



1 February 2021

Right to Repair inquiry  
Productivity Commission  
Locked Bag 2  
Collins Street East  
Melbourne VIC 8003

Via email: [repair@pc.gov.au](mailto:repair@pc.gov.au)

Dear Commissioners

**RE: Submission to the Productivity Commission 'Right to Repair' inquiry**

The National Farmers' Federation (NFF) welcomes the opportunity to provide a submission to the Productivity Commission 'Right to Repair' inquiry.

The NFF was established in 1979 as the national peak body representing farmers and more broadly, agriculture across Australia. The NFF's membership comprises all of Australia's major agricultural commodities across the breadth and the length of the supply chain. Operating under a federated structure, individual farmers join their respective state farm organisation and/or national commodity council, and these organisations form the NFF.

The NFF represents Australian agriculture on national and foreign policy issues including workplace relations, trade and natural resource management. Our members complement this work through the delivery of direct 'grass roots' member services, as well as state-based policy and commodity-specific interests.

With respect to the Terms of Reference of this inquiry, the NFF makes the following recommendations:

- A 'right to repair' be created to make illegal any barriers which prevent the owner of a product making repairs to that product themselves or using a contractor of their choice, where these barriers are not necessary to protect the legitimate commercial interests of the manufacturer or supplier.
- The consumer guarantee under Australian Consumer Law should be extended to all purchases of farm machinery.

Barriers to the repair of farm machinery are a serious and longstanding issue for the Australian farming sector. These barriers have become more pronounced in recent years, as the machinery used by farm businesses to carry out their operations has become more sophisticated in terms of both design and embedded technology. This

increasing sophistication has enabled manufacturers to erect new barriers to third-party repairs, including those carried out by the farmer. In identifying these barriers - including their commercial consequences - we draw heavily on the Australian Competition and Consumer Commission (ACCC) discussion paper, 'Agricultural Machinery - After-sales Markets'.

The primary market for agricultural machinery in Australia is highly concentrated and heavily reliant on imports. The market is dominated by six manufacturers who are also active in the markets for after-sales services and parts. These manufacturers predominantly sell their machinery through authorised dealers - businesses which have a 'dealer's agreement' with the manufacturer which gives them the right to act as a primary seller of the manufacturers' equipment and authorised replacement parts and as a provider of authorised servicing and repairs. These supply chain structures mean that the markets for primary sales and after-sales repairs and servicing are highly integrated.

There is no evidence available to suggest that the strength of competition between manufacturers in the primary market influences the cost and accessibility of repairs for consumers. We note the finding of the ACCC in its 2017 market study into new-car retailing, that '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'.

Common barriers to the repair of agricultural machinery are:

1. *Manufacturers voiding the machine's warranty if purchasers conduct repairs themselves or use an independent repairer.* The NFF acknowledges that there are legitimate reasons for a manufacturer to limit the applicability of warranties. Foremost among these is the desire of manufacturers to limit their financial liability to sub-standard repairs undertaken by a third-party. It may be fair and reasonable for a manufacturer to choose not to carry the risk arising from a third party over whose actions the manufacturer has no control. While this may provide justification for terms in a warranty which render that warranty inapplicable to mechanical issues arising from third-party repairs, it does not justify the inapplicability of that warranty to mechanical issues unrelated to the third-party repair. This includes the mechanical issue which necessitated the third-party repair being undertaken in the first place, since that issue must have preceded any interference by a third-party.
2. *Manufacturers restricting the supplier of genuine parts, technical information and diagnostic software tools to authorised dealers.* These restrictions go further than preventing owners from seeking third-party repairs without voiding the warranty. By restricting access to or sales of technical information, diagnostic software tools and genuine parts to third parties, the manufacturer prevents owners from seeking third-party repairs altogether. There does not seem to be any way to justify these additional restrictions by referring to third-party risk. If a manufacturer can offload all its risk (financial

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<sup>1</sup> <https://www.accc.gov.au/focus-areas/market-studies/new-car-retailing-industry-market-study>

liability) by declaring a warranty void when a third-party repair occurs, then that risk can no longer be used to justify the third-party repair being prevented.

3. *Insufficient recourse being provided by either the product warranty or the Australian Consumer Law (ACL) in the event of an issue.* The price of most agricultural machinery exceeds the \$40 000 threshold for goods to be covered by the non-excludable consumer guarantee under the Australian Consumer Law (ACL), and will exceed the new \$100 000 threshold when it comes into effect on 1 July 2021. Larger or specialised agricultural equipment commonly exceeds \$600 000 in cost. The consequence of this is that the product warranties are the only point of recourse for farm businesses, and there is no way to avoid their shortcomings.
4. *Dealership agreements which contain terms that unduly place the risk of providing repairs on local dealers or prevent dealers competing to provide repair services.* These agreements commonly exclude travel and transport costs when calculating reimbursement to the dealer. These costs become the responsibility of the final customer when defective parts or workmanship is an issue and the equipment is still under warranty. We note the view of the ACCC that these agreements may contain unfair contract terms<sup>2</sup>. Authorised dealers are commonly assigned 'areas of responsibility' by the manufacturer - a geographic region in which a single dealer is designated as the sole provider of repairs, effectively giving each dealer a monopoly on servicing and repairs in its designated area.

By restricting customers' ability to use independent repairers and non-genuine parts, manufacturers can charge inflated prices for their parts and services and deny purchasers access to cheaper, more available services and parts.

