, Massey Ferguson and New Holland.¹⁹

2.3.2 Competition in the servicing (after) market

Dealers of the same brand might be expected to be in direct competition with one another to provide servicing and repairs, and in the sales of spare parts. In the absence of barriers to competition, such as structural barriers (for example, the small size of a market relative to available profits) or strategic barriers (for example, restrictions in warranties that create disincentives to use competing repairers), dealers may be expected to lower their prices or improve their customer service to attract purchasers.

The Tractor and Machinery Association of Australia (TMA) states that service rates charged by authorised dealers are set independently by those dealers, and that its manufacturer members have no input into the setting of service rates. With respect to original parts, the TMA notes that dealers are supplied with a recommended retail price, but that these are recommendations only, and are not enforced by the manufacturer (it is illegal under the CCA for suppliers to require, or put pressure on, businesses to charge their recommended retail price or any other set price²⁰).

A market structure that enables competing manufacturers and repairers to effectively challenge the price and service offerings of incumbents is likely to produce significantly better outcomes for purchasers than one that does not. As such, authorised dealers of other brands, and independent repairers would also be expected to compete in the servicing, parts and repair markets to some extent.

¹⁹ Available at: <https://www.caseih.com/anz/en-au/dealer-locator>, <https://www.claasharvestcentre.com/>, <https://dealerlocator.deere.com/servlet/country=AU>, <https://kubota.com.au/where-to-buy/>, <http://www.masseyferguson.com.au/Dealer-Locator.aspx>, <https://agriculture.newholland.com/apac/en-au/about-us/buying-services/sale/find-a-dealer>.

²⁰ It is illegal under section 48 of the CCA for suppliers to require, or put pressure on, businesses to charge their recommended retail price or any other set price. This is known as resale price maintenance. Examples of such pressure include threatening to stop supply to the reseller, and preventing resellers from advertising, displaying or selling the goods below a specified price.

Access to and cost of repairs and parts, as well as the quality of customer service, will be influenced by the strength of competition between authorised dealers, and between authorised dealers and independent repairers.

The ACCC has identified a number of factors that limit competition in servicing, parts and repairs markets for agricultural machinery. These include:

- barriers that restrict independent repairers or farmers from accessing spare parts, specialised tools, repair manuals, technical information, and diagnostic software and updates needed to carry out repairs
- barriers that restrict the purchaser to a single authorised dealer for servicing and repairs, such as in warranties.

Further discussion on the potential issues associated with allowing independent repairers or purchasers with the necessary parts and information to provide similar services to those provided by authorised dealers is included in chapter 4.

2.3.3 Dealership concentration and consolidation

Throughout the course of this market study, the ACCC was made aware of concerns about the concentration of dealerships in some areas. The level of concentration in a market is one indicator of the degree of competition and the potential for firms to have market power. Economies of scale resulting from larger supplier operations can be beneficial in these markets, allowing suppliers to stock a larger range or provide additional services such as customer support.

While the ACCC understands that smaller, single-site dealerships still exist, the industry has undergone consolidation in recent years. For example, RDO Australia Group, one of the world's largest John Deere and Vermeer equipment dealers, operates 22 Vanderfield agricultural machinery dealerships across NSW and Queensland, and one in the Northern Territory. Concerns have been raised with the ACCC about West Australian markets being split between 2 John Deere dealers, Ag Implements, which has 6 branches, and AFGRI Equipment, which has 14 branches. As a result of ownership structures of this kind, some purchasers feel that they have no genuine choice or ability to 'shop around'.

2.4 Geographical restrictions and competition

2.4.1 Rationale for geographical restrictions

A significant issue raised with the ACCC as part of this market study is geographical restrictions on dealers in the sale of machinery. Agreements between manufacturers and dealers frequently assign an 'area of responsibility' or 'prime marketing area' to a dealership. This will typically involve a dealer operating as a franchisee or agent for a manufacturer. The arrangements between a manufacturer and a dealer often assign a geographic area in which the dealer is the primary seller of the manufacturer's products, and provider of authorised servicing and repairs.

Manufacturers 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. Manufacturers informed the ACCC that dealers are free to trade outside their geographical area and may use these geographic areas to measure dealer performance.

The TMA notes that authorised dealerships are required, under their respective agreements with manufacturer members, to maintain a high standard of service for customers, including in relation to the quality of their dealership site and service facilities and the technical qualifications of their technicians.

In its submission, John Deere states that dealerships are free to trade beyond their 'area of responsibility', and that dealerships are obliged to support all of a manufacturer's products and customers regardless of which dealership sold the product. In particular, they note that an 'area of responsibility' is used only to measure market share performance and customer and product support.

AGCO Australia Ltd (AGCO) states that its dealers may choose to work within a specific region to ensure they are able to adequately support its customers, but that it does not mandate competition within, or place any restrictions on operating outside of these regions.

2.4.2 Impact of geographical restrictions on purchasers

A number of free text responses to the survey spoke of difficulties arising from the 'area of responsibility' when it comes to getting quotes or service from dealers. These included difficulties sourcing quotes; difficulty sourcing parts; and difficulty getting a machine serviced under warranty by the local dealer when it was purchased from another dealer. Almost 20% of survey participants indicated that they sought quotes from multiple dealers, but that not all dealers they contacted offered a quote.

Responses from purchaser advocate groups tend to support the survey findings and suggest that dealers may be reluctant to assist purchasers outside their assigned area. The Victorian Farmers Federation (VFF) submitted that many farmers provided them with examples where they were directly told by dealers that they are unable to make a purchase outside their area. Similarly, the National Farmers Federation (NFF) describes each dealer as effectively having a monopoly in its designated geographical area. Where this is the case, the importance of strong inter-brand competition is elevated since there is limited or no intra-brand competition.

The VFF note that farmers have struggled to get agricultural machinery repaired by a dealer if it wasn't purchased locally. Grain Producers Australia (GPA) states in its submission that purchasers are limited in their options to get service beyond their geographically designated local dealership and, as such, purchasers are compelled to use their local dealership for servicing.

GPA also points to the lack of geographic restrictions in the vehicles and consumer goods markets. They argue consumers in this sector are able to consider the best deals available to them across a number of dealerships, companies and areas and to seek post-sale services in the same way.

2.4.3 ACCC view

Geographic restrictions in dealership agreements by their nature limit rivalry.

However, the ACCC notes manufacturers' submissions that the purpose of assigning specified geographic areas to dealers is not to restrict competition, and that dealers are not expressly prohibited from trading outside their geographical area. Relevantly, the geographic restrictions within dealer arrangements that the ACCC has reviewed are not absolute. Further, in some circumstances, arrangements that cause services to be supplied by fewer rather than more individual dealers, may enable them to be supplied to purchasers at a lower cost overall.

Nevertheless, geographic restrictions do have the potential to dampen competition. For instance, information received by the ACCC indicated there may be some confusion regarding dealers' rights and responsibilities, and about whether there would be a commercial benefit from trading outside of an assigned region. This could have the effect of deterring competition in after-sales services among dealers of the same brand of machinery.

If there is adequate inter-brand competition, limitations on intra-brand competition through geographic restrictions are less likely to substantially lessen competition in a market. However, if inter-brand competition is limited, or if restrictions such as these are imposed by multiple competing manufacturers, then inter-brand competition could become static.

Geographic restrictions in dealership agreements will often not breach competition laws. The CCA prohibits certain forms of anti-competitive agreements and behaviour where they substantially lessen competition in a market (see box 2.1). The ACCC would need to consider a number of factors to assess whether arrangements were likely to substantially lessen competition in a market. Any assessment would have regard to the particular circumstances in which competition between manufacturers and their authorised dealers takes place. This would include identifying the scope of competition between different products and geographic sources of substitutes, market concentration, barriers to entry and other factors specific to the matter being reviewed.

At this stage the ACCC does not have evidence to indicate that there is anti-competitive conduct in any specific agricultural machinery markets that would reach the threshold of substantially lessening competition as required under the CCA. To further investigate stakeholders' concerns about the possible effect of geographic restrictions, the ACCC would require evidence such as:

- a manufacturer having a substantial degree of market power in a particular geographic or product market
- dealers being prevented by manufacturers from selling products or services to customers outside their geographical region
- a geographic restriction limiting customer's ability to purchase products or services
- indications that dealers are willing to provide products or services outside of their geographic areas and would compete with other dealers in their network
- information about the impacts of geographic restrictions on customers, such as increased prices or decreased service offerings.

In particular, the ACCC would require information evidencing this in specific product or geographic markets. Should market participants have specific examples about such conduct, the ACCC welcomes any further information.

Box 2.1 Laws prohibiting anti-competitive conduct

The CCA prohibits a series of anti-competitive behaviours, such as:

- Competitors engaging in price fixing, output restrictions, market sharing, and bid rigging. The focus of the cartel prohibitions is on conduct where rival businesses coordinate rather than competing. Cartel conduct is strictly prohibited on the basis that it will always be damaging to competition.
- Corporations making or giving effect to agreements, or engaging in concerted practices, that have the purpose, effect, or likely effect of substantially lessening competition in any market in which any of those corporations supplies or acquires goods or services (section 45).
- A corporation with a substantial degree of power in a market from engaging in conduct that has the purpose, effect, or likely effect of substantially lessening competition in that market, or any other market in which the corporation supplies or acquires goods or services (section 46).
- Exclusive dealing only when it has the purpose, effect, or likely effect of substantially lessening competition in any market in which the corporation engaging in the conduct or any person whose dealings are affected by the conduct supplies or acquires goods or services (section 47). Broadly speaking, exclusive dealing occurs when a corporation trading with another corporation imposes some restrictions on the other corporation's freedom to choose with whom, in what, or where they deal.

2.5 Bargaining power between manufacturers and dealers

2.5.1 Competition and bargaining power imbalances

The balance of bargaining power between manufacturers and dealers influences the value that each party can obtain from an agreement between them. Bargaining power itself is determined by the options available to each party outside the agreement or the value they can achieve in the event an agreement is not reached. A party with a significantly better outside option has a stronger bargaining position, which allows it to extract a greater proportion of the value that an agreement generates.

A single manufacturer will typically have more valuable options available to them compared to a single dealer. This is because there may be other dealers a manufacturer can sell through, whereas the dealer may have few other manufacturers to enter into a supply agreement with, and may also face significant

barriers to switching. A similar scenario is likely for dealers relative to their customers with respect to machinery sales or the supply of repairs or other after-sales services.

However, the bargaining power balance may not be the same in all manufacturer-to-dealer, and dealer-to-purchaser relationships. For example, a dealer that sells through a large number of dealerships across a substantial geographic area is likely to be in a better bargaining position with a manufacturer, when compared to a single-site dealership.

One submission described the investment required to be a dealer as extremely high, attributing this to the multi-year agreements signed with manufacturers, the high value of the products sold, the specialised tools mandated by the manufacturers and the requirement to buy spare parts in sufficient quantities. Dealers must balance their obligations to purchasers, safeguard their own financial interests and maintain a long-term commercial relationship with their manufacturer. If the risks of providing repairs fall unduly on dealers, they may be incentivised to not process warranty claims or to limit the service they offer to agricultural machinery purchasers.

Manufacturer to dealer agreements may also be covered by the Franchising Code of Conduct. See box 2.2 for further detail.

Box 2.2 Franchising Code of Conduct

The Franchising Code of Conduct usually applies to conduct occurring on or after 1 January 2015 in relation to franchise agreements entered into, transferred, renewed or extended on or after 1 October 1998. A franchise agreement is an agreement, written, verbal or implied, under which:

1. one party (the franchisor/manufacturer) grants another party (the franchisee/dealership) the right to carry on a business offering, supplying or distributing goods or services under a specific system or marketing plan substantially determined, controlled or suggested by the franchisor or an associate of the franchisor, and
2. the operation of the business is associated with a trademark, advertising or a commercial symbol owned, used, licensed or specified by the franchisor or its associate, and
3. the franchisee pays to the franchisor or its associate an amount such as an initial capital investment fee or a royalty or franchise service fee.

The Franchising Code requires, among other things, that each party to a franchise agreement act in good faith in their dealings with one another. On 1 June 2020, amendments to the Code were introduced for new vehicle dealership agreements. The new regulations do not apply to all motor vehicle dealerships, only those agreements for dealerships that predominantly deal in new passenger vehicles or new light goods vehicles (or both). The key changes relate to end of term obligations, capital expenditure and dispute resolution. These amendments were considered necessary to address the effects of the power imbalance between car manufacturers and dealers.²¹

The MTAA submitted to the ACCC that these changes should also apply to farm machinery dealers and independent mechanical service providers, citing the minimal differentiation between farm machinery and new car franchise arrangements.

2.5.2 Contract terms in dealership agreements

Relationships between manufacturers and dealers are typically defined and governed by standard form agreements. These agreements require a dealer to promote, sell and provide aftersales and warranty service of the manufactures' products, typically within an 'area of responsibility' or 'prime marketing area'. In return, the manufacturer provides the dealer with products, parts, branding, marketing, technical support and software to support them.

21 Explanatory Statement, *Competition and Consumer (Industry Codes - Franchising) Amendment (New Vehicle Dealership Agreements) Regulations 2020*, available at <https://www.legislation.gov.au/Details/F2020L00636/Explanatory%20Statement/Text>.

These circumstances can place some dealers in a disadvantaged bargaining position and leave them susceptible to entering into agreements that may contain terms that are balanced in favour of the manufacturer.

The ACL seeks to protect small businesses against unfair contract terms (UCT) in business to-business (B2B UCT) standard form contracts for the supply of goods and services (see box 2.3).²² These protections can promote fairness in contracts where there is a bargaining power imbalance, and can increase certainty and confidence for small businesses.

Box 2.3 Small business unfair contract terms framework

The unfair contract terms protections currently apply to standard form contracts for the supply of goods and services where:

- at least one of the parties is a small business (employees less than 20 people), and
- 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 restrict one party and enable the other to:

- avoid or limit their obligations under the contract
- terminate the contract
- determine and penalise potential breaches of the contract, or
- vary the terms of the contract.

The Government announced in March 2019 that it intended to strengthen the B2B UCT framework to protect small businesses²³, and released a consultation regulation impact statement for feedback in December 2019. The consumer affairs ministers and agencies of the different Australian government jurisdictions recently decided that they will seek to strengthen the B2B UCT framework²⁴, including through:

- increasing the eligibility threshold for the protections from less than 20 employees to less than 100 employees, and introducing an annual turnover threshold of less than \$10 million as an alternative threshold for determining eligibility, and
- removing the requirement for the upfront price payable under a contract to be below a certain threshold in order for the contract to be covered by the UCT protections.

The ACCC supports strengthening of the B2B UCT framework in the ways agreed to by the Legislative and Governance Forum on Consumer Affairs. The ACCC notes that these reforms will make it more likely that agreements between dealerships and manufacturers will be captured by the framework. The changes will also make UCTs unlawful and give courts the power to impose a civil penalty. See box 2.4 for further information on the changes to the B2B UCT framework that the Government has committed to.

22 Section 23(3) of the ACL.

23 The Hon Stuart Robert MP, 'Further strengthening the unfair contract term protections for small businesses', media release, 28 March 2019.

24 Treasury, *Enhancements to Unfair Contract Term Protections*, regulation impact statement for decision, November 2020; The Hon Michael Sukkar MP, 'Penalties to be introduced for unfair contract terms', media release, 10 November 2020; Legislative and Governance Forum on Consumer Affairs, joint communique, 6 November 2020, p. 2.

Box 2.4 Strengthening the business to business unfair contract terms framework

Following the Government's consultation process last year, the consumer affairs ministers and agencies of the different Australian government jurisdictions have recently decided that they will seek to strengthen the B2B UCT framework, including through:²⁵

- making UCTs unlawful and giving courts the power to impose a civil penalty
- providing more flexible remedies to a court when it declares a contract term unfair, by giving courts the power to determine an appropriate remedy, rather than the term being automatically void
- clarifying that the remedies for 'non-party consumers' also apply to 'non-party small businesses'
- creating a rebuttable presumption that a term is unfair where it is the same or substantially similar to a declared UCT, and is used by the same entity in another contract
- increasing the eligibility threshold for the protections from less than 20 employees to less than 100 employees, and introducing an annual turnover threshold of less than \$10 million as an alternative threshold for determining eligibility
- removing the requirement for the upfront price payable under a contract to be below a certain threshold in order for the contract to be covered by the UCT protections
- improving clarity around the definition of a standard form contract, by providing further certainty on factors such as repeat usage of a contract template, and opportunity to negotiate the contract.

The ACCC has seen contract terms which have the potential to be unfair if dealer-manufacturer agreements were to fall within the scope of the B2B UCT laws. For example, terms that give manufacturers the ability to unilaterally vary or terminate agreements without the consent or consultation of dealers. These terms have the potential to cause significant detriment to dealers.

Whether such terms are unfair would require further consideration, including whether they are reasonably necessary to protect the legitimate interests of the manufacturer in the circumstances.

2.5.3 ACCC view

In conjunction with any obligations they may have under the Franchising Code, the ACCC encourages manufacturers to consider the potential impacts reforms to the B2B UCT framework may have on their agreements with dealers. Further, should these reforms be enacted, the ACCC strongly urges manufacturers to review their agreements for potential UCTs.

