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# Submission on the ACCC's Discussion Paper – *Agricultural Machinery: After-sales Markets*

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ACCC

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The NSW Young Lawyers Communications, Entertainment and Technology Committee (**Committee**) makes the following submission in response to the Agricultural Machinery: After-sales Markets (**Discussion Paper**).

## NSW Young Lawyers

NSW Young Lawyers is a division of The Law Society of New South Wales. NSW Young Lawyers supports practitioners in their professional and career development in numerous ways, including by encouraging active participation in its 15 separate committees, each dedicated to particular areas of practice. Membership is automatic for all NSW lawyers (solicitors and barristers) under 36 years and/or in their first five years of practice, as well as law students. NSW Young Lawyers currently has over 15,000 members.

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

# Summary of Recommendations

The NSW Young Lawyers Communications, Entertainment and Technology Law Committee (**the Committee**) welcomes the opportunity to comment on *Agricultural Machinery: After-sales Markets* (**Discussion Paper**) on behalf of NSW Young Lawyers.

The Committee has responded to the selected questions outlined below and have otherwise not made submissions on the remaining questions. The Committee has outlined considerations that it recommends the Australian Human Rights Commission (**the Commission**) take into account when reviewing these issues. The Committee hopes that these considerations provide helpful guidance to the Committee in conducting this review.

1. The Committee supports changes be made to the Australian Consumer Law to include the purchase of agriculture machinery.
2. The Committee recommends the creation of an industry code of conduct for agricultural machinery manufacturers.
3. The Committee recommends that such a code should include explicit standards for cybersecurity and privacy surrounding data gathered, transmitted, and stored by agricultural machinery.

# Part 1: Policy Context

## Digitalisation and Datafication of Agriculture

1. As the OECD highlights, modern agriculture is characterised by 'digitalisation' and 'datafication'.[1] These terms are defined as follows:

   ***Digitisation*:** the conversion of analogue data and processes into a machine-readable format...

   ***Datafication*:** the transformation of action into quantified digital data, allowing for real-time tracking and predictive analysis. Datafication takes previously unrecorded processes and activities and produces data that can be monitored, tracked, analysed and optimised.[2]

2. Digitisation and datafication are aspects of the long history of technological innovation in the agricultural sector and its mission 'to increase productivity, manage risk and improve environmental, social and economic sustainability'.[3] For instance, farmers have used Landsat data for agricultural monitoring since 1972 (one of the 'longest-standing operational applications' of the program).[4] More recently, 2017 saw the first crop to be sown, tended and harvested without any human being entering the field.[5]

## Benefits

3. Machinery enhanced by 'Internet of Things' (**IoT**) technologies can be made more effective through continuous monitoring, minimisation of downtime through better-scheduled maintenance, and informing better farming practices generally.[6] Sensors on increasingly complex agricultural machinery collect and send multitudes of data to be analysed in the cloud environments by ever more advanced algorithms.[7]

4. 'Agricultural Data' includes:

   (i) telematics data which agricultural machinery 'collects about itself'; and

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[1] Gwendolen DeBoe and Marie-Agnès Jouanjean, *Digital Opportunities for Better Agricultural Policies* (Report, OECD, 2019) 25.

[2] Gwendolen DeBoe and Marie-Agnès Jouanjean, *Digital Opportunities for Better Agricultural Policies* (Report, OECD, 2019) 25-6; at 25, citing OECD, *Vectors of Digital Transformation* (OECD Digital Economy Papers No 273, OECD, January 2019); at 26, citing Ashley I. Naimi and Daniel J. Westreich, 'Big Data: A Revolution That Will Transform How We Live, Work, and Think By Viktor Mayer-Schönberger and Kenneth Cukier' (2014) 9(1) *American Journal of Epidemiology* 1143–4.

[3] Gwendolen DeBoe and Marie-Agnès Jouanjean, *Digital Opportunities for Better Agricultural Policies* (Report, OECD, 2019) 21.

[4] Colin R. Leslie, Larisa O. Serbina and Holly M. Miller, *Landsat and Agriculture—Case Studies on the Uses and Benefits of Landsat Imagery in Agricultural Monitoring and Production* (Report, U.S. Geological Survey, U.S. Department of the Interior, 2017) 1.

[5] Marie-Agnès Jouanjean and Gwen DeBoe, *How Digital Technologies Are Impacting the Way We Grow and Distribute Food* (Background Note, Committee for Agriculture, OECD, 7 May 2018) 2.

[6] Australian Competition and Consumer Commission, *Agricultural Machinery: After-Sales Markets* (Discussion Paper, Australian Competition and Consumer Commission, February 2020) 15.

[7] See eg Jody L. Ferris, 'Data Privacy and Protection in the Agriculture Industry: Is Federal Regulation Necessary?' (2017) 18 *Minnesota Journal of Law, Science and Technology* 309, 315-7.

(ii) agronomic data collected by the operation of agricultural machinery — data 'describing crop health or field conditions.'[8]

5. Some of the technologies currently deployed in the sector (like *in situ* sensing, GPS, and secure data storage) have existed for some time. However, the growing capacity to aggregate the large Agricultural Datasets, where formerly systems were fragmented and decentralised, as well as the ability to fully exploit and analyse the product for decision-making, has been transformational for the industry. This transformation is at the core of the digitalisation and datafication of agriculture.[9]

## Challenges

6. Digitalisation and datafication of agriculture, and the significant commercial value of data created by new systems and machines, raise significant policy changes.[10] These implicate the competition, privacy, and cybersecurity spheres.

