



23 April 2018

Consumer Policy Unit
The Treasury
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Via email: australianconsumerlaw@treasury.gov.au

Submission to the Consultation Regulation Impact Statement - Australian Consumer Law Review

Grain Growers Limited (GrainGrowers) welcomes the opportunity to provide a submission to the Australian Consumer Law Review: Clarification, simplification and modernization of the consumer guarantee framework.

GrainGrowers is an independent and technically resourced, grain farmer representative organisation with more than 17,000 members across Australia. GrainGrowers' goal is a more efficient, sustainable and profitable grain production sector that benefits all Australia grain farmers and the wider grains industry. GrainGrowers' policy positions are developed by our National Policy Group, which comprises 15 elected grower representatives from Australia's main grain growing regions, and are supported by research and analysis undertaken by GrainGrowers' policy team.

Grain farmers are reliant upon machinery and vehicles every day in their business operations. When purchasing this machinery and equipment, there is an expectation that:

- Goods should work, be fit for purpose and can do what the seller said they could do;
- Any product failures or defects must be remedied by the seller expeditiously; and
- Appropriate warranties, including extended warranties, should exist and provide security for the purchaser in relation to repairs, replacement or refunds for faulty products.

However, there is increasing concern that farmers as small businesses are unable to secure appropriate and timely remedies and that consumer protection laws are inadequate in terms of both threshold and scope to cover many of their purchases.

GrainGrowers supports the Australian Consumer Law (ACL) being extended to specifically include farm machinery and equipment purchases regardless of value. A precedent for specific inclusions has been set given that vehicles or trailers that are mainly used for transporting goods are already covered by ACL.

In relation to other issues raised in the Review Consultation Paper, GrainGrowers supports:

1. An increase in the value of the threshold from \$40,000 to at least \$100,000. Consideration should be given to further increasing this threshold in relation to agricultural machinery and equipment as most will not be covered by a \$100,000 threshold. The threshold should be reviewed at regular intervals rather than an index being automatically applied given that fluctuation in the index may cause confusion for consumers as to the value of the threshold at any point in time.

2. A consumer being entitled to a refund or replacement without needing to provide evidence of a major failure within a specified period determined by the value of goods. For high value goods this should be at least 90 days and/or a set number of operating hours given that some equipment is often purchased in the off-season and may not be tested under normal operating conditions within 90 days.
3. Clarification that multiple non-major failures can amount to a major failure and that the number of failures specified should be proportionate to the value of the goods.
4. Enhanced oral and written disclosure for extended warranties with a cooling off right, and an opt-in process of 10 days to purchase an extended warranty.
5. Consumer guarantees applying to goods purchased through auctions regardless if the sale is in person or online.

Consumer protections are essential to small business operators including farmers. GrainGrowers supports a range of changes to the Australian Consumer Law to ensure farmers have clearer rights and remedies when purchasing goods and services.

If you require any further information, please contact me via email (fiona.mccredie@graingrowers.com.au) or by telephoning (02) 9286 2000.

Yours sincerely



Fiona McCredie
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Chapter One: Increasing the threshold in the definition of 'consumer'

The review of Australian Consumer Law (ACL) comes at an opportune time with increasing concern among our members about their consumer rights and protections including 'right to repair' issues, the lack of clear and direct recourse when machinery is faulty or a 'lemon', and warranty terms being inappropriate for the use and operation of farm equipment.

GrainGrowers agrees with the ACL Review Final Report finding that the extent of consumer and small business protection provided by the ACL has eroded over time. GrainGrowers is also concerned about the limited scope of the ACL as it applies to farmers as small business operators. As outlined in the Consultation paper (on page 5 chapter one), the Swanson Committee and subsequent Inquiries were strongly of the view that consumer protections should be extended to a range of business transactions, particularly purchases by small business.