Agreements that contain UCTs have the potential to reduce a dealer's willingness to fully engage in the market. This has the potential to distort the market, leading to reduced confidence and poorer outcomes for purchasers.

²⁵ Treasury, *Enhancements to Unfair Contract Term Protections*, regulation impact statement for decision, November 2020; The Hon Michael Sukkar MP, 'Penalties to be introduced for unfair contract terms', media release, 10 November 2020; Legislative and Governance Forum on Consumer Affairs, joint communique, 6 November 2020, p. 2.

3. Remedies in the event of a problem with machinery

Key Points

- A purchaser's primary recourse if there is a fault with agricultural machinery is usually the manufacturer's warranty.
- Manufacturers' warranties are limited in a number of ways, including time limitations on their coverage, and limitations on compensation for transport costs and income loss associated with repairs.
- Manufacturer warranties can deter purchasers from using independent repairers during the warranty period, which can impact competition for servicing and repairs.
- Some stakeholders consider that dealers do not receive sufficient reimbursement to cover costs from manufacturers for carrying out repair work under the manufacturer's warranty.
- The consumer guarantees in the Australian Consumer Law (ACL) offer broad protections to consumers, but do not usually apply to agricultural machinery. However, other consumer and fair trading laws do apply to agricultural machinery sales.
- The ACCC recommends that manufacturers and dealers provide clear and concise information to purchasers about warranties at the earliest practical opportunity in the sales process and before the point of sale.

3.1 Introduction

Agricultural machinery is a significant investment. In most circumstances, a purchaser's primary recourse if there is a fault with agricultural machinery is the manufacturer's warranty. Manufacturers offer their warranties voluntarily, but they are obliged to comply with them.

3.1.1 Typical warranty periods

A manufacturer's warranty requires the manufacturer to assist the purchaser if particular faults arise in machinery within a certain period. The period varies depending on the manufacturer and the product. A common warranty period for tractors and for some balers is 24 months or 2,000 hours of use, whichever comes first. A common period for other equipment, machinery or accessories is 12 months or 1,000 hours, whichever comes first.

Dealers or manufacturers sometimes offer extended warranties on particular products. Extended warranties usually cover additional years or hours of operation, whichever comes first. More than one third (36%) of participants to the purchaser survey said that they were offered an extended warranty, and 11% were unsure. However, the majority (89%) said they did not buy an extended warranty.

Survey responses indicated that extended warranties range from \$2,500 to tens of thousands of dollars, and provide additional coverage of 1,000–5,000 hours or 1–5 years. While some participants commented that extended warranties are expensive, VACC submitted that the cost is usually a small percentage of the machinery retail value, and that dealers sometimes provide extended warranties for free as a marketing initiative or gesture of good will.

3.1.2 Typical warranty coverage and exclusions

Warranties typically require manufacturers to provide parts and labour to fix defects in the product and materials which were within the manufacturer's control. Purchasers can typically lodge a warranty claim with a dealer, and dealers are reimbursed by manufacturers for completing warranty work that manufacturers have approved.

The conditions and coverage of warranties, such as inclusions, limitations and exclusions, vary from manufacturer to manufacturer. Purchasers can incur significant losses if there is a problem with their machinery that is not covered by the warranty. Warranties typically do not cover:

- depreciation caused by normal wear and tear, including on a wide range of particular parts that varies from manufacturer to manufacturer
- maintenance parts and service items, such as lubricants and filters
- problems caused by misuse, abuse or improper maintenance
- problems caused by certain types of alterations or modifications
- problems with parts made by another manufacturer (which may come with a warranty from the other manufacturer), such as tyres, radios and batteries
- problems caused by repairs carried out other than by authorised dealers, or by use of non-OEM parts
- travel, transport and freight costs associated with warranty work
- economic losses caused by machine downtime, or damage to property.

3.2 Key concerns

The ACCC's discussion paper raised concerns about the level of protection available to purchasers of agricultural machinery. The consumer guarantees under the ACL apply to a wide range of purchases of goods and services. However, the application of the consumer guarantees is limited with respect to agricultural machinery (as discussed in section 3.5 below). This is because a purchaser of agricultural machinery is generally not considered as a 'consumer' as defined in section 3 of the ACL. To be defined as a 'consumer' under the ACL, a purchaser must acquire the good or service below a set monetary threshold, and if the good or service is above that monetary amount, the goods must be of a kind ordinarily acquired for personal, domestic or household use or consumption.²⁶ The price of agricultural machinery is generally above the monetary threshold, and agricultural machinery is usually not a good of a kind ordinarily acquired for personal, domestic or household use or consumption.

Given the lack of statutory protection under the ACL, purchasers of agricultural machinery generally turn to their manufacturer warranties as their primary source of recourse.

In response to the discussion paper, stakeholders provided information reflecting concerns about limitations of manufacturer warranties, including:

- handling of warranty claims, including claim rejections and delays
- general limitations on warranty coverage
- lack of coverage for transport and freight costs associated with warranty claims
- lack of coverage for consequential losses, such as loss of farm income
- short warranty periods
- difficulties obtaining a remedy directly from the dealer.

The ACCC heard from a large number of purchasers who had experienced significant costs, losses, delays and other difficulties addressing faults that had arisen with their machinery, including a large proportion of survey participants who had had a warranty claim rejected.

Dealers, manufacturers and their representatives discussed the reasons for particular limitations on warranties. They highlighted the costs involved in responding to warranty claims, and described providing assistance beyond the scope of the warranty on some occasions. However, other parties submitted that current protections are not enough considering the cost and complexity of most machinery.

²⁶ There are also exceptions to being a 'consumer' in s 3(2) of the ACL.

The ACCC is concerned that warranty terms deter purchasers from using independent repairers and non-OEM parts, which can adversely impact outcomes for purchasers and competition for repairs.

The ACCC is also concerned that purchaser engagement with, and confidence in understanding, warranty terms and conditions appears to be low, despite measures to facilitate understanding described by manufacturers. There also appears to be a lack of ability for purchasers to negotiate on warranty terms and conditions.

3.3 Limitations of manufacturer warranties

In most circumstances, the manufacturer warranty is the primary protection purchasers have against agricultural machinery faults. However, the protections offered by manufacturer warranties are usually limited in a range of ways.

3.3.1 Limitations on warranties

Many stakeholders raised concerns about the coverage of manufacturer warranties. GrainGrowers suggested that warranty protections are not proportionate to the value of investment in agricultural machinery and do not reflect typical use patterns. Some stakeholders noted that warranties usually fall short of the protections offered by the consumer guarantees under the ACL, which usually do not apply to agricultural machinery (see section 3.5).

GrainGrowers submitted that farmers face substantial constraints to serviceability and in securing appropriate timely remedies in the event of a product fault or failure. Griffith University submitted that warranties tend to be drafted in a one-sided manner to provide the widest protection to manufacturers. VFF submitted that purchasers are afforded very few consumer protections and that the after-sales market is very lightly regulated in comparison to many equivalent industries.

Survey participants and submissions raised a range of warranty limitations including:

- broken parts being classed as 'normal wear and tear' and not being covered. This appeared to be common for parts such as bearings
- parts only being replaced once, with no remedy if a replacement part fails
- independent repairs or modifications to a particular part of the machine voiding the warranty over the entire machine
- off-road use of a tractor voiding the warranty
- warranties not covering second-hand machinery or machinery obtained through a lease or hire agreement.

Warranties can also be made invalid if purchasers or dealers do not complete mandatory administrative requirements. For example, the TMA noted that it is commonly a warranty requirement that a review/ service of the product take place, usually annually post-harvest, and that this is appropriate for complex machinery that is worked hard on a seasonal basis.

TMA submitted that warranties are comprehensive and provide for the repair of most faults that develop during the warranty period, and that warranties have conditions that are reasonable in the context of the complex types of machinery covered and the costs of providing the warranty cover. One manufacturer submitted that the limitations of the warranty strike a fair and reasonable balance between ensuring the price point affordability of the machine and having a resource pool to maintain its reliability and performance. Another manufacturer submitted that their warranty does not include terms that limit purchasers' ability to seek recourse and full compensation for faulty equipment.

3.3.2 Travel, transport and freight costs

Purchasers are generally not reimbursed for the travel or transport costs involved in repairing machinery even when the repair is otherwise covered by warranty. These costs can be significant for farms in remote locations. One farmer representative group submitted that the dealer repairs cost \$130–\$160 per hour, including travelling time.

Survey participants described frustration at being charged for travel, transport or freight to address warranty issues. Some said they incurred additional costs caused by inefficiencies such as a dealer unnecessarily returning multiple times or a repair by a closer mechanic not being permitted. Others said that better access to authorised software or telemetry for purchasers or local dealers would reduce thousands of dollars of travel expenses.

One manufacturer submitted that travel is not paid for as part of warranty repairs, but that it may offset travel costs at its discretion under some circumstances. Another manufacturer acknowledged that purchasers have been charged travel and transport costs in connection with repairing faulty equipment, but noted that it reimburses its dealer network to offset some of these costs to repair warrantable faults. The only dealer submission on the subject indicated that manufacturers exclude travel costs for conducting warranty repairs.

3.3.3 Warranty periods

Warranties usually cover a period as short as one or two seasons. One farmer contrasted this with warranties of up to 7 years on cars costing \$40,000, despite agricultural machinery costing hundreds of thousands of dollars. Stakeholders suggested that warranties should better reflect patterns of use by covering a set number of operating hours, instead of a fixed time period, for machinery that is only used for a couple of months each year.

A manufacturer submitted that warranties cover the period which the manufacturer believes is consistent with how long it would take for most defects in design or assembly to become apparent. TMA noted that purchasers can buy an extended or additional warranty for some products, and a dealer stated that warranty periods and extended warranties are 'very good'. GrainGrowers suggested that greater protections via more flexible and affordable extended warranties may be of interest to purchasers in the absence of other mechanisms.

Some survey participants commented that they had trouble obtaining remedies for faults that had occurred as soon as 3 or 4 weeks after the warranty expired. Many survey participants also described difficulties obtaining a remedy on the basis that the warranty had elapsed, for problems that had begun while the warranty was valid. Some of these participants had unsuccessfully started to request repairs during the warranty period. Others had repairs carried out under the warranty to fix an issue which then continued or resurfaced after the warranty expired. By contrast, one dealership submitted it will repair at no cost if there is an issue with its workmanship or the original complaint has not been rectified.

Stakeholders also raised concerns about faults that are common to particular models, which are sometimes not identified until after the warranty expires. Examples were raised of a tractor purchaser who lost thousands of dollars because of a known issue with the model, that they only discovered in their own machine soon after it exceeded the warranty 3,000 hour usage cap, and of a common fault in a harvester chopper module which the manufacturer only addressed for customers who reported it within the 12 month warranty period. Some survey participants suggested that common faults should trigger a recall. GrainGrowers submitted that aggregated data on specific performance or parts issues could be produced by an independent body and could potentially aid problem resolution, drive product improvement and support warranty claims.

3.3.4 Direct rights against suppliers and dealers

Manufacturer warranties do not necessarily allow purchasers to obtain a remedy directly from the dealer or seller, and they may not cover components manufactured by different companies. Therefore, purchasers may have to pursue warranty claims with various manufacturers rather than through the seller.

Purchasers described inconvenience and difficulties dealing with multiple parties when attempting to obtain a remedy. They referred to disagreements between dealers, manufacturers and importers, poor communication, and being referred from the dealer to the manufacturer or importer.

Agricultural machinery often contains parts that were made by a manufacturer other than the manufacturer of the main machine. In the purchaser survey 18% of participants said that in the past 5 years they had been told that they must deal with the parts manufacturer, rather than the dealer or machinery manufacturer, when making a warranty claim. Of these, 19% had their claim processed without issue, and 33% with delays. Many participants raised frustrations relating to referrals to tyre manufacturers.

3.3.5 Delays and liability for consequential loss

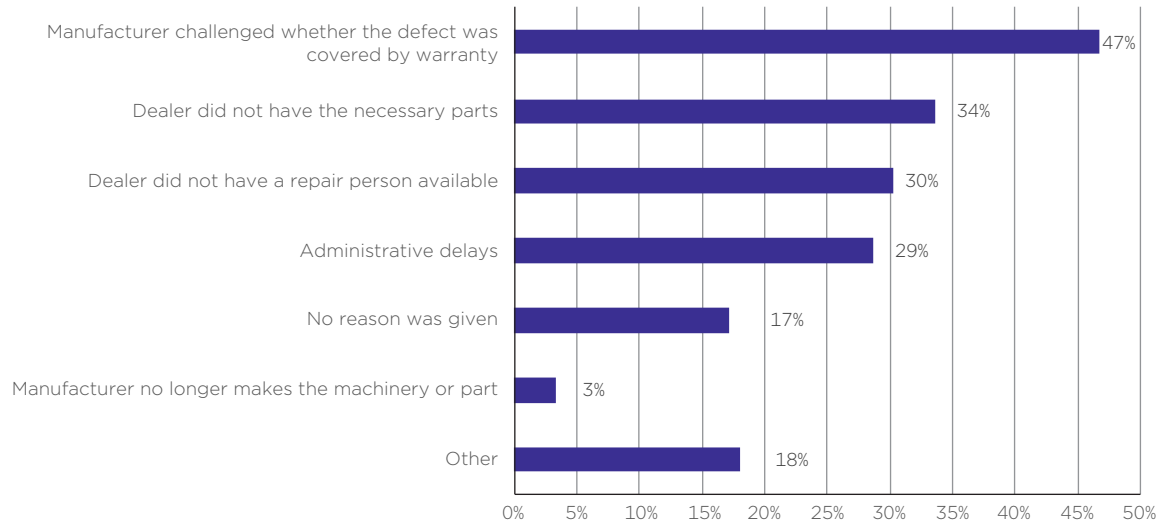
Stakeholders cited unsatisfactory purchaser support and extensive delays in warranty claims as a major concern. They reported that it can be difficult to access parts in peak periods, and that delays can lead to significant damage to crops depending on the weather.

In the purchaser survey, 47% of participants said they had experienced delays in having a warranty claim processed in the past 5 years. Delays were more common for purchasers of some brands than others.

According to participants, the most common reason provided for a delay was that the manufacturer challenged whether the defect was covered by the warranty (26%) (see figure 3.1). Other reasons included the dealer lacking the necessary parts or staff, and administrative delays. Several participants described delays while dealers or manufacturers tried to work out how to fix the problem. These participants described:

- machinery sitting idle for several months before being repaired, and farm work and maintenance being delayed as a result
- frustration with the process being 'drawn out' and a lack of communication and updates about the process or about whether a remedy would be provided
- replacing the machinery because the timeframe for a resolution was too long or unclear.

Figure 3.1 What reason were you given for your most recent claim delay? Select all that apply



Note: This question was asked only of participants who answered 'Yes' to the question, 'In the past 5 years, have you experienced any delays in having a warranty claim processed?'

The TMA emphasised that manufacturers take steps to avoid delays, and did not view significant delays as frequent. One manufacturer told the ACCC that they carry loan equipment to ensure customers' operations are not delayed during repairs. Similarly, a dealer submitted that it takes 'machine-down' situations very seriously regardless of warranty status and makes it an absolute priority to remedy them.

Several stakeholders raised the issue of limited supply of parts in local dealerships, describing the practice of sourcing parts from overseas rather than storing them locally as a 'just in time' approach. This can result in purchasers paying freight on individual replacement items at high expense and experiencing delays, including while waiting for items to be added to bulk orders to reduce transport costs. One survey respondent described the availability of parts as 'the biggest problem with our business' and said they can't afford to wait for dealers to bring parts into stock during peak periods of harvesting or planting. One manufacturer cited parts availability as the cause of most delays, stating that in some cases they will find solutions such as using parts from stock machines or airfreighting parts.

VFF noted that farmers have very little bargaining power during peak periods where even relatively short delays can result in substantial losses in income. However, many warranties limit manufacturers' liability for these consequential losses. Some stakeholders raised significant concerns about this and described farmers incurring losses in the tens or hundreds of thousands of dollars because their machinery was unavailable. A farmer may be faced with the choice of accepting significant consequential losses owing to machine downtime, or alternatively, voiding their warranty by using an independent repairer. This is supported by survey participants indicating that overall, when selecting a repairer, the expertise and availability of technicians are the most important considerations.

One dealer submitted that manufacturers and dealers should not be liable for consequential losses under warranties, because the cost of this would potentially cause dealers to go out of business. However, liability limitations cause farmers to bear these costs and remove an incentive for manufacturers to provide repairs quickly during peak periods.

Stakeholders called for a requirement that manufacturers stock commonly required parts in Australia. Others pointed to Canadian legislation regarding the timely supply of repair parts during peak periods.

Box 3.1: GrainCorp agrees to amend a term limiting its liability

Terms limiting liability for consequential losses can be problematic in various contexts.

In 2021 GrainCorp agreed to amend a term in its Grain Warehousing Agreement which limited its liability to growers to \$100,000, even if the loss was caused by GrainCorp's negligent acts or omissions. The value of the grain stored on behalf of growers can at times be substantially higher than \$100,000, and the ACCC considered that it was unfair to limit liability to this amount if the loss was caused by Graincorp's negligent acts or omissions.