7. Competition within the agricultural machinery market is restricted when vast agricultural datasets encourage the "distribution of informational power in the hands of a few subjects, potentially capable of abuses on information asymmetries, [and] of illegitimate advantages at the economic level."[11] In the context of agricultural machinery, the 'subjects' are the manufacturers of agricultural machinery, whose technological ecosystems house and process the Agricultural Data collected by smart agricultural machinery. This also has an impact on machinery parts that can only be purchased from manufactures. The Committee is aware of circumstances where an individual who needed to purchase a new latch for a tractor which would normally cost $20 to $50, was forced to make the purchase from their local dealer, which would cost upwards of $600. Furthermore, in circumstances where an individual is purchasing a new piece of machinery (for example, a tractor) from a particular brand, the individual may be required to purchase the piece form their local dealer. This means that the individual cannot 'shop around' with other dealers in other towns, which ties the individual to paying the price that the local dealer sets, reducing the level of competition in the market.

8. In relation to data, The manufacturers can use the *End User Licensing Agreements* governing the processing, and control or ownership, of the generated Agricultural Data, increasing their economic power as their pool of data grows.[12]

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[8] The wording of these definitions was drawn from: Shannon L. Ferrell, 'Legal Issues on the Farm Data Frontier, Part 1: Managing First-Degree Relationships in Farm Data Transfers' (2016) 21 *Drake Journal of Agricultural Law* 13, 17-20; and Todd Janzen, 'What Makes Agronomic Farm Data Different from Other Forms of Intellectual Property?', *Farm Journal* (Article, 10 May 2015) <https://www.agweb.com/blog/janzen-ag-law-blog/what-makes-agronomic-farm-data-different-from-other-types-of-intellectual-property>.

[9] Gwendolen DeBoe and Marie-Agnès Jouanjean, *Digital Opportunities for Better Agricultural Policies* (Report, OECD, 2019) 25.

[10] Jody L. Ferris, 'Data Privacy and Protection in the Agriculture Industry: Is Federal Regulation Necessary?' (2017) 18 *Minnesota Journal of Law, Science and Technology* 309, 317.

[11] Luca Leone, 'Addressing Big Data in EU and US Agriculture: A Legal Focus' (2017) 12(6) *European Food and Feed Law Review (EFFL)* 507, 510, citing Alessandro Mantelero, *Masters of Big Data: Concentration of Power over Digital Information* (Research Paper, 2012).

[12] Australian Competition and Consumer Commission, *Agricultural Machinery: After-Sales Markets* (Discussion Paper, Australian Competition and Consumer Commission, February 2020) 15.

9. The Commission must be alive to how such factors can help the manufacturers "control every aspect of production, including input costs that are associated with agriculture, due to the farmers' reliance on them."[13] Reliance is accentuated by 'switching costs,' which disincentivise changing machine companies by limiting data portability and interoperability across different brands of machinery,[14] undermining competition in the market.

10. Industry consolidation and vertical integration of supply chains for agricultural machinery as a result of the growing size of the manufacturers' Agricultural Data ecosystems contributes to a reduction in competition. Farmers become even more dependent on parts and software designed by fewer and fewer entities.[15] The Committee asks the Commission to consider whether the manufacturers of agricultural machinery should be treated as the equivalent of '*Big Tech*' companies, given the sheer amounts of Agricultural Data they handle and monetise.[16]

11. Privacy is a key consideration where the presence of regulatory frameworks like the *Privacy Act 1988* (Cth) attach to the collection and usage of Agricultural Data. The economic value of Agricultural Data makes the manufacturers who process and/or control it, at risk of abuse,.[17] The presence of third-party data intermediaries (for example, commercial advisers who help farmers process and analyse Agricultural Data) exacerbate this risk.[18] The importance of managing privacy risks in the context of Agricultural Data also arises from the potential value of trade secrets in providing a detailed representation of their farming practices. If unauthorised third parties access farmers' Agricultural Data, the latter's livelihoods could be adversely affected.[19]

12. As an extension of privacy to the digital context, cybersecurity risks are a related, but distinct challenge raised by Agricultural Data systems. Again, the value of Agricultural Data makes manufacturers of machinery, as well as data intermediaries, attractive targets for hackers. To maintain thriving Agricultural Data ecosystems, manufacturers need to ensure trust among

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[13] Neal Rasmussen, 'From Precision Agriculture to Market Manipulation: A New Frontier in the Legal Community' (2016) 17 *Minnesota Journal of Law, Science and Technology* 489, 498.

[14] Australian Competition and Consumer Commission, *Agricultural Machinery: After-Sales Markets* (Discussion Paper, Australian Competition and Consumer Commission, February 2020) 15.

[15] Neal Rasmussen, 'From Precision Agriculture to Market Manipulation: A New Frontier in the Legal Community' (2016) 17 *Minnesota Journal of Law, Science and Technology* 489, 495.

[16] The Committee notes, for instance, the reference to these companies as 'Agricultural Technology Providers' that 'offer "prescriptions" to farmers that allow them to better utilize their data and increase their output, for a fee': Neal Rasmussen, 'From Precision Agriculture to Market Manipulation: A New Frontier in the Legal Community' (2016) 17 *Minnesota Journal of Law, Science and Technology* 489, 494.

[17] Jody L. Ferris, 'Data Privacy and Protection in the Agriculture Industry: Is Federal Regulation Necessary?' (2017) 18 *Minnesota Journal of Law, Science and Technology* 309, 317.