The Consultation paper also outlined several key issues pertinent to why small business should receive protection under the ACL. The Australian Bureau of Statistics recorded 85,681 agricultural businesses were operating in Australia as at 30 June 2016 that had an Estimated Value of Agricultural Operations of \$40,000 or greater. These businesses accounted for 6.1% of all employing businesses in Australia¹ at June 2016. The Australian Small Business and Family Enterprise Ombudsman defines a small business as one that has an ABN and active GST role with a turnover less than \$2 million per annum or employs less than 20 people². *Table 1* outlines the proportion of Australian farmers that operate small and medium enterprises, by turnover and staff numbers.

Table 1: Proportion of Australian farmers that operate small and medium enterprises³

By turnover					
Zero to less than \$50k	\$50k to less than \$200k	\$200k to less than \$2m	\$2m or more	Total	
31.25%	29.51%	34.87%	4.34%	100%	
46,943	44,329	52,385	6,526	150,212	
By employee					
Non-employing	1-19 employees	20-199 employees	200+ employees	Total	
71.20%	27.73%	0.98%	0.04%	100.00%	
106,945	41,654	1,469	55	150,212	

SOURCE: Australian Bureau of Statistics, 2016, *Counts of Australian Businesses, including Entries and Exits, Jun 2012 to Jun 2016*, cat. no. 8165.0.

These farm businesses purchase a range of goods and services, including farm machinery and equipment. When purchasing this machinery, there is an expectation that:

- goods should work, be fit for purpose and can do what the seller said they could do;
- any product failures or defects must be remedied by the seller expeditiously; and
- appropriate warranties, including extended warranties, should exist and provide security for the purchaser in relation to repairs, replacement or refunds for faulty products.

Furthermore, just like other small business operators, faulty products result in direct commercial impacts for the farm operation and are likely to result in lost productivity or profits. This makes it imperative that clear and direct remedies are available to farmers in relation to goods purchased, and the ACL is an important component of providing such protection.

¹ Ai Group, 2017, *Economics Factsheet: Australian Businesses, June 2016*, www.aigroup.com.au/economics

² Australian Small Business and Family Enterprise Ombudsman, 2016, *Small Business in the Australian Economy*, www.asbfeo.gov.au

³ National Farmers' Federation, 2017, *Food, Fibre & Forestry Facts*, National Farmers' Federation, Canberra.

However, there is increasing concern by our members that farmers as small businesses are unable to secure appropriate and timely remedies and that consumer protection laws are inadequate in terms of both threshold and scope.

GrainGrowers notes the protections afforded to small business truck owner-operators under ACL (since 1986⁴) and believes that similar protections should be provided to farmers as owner-operators of farm machinery. As noted in the Consultation Paper, the 1984 National Road Freight Industry Inquiry Report found consumer protection arrangements available for truck owner-operators was complex, and it is very difficult to quickly establish rights without involving legal advice with its attendant costs. Similar issues face farmers today and consideration should be given to extending the ACL to specifically include farming equipment and machinery.

Farm businesses may lack the time, skill and/or expertise to assess the quality of products and the adequacy of provided warranties. And while other remedies and alternative legal avenues are available in the absence of protections by Australian Consumer Law (ACL), these are often complex, slow, costly and resource-consuming. GrainGrowers therefore seeks the extension of the ACL consumer guarantees and remedies to cover goods (agricultural machinery and equipment) that suffer from repeated non-major, or a major failure.