GrainCorp has committed to amending this term to address the ACCC's concern that the term is likely to be an unfair contract term under the ACL, so that the limitation of liability does not apply for cases of gross negligence, fraud, criminal conduct or wilful misconduct by Graincorp. It will also increase liability for all other losses to \$200,000.²⁷

3.3.6 ACCC view

The ACCC has found that there are a range of limitations to warranties that can result in substantial losses to purchasers in the event of a fault with machinery. Purchasers raised significant concerns about general limitations on coverage, lack of coverage for transport costs associated with repairs, and loss of income related to failures. Many purchasers reported difficulties obtaining a remedy and delays or dissatisfaction with the handling of warranty claims.

The ACCC is concerned that terms which limit manufacturers' liability for losses caused by problems with their machinery, and prevent purchasers from pursuing legal claims relating to losses that would otherwise be available outside of the warranty, could potentially be unfair contract terms within the meaning of the ACL (see section 2.5.2).

The ACCC has found that warranties cover a short time period relative to the upfront cost and expected life of machines. While dealers and manufacturers indicated that they will sometimes exercise discretion to conduct repairs outside the warranty period (see section 3.4.2), purchasers should not have to rely on goodwill to access adequate recourse.

3.4 Claims under manufacturer warranties

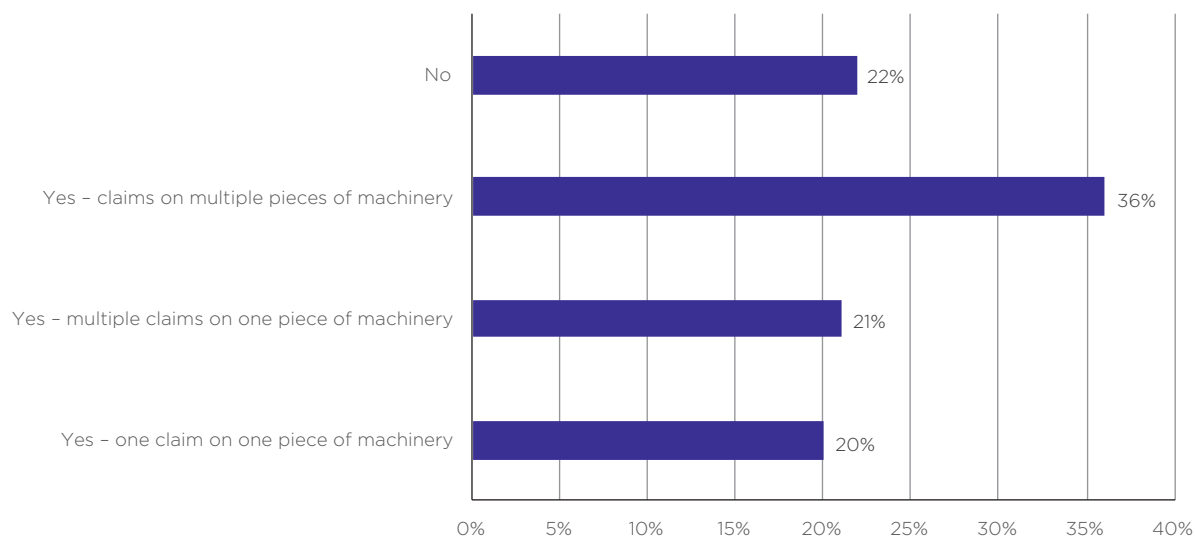
3.4.1 Frequency of warranty claims

The manufacturing industry submitted that they allocate significant resources to handling warranty claims. TMA submitted that the average value of warranty work funded by manufacturers varies across the industry from approximately 0.9% to 2% of the value of the machine per annum. One manufacturer noted the complexity of agricultural machinery and the large investment in specialised skills and tools for repair and servicing. This manufacturer processes 1,500–2,000 warranty claims per month.

More than two thirds (77%) of purchaser survey participants had made a warranty claim on their agricultural machinery in the past 5 years, including 21% who had made multiple claims on one piece of machinery and 36% who had made claims on multiple pieces of machinery (see figure 3.2). The more expensive their most significant purchase in the last 10 years was, the more likely they were to say they had made at least one warranty claim.

²⁷ For more information see ACCC media release, 22 March 2021, *GrainCorp Amends terms in its warehousing agreement*, <https://www.accc.gov.au/media-release/graincorp-amends-terms-in-its-warehousing-agreement>.

Figure 3.2 Have you made a warranty claim on any of your agricultural machinery in the past 5 years?



Note: Total of 99% is owing to rounding.

3.4.2 Responses to warranty claims

The purchaser survey indicated a high rate of rejection of warranty claims. Of participants who had made a warranty claim in the past 5 years, 43% had had a claim rejected. Rejections were more common among those whose most significant purchase was from some of the major brands than some other major brands. Participants expressed dissatisfaction with the handling of claims and the terms and conditions of the warranty. They described dealers or manufacturers ignoring requests for remedies and refusing to acknowledge the problem, and said they had spent thousands of dollars repairing machinery themselves.

In strong contrast with the survey results, TMA said that dealers commonly go to considerable trouble to support customers who have a major break down, including making replacement machines available on loan at no cost or for a very reasonable hire fee. The ACCC understands that such arrangements are less likely to be available in more remote areas or where crop production is not prevalent. MTAA submitted that dealers work extended hours to meet customer expectations, particularly during peak periods in the farming year.

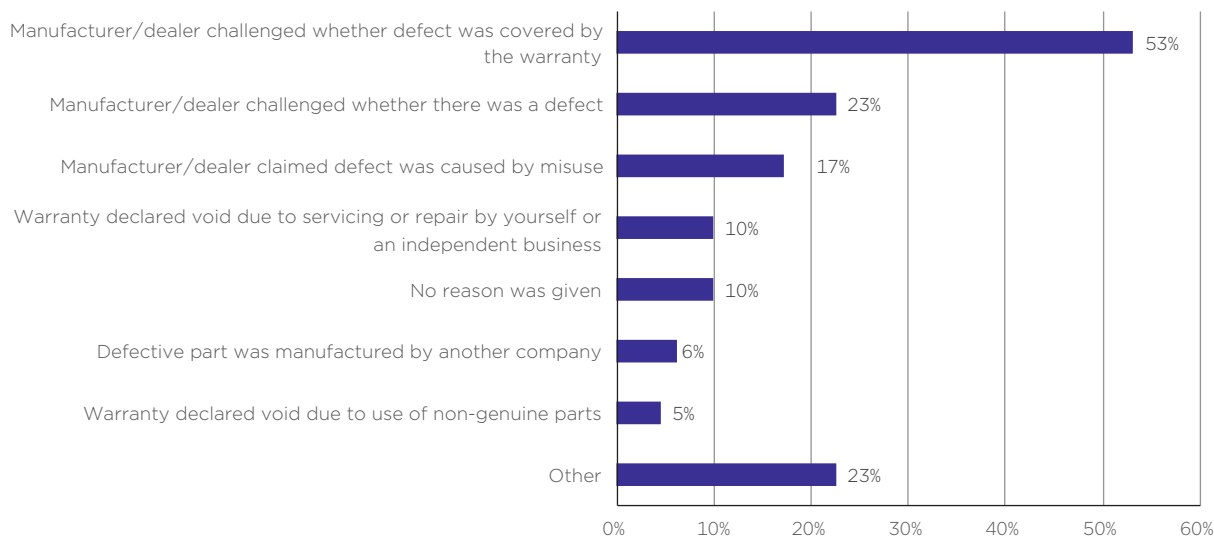
Manufacturers, dealers and their representatives submitted that dealers often exceed their warranty obligations. They submitted that it is very rare for consumers to lack recourse in the event of a problem, noting the importance of acts of goodwill, reputation and repeat custom in small rural communities. One manufacturer described a process and policy to approve goodwill servicing or repairs by a dealer after a warranty has expired, and the TMA submitted it is not uncommon for a dealer to assist customers with an ongoing problem not covered under warranty at no cost. The ACCC understands that this may be more common where there is a strong relationship between the purchaser and the dealer, and the machine is just out of the warranty period. A small number of survey participants commented that dealers had assisted beyond the scope of the warranty.

Survey participants who had had a claim rejected reported that this had occurred for a range of reasons (see figure 3.3). The likelihood of a claim being rejected for a particular reason varied depending on the brand of the participant's most significant purchase. The most commonly reported reasons for rejection were that the manufacturer/dealer challenged whether the defect was covered by the warranty (53%), challenged whether there was a defect (23%), or claimed that the defect was caused by misuse (17%).

The ACCC understands that manufacturers perceive misuse as a common reason that problems will not be warrantable. One manufacturer submitted that minimal cases of refusal to repair have been reported, but in the cases investigated the fault was judged not warrantable based on evidence. Those who had purchased more expensive machinery were more likely to report that the manufacturer/dealer challenged whether the defect was covered by the warranty. The ACCC has observed that some

warranties provide significant manufacturer or dealer discretion as to whether repairs are covered under the warranty.

Figure 3.3 What reason were you given for your most recent claim rejection? Select all that apply



Note: This question was asked only of participants who answered 'Yes' to the question, 'In the past 5 years, have any of your warranty claims been rejected?'

3.4.3 Adequacy of reimbursements

Stakeholders raised concerns about the reimbursement that dealers receive in practice from manufacturers. VACC noted that 63% of Farm and Industrial Machinery Dealers Association of Victoria (FIMDA) members had experienced not being reimbursed for warranty claim work; often related to disputes in labour costs. According to VACC, in such circumstances its members typically cover the cost themselves rather than passing them on to the purchaser. This aligns with feedback from multiple other sources about dealers struggling to get adequate compensation for warranty work, which is frequently performed at a loss.

The TMA stated that pursuant to the agreements in place, dealerships are appropriately reimbursed for warranty repairs, and a manufacturer submitted that its systems and processes ensure dealers are paid for warranty work 'without delay'.

Warranty repair rates are determined by the manufacturer. These rates are calculated by taking into account the appropriate technician needed to perform the type of work, the tasks involved, and the timeframes in which the repair is made. While the TMA notes the hourly rates paid 'are generally the same as the retail service rates charged by those dealers', industry feedback is that the allotted number of hours are generally inadequate to do the work, and therefore a dealer will invariably lose money on warranty repairs. The ACCC understands that this may be related to, for example, the manufacturer allocating funds for a senior technician to perform a repair, but the dealer deciding to support their work with an apprentice, thus accruing more total hours than the manufacturer had allowed. Another explanation may be that some jobs require a significant amount of travel time for the mechanic, but this is not allowed for in the allotted time that the manufacturer will reimburse.

According to one dealer, the costs associated with conducting a warranty repair are 'typically in the tens of thousands of dollars', and are accompanied by overly burdensome administrative requirements. MTAA and VACC raised concerns that many dealers do not have the resources to enforce their right to reimbursements from manufacturers. MTAA referred to disputes between dealers and manufacturers about whether particular defects are covered by the warranty.

If dealers view providing warranty repairs as a loss making exercise, this provides an incentive to avoid work that is viewed as complex or at risk of exceeding their allotted reimbursement.

3.4.4 Dispute resolution for warranty disputes

If a manufacturer and purchaser disagree regarding a warranty claim, there are limited opportunities for the purchaser to dispute the manufacturer's decision.

Within the Australian Small Business and Family Enterprise Ombudsman's (ASBFEO's) office, the assistance function provides access to dispute resolution services for small businesses and family enterprises in dispute with other businesses or Commonwealth government agencies. The ASBFEO provides guidance on how to resolve the dispute, facilitates discussions between the disputing parties and works towards a solution through communication in a confidential manner. The ASBFEO also assists small agricultural businesses under various industry codes such as the Franchising Code, the Dairy Code and the Horticulture Code.²⁸

For more information about requesting assistance from the ASBFEO, visit [asbfeo.gov.au](https://www.asbfeo.gov.au) or phone the ASBFEO's Information Line on **1300 650 460**.

Purchasers can also take legal action to resolve their dispute. However, legal action is usually very expensive and time consuming, and can take a long time to reach an outcome. Some purchasers described spending tens of thousands of dollars in legal disputes, joining class actions, or settling for an unsatisfactory outcome as legal fees made pursuing their dispute financially unviable.

The ACCC considers manufacturers should set out a dispute resolution process in their warranties, to make purchasers aware of how disputes over warranty claims will be resolved.

3.4.5 ACCC view

Warranty claims for agricultural machinery appear to occur frequently. Manufacturers have submitted that they assist customers within and outside the warranty period. However, a large number of purchasers say they have experienced significant difficulty obtaining a remedy for faulty machinery, for a range of reasons. There are limited opportunities available for purchasers to dispute a rejection of a warranty claim.

The ACCC recommends that manufacturers and dealers provide clear and concise information to purchasers about warranties at the earliest practical opportunity in the sales process and before the point of sale.

3.5 Consumer and fair trading laws

3.5.1 Application of the consumer guarantees

The consumer guarantees in the ACL offer a range of protections to consumers of goods and services (see box 3.3). The consumer guarantees apply to products purchased by businesses in some circumstances (see box 3.2). However, they are unlikely to apply to most purchases of agricultural machinery, because it is a high-value purchase and not normally used for personal, domestic or household purposes.

28 The Franchising Code of Conduct, <https://www.accc.gov.au/business/industry-codes/franchising-code-of-conduct>; The Dairy Industry Code of Conduct, <https://www.accc.gov.au/business/industry-codes/dairy-code-of-conduct>; The Horticulture Code of Conduct, <https://www.accc.gov.au/business/industry-codes/horticulture-code-of-conduct>.

Box 3.2 When do the consumer guarantees apply?

For goods sold, hired or leased after 1 January 2011, the consumer guarantees apply to:

- goods priced under \$40,000
- goods priced over \$40,000, that are of a kind ordinarily acquired for personal, domestic or household purposes.

From 1 July 2021, the \$40,000 threshold will increase to \$100,000 following a recent regulatory amendment.

Vehicles and trailers are also covered by the consumer guarantees, irrespective of cost, provided they are mainly used to transport goods on public roads.

The consumer guarantees do not apply to goods which are to be re-sold or transformed into something that is sold or used up.

Further information about the consumer guarantees is available on the [ACCC website](#).

Box 3.3 What protection do the consumer guarantees provide for products?

The consumer guarantees require that products be of acceptable quality. This means they must be safe and lasting with no faults, look acceptable and do all the things someone would normally expect them to do. Acceptable quality takes into account what would normally be expected for the type of product and cost.

Under the consumer guarantees, products must also:

- match descriptions made by the salesperson, on packaging and labels, and in promotions or advertising
- match any demonstration model or sample you asked for
- be fit for the purpose the business told you it would be fit for and for any purpose that you made known to the business before purchasing
- come with full title and ownership
- not carry any hidden debts or extra charges
- come with undisturbed possession, so no one has a right to take the goods away or prevent you from using them
- meet any extra promises made about performance, condition and quality, such as lifetime guarantees and money-back offers
- have spare parts and repair facilities available for a reasonable time after purchase unless you were told otherwise.

If a product does not meet any one or more of the consumer guarantees (with the exception of availability of spare parts and repair facilities), the purchaser can claim a repair, replacement or refund from the retailer who sold them the product.

The purchaser can claim compensation directly from the manufacturer or importer if the goods do not meet the consumer guarantees relating to repairs and spare parts, acceptable quality, matching description, and extra promises about performance, condition and quality.

The consumer guarantees provide more extensive protections than most agricultural machinery manufacturer warranties in several ways. For example:

- Consequential losses including travel, transport and freight costs and consequential income loss are not excluded from the coverage of the consumer guarantees.
- The consumer guarantees apply for a reasonable period of time, which can be longer than a manufacturer warranty.
- The consumer guarantees allow purchasers to seek a remedy directly from the seller.
- Sellers or manufacturers cannot opt out of the consumer guarantees.

However, the consumer guarantees only apply to the very small proportion of agricultural machinery that is priced below \$40,000. This would apply to the most significant agricultural machinery purchase in the last 10 years for only 3% of purchaser survey participants.

From 1 July 2021, the consumer guarantees will apply to products priced below \$100,000. This will significantly broaden the protection of the consumer guarantees across the economy, but they will continue to cover only a very small proportion of agricultural machinery. Most survey participants (84%) said their most significant purchase of agricultural machinery in the last 10 years cost more than \$100,000, and more than half (53%) said they had made a purchase of more than \$300,000.

Of the machinery referred to by participants, 74% of tractors, 96% of spray rigs and 99% of harvesters cost more than \$100,000. A manufacturer submitted that the cost of machinery can range from \$3,000–30,000 (mowers), \$18,000–\$300,000 (tractors), \$5,000–\$300,000 (implements and balers) and up to \$800,000 (harvesters). VFF submitted that a new header will often cost \$800,000–\$1,000,000.

3.5.2 Application of other consumer protection and fair trading laws

Sellers of agricultural machinery are subject to a number of other provisions of the ACL whose application is not limited in the same way as the consumer guarantees. These include provisions relating to misleading or deceptive conduct²⁹, false or misleading representations³⁰, unconscionable conduct³¹ and unfair contract terms.³²

Box 3.4 Example of alleged false or misleading representations: Agrison

In October 2020 the ACCC instituted proceedings against AA Machinery Pty Ltd (trading as Agrison), alleging it made false or misleading representations about the warranties and after-sales services available to its customers, in breach of the ACL.