[18] Ajit Maru et al, *Digital and Data-Driven Agriculture: Harnessing the Power of Data for Smallholders* (Paper, Global Forum on Agricultural Research and Innovation, Global Open Data for Agriculture and Nutrition initiative and Technical Centre for Agricultural and Rural Cooperation, March 2018) 17.

[19] Jody L. Ferris, 'Data Privacy and Protection in the Agriculture Industry: Is Federal Regulation Necessary?' (2017) 18 *Minnesota Journal of Law, Science and Technology* 309, 332; at 316, citing Meghan Grebner, 'Addressing Privacy Concerns with Big Data', *Brownfield* (Article, 31 January 2014) <http://brownfieldagnews.com/2014/01/31/addressing-privacy-concerns-big-data/>; at 316, citing Tiffany Dowell, 'Big Data on the Farm (Part I): What Is It?', *Texas Agriculture Law Blog* (Blog Post, 1 September 2015) <http://agrilife.org/texasaglaw/2015/09/01/big-data-on-the-farm-part-i-what-is-it/>; .

participants via secure data infrastructures.[20] If these infrastructures and/or the machinery sending data are compromised, then farmers' livelihoods could be disrupted, as can the broader sector, given the dependence of modern agriculture on such technological systems to deliver increasing yields at lower costs.[21]

# Part 2: Stakeholders and Policy Issues

## Barriers for Farmers

### Contractual Issues

13. The historical culture of self-repair in rural Australia has been jeopardised by the proliferation of increasingly sophisticated and computerised agricultural technologies.[22] The Committee supports the ACCC's focus on the following contractual issues:

(a) manufacturers of agricultural machinery frequently require purchasers to accept standard form contracts containing highly complex terms, without scope for negotiation. Frequently farmers do not have the requisite legal knowledge to engage with and interrogate their obligations and ensure they are not operating in violation of warranty terms or freedom to operate clauses;

(b) Contracts for purchase of agricultural machinery often involve clauses which limit farmers' access to diagnostic tools or their capacity to perform independent repairs. Manufacturers may retain the exclusive right to repair or replacement of parts or software, at their sole discretion. In signing these agreements purchasers are effectively bound to particular dealers, manufacturers, or repairers;[23]

(c) Certain conditions within manufacturer and dealer documents may constitute unfair contract terms under the Australian Consumer Law (**ACL**).[24] Conditions of use can be so wide-ranging that certain use, access to, or modification, of equipment by farmers can be deemed a breach of contract potentially resulting in termination of the contract and exposure to litigation. A breach of restrictive warranty terms could result in a void warranty, which would expose farmers to untenable levels of risk to the continued operation of their equipment.[25] Terms such as these cause real detriment to the purchaser, create a significant imbalance in the respective right of the parties, and are arguably not reasonably necessary to protect any legitimate interest of manufacturer or dealer. Given no pecuniary penalties apply if a term in a standard form consumer or small business contract is found unfair, manufacturers and dealers do not have a

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[20] Gwendolen DeBoe and Marie-Agnès Jouanjean, *Digital Opportunities for Better Agricultural Policies* (Report, OECD, 2019) 120.

[21] Neal Rasmussen, 'From Precision Agriculture to Market Manipulation: A New Frontier in the Legal Community' (2016) 17 *Minnesota Journal of Law, Science and Technology* 489, 489-90.

[22] ABC Radio National, 'Encouraging repair over waste', *Big Ideas Podcast*, 13 February 2020 (Paul Barclay); Design Innovation Research Centre at the University of Technology Sydney, 'Can we talk about a 'Right to Repair in Australia?', 2 October 2019 (Jesse Adams Stein, Guido Verbist, John Gerstakis, Leanne Wiseman, Annette Mayne, Guy Keulemans).

[23] Jemima Burt, 'Tractor-hacking farmers in the US fight for right to repair under equality law', *ABC News* (online), 2 February 2018, <https://www.abc.net.au/news/rural/2018-02-22/tractor-hacking-farmers-in-the-us-fight-for-right-to-repair/9470658>.

[25] Jason Koebler, 'Tractor-Hacking Farmers Are Leading a Revolt Against Big Tech's Repair Monopolies', *Vice* (online), 15 February 2018, <https://www.vice.com/en_us/article/kzp7ny/tractor-hacking-right-to-repair>.

strong incentive to review their contracts and remove potentially unfair terms. Individual may lack the awareness and resources necessary to seek a court declaration that onerous terms are unfair; and

(d) The Discussion Paper[26] notes that consumer guarantees offered under the ACL are not typically extended to purchasers of agricultural machinery, being goods not ordinarily acquired for personal, domestic or household use and priced in excess of the legislative limit of $40,000.[27] The absence of such consumer protections to purchasers of agricultural machinery contributes to imbalanced contractual relationships between farmers and manufacturers or dealers. Farmers frequently have limited options to address product faults without incurring significant costs.

## Data ownership

14. The Discussion Paper notes that farmers are often unsure of their rights as regards ownership of the data captured by agricultural equipment from their farms. Farmers may unknowingly waive their rights to control the use of data generated by their farms by agreeing to the terms in manufacturer or dealer documents. These documents often entitle manufacturers to wide-ranging use of user-generated data, including the sale of data to third parties.[28]

## Limited access to repairs and diagnostics

15. The Committee considers that a farmer may be unfairly disadvantaged by the threat of a manufacture voiding a warranty if a farmer uses a non-authorised repairer. Authorised repairers may be inaccessible to farmers due to geographic location, have significant repair backlogs or require parts from overseas suppliers. This can result in significant expenses for farmers whose operations are stifled by lack of access to functional equipment.[29]

16. Furthermore, the software embedded in much modern agricultural technology requires frequent updates that, in many cases, must be performed by authorised technicians.[30] Access to software and diagnostics is further inhibited by lack of internet connectivity in remote areas, which render online monitoring systems ineffective.[31]

17. The Committee notes that warranty terms that are not proportionate with consumer guarantees result in a lack of accessible and affordable means of servicing and repairing agricultural equipment. This kind of activity unfairly burdens famers and will be further considered in this submission in greater detail.