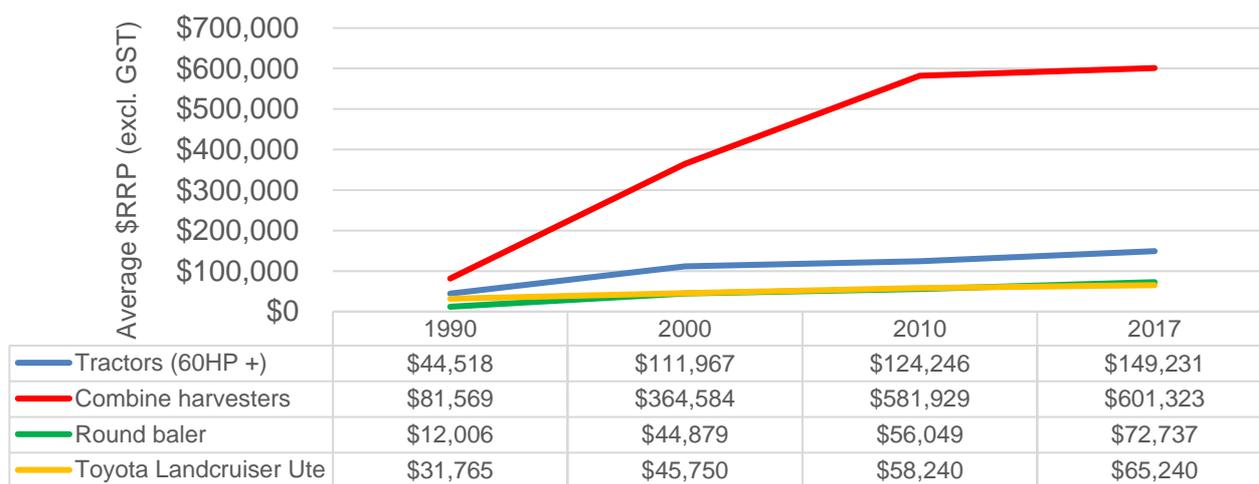
GrainGrowers recommends:

Extending the definition of consumer in the Australian Consumer Law to specifically include farm machinery and equipment.

GrainGrowers supports the policy objective of increasing the monetary threshold to ensure ACL continues to be fit for purpose in protecting small business consumers when purchasing goods.

The current threshold value of \$40,000 excludes a significant amount of farm equipment and machinery. Retail prices of different types of agricultural machines vary considerably, but overall trends show prices have increased significantly over time. The table below shows the increases in the average recommended retail price (excluding GST) of some broadacre farm machinery from 1990 to 2017.

Changes in value of broadacre farm machinery



Farm equipment data supplied by Agriview, www.agriview.com.au. Note that a culmination of factors (such as changes in specifications of these goods) would contribute to the increases in \$RRP. Toyota Landcruiser data sourced from www.redbook.com.au for Toyota Landcruiser 2 door cab chassis 6 cylinder 4.2L diesel manual 4x4 (1990, 2000) and Toyota Landcruiser Workmate 2 door cab chassis 8 cylinder 4.5L diesel manual 4x4 (2010, 2017). Toyota Landcruiser prices supplied to RedBook by manufacturer excluding costs such as options, dealer delivery, stamp duty and government charges.

⁴ Parliament of the Commonwealth of Australia, *Trade Practices Revision Bill 1986 – Explanatory Memorandum*, http://classic.austlii.edu.au/au/legis/cth/bill_em/tprb1986262/memo_0.html

An increase in the threshold from \$40,000 to \$100,000 will see more farm equipment and machinery covered under the threshold. For example, a smaller tractor, a brand new 2017 New Holland TD 5.95 95HP is currently listed for sale by a dealer online for \$55,000⁵. A farm business purchasing this tractor would not presently be classified as a 'consumer' based on the current value threshold. However, if the value threshold is raised to \$100,000 then consumer protection would cover this purchase.

However, most farm machinery and equipment would still be above the \$100,000 given that a modern, 3000-hectare grain farm would typically own and operate at a minimum:

- A 400-500 horsepower (HP) tractor, approximate value \$500,000;
- An air seeder, approximate value \$250,000;
- A header, approximate value \$700,000; and
- A self-propelled spray rig, approximate value \$400,000.

We recommend that consideration is given to specific consumer protection provisions which cover purchases of agricultural equipment and machinery that exceeds the \$100,000 threshold.

Quote from a farmer from South Australia:

"...[Not many] of our machinery purchases would come in under \$100,000.... Ideally there should be no limit. Why should a tractor costing \$400,000 or a header costing \$800,000 be any different to a spreader costing \$80,000?"

Indexation

GrainGrowers does not see benefit in the introduction of indexation, such as Producer Price Indexes (PPI), to automatically adjust the threshold as it is likely to cause confusion rather than clarity. This is because the PPI for agricultural equipment can fluctuate from year to year making it difficult for a consumer to quickly identify the threshold value at time of purchase. GrainGrowers would support a regular review of the threshold, perhaps at a five-yearly interval.