It is alleged that Agrison has represented on its website and in print and social media that its tractors would be fully supported by a five-year nationwide warranty, a national after-sales service network and access to spare parts, and that Agrison would provide timely after-sales service to customers if problems occurred.

Agrison customers reported that, despite these representations, they experienced a wide range of serious defects with their tractors and were unable to get spare parts or repairs from Agrison within a reasonable timeframe or at all. The matter is currently before the Federal Court of Australia.

29 For further information see ACCC, *Advertising and selling guide*, <https://www.accc.gov.au/publications/advertising-selling/advertising-and-selling-guide/avoid-misleading-or-deceptive-claims-or-conduct/misleading-or-deceptive-conduct>.

30 For further information see ACCC, *False or misleading statements*, <https://www.accc.gov.au/business/advertising-promoting-your-business/false-or-misleading-statements>.

31 For further information see ACCC, *Unconscionable conduct*, <https://www.accc.gov.au/business/anti-competitive-behaviour/unconscionable-conduct>.

32 For further information see ACCC, *Unfair contract terms*, <https://www.accc.gov.au/business/business-rights-protections/unfair-contract-terms>.

Box 3.5: Example of alleged false or misleading representations: Apple Inc

In June 2018 the Federal Court ordered Apple Inc to pay \$9 million in penalties for making false or misleading representations to customers with faulty iPhones and iPads about their rights under the ACL. Apple's representations led customers to believe they would be denied a remedy for their faulty device under the ACL because they used a third party repairer.

The use of a third party repairer does not necessarily prevent the ACL from applying to situations where it would otherwise apply. The ACL prohibits false or misleading representations about consumers' rights to a remedy.

The unfair contract terms protections apply only to standard form consumer and small business contracts. Some contracts for the sale of agricultural machinery, including warranty terms, are likely to be considered to be standard form consumer and small business contracts to which the unfair contract terms provisions apply. Examples of warranty terms that could potentially be unfair contract terms include:

- Terms that limit purchasers' ability to seek compensation, through avenues external to the warranty, for income loss and other losses caused by faulty machinery;
- Terms that place the onus on the purchaser to show that a defect was not caused by abnormal use.

See section 2.5.2 for information about the unfair contract terms provisions.

In addition, state legislation may provide protection to some purchasers in some instances. The nature of the protections offered, and the ability for parties to contract out of these protections, varies depending on the jurisdiction. For example, the Sale of Goods Act 1923 (NSW) provides that there are several implied conditions in contracts for the sale of goods, but the implied conditions can be negated or varied in the agreement between the parties.

3.6 Use of independent repairers

Typically if repairs are carried out by someone other than an authorised dealer using OEM parts, the purchaser will not be reimbursed under the manufacturer's warranty. In addition, some warranties expressly state that it is subject to purchasers having their machinery serviced and repaired by an authorised dealer using OEM parts.

Twelve per cent of the survey participants who reported having a warranty claim rejected in the past 5 years said that this was because the warranty had been declared void as a result of servicing or repair by themselves or an independent business (10%) and/or use of non-genuine (non-OEM) parts (5%). NFF raised the right to independent repair within the warranty period as a major concern.

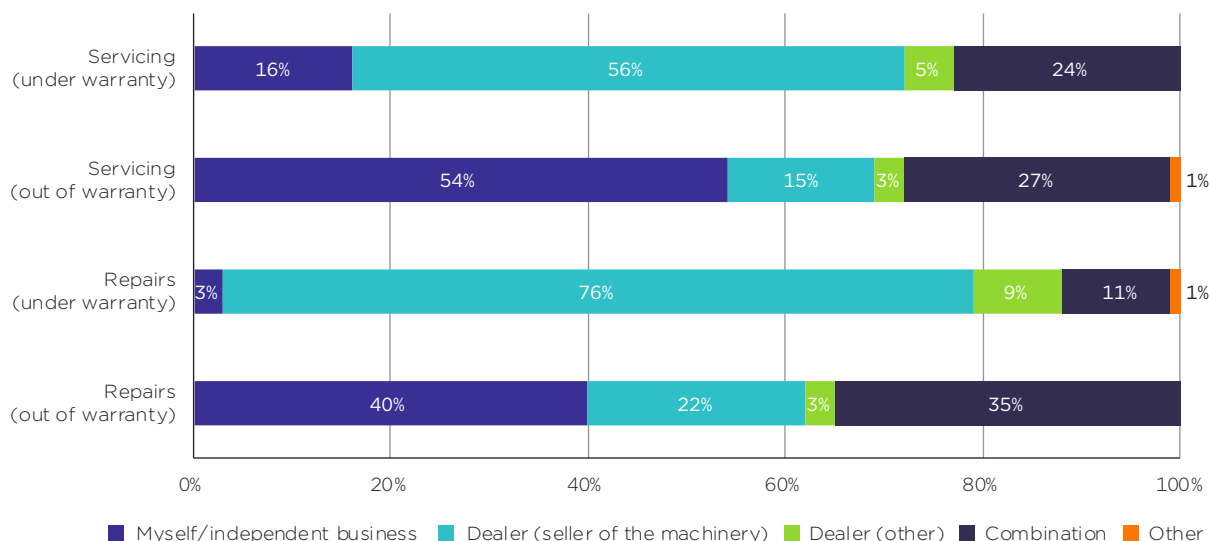
However, the terms of warranties that the ACCC has reviewed do not indicate that the warranty will necessarily be void should an independent repairer service or repair the machinery, and a manufacturer and authorised dealer agreed with this in their submissions. The TMA submitted that purchasers are not necessarily restricted from using independent repairers to perform normal scheduled service maintenance work, and the type of work a purchaser may conduct is usually specified in the operator's manual. The TMA, a manufacturer, and an industry group pointed to difficulties with monitoring the quality of work carried out by someone other than the authorised dealer and how this could impact on the warranty and lead to disputes.

3.6.1 Impact of warranty restrictions on servicing and repairs

Warranty considerations appear to have a noticeable influence on purchasers' decisions about servicing and repair. Most survey participants reported using the dealer from whom they purchased the machinery for both servicing and repairs while under warranty. Outside of the warranty period, participants relied more heavily on independent repairers, or carrying out servicing and repairs themselves (see figure 3.4). Survey participants who used a combination of services, said that

they generally opted to do smaller repair and servicing jobs themselves and use a dealer for larger or more complicated jobs. In a similar vein, one submission stated that independent repairers operate in a different market segments to authorised dealers, servicing older, less technologically complex machinery.

Figure 3.4 Who services and repairs your machinery?



Stakeholders raised concerns about the impact of warranty restrictions on purchasers located long distances from authorised dealerships. Several stakeholders noted that limited availability of authorised dealers could result in lengthy delays and limited access to repairs during peak periods, with the NFF stating that independent repairers are usually located closer to purchasers than authorised dealers. Griffith University noted that Australian farmers are typically located further from an authorised repairer than US farmers. By contrast, one manufacturer stated that independent repairers and authorised dealers are generally close together, and therefore accessibility is similar, while another submitted that most customers' machines are within 150 km of a selling dealer, and there are virtually no independent repairers in remote locations.

One submission stated that restrictions on the use of independent repairers during the warranty period do not lessen competition in after-sale markets because the warranty period tends to be of limited duration. However, the NFF suggested that the effects of warranty restrictions were longer lasting, raising a barrier to entry for independent repairers by keeping them out of an important market segment.

3.6.2 Reasons for warranty restrictions on servicing and repair

Manufacturers and an authorised dealer acknowledged that manufacturers will only reimburse costs under warranty when an authorised dealer carries out servicing and repairs, but offered reasons for their restrictions, with some stating they were reasonable and necessary.

The TMA and an authorised dealer emphasised the obligations of dealers to meet high minimum performance standards in terms of customer service, machine servicing and repair, and compliance with quality and safety regulations. It was also submitted that independent repairers do not receive the same level of manufacturer support.

Submissions asserted that dealers face substantial cost outlays in purchasing necessary equipment and training staff to carry out servicing and repair work to the manufacturer's standards, and that this places them at a disadvantage against independent repairers when competing on price. A manufacturer submission stated that dealers find it increasingly hard to be profitable and find suitable staff.

One submission gave examples of instances where independent repairers had misdiagnosed issues, leading to further expenses where, for example, the wrong part was ordered. By contrast, another submission stated that dealers lack the expertise to service the equipment they sell, and that the

industry is characterised by low retention of experienced technicians. GrainGrowers and several survey participants also commented on problems caused by authorised dealers lacking knowledge or experience.

It was also submitted that the costs of servicing and repairs of agricultural machinery can run into the tens of thousands of dollars, and using authorised dealers allows manufacturers to manage these costs and minimise the risk of fraud. NFF acknowledged that manufacturers have an interest in limiting their financial liability for sub-standard independent repairs, but stated that this does not justify voiding warranties for mechanical issues unrelated to a third-party repair (including the mechanical issue which necessitated the repair in the first place).

VFF's submission recommended that agricultural machinery warranties be prohibited from permitting only authorised dealers to conduct after-market services. NSW Young Lawyers suggested legislative reforms providing that a warranty cannot be void if a repair is conducted by an independent repairer, as long as the repair has been carried out with due care and skill and with spare parts that are fit for purpose.

3.6.3 ACCC view

Manufacturer warranties may impact competition for servicing and repairs by discouraging the use of independent repairers, and creating a barrier to entry into the repair market. The ACCC considers that authorised dealers and independent repairers operating in different market segments is likely a consequence of independent operators being discouraged from entering the repair market through a combination of warranty terms and lack of access to the necessary tools and parts.

Protecting authorised dealers from competition with independent repairers may impact factors such as the price of servicing, repairs and replacement parts, the quality and speed of work, geographical convenience and the provision of loan equipment.

There may be legitimate reasons for restricting independent repairers' ability to conduct work which will be paid for by the manufacturer under warranty, including ensuring the quality and safety of the machinery and reducing the risk of fraud or poorly completed work. However, it may limit purchaser's ability to access servicing and repairs without being deprived of the benefits of the warranty. Restrictions appear to be even less justified when they extend to servicing or repairs which would not be reimbursed by the manufacturer.

The ACCC acknowledges statements from manufacturers that the warranty will not necessarily be void where an independent repairer carries out servicing or repairs. However, the ACCC is concerned that uncertainty over the impact of using independent repairers deters purchasers from using them. The ACCC is also concerned that terms placing the onus on the customer to show that a defect was not caused by abnormal use are potentially unfair contract terms within the meaning of the ACL (see section 2.5.2).

For these reasons, the ACCC considers that right to repair initiatives should be applied to agricultural machinery markets. Further discussion about right to repair issues is contained in chapter 4.

3.7 Warranty term transparency

Given the limited protection offered by the ACL for agricultural machinery it is important that purchasers understand their warranties so that they can consider and account for all relevant risks in their decision to purchase a machine.

3.7.1 Competition on warranty terms

The ACCC has not observed manufacturers using their warranty terms to attract purchasers and differentiate themselves from their competitors.

This is in contrast to the new car retailing industry, where some manufacturers promote themselves as offering significantly longer or more comprehensive warranties than others. Offering a better warranty might be more costly for agricultural machinery manufacturers than for car manufacturers.

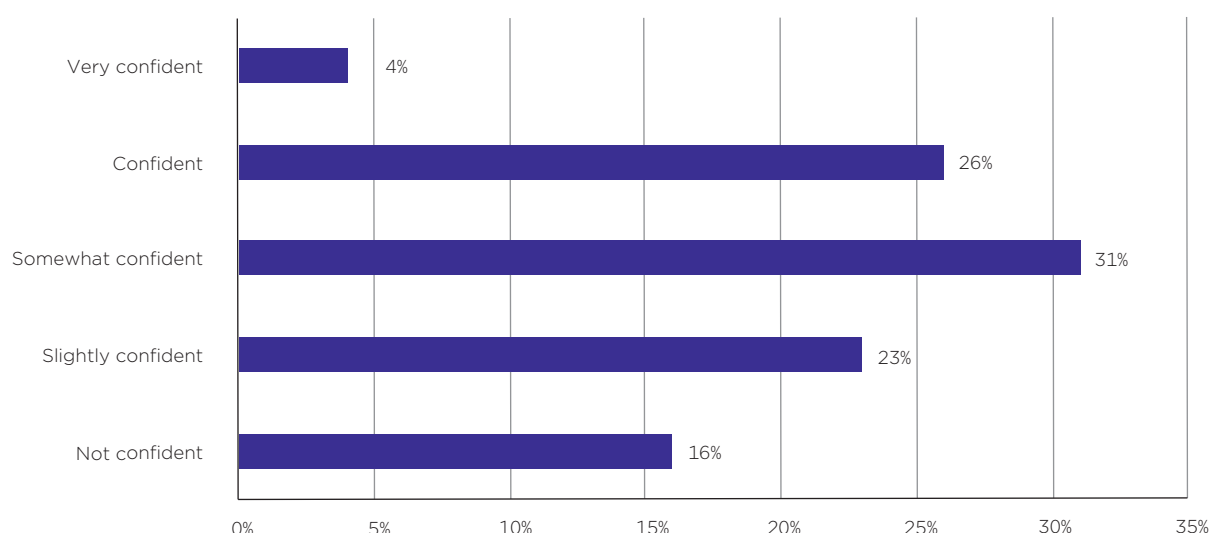
This is because there is overlap in many circumstances between car manufacturers' obligations under their warranties and under the ACL, but not for agricultural machinery manufacturers. The lack of warranty-based competition may also be related to or symptomatic of:

- a lack of transparency and understanding of warranty terms
- a lack of ability for purchasers to negotiate on warranty terms
- a lack of importance placed on warranty terms by purchasers owing to a lack of faith in warranties in general, or prioritisation of other factors.

3.7.2 Purchaser confidence understanding and negotiating warranties

Survey results indicated that purchasers lacked confidence in their ability to understand manufacturers' warranties (see figure 3.5). Less than one third of participants said they were 'very confident' (4%) or 'confident' (26%) that they understand their warranty and, in particular, which categories of repairs or servicing are and are not covered by their warranty. In addition, almost one fifth (19%) of those who bought an extended warranty said they were not confident that they understood the rights they would obtain under the extended warranty based on the salesperson's explanation.

Figure 3.5 How confident are you that you understand your manufacturer's warranty and, in particular, which categories of repairs or servicing are and are not covered by your warranty?



Half of the participants to the purchaser survey (50%) said they had never asked the dealer or manufacturer about what could void their warranty, including servicing or repairing the machinery themselves, or using an independent business.

TMA submitted that farmers are long term and repeat purchasers of agricultural equipment, and generally understand warranty limitations. A dealer said that purchasers often review and compare warranty terms between suppliers when comparing products. A manufacturer and a dealer submitted that purchasers can negotiate warranty terms with dealers outside of the manufacturers' warranty (without the manufacturers' endorsement or support), but that this should not be mandatory and should be driven by competition.

Regarding the ability to negotiate, 15% of survey participants indicated that they were able to successfully negotiate on the warranty terms and, for the vast majority of these, at least one other aspect of the sale, when purchasing their machinery. Other survey participants, supported by several other stakeholders, commented that warranties are set by manufacturers and offered on a 'take it or leave it' basis with very little opportunity to negotiate or discussion of the terms.

3.7.3 Transparency of warranties

The lack of engagement with warranties may be partly due to the complexity of warranty documents. VFF submitted that warranties vary significantly from manufacturer to manufacturer, and are often detailed in long sales contracts which are difficult to understand, resulting in many purchasers being unaware of their rights.

Stakeholders suggested there is a lack of transparency around warranties at the point of enquiry and purchase. The ACCC has found that warranty documents frequently use legal terms and language that may not be understood by many purchasers. GrainGrowers and NFF submitted that warranty terms are confusing, and that there is a lack of transparency and accountability between dealership, manufacturer and purchaser obligations under warranty terms, particularly for machines that use parts supplied by many different manufacturers. One farmer suggested that manufacturers 'hide behind confusing and complicated warranties that they pressure buyers into signing'.