There are other adverse consequences for farm businesses besides being faced with inflated prices. For example, various costs associated with servicing and repairs are also inflated. For many farm businesses, the extra travel required to visit an authorised dealer imposes a significant cost burden. This cost is increased by the additional expense of transporting the machinery. Alternatively, the farm business can arrange for an authorised dealer to visit the property on which the equipment is kept. This option is also expensive.

Furthermore, third-party repairs will often not provide repair services to businesses during peak periods and out of business hours. Not having this option available when machinery failure occurs can impact on the ability of a farm business to undertake its operations. The nature of agricultural operations, where the window of time in which certain activities can be undertaken is often narrow, means that these delays can have severe consequences for the affected business.

### **Policy solutions**

The NFF considers that the finding of the ACCC in its market study 'New Car Retailing Industry' - that the market for aftermarket services in the car industry is

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<sup>2</sup> <https://www.accc.gov.au/focus-areas/agriculture/agricultural-machinery-after-sales-markets>

less competitive as a result of the ability and incentive of manufacturers to impede competition by controlling access to necessary inputs - is likely to also be true of the after-sales market for repairs and servicing of agricultural machinery to the extent that these market structures mirror one another, which it appears they largely do.

In the case of restrictions arising from the manufacturer's decision to not provide technical information or diagnostic software tools to a third-party repairer, we acknowledge that manufacturers may have genuine interests in protecting their intellectual property. We do not wish to make comment on whether the current level of information being withheld goes beyond what is necessary to protect the manufacturers' intellectual property. However, we consider that, where withholding of information is not necessary to protect intellectual property, the decision to withhold that information has the same effect as the decision to withhold the supply of genuine parts, and the relevant sections of the *Competition and Consumer Act 2010* (notably section 46) should be enforced if they are found to have been breached.

In the case of agricultural machinery, the analysis of warranties through the lens of section 46 of the *Competition and Consumer Act 2010* should result in certain warranty provisions being prohibited, thereby providing a *de facto* 'right to repair' for farm businesses. However, this 'right to repair' is only incidental and will apply only where the relevant warranty clauses are found to be anti-competitive in their effect. This leaves open the possibility of clauses which are not anti-competitive but nonetheless prevent a farm business from repairing its equipment in its preferred way. It is this category of cases that the NFF considers justifies the creation of a positive 'right to repair' in Australian law - where warranty clauses:

- a. Prevent a farm business from repairing its equipment in its preferred way;
- b. Are not anti-competitive in their effect; and
- c. Are not necessary to protect the legitimate commercial interests of the manufacturer/supplier

#### Right to Repair

The NFF recommends that a 'right to repair' be created as either standalone legislation or embedded within existing legislative frameworks. The right to repair should serve a single purpose: to make illegal any barriers which prevent the owner of a product making repairs to that product themselves or using a contractor of their choice, where these barriers are not necessary to protect the legitimate commercial interests of the manufacturer or supplier.

The test of 'necessary to protect the legitimate commercial interests of the manufacturer or supplier' - as stated - is, of course, highly ambiguous, and the legislation would need to contain precise tests for determining what barriers are and are not legitimate. It is likely that existing legislation will require amendment to make room for this right. The *Copyright Act 1968*, for example, will likely require a new exception to allow for non-infringing uses of copyright material for the purpose of repair.

The agricultural sector has no preferences for how this new legal framework should be constructed, provided it achieves the aim stated above. One possibility would be to incorporate a right to repair into a new economy-wide prohibition on unfair trading practices contained within the ACL, as recently recommended by the ACCC in its Perishable Agricultural Goods Inquiry<sup>3</sup>.

#### Australian Consumer Law

Further amendments to the ACL would assist the operation of this right to repair. The \$40 000 threshold for goods covered under the consumer guarantee in the ACL means that most agricultural machinery is not covered. With the average price of, for example, a combine harvester being approximately \$600 000, the new threshold of \$100 000 coming into effect on 1 July 2021 will leave most large machinery uncovered.

The NFF considers that the consumer guarantee under the ACL should be extended to all purchases of farm machinery. The value threshold was introduced in the *Trade Practices Amendment Act 1977* in order to facilitate the extensions of the protections available to consumers under the ACL to small businesses. It was recognised that extending these provisions to small businesses would better align them with their key goal, which was 'to redress, between supplier and customer, inequalities in the technical expertise required to recognise, and the power to negotiate, a fair bargain<sup>4</sup>'. This inequality in technical expertise and bargaining power is true for many farm businesses conducting machinery purchases which greatly exceed the current value threshold. Importantly, the recent Consumer Affairs Australia and New Zealand Review of Australian Consumer Law found that 'while the threshold was developed with small businesses in mind, there was no intention to exclude businesses, large or small, from the protections in the ACL<sup>5</sup>'.

Extending these protections to all purchases of farm machinery would create many important protections for farm businesses. Foremost among these is the right of a purchaser to seek damages for losses or consequential losses related to a good's failure. This would cover the travel and transport costs associated with repair, as well as the losses to farm business revenue incurred when machinery fails during a key stage of the production cycle.

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<sup>3</sup> <https://www.accc.gov.au/focus-areas/inquiries-ongoing/perishable-agricultural-goods-inquiry>

<sup>4</sup> Consumer Affairs Australian and New Zealand 2018, *Australian Consumer Law Review: Clarification, simplification and modernisation of the consumer guarantee framework*

<sup>5</sup> Consumer Affairs Australian and New Zealand 2018, *Australian Consumer Law Review: Clarification, simplification and modernisation of the consumer guarantee framework*

Should you have any questions regarding this submission please contact Mr  
Liam Watson

Yours sincerely

**TONY MAHAR**  
Chief Executive Officer