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[26] Australian Competition and Consumer Commission, *Agricultural machinery: After-sales* markets, Discussion Paper (2020) 11.
[27] *Competition and Consumer Act 2010* (Cth), sch 2, s 3 (definition of 'consumer').
[28] Australian Farm Institute, '"Right to repair" debate highlights critical issue of data rights' (26 March 2017), Ag-forum, <http://www.farminstitute.org.au/ag-forum/right-to-repair-debate-highlights-critical-issue-of-data-rights>.
[29] Jason Koebler, 'Tractor-Hacking Farmers Are Leading a Revolt Against Big Tech's Repair Monopolies', *Vice* (online), 15 February 2018, <https://www.vice.com/en_us/article/kzp7ny/tractor-hacking-right-to-repair>.
[30] Kit Mochan and Mark Bennett, 'Farmers driving 'right to repair' issue as legislative battle unfolds in US', *ABC News* (online), 11 March 2018, <https://www.abc.net.au/news/rural/2018-03-11/farmers-spearhead-right-to-repair-fight/9535730>.
[31] Australian Farm Institute, '"Right to repair" debate highlights critical issue of data rights' (26 March 2017), Ag-forum, <http://www.farminstitute.org.au/ag-forum/right-to-repair-debate-highlights-critical-issue-of-data-rights>.

## Intellectual Property

18. The Committee notes that there is an increasingly proprietary nature ascribed to the software and associated sensors contained within modern agricultural technology. The Committee recognises that there is often a dissonance between legitimate intellectual property and commercial confidentiality concerns of manufacturers, and consumer protection mechanisms.

19. The Committee makes the following observations regarding the intellectual property rights of Original Equipment Manufacturer (**OEMs**) in agricultural machinery aftermarkets:

    (a) Software applications, diagnostic toolkits and repair manuals related to agricultural machinery are likely protected by the *Copyright Act 1968* (Cth). The Copyright Act incorporates a number of "fair dealing" defences to breach of copyright, but current fair dealing provisions do not extend to unauthorised use or reproduction of copyright materials for the purpose of maintenance or repair;

    (b) The *Designs Act 2003* (Cth) covers the physical appearance of a product or a unit of a product. Use of materials for repair or maintenance which do not replicate the visual appearance of a component part of a piece of agricultural machinery would not infringe the OEM's design rights. The repair of complex products is permitted as a complete defence to design infringement,[32] provided the overall appearance of the unit or product is being restored, and this is the only purpose for which the replicated part is being used.[33] The rationale of the repair defence is to allow greater competition within aftermarkets for spare parts and associated benefits to consumers;[34]

    (c) Innovative methods or devices which underlie agricultural technology are protected separately by means of the *Patents Act 1990* (Cth). There is an implied licence granted to purchasers of patented goods to use and dispose of the goods at their discretion.[35] This licence does not extend to remaking or repurposing patented goods, and it is presently unclear whether there is a general right to repair of patented goods by a purchaser.

20. The rights of manufacturers to data collected and stored by the OEM's agricultural technology is less clear. *The Copyright Act* does not afford rights to data that is produced without human intervention or due care and skill in the selection, compilation and arrangement of data or information.[36] As copyright is not extended to automated collection and storage of data by agricultural machinery, OEMs seek to make data the subject of proprietary rights through confidentiality clauses in manufacturer and dealer documents. Data and information can only be classified as confidential if the party collecting and storing it maintains its confidential nature through security measures and appropriate steps to prevent its public disclosure. For this reason, the Committee recognises the hesitation of manufacturers in allowing access to confidential data and information by farmers as it may be prejudicial to their commercial and legal interests.

21. The justification for intellectual property law is to encourage innovation and business growth by granting rights holders a limited monopoly over the technologies they devise and/or produce.

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[32] *Designs Act 2003* (Cth) s 72.
[33] *GM Technology Operations LLC v SSS Auto parts Pty Ltd* (2019) 139 IPR 199.
[34] Jeremy Dobbin, 'Review of the right of repair or spare parts exclusion under the Designs Act 2003', FindLaw Australia, <https://www.findlaw.com.au/articles/2149/review-of-the-right-of-repair-or-spare-parts-exclu.aspx>.
[35] *Calidad Pty Ltd v Seiko Epson Corporation* [2019] FCAFC 115.
[36] *Telstra Corp Ltd v Phone Directories Co Pty Ltd* (2010) 264 ALR 617.

The Committee supports the entitlement of manufacturers of agricultural equipment to a return on investment on their intellectual property, in particular as it relates to software applications and data capture. The Committee further acknowledges that relaxation in freedom to operate arrangements may enable third parties to gain unfettered access to manufacturers' intellectual property.[37]

22. The doctrine of exhaustion of intellectual property rights, however, indicates that intellectual property was never intended to grant manufacturers influence over aftermarkets for their proprietary goods.[38] The Committee contends that, to this extent, protection of OEM intellectual property rights, in particular contractually enforced controls over confidential information, ought to be balanced with the right of farmers to the maintenance and repair of agricultural equipment they own.