By contrast, the manufacturing sector reported that warranties are clear and transparent. Comments from the manufacturing sector included:

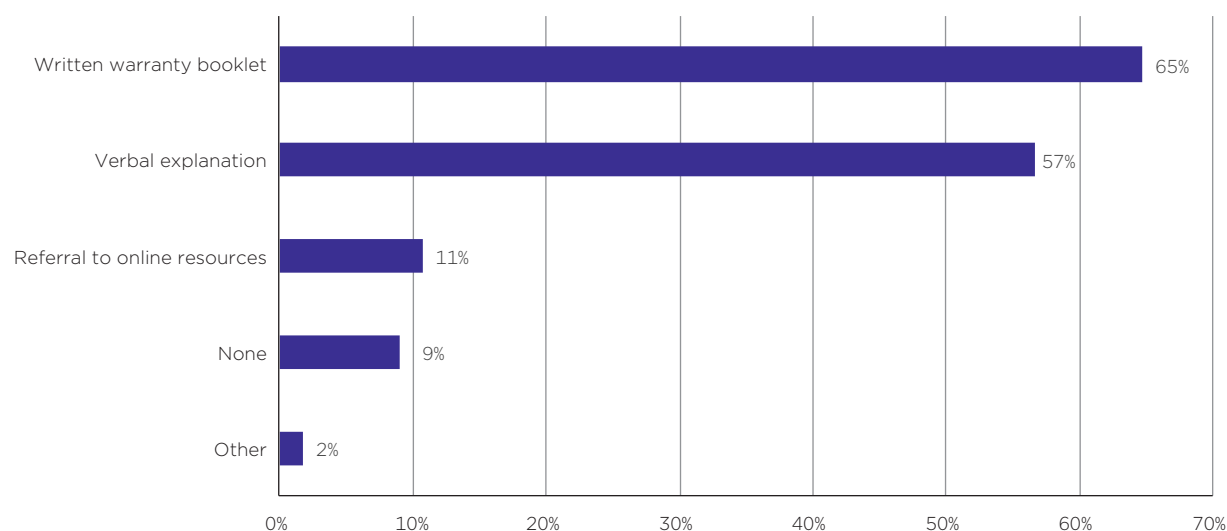
- that they publish all warranty terms in a booklet and advise dealers of changes
- that their warranties clearly disclose the conditions that apply
- that they provide a plain English warranty document that clearly communicates how the warranty applies, what is covered, and what is not.

The manufacturing and retailing sectors also described the following processes for ensuring that dealers discuss warranties with purchasers, including at the point of sale:

- Requiring dealers to ensure that the customer understands the conditions of the warranty at the point of sale or upon delivery.
- Requiring the selling dealer and the customer to sign a declaration acknowledging the warranty terms and conditions.
- Making the warranty available at any time from the dealer or online.
- Giving warranty guidelines to customers about what self-assistance in the upkeep of machinery may be undertaken by the customer without the authorised dealer's assistance.
- Allowing customers to request a list of repairs and maintenance that they can do themselves to ensure the warranty is not voided and safety of the machine is not compromised, and usually also specifying this information in the operators manual.
- Advising customers to consult with a dealer for warrantable features.

VACC submitted that its research indicates that 63% of dealers advise consumers of the warranty period and the process involved for making a claim. A similar percentage of survey participants said they received a written warranty booklet (65%) and/or verbal explanation (57%) from the dealer at the point of sale (see figure 3.6). Twelve per cent said they did not receive a warranty booklet or verbal explanation. Eleven per cent said they were referred to online resources, and 9% said they did not receive any warranty information at the point of sale. A small number of participants received other information such as having terms emailed, a dealer guarantee in writing, or reference to the warranty on their quote or invoice.

Figure 3.6 What information were you provided from the dealer at point-of-sale about the manufacturer’s warranty? Select all that apply



One purchaser reported that the dealer insisted that they sign the warranty, but they refused because the dealer had not completed all agreed parts of the delivery. Others said they had to buy the service manual separately, received a manual that was out-of-date, or have found manuals difficult to understand because they have been poorly translated from other languages. Other purchasers commented about a lack of information regarding which parts need routine inspection or maintenance until after the parts fail, and that they were only told not to do any servicing themselves after the tractor was delivered.

MTAA and a dealer raised concerns that customers often do not take their obligations seriously in terms of following the operating manual, learning to operate the machinery and understanding warranties, despite dealers providing information and training at delivery. The dealer noted that there is ‘a lot to take in’, and said that some purchasers rely on dealers to assist them with non-warranty issues, rather than consulting their operating manuals.

3.7.4 Increasing understanding of warranties

Several stakeholders suggested that there should be requirements for greater plain language oral and written disclosure of the terms and extent of warranties, including extended warranties, at the time of purchase. Some stakeholders recommended that manufacturers or the ACCC develop resources such as fact sheets informing purchasers about their legal rights. Stakeholders drew analogies with:

- the requirement in Arkansas that sellers provide particular information to purchasers at the time of sale, including a guide to their legal rights
- the requirement that product disclosure statements be provided to consumers before they purchase a financial service, which is enforceable through penalties for non-compliance
- information provided to purchasers of new cars by the Australian Automobile Aftermarket Association.

3.7.5 ACCC view

Despite some measures by the manufacturing and retailing sectors, there appears to be a low level of purchaser understanding of, and engagement with, warranty terms and conditions overall.

It is important that purchasers consider and understand the warranty at or before the time of sale to ensure that both parties are clear about their rights and obligations. Purchasers should read the manufacturer’s warranty carefully to ensure they understand its coverage and limitations before they buy agricultural machinery. Importantly, manufacturers and dealers should facilitate this process by

ensuring that warranties are clear and transparent, and should provide a clear, plain English explanation of warranty terms and conditions, including key limitations, to consumers at or before the point of sale.

If a purchaser understands the machine warranty at the point of sale, they can take into account the potential likelihood and cost of a defect as well as the likelihood of the warranty covering the repair. Purchasers who understand their warranty may also be less likely to submit an invalid warranty claim, reducing warranty claim rejection rates.

Further, engagement with warranties also increases the incentive for manufacturers to provide a more generous warranty as a way to compete. A lack of transparency and engagement with warranty terms may indicate a lack of warranty-based competition.

Manufacturers and dealers have a clear role to play in ensuring that their manufacturer warranties can be easily understood by purchasers. The ACCC recommends that manufacturers and dealers provide clear and concise information to purchasers about warranties at the earliest practical opportunity in the sales process and before the point of sale. This information should include a one-page statement about the terms and key limitations of the warranty and should set out a clear process for resolving disputes over warranty claims.

3.8 Recommendations and ACCC action

In addition to the recommendations listed below, the ACCC considers that future Australian right to repair legislation could include provisions that address some of the concerns raised in this chapter. This is discussed in section 4.5.2.

3.8.1 Voluntary reform by manufacturers

Agricultural machinery is a significant investment and continues to increase in complexity. The ACCC considers that there is currently an imbalance in the rights and obligations of purchasers, dealers and manufacturers of agricultural machinery when it comes to addressing problems with the machinery. Several farmers noted that they would have more rights relating to a simple consumer good like a broken toaster than the expensive and complex agricultural machinery that they rely on for their business.

Several stakeholders proposed that an exception to the value threshold for the application of the consumer guarantees be introduced for agricultural machinery, so that the consumer guarantees would apply to all agricultural machinery, regardless of its value. This would protect purchasers of agricultural machinery in the event that their purchase were not of acceptable quality, did not match its description or demonstration model, or were not fit for purpose.

Some stakeholders noted similarities between agricultural machinery and vehicles and trailers. Vehicles and trailers which are mainly used to transport goods are covered by the consumer guarantees regardless of their cost. This exemption was designed to extend the protection of the consumer guarantees to truck owner-operators whose business is directly affected by the dependability of their vehicles.³³ Similar to truck owner-operators, purchasers of agricultural machinery depend on agricultural machinery for the viability of their business, and can suffer enormous consequential losses in the event of a product failure.

However, this is also the case for many other business to business purchases across the economy to which the consumer guarantees also do not apply, including, for example, purchases of other types of machinery. Additionally, amendments to the consumer guarantees following the review which concluded in 2017 are now coming into effect, making it unlikely that further amendments to the regime will be considered for some time.

33 Trade Practices Revision Bill 1986 Second Reading, 19 March 1986, p. 1624, <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansard%2F1986-03-19%2F0100%22>; Trade Practices Revision Bill 1986 Explanatory Memorandum, p. 6, paragraph 14, http://classic.austlii.edu.au/au/legis/cth/bill_em/tprb1986262/memo_0.html; Consumer Affairs Australia and New Zealand, 2018, *Australian Consumer Law Review: Clarification, simplification and modernisation of the consumer guarantee framework*, p. 14, paragraph 15, https://consult.treasury.gov.au/market-and-competition-policy-division/c2018-t271629/supporting_documents/20180322RISACLReviewCombined.pdf.

Representatives of the retail side of the industry opposed the idea of extending the application of the consumer guarantees to agricultural machinery. Concerns were raised that this would negatively impact the agricultural machinery sales industry and lead to unfair situations to the detriment of dealers. They noted that agricultural machinery purchases are typically business-to-business transactions, and contrasted farmers with other types of consumers.

The ACCC considers that industry-specific measures, rather than the broad protections offered by the consumer guarantees for lower value purchases, would be an appropriate avenue for addressing the current barriers to remedies in the agricultural machinery industry.

3.8.2 Improved point of sale information

The ACCC considers that purchasers would benefit from improved information regarding warranty terms and conditions at or before the point of sale.

In most circumstances, the manufacturer warranty is the sole protection available to purchasers against agricultural machinery faults. However, manufacturer warranties are limited in a range of ways that can result in substantial losses to purchasers in the event of a fault with machinery. Further, survey results indicated that purchasers lacked confidence in their ability to understand manufacturers' warranties. Manufacturers and dealers should assist purchasers in engaging with warranties by providing clear information about their rights at or before the point of sale, and regarding the process in the event of a dispute.

More accessible information about warranties could be achieved through manufacturers providing additional materials to purchasers at the point of sale through their authorised dealers. In addition, purchasers would benefit from improved information regarding data rights and machine interoperability (see chapter 5). This reform would be a matter of best practice for which manufacturers should take responsibility.

► Recommendation 3

The ACCC recommends that manufacturers and dealers provide clear and concise information to purchasers about warranties at the earliest practical opportunity in the sales process and before the point of sale.

This information should include a one-page statement about the terms and key limitations of the warranty and should set out a clear process for resolving disputes over warranty claims.

3.8.3 Educational materials and simple guidance

The ACCC will develop simple guidance materials to assist purchasers of agricultural machinery to understand their business and consumer rights. This will be available to industry by the end of 2021.

4. Access to tools, technical information and OEM parts

Key Points

- The technology utilised in modern agricultural machinery allows manufacturers to restrict independent repairers' ability to service or repair machinery, and may prevent the installation of non-OEM parts.
- Restrictions on access to diagnostic software tools and 'genuine'/OEM parts have the potential to impact competition regardless of whether or not machinery is under warranty.
- Nearly half of survey participants reported that they (or an independent repairer they had engaged) had limited or no access to diagnostic software tools to carry out servicing and repairs.
- The manufacturing and retailing sectors emphasised the need for these restrictions to maintain quality and safety standards, as well as protect the investments both manufacturers and dealers have made in their businesses and ensure they remain viable.
- Submissions indicate that manufacturers generally place restrictions on the use of non-OEM parts in their branded agricultural machinery. However, stakeholders' submissions varied as to the extent this was likely to impact on competition in after-sales markets, and whether such restrictions were necessary or beneficial.
- The inclusion of agricultural machinery in the motor vehicle service and repair information sharing scheme, and the Productivity Commission inquiry into the Right to Repair within Australia may increase the ability of independent repairers to compete in after-markets.

4.1 Introduction

Modern agricultural machinery increasingly utilises complex computerised systems that rely on embedded software to function. This technology has enabled increased productivity and innovation in the agriculture industry. However, a consequence of this technology is that repairing agricultural machinery can depend on having access to the software tools, technical information and service manuals held by manufacturers.

Despite receiving mixed feedback on the matter, the ACCC understands that manufacturers typically give purchasers access to product guides and service manuals, which contain technical information to assist with the operation, maintenance and repair of machinery. However, the ability to carry out servicing and repair on agricultural machinery may also depend on a range of specialised tools and software, access to which is restricted. The NFF submitted that manufacturers withhold information or software as a means of restricting market access of third party repairers.

Agricultural machinery is increasingly dependent on sensors and related diagnostic systems to identify any faults. Where these systems detect a fault, they may shut the machinery down until the fault is addressed. Issues with these diagnostic systems may themselves result in the machinery shutting down, even when no underlying mechanical problem exists.³⁴ Resolving these issues requires access to the machinery's onboard computer, which itself requires access to tools such as proprietary cables and software.

The increasing computerisation of agricultural machinery also allows manufacturers to use technological protection measures (TPMs), sometimes referred to as 'digital locks'. These prevent access to software

³⁴ Anthony Rosborough, 'Unscrewing the Future: The Right to Repair and the Circumvention of Software TPMs in the EU', [24], <https://www.iipitec.eu/issues/iipitec-11-1-2020/5083>.

on the premise of protecting copyright. TPMs may limit a repairer's ability to diagnose faults or carry out servicing and repairs on machinery without certain software tools.³⁵

Manufacturers may restrict the installation of replacement parts by using TPMs such that particular software tools are required to co-verify or 'activate' them. Installation of replacement parts without software activation will then render the machinery inoperable until the part is activated by a technician with the necessary tools. TPMs may also prevent installation of 'non-genuine' (non-OEM) parts.³⁶

4.2 Key concerns

The ACCC's discussion paper noted stakeholder concerns about manufacturers restricting independent repairers' ability to service or repair agricultural machinery by limiting access to technical information, diagnostic software tools, and OEM parts. The ACCC expressed concern that such restrictions could adversely affect competition in the market for providers of agricultural machinery, or outcomes for purchasers:

- If purchasers are limited to using certain businesses to service or repair their machinery, this may result in purchasers paying a higher price.
- Restrictions on the services or repairs which independent repairers can perform may limit competition in after-sales markets.
- If purchasers are reliant on authorised dealers for servicing or repairs, delays during peak periods may result in a significant loss of income, particularly for purchasers in remote areas.

The discussion paper acknowledged manufacturers' stated reasons for imposing these restrictions, such as ensuring machinery quality and safety, as well as compliance with environmental and safety regulations. However, these restrictions have the potential to impact on competition even where machinery is outside of the warranty period.

The ACCC sought submissions providing feedback and further information on:

- restrictions on access to technical information and diagnostic software tools
- differences in prices between OEM parts, and comparable quality non-OEM parts.

Submissions from the manufacturing and retailing sectors stated that technical information and service manuals are available to third party repairers. However, both survey participants and submissions reported difficulties accessing these diagnostic software tools, including the high cost of these tools when they were available. Survey participants commented specifically on fault codes and how they were unable to diagnose faults without the assistance of an authorised dealer with the specific software tools. The ACCC notes that these restrictions on technical information, diagnostic software tools and service manuals may impact competition even when machinery falls outside of the warranty period.

Both survey participants and submissions raised concerns with restrictions on the sale of OEM parts, and also with issues installing non-OEM parts. Such restrictions are likely to affect competition even where machinery is outside of the warranty period.

The ACCC understands the purchaser is responsible for the proper functioning and maintenance of their machinery outside of the warranty period, and bears all associated costs. The ACCC therefore considers that purchasers should not be restricted as to who services or repairs their machinery when it is outside of the warranty period. Restrictions on independent repairers' ability to access diagnostic software tools, technical information and necessary parts effectively limits their ability to compete with authorised dealers in after-sales markets.

³⁵ *ibid* [5], [26].

³⁶ *ibid* [5], [27].

4.3 Access to diagnostic software, technical information, and service manuals

The discussion paper noted that the ACCC had received reports of manufacturers and dealers limiting access to diagnostic software tools, service and repair materials. This limits the ability of independent repairers to carry out servicing or repair work on agricultural machinery, even when machinery is no longer under warranty. This in turn may impair their ability to compete in the provision of after-sales services. It may also allow authorised dealers to charge higher prices for servicing and repairs.

The ACCC sought submissions on whether:

- limitations on independent repairers accessing diagnostic, service and repair materials are a barrier to them competing for business in the after-sales services market
- 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.

Nearly half (47%) of survey participants reported that they or the independent business they had engaged had no or limited access to the diagnostic tools or manuals needed to carry out servicing or repairs. These responses were not limited to purchasers of any particular brand of machinery.

Survey responses and submissions made numerous references to restrictions on diagnostic software tools preventing independent repairers from servicing or repairing machinery, and where an authorised dealer with the appropriate software was required. It was mentioned that this had occurred even when faults were minor and repairs involved inexpensive and easily replaced components.

Some of these issues were also considered in the *New Car Retailing Industry - a market study by the ACCC*, released in December 2017.³⁷ These included manufacturers restricting access to technical information, diagnostic software tools and OEM parts (see box 4.1).

³⁷ ACCC, *New Car Retailing Industry Market Study Report*, December 2017, <https://www.accc.gov.au/focus-areas/market-studies/new-car-retailing-industry-market-study>.

Box 4.1. The ACCC's New car retailing industry market study

The New car retailing industry market study identified a range of competition concerns stemming from restrictions on access to technical information and diagnostic software tools, including:³⁸

- car manufacturers have an incentive to limit access to technical information by independent repairers to steer service work to authorised dealers and repair work to preferred repairer networks
- limiting access to technical information by independent repairers impacts their ability to compete with authorised dealers and preferred repairer networks on an even playing field
- these restrictions are causing detriment to consumers in the form of increased costs, inconvenience and delays when having their new car repaired or serviced, and thereby reducing the choices available to consumers for the repairing and servicing of new cars
- consumer switching in the new car market is unlikely to provide strong competitive discipline on manufacturers and dealers in aftermarkets, and any benefit of competition in the sale of new cars to consumers does not offset the impact of less competitive aftermarkets.