GrainGrowers recommends:

- The value threshold be increased to \$100,000;
- The definition of 'consumer' is extended to provide coverage for the purchases of agricultural goods that are more than \$100,000; and
- The Producer Price Index, or any other form of indexation, is not introduced but a regular review of the value threshold is undertaken.

⁵ www.farmmachinerysales.com.au, accessed 16/04/17

Chapter Two: Clarifying the consumer guarantees

There is a need to provide greater clarity about product failures and the remedies available to consumers.

Farmers who have experienced repeated non-major and/or major failure with agricultural machinery and equipment goods report dissatisfaction with recourse options provided by suppliers to remedy problems.

GrainGrowers believes that a number of non-major failures does constitute a major failure. Furthermore this number should be proportional to the value of the goods, rather than a fixed number across all goods and services.

A few examples are shown below to outline the nature of the failures, the impact of a series of non-major failures on a small business, and the difficulty in securing appropriate remedy.

Case study – repeated failures with an air cart

Provided by a farmer from Western Australia

A farm business purchased an air cart in March 2017 with which they encountered several issues. In a letter to the manufacturer of the air cart, the farmer detailed issues which have been summarized as:

- The machine was purchased with the promised capability of Variable Rate Technology (VRT). However, it was unable to maintain one accurate rate and did not deliver VRT capabilities. The machine had to be manually calibrated and so the computer was not able to provide accurate seeding rate information;*
- The low pressure differential alarm sounded continually, causing machinery operators to disregard its operational significance;*
- Air leaks occurred throughout seeding and caused transition hopper bolts to pull through the plastic tank and elongate the bolt holes, and have caused premature wearing of the air cart;*
- Plastic linkages for the cleanout door and top and bottom run are continually breaking causing time delays;*
- An error message continually displayed on the [computer] monitor, 'Warning: The implement is no longer communicating with the task controller'.*
- Intake pipes to the auxiliary tank hopper continually blocked and the tank camera was unable to provide vision due to dust filling the tank;*
- Air hoses were kinked and had to be replaced;*
- Hydraulic hoses were six metres too short [for normal operation of the machine];*
- A metre light had not been installed prior to delivery and had to be installed by the farmer; and*
- The design of the tank disallowed for it to be thoroughly cleaned, compromising hygiene standards.*

In concluding their letter, the farmer wrote: "The product is unable to deliver on many of the advertised qualities and the issues we have experienced are not within the acceptable limits of 'teething issues'. We have found the product incapable of delivering the promised quality and precision. Poor product knowledge and service from both the manufacturer and distributor seems to be a result of bad training..."

Case study – boom spray issues

Provided by a farmer from South Australia

In March 2015 a farmer took delivery of a brand new self-propelled boom spray, costing around \$500,000. The machine suffered a series of failures that caused significant and ongoing down time, adding significant costs to their business operation. The issues (listed below) occurred during the first 18 months of operation. Eventually the supplier took the machine in for major repairs in November 2017. At this time the machine was two-and-a-half years old and had done approximately 2000 hours, of which the farmer estimates 20-25% were break down hours in which the machine had been running whilst being repaired and tested. The farmer calculated this equated to approximately \$50,000-\$60,000 in depreciation additional to down-time hours, which cost the business more than \$100,000.

The supplier planned that the overhaul of the machine would take 10 days to complete and the machine would be returned within two weeks. However, the machine was with the supplier for repairs for over three months and was unable to be used for the entire summer spray programme. The farmer believes the supplier should have replaced the machine within the first 12 months of its delivery.