## Barriers for Repairers

23. The Committee considers the exclusivity of the authorised repairer network creates impediments to the competitiveness of the aftermarket for agricultural machinery. Payment by repairers to manufacturers in exchange for access to replacement parts, tools, service manuals, encrypted software and data[39] limits market access for independent repairers.[40] For example, the Discussion Paper provides reports made by independent repairers of being required to pay premium prices for access to genuine parts. Ownership of and access to data is a particularly valuable commodity in aftermarkets for agricultural machinery. The Committee notes the high value of data generated by agricultural machinery allows authorised dealers to gain an unfair market advantage[41] over farmers and independent repairers.

24. Membership to the authorised repairer network is formalised by warranties conditional on the use of that network for maintenance and repair of purchased machinery. In this regard, the Committee notes the concerns raised in the Discussion Paper that the nature of dealership agreements may encourage repairers to reject warranty claims and limit service availability.[42] The Committee further considers that conditional warranties of this nature may enable manufacturers to force products into early obsolescence through removal of parts or software for certain machinery from aftermarkets,[43] which creates difficulties for dealers in meeting the service requirements of their customers.

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[37] Craig Johnson, ''Right to Repair' Is About Stealing Tech, Not Helping Farmers' (20 March 2020), RealClear Policy, <https://www.realclearpolicy.com/articles/2020/03/20/right_to_repair_is_about_stealing_tech_not_helping_farmers_487046.html>.
[38] ABC Radio National, 'Encouraging repair over waste', *Big Ideas Podcast*, 13 February 2020 (Paul Barclay); Design Innovation Research Centre at the University of Technology Sydney, 'Can we talk about a 'Right to Repair in Australia?', 2 October 2019 (Jesse Adams Stein, Guido Verbist, John Gerstakis, Leanne Wiseman, Annette Mayne, Guy Keulemans).
[39] Jason Koebler, 'Tractor-Hacking Farmers Are Leading a Revolt Against Big Tech's Repair Monopolies', *Vice* (online), 15 February 2018, <https://www.vice.com/en_us/article/kzp7ny/tractor-hacking-right-to-repair>.
[40] Australian Farm Institute, '"Right to repair" debate highlights critical issue of data rights' (26 March 2017), Ag-forum, <http://www.farminstitute.org.au/ag-forum/right-to-repair-debate-highlights-critical-issue-of-data-rights>.
[41] Australian Farm Institute, '"Right to repair" debate highlights critical issue of data rights' (26 March 2017), Ag-forum, <http://www.farminstitute.org.au/ag-forum/right-to-repair-debate-highlights-critical-issue-of-data-rights>.
[42] Australian Competition and Consumer Commission, *Agricultural machinery: After-sales* markets, Discussion Paper (2020) 2.
[43] Katie Burgess, 'Australians could soon have the 'right to repair' their broken phones', *The Canberra Times* (online), 30 August 2019, <https://www.canberratimes.com.au/story/6357702/australians-could-soon-have-the-right-to-repair-their-broken-phones/digital-subscription/>.

25. The Committee notes that repairers are not entirely beholden to manufacturers in aftermarkets for agricultural machinery. Demand for aftermarket services can provide valuable information to manufacturers that will influence product design of new models of machinery.[44] For this reason, the Committee considers repairers have a role to play in restoring the balance between the rights of farmers and manufacturers in agricultural machinery aftermarkets.

# Part 3: Proposed Solutions

## Australian Consumer Law

26. The terms and conditions of a manufacturer's warranty offer some protection to purchasers, in that they define the obligations of the manufacturer and the rights of the purchaser in the event of fault or failure. Manufacturer warranties, however, will generally fall short of the protections available to consumers under the ACL. As mentioned in the Discussion Paper, some manufacturer warranties place restrictions on using independent repairers and non-genuine parts. Although restrictions on the use of non-genuine parts in repairs can be seen as protective, as a form of quality control which disincentivises the use of counterfeit parts, such restrictions can disadvantage farmers and cause issues in the event of the fault or failure of agricultural machinery they have purchased. This may negatively impact the farming process through additional costs or substantial delays, effectively restricting farmers' livelihood. The Committee submits there is a live question as to whether manufacturer warranty terms and restrictions for agricultural machinery are reasonable and necessary to achieve a fair balance between the needs of farmer purchasers and the commercial considerations of manufacturers.

27. The ACL provides clear protections to consumers where there is a problem with goods or services. One such protection is automatic consumer guarantees that require goods to be of an acceptable quality and to perform as expected, notwithstanding the terms of any manufacturer or supplier warranties. The following automatic ACL guarantees would be of relevance to purchasers of agricultural machinery:

    - *Guarantee as to repairs and spare parts*: there is a guarantee that a manufacturer will take reasonable action to ensure that facilities for the repair of the goods, and parts for the goods, are reasonably available for a reasonable period after the goods are supplied,[45] and
    - *Guarantee as to express warranties*: there is a guarantee that a manufacturer will comply with any express warranty given or made by the manufacturer in relation to the goods supplied to a consumer.[46]

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[44] ABC Radio National, 'Encouraging repair over waste', *Big Ideas Podcast*, 13 February 2020 (Paul Barclay); Design Innovation Research Centre at the University of Technology Sydney, 'Can we talk about a 'Right to Repair in Australia?', 2 October 2019 (Jesse Adams Stein, Guido Verbist, John Gerstakis, Leanne Wiseman, Annette Mayne, Guy Keulemans).
[45] *Competition and Consumer Act 2010* (Cth), Schedule 2, s58(1) (**Australian Consumer Law**).
[46] *Competition and Consumer Act 2010* (Cth), Schedule 2, s59(1) (**Australian Consumer Law**).