The ACCC recommended a mandatory scheme giving independent repairers access to the necessary tools to carry out repairs, addressing a number of matters:³⁹

- Car manufacturers should make available to independent repairers, in real time, the same digital files and codes, such as software updates and reinitialisation codes, made available to dealers to repair or service new cars.
- Obligations on sharing technical information should apply to all car manufacturers in Australia.
- Relevant intermediaries should have options to access technical information from car manufacturers on commercially fair and reasonable terms.
- A process should exist for vetting end users accessing environmental, safety and security-related technical information and for tracing the use of that information.

As discussed at section 4.5.1 below, the government subsequently drafted the Competition and Consumer Amendment (Motor Vehicle Service and Repair Information Sharing Scheme) Bill 2021 following consultation with stakeholders. The bill was introduced into the House of Representatives and read for a second time on 24 March 2021.

4.3.1 Restrictions on service manuals

Submissions from the manufacturing and retailing sectors stated that they do not usually restrict independent repairers' access to service manuals. Despite this, farmers have reported to GrainGrowers that their independent mechanics have been unsuccessful in accessing service manuals and parts from the local dealership and have subsequently had to purchase these from international sources.

4.3.2 Restrictions on diagnostic software tools

Submissions noted that manufacturers limit independent repairers' access to diagnostic tools and proprietary software to at least some extent.

Manufacturers, dealers and industry groups stated that such restrictions were reasonable and necessary to prevent software modification, protect the manufacturer's intellectual property and ensure machinery complies with quality, safety and environmental standards. They pointed out that some independent repairers advertise that they can modify engines beyond their standard design specifications, and that this may negatively impact on the manufacturer warranty and machine quality and safety.

38 *ibid.*, p. 129.

39 *ibid.*, pp. 133-134.

John Deere noted the distinction between repairing and modifying equipment, noting that even in the case of its own authorised dealers it permits modification in only certain circumstances, because of the complexity and risks involved. Manufacturers indicated that purchasers can conduct minor repairs on parts such as sensors themselves, provided they use equivalent or 'like' parts.

Manufacturer submissions mentioned that they have a number of means available to assist farmers with remote/on-farm repair. These include tools that provide diagnostic information to farmers and remote assistance, as well as educational material provided online and through various clinics. John Deere noted that it also provides software that allows for repairs to be carried out on-farm by the farmer, facilitating diagnosis and repair of faults.

By contrast, other submissions stated that these restrictions went beyond what was reasonably necessary to achieve these aims, and that they may be limiting competition in after-sales markets. Submissions and survey responses noted that software allowing for the reading of fault codes was limited to authorised dealers, preventing either the purchaser or an independent repairer from identifying faults. This may result in lengthy delays, irrespective of the complexity of the fault, with some faults being minor in nature. GPA raised concerns about the increasing complexity of agricultural machinery and whether this was being used to limit competition in after-sales markets.

The sensors found on modern agricultural machinery were singled out in submissions as a source of concern. Malfunctioning sensors can cause machinery to shut down even when there is no underlying mechanical problem. While replacement sensors are generally inexpensive and readily available, an authorised dealer with access to the necessary proprietary tools and software may be required to resolve such issues. Several submissions suggested that purchasers and independent repairers should have the means available to repair and replace these. Submissions also noted that internet connectivity in some regions is unreliable or non-existent, raising doubts about the value of fault diagnosis and repair services provided via telemetry.

Information received indicated that while generic diagnostic software was available, the cost of these tools may be prohibitive, particularly for smaller businesses, and where manufacturers do permit access to technical information and service manuals, the high prices they charge discourage purchasers of agricultural machinery and independent repairers.

The Australian Digital Alliance (ADA) and NSW Young Lawyers raised additional concerns with the application of copyright laws to manufacturers' proprietary software, which may prevent independent repairers from servicing or repairing machinery, and the application of TPMs. While exemptions exist, it was submitted that circumvention for the purpose of repair is not currently permitted in Australia. The ACCC has not been able to confirm this issue. Other issues relating to machinery software are discussed in chapter 5.

4.3.3 ACCC view

Manufacturers and dealers have a commercial incentive to restrict purchasers' ability to use independent repairers. By limiting access to necessary tools and technical information, and forcing purchasers to rely on authorised dealers for servicing and repair work, manufacturers and dealers could charge high prices for their services. This could allow manufacturers to increase the profits of their dealer network. It may also reduce the availability of repairers in the industry if independents are foreclosed from certain market segments. Despite the potential for efficiency gains and increased production flowing from increased computerisation, the ACCC also considers that this technology has the potential to limit competition in after-sales markets.

The ACCC is concerned by reports about restrictions on access to diagnostic software tools that prevent purchasers and independent repairers from reading and interpreting fault codes. While acknowledging manufacturers concerns about software modification, such restrictions reduce independent repairers' ability to compete in after-sales repair markets, irrespective of whether or not machinery is within warranty.

This may expose purchasers of agricultural machinery to higher repair and servicing costs, and leave them with fewer technicians able to carry out servicing or repair, and fewer suppliers of replacement parts to choose from. It also exposes purchasers to the risk of loss of production income during peak

periods if they must wait for assistance from an authorised dealer, even where repairs could easily be performed by the purchaser themselves. This issue is likely to be exacerbated in cases where purchasers are in remote locations and have no or limited internet connectivity.

As noted above, survey participants and submissions stated that independent repairers and purchasers themselves were often unable to perform minor repairs, such as replacing sensors and lights on machinery. It is unclear whether manufacturers' stated restrictions on software modification are responsible for preventing such repairs. The ACCC has received varying information from stakeholders as to the extent to which purchasers and independent repairers are able to carry out these repairs without the involvement of an authorised dealer.

Arguments for withholding technical information and diagnostic software tools in order to ensure proper functioning hold less weight when machinery is outside the warranty period, as the purchaser is wholly responsible for the maintenance of the machinery and any costs resulting from sub-standard work or parts. Similarly, even when machinery is under warranty, this will not necessarily cover all types of servicing and repair, and purchasers will need to carry out such work at their own expense. The ACCC considers that where the purchaser bears the costs associated with servicing or repair, they should be able to choose who will carry out this work.

The ACCC understands that it is possible to modify software and alter the performance of machinery, and that some technicians offer services such as engine control unit remapping ('chipping'). However, we have not received evidence indicating that this practice is widespread, or that this is a significant motivation for independent repairers seeking access to diagnostic software tools.

The ACCC recognises that these tools are the product of significant investment on the part of manufacturers (in terms of research and development) and dealers (in terms of capital outlay). However, we are of the view that competition in aftermarkets would be improved where independents have the necessary tools, skills and other resources to compete to provide repairs. The introduction of the motor vehicle service and repair information sharing scheme may provide an opportunity to address some of the issues identified (see section 4.5.1), as may the consideration of agricultural machinery as part of any future 'Right to Repair' legislation, which the Productivity Commission is currently exploring (see section 4.5.2).⁴⁰

4.4 OEM parts

The discussion paper expressed concerns with restrictions on the use of non-OEM parts in agricultural machinery. These include restrictions which may impact on competition even when machinery is outside of the warranty period, such as:

- machines ceasing to function if a non-OEM part is detected
- limiting the supply of OEM parts to authorised dealers.

Where machinery is designed such that it will not function if a non-OEM part has been installed, this may lessen competition in after-sales markets for parts. It may allow manufacturers to charge monopoly prices for OEM parts, even outside of the warranty period. Limitations on the supply of OEM parts to independent repairers may also impact on their ability to compete in after-sales markets.

The ACCC received submissions from a range of industry participants discussing purchasers' experiences with being unable to install non-OEM parts. Submissions also detailed some of the methods used by manufacturers to prevent installation of non-OEM parts. Although the TMA noted that both independent repairers and owners can generally access OEM parts via dealerships, submissions from farmer representative organisations and other interested parties raised concerns about restricted access to parts.

40 See Productivity Commission, Right to Repair Inquiry (<https://www.pc.gov.au/inquiries/current/repair#draft>).

4.4.1 Compatibility of non-OEM parts

NSW Farmers reported issues with machinery 'locking down' if non-OEM parts are installed. Similar to the discussion of restrictions on independent repairers, they expressed concern about the delays purchasers may experience if required to order a specialised part from interstate or overseas during peak periods. GPA raised concerns of 'proprietary lock-in' where machinery will only accept OEM parts, and where supply of these parts is restricted to authorised dealers and may be difficult to access. It also reported on an instance where a farmer had been unable to install a part as it had not been purchased from an authorised dealer. ADA noted that TPMs employed by manufacturers can be used to prevent the installation of non-OEM parts.

Some 17% of survey participants had experienced their machinery only recognising OEM parts when servicing or repairing the machinery themselves, or when using an independent repairer.

Precision Technology, an Australian designer and manufacturer of agricultural machinery software and electronic modules, stated that evidence exists of manufacturers installing on-board electronics that cause the machine to shut down if, for example, a third party GPS system is detected. It also gave examples of measures manufacturers take to hinder or prevent third party manufacturers from making their equipment interoperable, such as through withholding information or charging money to unlock a system.

4.4.2 Quality and pricing of parts

Submissions from the manufacturing and retailing sectors raised concerns about the quality of non-OEM parts.

One manufacturer stated that it does not support the use of non-OEM parts as it could not verify the quality of those parts, their serviceability, or potential risks that may be incurred through their use. That manufacturer also stated that some authorised dealers will sell non-OEM parts, but are offered to the purchaser with the understanding that they may void the warranty. John Deere stated that it does allow its dealerships to stock non-OEM but otherwise compatible parts for its equipment. It stated that it believes the prices on these parts to be comparable to those offered by independent dealers. One dealer stated that OEM parts typically come with a warranty while most non-OEM parts do not, which is the cause of this price difference.

Dealer submissions noted that the lower cost of non-OEM parts may reflect poorer quality when compared to similar OEM parts. By contrast, Precision Technology submitted that, at least in the case of its own equipment, there was little basis for arguments commonly made by manufacturers against installing non-OEM parts. Precision Technology pointed to its long history of manufacturing and fitting guidance technology, and stated that the performance of its technology was superior to that provided by major agricultural machinery manufacturers.

4.4.3 Restrictions on the supply of parts

The ACCC received submissions expressing concerns about manufacturers only supplying OEM parts to authorised dealers. Additionally, one quarter (25%) of survey participants had experienced no or limited access to OEM parts when servicing or repairing their machinery themselves, or when using an independent repairer.

TMA noted in its submission that its members will have differing policies in relation to parts. However, it stated that independent repairers and purchasers will generally have access to these parts through the authorised dealer in their capacity as a retailer. A dealer submitted that manufacturers do not prevent on-selling of OEM parts to independent repairers, however independent repairers frequently expect to pay a similar price as the dealer, ignoring the expenses they incur in ensuring they have adequate stock on hand. One submission stated that manufacturers may delay delivery or otherwise increase the cost of parts to independent repairers.

4.4.4 ACCC view

The ACCC considers that manufacturers and dealers may have an incentive to restrict purchasers' ability to access OEM parts, or to use non-OEM parts in their place. This might occur:

- by restricting the sale or supply of OEM parts to certain parties, and/or
- employing measures preventing the installation of non-OEM parts or third party equipment.

As a result, manufacturers could charge inflated prices for OEM parts and deny purchasers access to cheaper, more available parts.

Despite industry assurances that OEM parts are generally available to independent repairers and purchasers, the ACCC is concerned that this does not align with reports from purchasers and independent repairers about experiencing difficulty accessing parts.

The ACCC heard concerns about independents being charged higher prices for OEM parts than the authorised dealer. This may be reasonable in some cases, for example where an authorised dealer on-sells OEM parts to third parties, incurring inventory and administrative expenses. However, the ACCC considers that OEM parts should be available to independent repairers on commercially fair and reasonable terms.

Competition would be affected in instances where neither the manufacturer nor authorised dealer agreed to supply OEM parts to independent repairers. This would include instances where parts are sold at such a high price as to prevent independents from participating in the market, or where independents are exposed to additional inconveniences (such as lengthy delays in delivery). The ACCC is of the view that OEM parts should be available to independents on commercially fair and reasonable terms.

While the ACCC is aware of some instances of the above conduct, it would require further evidence to determine whether such behaviour is a systemic problem in the industry. Measures which prevent the proper functioning of the machinery when non-OEM parts are installed are likely to impact on competition.

The ACCC acknowledges the concerns of manufacturers with respect to ensuring machinery continues to function efficiently and safely, and in compliance with all relevant laws. However, not all machinery parts are related to internal safety and security systems. The case for restrictions on use of such parts is not strong. It is also weaker outside the warranty period when purchasers are responsible for ensuring the functionality of their machinery and bear all associated costs. As such, the ACCC has concerns that these restrictions may be limiting competition without providing a discernible benefit to purchasers.

4.5 Recommendations

The ACCC has considered the barriers to competition in repair markets and is concerned that independent repairers are limited, by a variety of means, from fully competing in after-markets for agricultural machinery repairs and servicing. Independent repairers appear in many cases to be prevented from competing in the market for servicing and repairs owing to a lack of access to necessary tools, parts or diagnostic software. Weakened competition in after-markets reduces purchaser access to genuine choice, and may result in higher prices charged by authorised repairers, lower levels of customer service, and unnecessary delays in accessing repairs and servicing. The ACCC received several submissions recommending the introduction of a scheme for manufacturers to provide independent repairers with access to the same technical information, parts and diagnostic tools which they make available to dealers and preferred repairer networks, on commercially reasonable terms.

There are currently 2 processes occurring in Australia that offer potential avenues to increase opportunities for independent repairers to compete in after-markets. These are the motor vehicle service and repair information sharing scheme, and the Productivity Commission inquiry into the Right to Repair within Australia.

4.5.1 Motor vehicle service and repair information sharing scheme

On 24 March 2021, the Competition and Consumer Amendment (Motor Vehicle Service and Repair Information Sharing Scheme) Bill 2021 was introduced into the House of Representatives and read for a second time. This scheme was originally announced in 2018 with the aim of increasing competition in motor vehicle after-sale markets, including through mandating access to diagnostic, repair and servicing information on fair and reasonable commercial terms.

The objectives of this scheme include:⁴¹

- promoting competition between Australian repairers of passenger and light goods motor vehicles and establish a fair playing field by mandating access to diagnostic, repair and servicing information on fair and reasonable commercial terms
- enabling consumers to have their motor vehicles repaired by an Australian repairer of their choice who can provide efficient and safe services
- protecting safety and security information about motor vehicles to ensure the safety and security of consumers, information users and the general public.

Under the scheme, the definition of a vehicle does not, among other things, capture farm machinery. However, a rule-making power has been included to enable other vehicle types to be brought into the scheme in the future. The government has noted that further consultation would be needed in order to consider including agricultural machinery in the scheme.⁴²

The ACCC considers that there are reasons to warrant consideration of expansion of the scheme to include agricultural machinery, and recommends that this be considered at the first review of the scheme. The review should take the following factors into account:

- As with motor vehicle after-sales markets, the presence of independent repairers in agricultural machinery after-sales markets can increase competition in the market for repair services. This can benefit purchasers through lower prices and higher quality services.
- The ACCC has previously found that new car retail markets are characterised by low levels of market concentration.⁴³ The ACCC considers that new agricultural machinery retail markets are likely to be more concentrated than new car retail markets. Consequently, manufacturers of agricultural machinery have a greater ability to leverage their market share in the primary market into the secondary (after) market and thereby reduce competition.
- Unlike motor vehicles, where purchasers have multiple makes and models to choose from in the primary market, purchasers of agricultural machinery may have limited options available in the primary market and are at greater risk of being 'locked in' to a particular brand in the secondary (after) market.
- While agricultural machinery purchases are typically business to business transactions, they have some characteristics typical of a consumer transaction. For example, contracts and warranties are frequently offered on a 'take it or leave it' basis. In this sense agricultural machinery purchases are similar to motor vehicle purchases.
- The ACCC has previously noted that consumers face inconvenience, delays, unexpected expenses, and a reduction in choice when their car must be taken to a dealer who does not have access to the technical information or proprietary diagnostic tool required.⁴⁴ These problems are exacerbated for purchasers of agricultural machinery, where a fault can lead to substantial loss of income, particularly during peak periods or where purchasers are in a remote location.

41 Competition and Consumer Amendment (Motor Vehicle Service and Repair Information Sharing Scheme) Bill 2021, Explanatory Memorandum, p. 5 (https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r6695_ems_295e259b-1f16-4077-9b4d-1bdce7935f8b/upload_pdf/JC001692.pdf;fileType=application%2Fpdf).

42 Competition and Consumer Amendment (Motor Vehicle Service and Repair Information Sharing Scheme) Bill 2021, Explanatory Memorandum, p. 13 [1.45].

43 ACCC, New Car Retailing Industry Market Study Report, December 2017, p. 4.

44 *ibid*, p. 92.

► Recommendation 1

The ACCC recommends that agricultural machinery be considered for inclusion in the motor vehicle service and repair information sharing scheme.

The ACCC considers that work regarding how agricultural machinery could be incorporated into the scheme should commence with a view to it being considered for addition at the first review of the scheme.