- *Boom issues – issues with the front, right side hoses and some with the left side hoses;*
- *Leaky rear wheel hub;*
- *Hydraulic line hoses rubbed together, and in one spot the metal hose fittings rubbed together;*
- *Bolts on the boom sensor had to be replaced;*
- *Faulty hydraulic solenoid valves, with water in one;*

17 May 2015:

- *Soft fold won't fold around – resolved [by mechanic] increasing hydraulic pressure;*
- *Steering rattle reoccurring – resolved [by mechanic];*
- *Heat in right-hand rear wheel hub;*
- *Vibration through floor;*
- *Mid-section booms do not have drain taps;*
- *Air-conditioner not working correctly since [mechanic] left;*
- *'Electrical' smell in cab, cab vents working intermittently.*

27 May 2015:

- *[Mechanic] came to fix air-conditioning;*
- *Gas leak;*
- *End on air-conditioning hose had incorrect crimp for the hose size;*
- *Pressure switches incorrectly fitted;*
- *Loom into back of air-conditioning control not plugged in properly (fixed vents not working correctly).*

4 June 2015:

- *[Manufacturer representative] travelling to France hoping to come back with a proper fix.*

8 June 2015:

- *Blowers not working today – checked plugs but all secure. Electrical fault somewhere in or around the cab;*
- *Radio antennae not working – since resolved.*

15 July 2015:

- *Boom fold not working on outer left-side;*
- *System not maintaining level boom – possibly due to faulty roll cylinder – this has been replaced;*
- *Non-drip nozzles are dripping;*
- *Right-hand wheel motor hose damaged.*

Continued over page...

Case study – boom spray issues (continued from previous page)

24 July 2015:

- System keeps displaying “Bad data intermediate frame”, mechanic sending new sensor.

28 August 2015:

- Air-conditioner compressor is to be replaced. Ran hot when switches were wrongly fitted;
- Air conditioner hose fitting on compressor was to be replaced.

1 October 2015:

- Axle extensions: pad mounts stripped and still do not slide properly;
- Air-conditioner compressor still not replaced;
- Air-conditioner clutch wire shorted out on manifold – [mechanic] repaired;
- Air-conditioner hose not replaced (mismatched fitting);
- Rubbed wiring in roof space, loom replaced earlier due to short;
- Still two wheel motor hoses to be replaced;
- Active roll cylinders problematic again;
- System should have “not engaged” warning so cannot move off with system disengaged;
- Can’t get settings to allow adjustments from propulsion handle instead of using touch screen – have followed instruction book but does not work;
- Drain taps for intermediate booms now fixed;
- Boom fold on left-hand end jammed again on 30/09/15 now fixed – [mechanic] found “O” ring piece;
- Chemical pump often difficult to prime once tank has emptied;
- Transport locks damaged.

22 February 2016:

- Auto greaser shifted so filters can be accessed;
- Sprayer won’t maintain speed once propulsion lever is set – keeps speeding up;
- System still doesn’t work properly in hybrid mode – left hand wing doesn’t always lift;
- Alarm saying boom not folded when moving off with boom folded – now fixed;
- Left-hand boom needs repairing still following boom hitting ground when first used. Faulty hydraulic valve meant it was lifting centre and lowering wings instead of the reverse;
- Some cracks in boom – have shown [mechanic];
- Boom dribbling on outside of turn.

16 March 2016:

- Propulsion unit has been erratic lately. Sometimes it has taken off in reverse with handle well and truly in neutral position. When it does this the reverser alarm also sounds even when fully in neutral;
- Hydraulic hose leaking on left-hand wheel axle extender cylinder.

1 May 2016:

- Propulsion lever playing up again. Was good after [mechanic] calibrated for one to two days.

26 May 2016:

- Propulsion lever still not right but not as bad as it was. Around this time the machine did not slow or stop forward movement until the propulsion lever had been put into neutral and then reverse, putting the machine and the operator into the scrub and within metres of serious damage.

2 June 2016:

- Gas struts for oil cooler fitted upside down and now don’t work.

26 June 2016:

- [Mechanic] re-programmed hydro. I only drove it briefly and thought it deteriorated back towards its old issue after the first couple of tanks.

27 September 2016:

- Boom fold problems remain unresolved on left-hand side;
- Still won’t work in other than soil mode and propulsion issues continue.