28. Significant rights to a repair, replacement, refund, cancellation or compensation under the ACL do not, however, apply to items worth more than $40,000 purely for business use, including machinery or farming equipment.[47]

29. At the Meeting of Ministers for Consumer Affairs on 26 October 2018, in relation to consumer guarantees, the Ministers for Consumer Affairs (**Ministers**) agreed to the following:

    - *'to maintain the current framework in the Australian Consumer Law for non-major failures, including failures within a short period of time after purchase and to undertake further work to ensure consumers and retailers are supported when a good fail'.*[48]
    - '*to increase the threshold in the Australian Consumer law definition of 'consumer' from $40,000 to $100,000'.*[49]

30. This proposed increase is yet to be legislated and, while the increased threshold has the potential to capture more agricultural machinery than the current model, many purchasers of agricultural machinery would still not fall within the definition of a 'consumer' under the ACL, as such machinery can cost over $100,000 and, again, is not typically acquired for personal, domestic or household use. In the absence of further legislative reform, a purchaser's primary recourse in the event of a fault with their agricultural machine is, in most circumstances, likely to remain limited to the manufacturer's warranty.

## Possible solutions under the ACL

31. A combination of practical measures and legislative reforms may help to achieve a fair balance between the needs of farmer purchasers of agricultural machinery and the commercial considerations of manufacturers.

32. Possible practical solutions include:

    - Ensuring that farmers purchasing agricultural machinery are made fully aware of the terms and conditions of the manufacturer's warranty (and the sale agreement) at the time of sale, and are fully informed of the effect of extended warranty should they choose to take it. This could be enforced in the same way that product disclosure statements are provided to consumers prior to purchasing a financial service, i.e. with penalties if the relevant documents are not provided;
    - Providing that a warranty cannot be voided if a repair is conducted by a non-authorised party, as long as the repair has been carried out with due care and skill and with spare parts that are fit for the purpose for which they are used;
    - Ensure that plain language is used in warranty terms and explanations of same to facilitate purchaser engagement with and understanding of warranty terms and conditions. This could

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[47] Australian Competition & Consumer Commission, *Consumer Guarantees* <https://www.accc.gov.au/consumers/consumer-rights-guarantees/consumer-guarantees>

[48] Legislative and Governance Forum on Consumer Affairs, Melbourne, Victoria, 26 October 2018, Joint Communique, Meeting of Ministers for Consumer Affairs, <https://consumerlaw.gov.au/sites/consumer/files/2018/10/CAF-10-Communique-October-2018.pdf>

[49] Legislative and Governance Forum on Consumer Affairs, Melbourne, Victoria, 26 October 2018, Joint Communique, Meeting of Ministers for Consumer Affairs, <https://consumerlaw.gov.au/sites/consumer/files/2018/10/CAF-10-Communique-October-2018.pdf>

be achieved by providing examples of plain language terms and conditions on the ACCC's website; and

- Engender better-informed purchasers by ensuring that farmers are properly and appropriately informed about their legal rights, and made aware of the limits of the recourse available to them before purchasing agricultural machinery. Again, this could be achieved by providing accessible resources such as fact sheets on the ACCC's website.

33. In addition the Committee submits that possible legislation reform should be considered. At present, manufacturer warranty terms and conditions limit the ability of farmer purchasers of agricultural machinery to seek recourse and full compensation in the event of fault or failure. The Committee submits that farmer purchasers' rights need to be increased in relation to servicing and repairs.

34. Besides the possibility of developing and introducing new legislation that specifically applies to farmer purchasers of agricultural products, the more appropriate solution would be to make amendments to the ACL so that it applies to, and therefore provides greater protections to, farmer purchasers of agricultural machinery. If the ACL applied to farmer purchasers of agricultural machinery, they would benefit from the suite of protections the ACL provides, not only including the automatic consumer guarantees, which may continue to apply after a manufacturer's warranty has expired, but also extending to a ban on misleading and deceptive conduct, unconscionable conduct, and the voiding of unfair contract terms.

35. The most significant issue with the ACL is that the definition of a '*consumer*' generally excludes farmer purchasers of agricultural machinery from coverage under the ACL. The Committee submits that the definition of a 'consumer' in section 3(1) of the ACL needs to be appropriately amended so that it extends to farmer purchasers of agricultural machinery. It is noted that the definition of a consumer in section 3(1) of the ACL presently incorporates at subsection (1)(c) *'a vehicle or trailer acquired for use principally in the transport of goods on public roads'*,[50] irrespective of price. On that basis, there is a reasonable analogy and precedent for the definition of a '*consumer*' in section to be extended to include a further subsection (1)(d) applying to agricultural machinery (and therefore farmer purchasers of agricultural machinery). Such a subsection may be drafted as follows:

> '*the goods consisted of a* ***machine*** *acquired for use principally in* ***agriculture*** *for the cultivation of soil, growing of crops and rearing of animals in order to produce* ***goods*** *consisted of food and other produce and animals/livestock to be distributed to the public*'.

36. Finally, it is noted that the simple amendment of the definition of consumer in section (3)(1) of the ACL will ensure that more farmer purchasers of agricultural machinery are protected, as farmer purchasers of *second-hand* agricultural machinery, which may not be subject to an enforceable manufacturer warranty (e.g. the manufacturer warranty may have expired or not apply to on-sale), will receive protection under the ACL.[51] Further, in relation to goods, the ACL definition of 'acquire' is not exclusive to obtaining by way of purchase, extending to lease or hire.