In making this recommendation, the ACCC notes that it received submissions asserting that there are differences between motor vehicles and agricultural machinery:

- Agricultural machinery is generally purchased to generate income, with the purchaser more likely to be a business than a consumer. As such, the relationship between the purchaser and dealer is of a different nature.
- While motor vehicles tend to be mass produced, agricultural machinery is produced to perform a specialised function and is highly complex. Consequently, technicians require a greater degree of professional training and guidance to carry out servicing and repairs.
- The consequences of faulty or non-compliant machinery may be greater in the case of agricultural machinery, both in terms of loss of income and safety and environmental concerns.

Submissions raised concerns with the ACCC that allowing independent repairers access to diagnostic software tools and other technical information may increase the possibility of software modification, with subsequent impacts on the reliability, safety and environmental credentials of machinery.

The government has previously noted concerns regarding access to safety and security information for motor vehicles, and that unrestricted access could negatively impact on vehicle performance and compromise the safety of repairers, users and the general public.⁴⁵ While the scheme allows for the sharing of safety and security information, access to this information is subject to a number of restrictions. These include:

- restrictions on who can access safety and security information, as well as the purposes for which it may be accessed⁴⁶
- requirements regarding the separation of safety and security information from other information provided under the scheme⁴⁷
- record keeping requirements in relation to supplying safety and security information.⁴⁸

Consequently, the ACCC does not consider that these concerns should pose a barrier to eventually including agricultural machinery in the scheme.

4.5.2 ‘Right to repair’ inquiry

The motor vehicle service and repair information sharing scheme focusses on access to software tools and technical information, however will not provide independent repairers with access to OEM parts, nor would it provide farmers with access to software tools or technical information. Access to parts is vital in enabling independent repairers to compete in agricultural machinery after-markets, and in some cases the ability for machinery owners to perform their own repairs may be appropriate. A right to repair scheme has the potential to extend to access to parts, and provide machinery owners with greater access to software tools and technical information.

The Productivity Commission is currently undertaking an inquiry into the Right to Repair within Australia. The *Right to Repair Productivity Commission Issues Paper* listed a number of policy options to address barriers to repair, many of which, while affecting the broader economy, are highly relevant

45 Treasury, Motor Vehicle Repair Scheme consultation update, p. 4 (<https://treasury.gov.au/sites/default/files/2019-11/Industry-update-paper-t358002-updated.pdf>).

46 Competition and Consumer Amendment (Motor Vehicle Service and Repair Information Sharing Scheme) Bill 2021, s 57DB.

47 Competition and Consumer Amendment (Motor Vehicle Service and Repair Information Sharing Scheme) Bill 2021, s 57DA.

48 Competition and Consumer Amendment (Motor Vehicle Service and Repair Information Sharing Scheme) Bill 2021, s 57DE.

to the issues identified in agricultural machinery after-sales markets. The issues paper addressed some of the costs and benefits of a potential 'right to repair' in Australia, and presented a range of preliminary policy options, one of which was a 'duty to deal', based in part on similar legislation in overseas jurisdictions.⁴⁹

Right to repair legislation including a 'duty to deal' has the potential to address many of the issues identified by stakeholders during this market study.

Consequently, the ACCC recommends that agricultural machinery be considered as part of any broader right to repair scheme introduced in Australia.

► Recommendation 2

The ACCC recommends that agricultural machinery be included as part of any broader right to repair scheme introduced in Australia.

A detailed recommendation about the form that right to repair legislation should take in order to provide adequate protections for purchasers in agricultural machinery markets is beyond the scope of this market study. However, the ACCC has considered possible policy options, and referred to schemes that exist in other jurisdictions. For example, the ACCC considers that future Australian right to repair legislation could include provisions:

- granting access to diagnostic software tools and OEM parts to independent repairers on commercially reasonable terms ('duty to deal'). This would be subject to certain conditions (such as not modifying machinery to be non-compliant with applicable laws or operating specifications)
- requiring manufacturers to publish reasonable levels of information to facilitate third parties fitting technology onto their machinery
- allowing for replacement of inexpensive parts such as lights and sensors, and the ability to override non-critical errors, without needing to make recourse to an authorised dealer
- allowing for the use of non-OEM parts in warrantable repairs under certain circumstances (see also chapter 3)
- requiring that a sufficient supply of repair parts be readily available in Australia for a defined period from the date of the sale agreement (see also chapter 3)
- requiring manufacturers to support software systems in machinery for a defined period, to prevent otherwise functional machinery from becoming obsolete (see also chapter 5)
- prohibiting or limiting the use of TPMs that prevent the installation of non-OEM parts or third-party equipment (see also chapter 5).

There are likely to be complex issues surrounding intellectual property rights which would need to be addressed if the sharing of software tools or other technical information were to be mandated.

49 Productivity Commission, Right to Repair Inquiry Issues Paper, p. 25 (<https://www.pc.gov.au/inquiries/current/repair#draft>).

5. Data ownership and management

Key Points

- The vast majority of survey participants (over 80%) reported owning machinery with data collection capabilities.
- The lack of interoperability of machinery software and collected data increases switching costs between different brands of machinery as well as the potential of 'proprietary lock-in'. This may reduce competition and market efficiency overall.
- The lack of interoperability between older and newer machinery is a key issue. There are also concerns from some purchasers that software upgrades provide little benefit, but rather, increase costs and render older (but otherwise functional) equipment obsolete.
- Submissions indicated that manufacturers are taking steps to improve the compatibility of data systems embedded in their equipment with data systems in other machinery brands. Some purchasers are also aware of how they can transfer data from one brand of machinery to another.
- There is a substantial lack of understanding from purchasers regarding the circumstances under which manufacturers can aggregate, share and benefit from data generated by purchasers' machinery.
- A future right to repair scheme could provide greater certainty and protection to purchasers, by addressing obsolescence caused by software upgrades and lack of support for older systems.
- Providing purchasers with clear and concise information at the time of sale about their data rights and how to access their data would improve purchaser confidence and ensure purchasers can understand the value of the data being captured.

5.1 Introduction

Modern agricultural machinery increasingly utilises or relies on computer systems to function as intended, and now has extensive data collection capabilities as a result. 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 addition to improving the efficiency of agricultural machinery, the collected data is itself a source of value for a variety of reasons. For example, data can allow for the creation of predictive business models, assist with determining the productivity of farmland, or facilitate compliance with environmental regulations. The value of production data, in particular, increases over time as data from multiple production years is accumulated.

'Interoperability' refers to the extent to which modern agricultural machines are designed to work effectively with other pieces of machinery from different brands, or with older machinery of the same brand. The discussion paper expressed initial concerns that there may be significant barriers to one brand of agricultural machinery being able to access the same systems and data of another brand.

Data collection can improve the performance and utilisation of machinery by enabling real-time monitoring. However, the increased use of data in agricultural machinery may also raise competition and data ownership concerns.

5.2 Key concerns

The ACCC sought submissions providing feedback and further 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.

Feedback from survey participants suggests that while concerns exist around both privacy and interoperability, concerns relating to privacy, data collection and purchasers' rights in relation to their data were most prevalent.

Survey responses and submissions both indicated that purchasers of agricultural machinery generally have little understanding of their rights in relation to the data their machinery collects. They also indicate that they receive little information about their rights at the time of sale. This was despite submissions from the manufacturing and retailing sectors stating that they consider data collected by purchasers' machinery to belong to the purchaser.

There are indications that manufacturers are taking steps to increase the compatibility of data systems embedded in their equipment with data systems in other machinery brands. Tools are also available which facilitate the transfer of data from machinery of one brand to another. However, a majority of participants stated that potential data loss and/or software compatibility issues would impact their decision to buy machinery of a different brand, indicating concerns about interoperability are still widespread among purchasers.

In addition to the issues identified in the discussion paper, submissions also discussed the interoperability of newer technology with older machinery. Submissions questioned the utility of machinery software upgrades, and expressed concern that these were a significant ongoing cost to purchasers which also had the potential to render older machinery obsolete.

The ACCC has previously engaged with data rights and privacy concerns in its Digital Platforms Inquiry (see box 5.1), as well as data accessibility in its role as a key regulator of the Consumer Data Right (discussed in section 5.4 below).

Box 5.1 Digital Platforms Inquiry

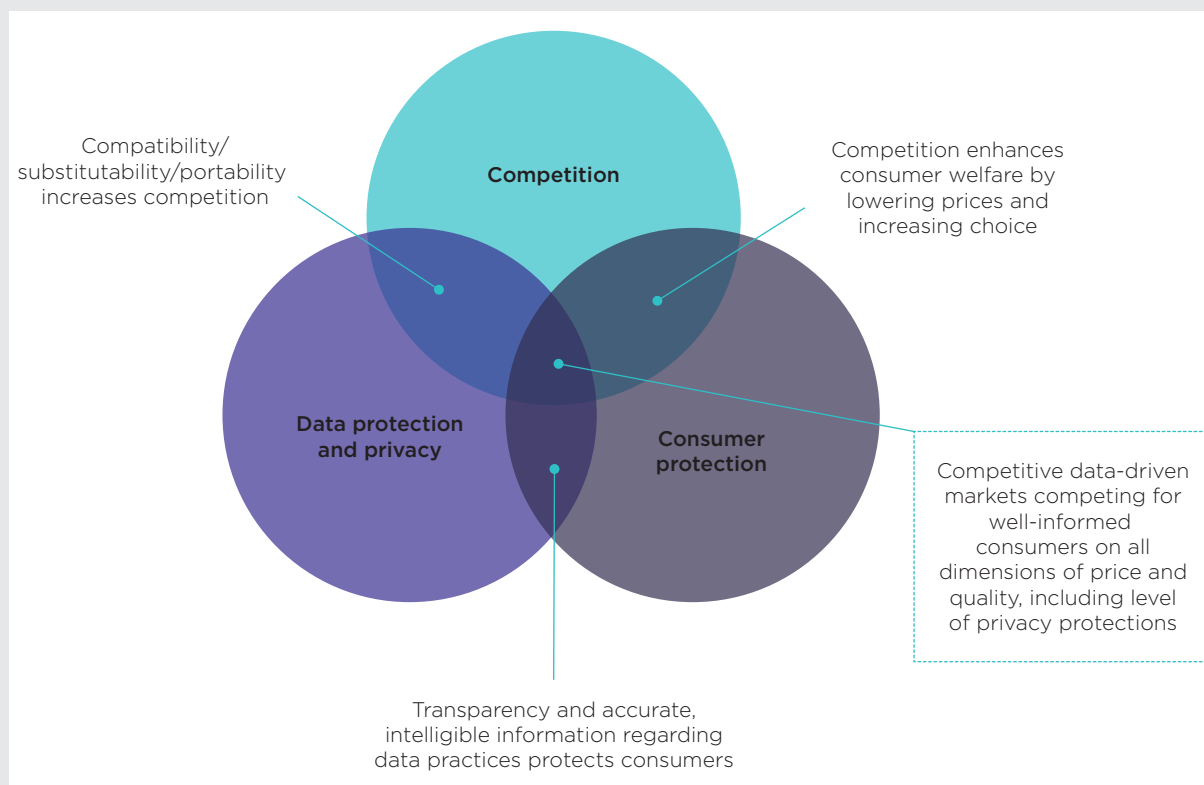
On 4 December 2017, the government directed the ACCC to conduct an inquiry into digital platforms. The inquiry looked at the effect that digital search engines, social media platforms and other digital content aggregation platforms have on competition in media and advertising services markets. In particular, the inquiry looked at the impact of digital platforms on the supply of news and journalistic content and the implications of this for media content creators, advertisers and consumers.

The inquiry highlighted the intersection of privacy, competition, and consumer protection considerations. It noted privacy and data protection laws can increase consumer protections by addressing sources of market inefficiencies such as information asymmetries and bargaining power imbalances. Strengthened privacy and data protection laws can also empower consumers to make more informed choices about how their data is processed. This, in turn, is likely to increase competition between digital platforms regarding the privacy dimension of their services.

Privacy and data protection laws may also encourage the emergence of alternative business models that generate value for, and from, consumers in other ways.⁵⁰

The ACCC also considered how data portability could promote competition by reducing barriers to entry and expansion.⁵¹

Figure 5.1 Overlap between data protection, competition and consumer protection



While the inquiry examined these issues as they relate to online search engines, social media and digital content aggregators, the concerns raised by the inquiry are likely to be applicable to any industry where data is collected, aggregated and/or shared with third parties, including agricultural machinery.

50 ACCC, Digital Platforms Inquiry Final Report, June 2019, p. 5 (<https://www.accc.gov.au/focus-areas/inquiries-finalised/digital-platforms-inquiry-0>).

51 *ibid*, p. 115.

5.3 Interoperability and competition

The discussion paper expressed concerns that where the software or data collected by one brand of agricultural machinery is not compatible with another, this has the effect of ‘locking’ producers into a particular brand. This in turn may result in a lessening of competition.

Similarly, the data collected by agricultural machinery is itself a source of value, particularly production data collected over an extended period of time. This data may allow a producer to control for seasonal variance, operation error and other production 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 if this data is likely to be lost, or its utility downgraded.

The ACCC’s submission to the Productivity Commission Inquiry into the Right to Repair in Australia noted that switching costs can be high where the purchaser has invested significantly in a particular product ‘ecosystem’ through accumulation of their data, buying accessories, or purchasing a range of compatible devices.⁵² It also raised concerns about obsolescence in computer software or devices with a software component should manufacturers cease to provide the necessary updates.⁵³ These issues are highly relevant to agricultural machinery given its increasing complexity and computerisation.

5.3.1 Interoperability of collected data and machinery software

The vast majority of survey participants (83%) reported owning machinery with data collection capabilities. Over half (59%) of participants owned machinery which collected both machinery and production data.

Over half (60%) of survey participants said interoperability or potential data loss would impact on their decision when buying data-capable machinery, either in relation to their existing machinery’s software or collected data.

A number of submissions shared the concerns raised in the discussion paper about interoperability with respect to data, and the potential for purchasers to be ‘locked in’ to a particular brand. Two submissions stated that purchasers were unable to transfer their data across to machinery of other brands, and that this was negatively effecting competition. Farmer representative groups raised similar concerns about the interoperability of parts and the potential for purchasers to be ‘locked in’ to a particular brand of machinery.

Submissions also questioned the utility of manufacturers’ software upgrades, and whether this practice was leading to otherwise functional equipment becoming obsolete. GrainGrowers referred to situations where the manufacturer stops supporting older versions of proprietary controlling systems and where old machinery cannot be retrofitted with new systems. Submissions identified the need to update or replace this software over the life of the machinery as a significant and unavoidable ongoing cost.

A submission from Griffith University described the process of purchasing agricultural machinery as entering into a licence agreement for the software in addition to purchasing the physical machinery. The submission stated that the terms of these licence agreements may regulate the operation of the technology and may be unilaterally updated, usually by notices on the manufacturer’s website.

AGCO (a manufacturer) stated that they were working to achieve a greater degree of interoperability with not only different brands of machinery, but also machinery of different ages. Submissions reported that manufacturers are increasingly adopting International Organization for Standardization (ISO) standards to allow a greater degree of interoperability. A dealer noted that problems with interoperability are more likely to occur where one machine utilises older systems or technology than another, not necessarily because they are different brands.

Precision Agriculture stated that despite manufacturers’ adoption of ISO standards, this did not allow for full interoperability.

52 ACCC, Submission to the Productivity Commission Inquiry into the Right to Repair, February 2021, p. 4 (https://www.pc.gov.au/_data/assets/pdf_file/0007/272662/sub106-repair.pdf).

53 *ibid*, pp. 4-5.

Survey participants were generally confident about their ability to access production data, with only 16% reporting that they were not confident about accessing this information. A higher proportion (31%) said they were not confident about accessing machine data.

The ACCC understands that the number of manufacturers enabling the transfer and sharing of data has increased as it has become clear that this has greater commercial benefits compared to attempting to lock purchasers into a particular brand of machinery. The TMA pointed to Farm Management Information Systems which allow purchasers to extract, manage and retain production data collected across all brands of machinery, and recognised purchasers may have a fleet of machinery spanning multiple brands. Additionally, one submission stated that while there may be some time and effort involved in transferring data from one brand of machinery to another, it was still possible. Submissions suggested that where purchasers are unable to access their data, it is typically because they have not made use of the manuals and instructions available to them.

While a majority of survey participants did have interoperability concerns, it is important to note that a significant minority (28%) responded that data loss or lack of interoperability would not impact on their decision when purchasing data capable machinery. Some participants commented that they were aware of or had access to tools which can convert data to a different format if needed. Approximately one third (34%) of participants indicated that the potential loss of data was *not* an important consideration when choosing a brand of machinery. These results suggest a level of awareness among purchasers of the means available to them to access and transfer their data between different brands of machinery.

5.3.2 ACCC view

The absence of interoperability can create a switching barrier for purchasers. These barriers can reduce choice for individual purchasers, as well as create barriers to entry for new manufacturers, and reduce competition among manufacturers.

The ACCC acknowledges the measures manufacturers have implemented to facilitate the portability of purchasers' agricultural machinery data between different brands of machinery.

Despite these measures, the ACCC notes there is still widespread concern among purchasers regarding the transferability of data and compatibility of software when purchasing agricultural machinery. Manufacturers provide some level of interoperability, but survey responses and submissions suggest this is not comprehensive across the industry. Survey responses also suggest that while some purchasers are generally confident about their ability to access their data, a sizeable minority of purchasers lack sufficient information to access the data collected by their machinery.