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[50] *Competition and Consumer Act 2010* (Cth), Schedule 2, s 3(1)(c) (**Australian Consumer Law**).
[51] *Competition and Consumer Act 2010* (Cth), Sch 2, s 2, definition of 'goods' includes '*second-hand goods*' (**Australian Consumer Law**).

Therefore, if the ACL applied to agricultural machinery, farmers who acquire such machinery pursuant to a lease or hire-agreement would also receive protection.[52]

## Industry Code of Conduct for Agricultural Machinery

37. The Committee calls for the enactment of an Industry Code of Conduct to regulate the manufacturers and sellers of agricultural machinery in Australia ('*Agricultural Machinery Code of Conduct*') under section 51AE of the *Competition and Consumer Act 2010* (Cth).

### Analogy with the Franchising Relationship

38. The Committee grounds its recommendation in the comparison of the relationship between manufacturers/sellers (especially those sellers controlled by manufacturers), and purchasers of agricultural machinery, and that of franchisors and franchisees. We submit that this creates an impetus for the creation of an Industry Code of Conduct similar to the *Competition and Consumer (Industry Codes—Franchising) Regulation 2014* (Cth). From schedule 1 of *Franchising Code of Conduct*.

    The franchising relationship is characterised by:

    - a high degree of control of the franchisor over the activities of the franchisee;
    - the (substantial) 'inherent imbalance' in bargaining power in favour of the franchisor;
    - greater sophistication of the franchisor; and
    - the use of standard form contracts.[53]

39. The contractual bond between franchisor/franchisees, is grounded in a 'relational contract', a continuing relationship.[54] There are policy concerns around the information asymmetries in favour of the franchisor as well as the weaker party's 'lack of understanding of the skills, experience and capital necessary to succeed'.[55] These were the sorts of issues that triggered the enactment of the *Trade Practices (Industry Codes - Franchising) Regulations 1998* (Cth)[56] and the *Franchising Code of Conduct* in 2014.[57] The need to solve these sorts of problems — in a manner interfering 'minimally with freedom to contract' — represents the regulatory objective

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[52] See *Competition and Consumer Act 2010* (Cth), Sch 2, s 2 definition of 'acquire' (**Australian Consumer Law**).

[53] Rozenn Perrigot, Andrew Terry and Cary Di Lernia, 'Good Faith in Franchising: The Perceptions of Franchisees, Franchisors and Their Lawyers in the French Context' (2019) 47(3) *International Journal of Retail & Distribution Management* 246, 251; Andrew Terry and Des Giugni, *Business & the Law* (Thomson Reuters, 7th ed, 2019) 651.

[54] Andrew Terry and Des Giugni, *Business & the Law* (Thomson Reuters, 7th ed, 2019) 651, 658.

[55] Rozenn Perrigot, Andrew Terry and Cary Di Lernia, 'Good Faith in Franchising: The Perceptions of Franchisees, Franchisors and Their Lawyers in the French Context' (2019) 47(3) *International Journal of Retail & Distribution Management* 246, 251; Explanatory Statement, Trade Practices (Industry Codes - Franchising) Regulations 1998 (Cth).

[56] Explanatory Statement, Trade Practices (Industry Codes - Franchising) Regulations 1998 (Cth).

[57] The Treasury, Australian Government, *Regulation Impact Statement: Proposed Changes to Franchising Regulation* (March 2014) 11-22.

of the power to prescribe industry codes under *Competition and Consumer Act 2010* (Cth) pt IVB.[58]

40. As per the Discussion Paper, the manufacturers and sellers (especially those controlled by manufacturers) of agricultural machinery exert a similar level of control and bargaining power, possess a similar level of sophistication, and utilise a standard form contract (the End-User License Arrangement (**EULA**) in this case) as would a franchisor. The nature of the relationship and machinery are such that the purchaser is locked within an ecosystem regulated by the manufacturer; for example, by the limited interoperability and data portability. Further, there are concerns that purchasers may lack the degree of digital literacy required to grasp the economic value of Agricultural Data and the nature of their complex machinery.[59] Similar to how some of the franchisor's power stems from their owning the intellectual property in the operational manual governing franchisee operations,[60] some of the power of the manufacturer stems from their controlling the technological ecosystems processing Agricultural Data collected by their products, ecosystems that are vital to farmers' operations.[61]

41. The Committee submits that the need for an *Agricultural Machinery Code of Conduct* is pressing. This is combined with the special need, described above, to appropriately regulate activities in the agricultural sector, particularly in relation to Agricultural Data. The presence of a targeted statutory framework will act as a key deterrent against malpractice in the sector.

## What an Agricultural Machinery Code of Conduct Should Look Like

42. Given the analogy of the franchisor-franchisee relationship with the manufacturer/seller-purchaser relationship in the context of agricultural machinery, the Committee submits that an *Agricultural Machinery Code of Conduct* should be modelled after the *Franchising Code of Conduct*.

43. The proposed *Agricultural Machinery Code of Conduct* would apply in relation to 'agricultural machinery agreements', which could be defined as follows (based on clause 5 of the *Franchising Code of Conduct*):

    (1) An **agricultural machinery agreement** is an agreement, however reached, in which a person (the seller) contracts with another person (the purchaser) to sell agricultural machinery to the purchaser.

44. The Committee does not propose a definition of 'agricultural machinery'. It considers that the definition should be formulated after appropriate consultation with technical experts, industry representatives and farmers.

*45.* Regarding the obligations which should be imported from the *Franchising Code of Conduct* the Committee submits that equivalent, or otherwise appropriately adapted versions, of the following

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[58] The Treasury, Australian Government, *Regulation Impact Statement: Proposed Changes to Franchising Regulation* (March 2014) 21; Explanatory Memorandum, Trade Practices Amendments (Fair Trading) Bill 1997 (Cth), 3.

[59] Australian Competition and Consumer Commission, *Agricultural Machinery: After-Sales Markets* (Discussion Paper, Australian Competition and Consumer Commission, February 2020) 1, 15-16; Gwendolen DeBoe and Marie-Agnès Jouanjean, *Digital Opportunities for Better Agricultural Policies* (Report, OECD, 2019) 31-2.

[60] Andrew Terry and Des Giugni, *Business & the Law* (Thomson Reuters, 7th ed, 2019) 656.

[61] Neal Rasmussen, 'From Precision Agriculture to Market Manipulation: A New Frontier in the Legal Community' (2016) 17 *Minnesota Journal of Law, Science and Technology* 489, 497-8.

obligations and components of the *Franchising Code of Conduct* should be included in the proposed *Agricultural Machinery Code of Conduct*:

- Clause 6 — Obligation to act in good faith
- Part 2–Disclosure requirements before entry into a franchise agreement
- Part 3–Franchise agreements
- Part 4–Resolving disputes

46. These obligations will help correct information asymmetries as well as provide certainty to the purchasers of agricultural machinery about their and the manufacturers'/sellers' obligations, how the agricultural machinery agreement can operate, and how any disputes must be resolved (such as through mandatory mediation).

47. The Committee strongly supports the inclusion of the equivalent of clause 6 of the *Franchising Code of Conduct* (as applied to an 'agricultural machinery agreement'), given the broad coverage of the obligation and its 'explicit statutory' basis.[62] It is particularly necessary in the agricultural machinery context, given the sizeable imbalance in bargaining power and sophistication, as well as information asymmetries among the parties (as discussed above). As with the *Franchising Code of Conduct*, such an obligation would be 'an important change that will underpin the [*Agricultural Machinery Code of Conduct*]... as a whole and improve standards of conduct within the sector,'[63] not least since the obligation 'will require parties... to act honestly, not arbitrarily and to cooperate to achieve the purposes of the... [agricultural machinery] agreement'.[64]

## Cybersecurity and Privacy

48. The Committee also proposes the inclusion of a specific obligation of the manufacturer under agricultural machinery agreements to ensure that risk-based cybersecurity and privacy controls apply to agricultural machinery in which the machinery directly sends and receives Agricultural Data.

49. The targeting of the manufacturer is intended to help stem cybersecurity and privacy risks surrounding agricultural machinery, and recognises that manufacturers, by designing the machinery itself and the core of the technological ecosystem, are best placed to comply with this obligation. This will help underpin the sale and use of *secure* machinery and accompanying technological ecosystems in Australia, to the betterment of the sector. In this regard, the Committee also recommends that no manufacturer be allowed to enter, or fail to take reasonable steps to prevent others from entering, agricultural machinery agreements, unless they have passed a cybersecurity and privacy compliance audit.

*50.* The proposed policy may be modelled as follows:
*Clause [X] Cybersecurity and Privacy*

(1) The manufacturer of agricultural machinery must ensure that the:

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[62] Andrew Terry and Des Giugni, *Business & the Law* (Thomson Reuters, 7th ed, 2019) 667.

[63] The Treasury, Australian Government, *Regulation Impact Statement: Proposed Changes to Franchising Regulation* (March 2014) 29.

[64] The Treasury, Australian Government, *Regulation Impact Statement: Proposed Changes to Franchising Regulation* (March 2014) 30.

(a) agricultural machinery which is the subject of an agricultural machinery agreement; and

(b) technological ecosystem which that agricultural machinery sends and receives Agricultural Data from;

(c) are subject to risk-based privacy and cybersecurity controls which are the equivalent of the following:

(i) the Australian Privacy Principles contained in the *Privacy Act 1988*;

(ii) the practices recommended under the Five Safes framework; and

(iii) privacy and cybersecurity best practices as applicable to the agricultural sector.

(2) The manufacturer of agricultural machinery must not:

(a) enter into an agricultural machinery agreement; or

(b) fail to take reasonable steps to prevent any other person from entering into an agricultural machinery agreement;

unless the manufacturer has certified to the Commission that it has passed a cybersecurity and data governance audit for compliance with the *Privacy Act 1988* and the Australian Government Information Security Manual. The audit must have been conducted in a manner which has been approved by the Australian Cyber Security Centre.

(3) In this Code:

(a) ***Agricultural Data*** includes:

(i) telematics data; and

(ii) agronomic data collected by the operation of agricultural machinery;

(b) ***Telematics data*** means data which agricultural machinery collects about itself; and

(c) ***Agronomic data*** means data describing crop health or field conditions.[65]

[65] The wording of these definitions was drawn from: Shannon L. Ferrell, 'Legal Issues on the Farm Data Frontier, Part 1: Managing First-Degree Relationships in Farm Data Transfers' (2016) 21 *Drake Journal of Agricultural Law* 13, 17-20; and Todd Janzen, 'What Makes Agronomic Farm Data Different from Other Forms of Intellectual Property?', *Farm Journal* (Article, 10 May 2015) <https://www.agweb.com/blog/janzen-ag-law-blog/what-makes-agronomic-farm-data-different-from-other-types-of-intellectual-property>.

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## Concluding Comments

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


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