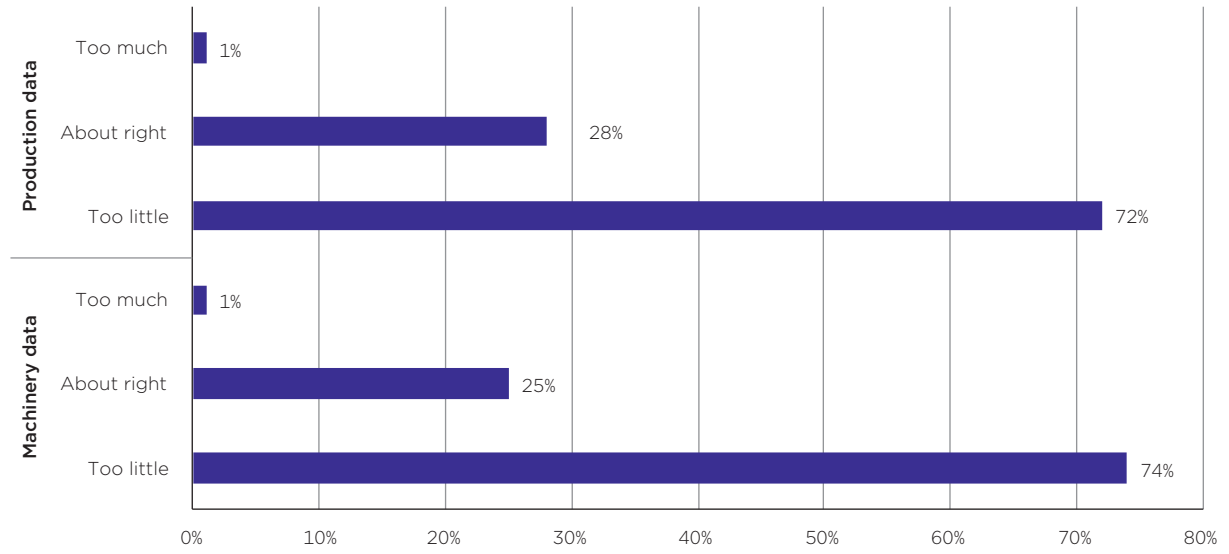
It is also clear that the increasing computerisation of agricultural machinery is leading to problems with interoperability not just between different brands of machinery, but between older and newer systems and technology. Related to this are concerns about the cost to purchasers of regular and ongoing software updates, with little perceived benefit or utility, and even the obsolescence of older but functional machinery.

5.4 Data rights and privacy

The discussion paper noted that purchasers of agricultural machinery are often unsure of their rights regarding ownership and use of the data collected by their machinery. The ACCC raised concerns about the length and complexity of End-User Licensing Agreements (EULA), and the information provided to purchasers at the time of sale regarding their rights.

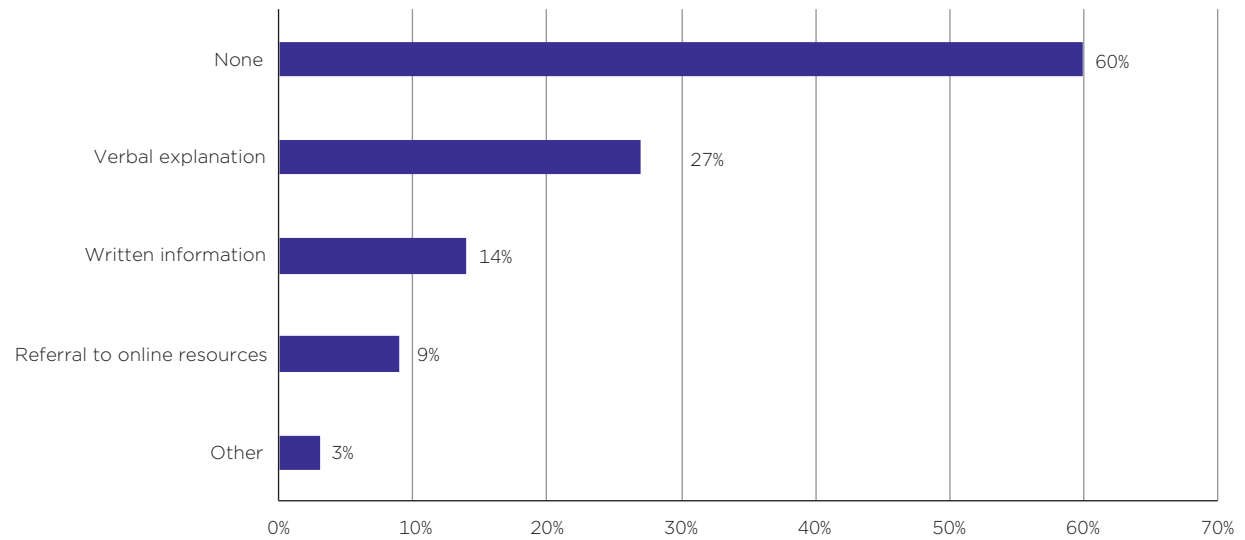
Survey results suggest purchasers of agricultural machinery receive little information with respect to their rights in relation to data at the point of sale. Some 72% of participants said they received too little information regarding production data when purchasing their latest piece of data-capable machinery. Almost three quarters (74%) said they received too little information regarding their rights to machinery data.

Figure 5.2 Information given to purchasers about data rights at the time of sale



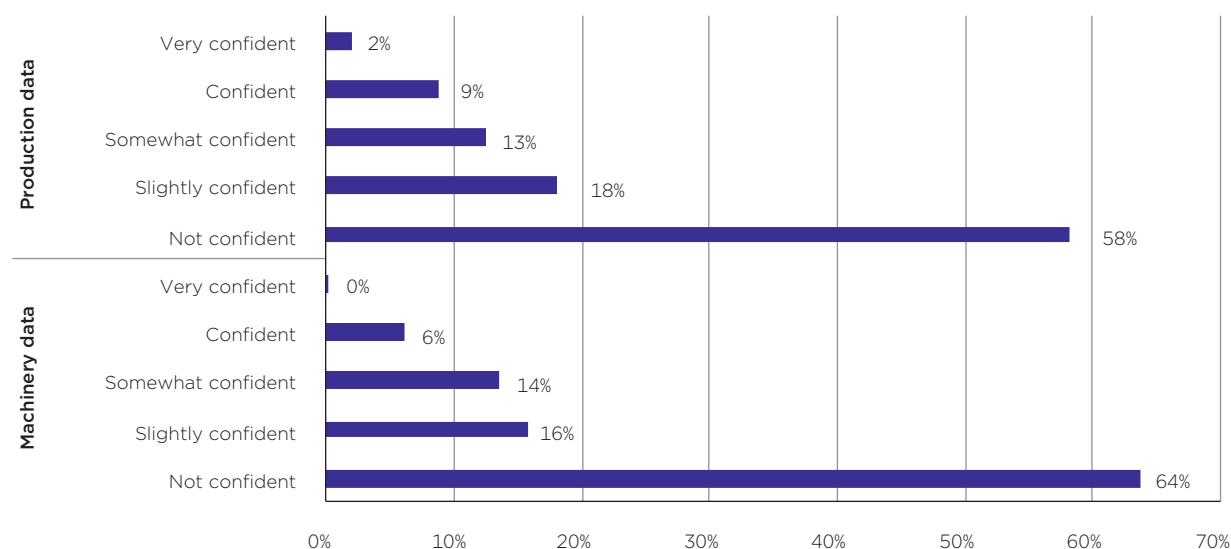
Some 60% of participants reported receiving no information about their data rights when purchasing their latest piece of machinery (figure 5.3).

Figure 5.3 Type of information purchasers received about data rights when purchasing machinery



A majority of participants reported that they were not confident when it came to understanding their data rights (figure 5.3).

Figure 5.4 Purchaser confidence understanding data rights



Submissions from farming industry groups (among others) expressed concern about purchasers’ rights in relation to data collected by their machinery. They called for greater transparency around what data is collected and how it is used, as well as clarification on rights to ownership, access and use of this data.

Submissions stated that purchasers of agricultural machinery may be unaware of the terms of data licences that they are entering. QFF highlighted that the general lack of discussion of the terms of the data licences at both a broad industry level and at individual points of sale of agricultural technologies contribute to the lack of trust about the management of agricultural data.

A submission from Griffith University highlighted the results of a 2017 survey which found that farmers have little understanding of the terms of the data licences that they enter into, and were concerned about how their data was managed and shared with third parties.⁵⁴ Standard form data licences are presented to purchasers of agricultural machinery on a ‘take it or leave it’ basis which do not allow for negotiation. The submission also expressed concerns with how aggregation and sharing of collected data can occur.

Submissions from the manufacturing and retailing sectors stated that purchasers own the data collected by their machinery. John Deere submitted that purchaser data is not shared unless the purchaser gives their consent.

However, QFF submitted that while farmers typically own copyright in their accumulated data, third parties may possess copyright in aggregated datasets. NSW Young Lawyers stated that copyright is not extended to automated collection and storage of data by agricultural machinery, and that manufacturers seek to make data the subject of proprietary rights through confidentiality clauses in manufacturer and dealer documents.

NSW Young Lawyers recommended the introduction of an industry code (*Agricultural Machinery Code of Conduct*) similar to the Franchising Code of Conduct, with the purpose of addressing standard form contracts that have the potential to limit purchasers’ rights to their data. Similar to the relationship between franchisor and franchisee, NSW Young Lawyers submitted that manufacturers and dealers have a greater degree of information, control and bargaining power in relation to purchasers of agricultural machinery. It submitted that a code could help to correct information asymmetries and provide certainty as to manufacturers’/dealers’ obligations.

In a similar vein, NFF’s submission referred to the voluntary code which it has developed, the purpose of which is to increase transparency around the collection of data as well as facilitate ease of access

⁵⁴ See Accelerating Precision to Decision Agriculture at www.crdc.com.au/precision-to-decision

for farmers (see box 5.2). This follows the introduction of similar voluntary codes in the US and New Zealand.⁵⁵

One submission raised doubts about the ability of a voluntary code to address these issues, and observations that manufacturers have done little to alter their EULAs in jurisdictions where such codes had been introduced. The NFF has noted that while it is too early to fully assess the impact of the Code, there is some initial evidence that it is effective. It has a preference to address issues with industry data practices via a voluntary code where possible, rather than introducing regulations which it fears may stifle innovation and increase regulatory burdens.

Box 5.2 The Australian Data Farm Code

On 18 February 2020, the National Farmers' Federation (NFF) released the first iteration of the *Australian Farm Data Code*, drafted in consultation with industry. The stated purpose of the Code is 'to inform the policies of service providers who manage data on behalf of farmers', and proposes to help purchasers by:

- increasing awareness and understanding of the ways in which providers are collecting, using and sharing their farm data
- preserving purchasers' ability to determine who can access their data, and allow them to access and retrieve their individual data
- providing a framework to compare providers and inform negotiations about data policies
- bringing about improvements to industry-wide data practices over time.

The development of the Code is indicative of the growing interest and concern with farmers' data in the industry.

Several submissions supported the introduction of the Consumer Data Right (CDR) into the agricultural machinery industry (see box 5.3). Griffith University submitted that this would place responsibility on agricultural data aggregators to ensure data portability and greater accountability in how data is managed.

Box 5.3 Consumer Data Right

On 26 November 2017, the Australian Government announced the introduction of a consumer data right (CDR) in Australia. The CDR aims to give consumers greater control over their data. It will improve consumers' ability to compare and switch between products and services, and will encourage competition between service providers, leading not only to better prices for customers but also more innovative products and services.

The CDR was implemented in the banking sector in July 2020, and will be gradually introduced into other sectors. From 28 February 2021, the Department of the Treasury assumed leadership and responsibility for the CDR program, including the development and advice on the rules and for assessing sectors for future introduction of the CDR.

The ACCC will continue to have a number of responsibilities in relation to the CDR, including accreditation of data recipients, registration and on-boarding of data holders and data recipients, compliance and enforcement (together with the Office of the Australian Information Commissioner (OAIC)).

By contrast, a dealer stated that the licences already prevent abuse of the purchaser's data.

55 Jay Sanderson, Leanne Wiseman, Sam Poncini, 'What's behind the ag-data logo? An examination of voluntary agricultural data codes of practice', *International Journal of Rural Law and Policy*, No. 1, 2018 (<https://epress.lib.uts.edu.au/journals/index.php/ijrlp/article/view/6043/6989>).

GPA raised additional concerns about protecting access to data in instances where a data service provider goes into insolvency or machinery manufacturers withdraw from operations and sales support in Australia.

5.4.1 ACCC view

Privacy and data rights is a key emerging issue in agricultural machinery markets. The submissions and survey results indicate that there is a significant variance in understanding of rights and obligations in this space. It is also clear that there is a substantial lack of understanding regarding the circumstances under which manufacturers can aggregate, share and benefit from data generated by purchasers' machinery.

The ACCC notes submissions calling for the application of the CDR to the agricultural machinery industry. While the ACCC is not primarily responsible for this particular area, at this stage the ACCC does not consider that significant enough market problems exist to warrant the application of the CDR to the agricultural machinery industry as a priority. However, it is possible that agricultural machinery would be considered as the government continues to apply the CDR to additional sectors in future.

5.5 Recommendations

5.5.1 Interoperability and ISO standards

The ACCC notes that manufacturers are adopting measures which would increase the interoperability of the data generated by their machinery with that generated by other brands. The ACCC supports these developments and recommends that manufacturers continue to adopt ISO data standards to promote interoperability between brands of machinery.

► Recommendation 5

The ACCC recommends that manufacturers continue to adopt ISO data standards to promote interoperability between brands of machinery.

5.5.2 Right to repair

As discussed in chapter 4, the Productivity Commission is currently undertaking an inquiry into the Right to Repair within Australia, and has released an issues paper listing a number of policy options addressing barriers to repair.⁵⁶

The ACCC considers that a right to repair scheme may address stakeholder concerns relating to older systems being made obsolete by software or system upgrades. The Productivity Commission's issues paper noted concerns about planned obsolescence strategies, such as releasing updates for electronic products that reduce the performance of older models.⁵⁷ The Issues Paper referred to a number of regulations in both Australia and other jurisdictions which are designed to prevent or mitigate planned obsolescence.

As noted in chapter 4, a detailed recommendation about the form that right to repair legislation should take is beyond the scope of this market study. However, the ACCC considers that future Australian right to repair legislation could include provisions that require manufacturers to:

- support software systems in machinery for a defined period of time
- provide purchasers with information regarding how long a certain software system will be supported.

⁵⁶ Productivity Commission, Right to Repair Inquiry Issues Paper, December 2020 (<https://www.pc.gov.au/inquiries/current/repair#draft>).

⁵⁷ *ibid*, pp. 18–21.

► Recommendation 2

The ACCC recommends that agricultural machinery be included as part of any broader right to repair scheme introduced in Australia.

The ACCC has noted previously that it is cost-prohibitive for manufacturers to continue to support older products for an extended period of time.⁵⁸ It is also necessary to take into account the degree to which software upgrades or the introduction of newer systems and products is driven by technological advances and changing purchaser preferences.⁵⁹ However, the ACCC considers that there is scope for including provisions requiring systems be supported for a defined period in a future right to repair scheme, as a way of providing purchasers with greater certainty and protections.

5.5.3 Improved information before the point of sale

The ACCC considers that purchasers would benefit from improved information regarding data rights and machine interoperability at the earliest practical opportunity in the sales process and before the point of sale.

Greater transparency on these issues would enhance purchaser confidence and ensure purchasers can understand the value of the data being captured. The scope of this market study did not extend to analysis of EULAs presented to purchasers at the time of sale. However, information received suggests there is a need to provide greater clarity to purchasers before the point of sale as to how their data will be shared and aggregated. The ACCC recommends that manufacturers and dealers provide information to purchasers about data issues at the earliest practical opportunity in the sales process and before the point of sale:

- explaining how purchasers can access and transfer their data
- providing a statement about how the manufacturer will use data captured by the machine, including options which allow purchasers to 'opt out' of schemes that would share or aggregate the data.

In addition, the ACCC recommends that manufacturers and dealers provide clear and concise information to purchasers issues at the earliest practical opportunity in the sales process and before the point of sale regarding the interoperability of machinery.

This reform would be a matter of best practice for which manufacturers should take responsibility.

The ACCC notes that the NFF has introduced the *Australian Farm Data Code* and is broadly supportive of industry-initiated, voluntary measures to help purchasers understand their data rights. At this stage, the ACCC does not recommend the introduction of similar government regulation specifically targeting agricultural machinery markets.

► Recommendation 4

The ACCC recommends that manufacturers and dealers provide information to purchasers about data issues at the earliest practical opportunity in the sales process and before the point of sale.

This should include:

- information about machinery interoperability
- explaining how purchasers can access and transfer their data
- a statement about how the manufacturer will use data captured by the machine, including options which allow purchasers to 'opt out' of schemes that would share or aggregate the data.

58 ACCC, Submission to the Productivity Commission Inquiry into the Right to Repair, p. 4.

59 Productivity Commission, Right to Repair Inquiry Issues Paper, p. 20.



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