In some instances, the lack of cooperation by a supplier, gaps in dealers' product knowledge, difficulties making repairs due to access to parts or ability to identify the cause, and inappropriate timeframes for repairs have been reported as issues encountered when dealing to resolve problems.

Failure to provide appropriate and timely remedies are evident and the impact on the business can be significant given the resulting production losses (both yield and profit), increased wage bills, additional production costs, down-time and emotional strain (stress and frustration). This is shown in the following case study:

Case study – repeated failures with an air cart

Provided by a farmer from Western Australia

“Faults with our [air cart] meant we seeded 750 hectares in a time period of four weeks where we should have seeded 3000 hectares... the down time we have experienced has cost us in excess of two full time wages. In addition, our business has had to chase up issues and is constantly on the phone dealing with issues that should have been addressed by mechanics. [Staff] had to spend time chasing up issues and parts when other farm jobs should have been completed. We are constantly finding issues that were previously known to [manufacturer] and the distributor, however they were not communicated to us, which has in turn compounded issues and extended interruptions. Delaying seeding beyond optimal timing due to these numerous issues means our business will suffer yield loss and therefore reduced profitability in 2017”.

Time periods

For agricultural machinery and equipment, the suggested 30-day time period in which a consumer is entitled to a refund or replacement without needing to prove major failure is insufficient. This is because a machine is typically delivered ahead of a particular season. For example, a header might be delivered in September ahead of harvest which starts in November, or a machine may be traded and replaced at the end of a season, but the new machine may not be used until the following season. Likewise, a new boom spray may be delivered in a quiet spray period and the business may only get to use the machine for 50 hours in this time.

Therefore, 30 days does not provide sufficient time for the good to be operated and tested under normal working conditions to see if failures arise. GrainGrowers therefore supports the time period being extended to 90 days. Given the specific issues associated with agricultural machinery and equipment, there is merit in the time period being replaced by a set number of 'hours of use' within which a consumer is entitled to a refund or replacement if a major failure occurs.

GrainGrowers recommends:

- Consumers be entitled to a refund or replacement without needing to provide evidence of a major failure within a specified period of time as determined by the value of goods. For high value goods this should be at least 90 days and/or a set number of 'hours of use'; and
- Clarification that multiple non-major failures can amount to a major failure and that the number of failures should be specified and proportionate to the value of the goods.

Chapter three: Enhanced disclosure for extended warranties

GrainGrowers supports the need for better disclosure around warranties and making extended warranties more accessible.

Farmers have raised concerns about the coverage and terms of warranties and extended warranties, particularly as they relate to agricultural machinery and equipment.

The expiration terms of the warranty typically include a maximum number of hours of operation or a defined time period, whichever comes first. However, in Australian production systems, the time period defined by the warranty often expires well before the machinery reaches anywhere near the defined maximum number of hours for which it is covered under warranty. And for much of this defined period, the machine may in fact not be used given the production calendar in Australian grain. This means that the warranty cover expires before a machine is fully tested under normal operating conditions simply because the time period has expired, and it is often the case that issues arise with the equipment when it is well under the maximum hours of operation included in the warranty.

Manufacturers' warranties for agricultural machinery and equipment may not cover parts that are not manufactured by their company, such as starter motors and alternators. The parts are usually covered by a separate warranty supplied by the manufacturer of the component. The Kondinin Group reported that if one of these parts fails within the warranty period, the manufacturer will refer the buyer to the component manufacturer. However, they state that the claims procedure often is open to manipulation and misinterpretation due to the number of people involved in assessing the claim.

GrainGrowers recommends a review of warranties for agricultural machinery and equipment, so that terms provide appropriate coverage for machinery, factoring in appropriate hours of operation and the timeframes of Australian production systems.

Extended warranties are offered for purchase with most new agricultural machines and equipment in Australia and, based on member feedback, it appears farmers understand that an extended warranty is designed to provide additional coverage to the standard manufacturer's warranty. A farmer contributed:

Quote from a farmer in South Australia:

"... Personally, I would always opt in to an extended warranty because the standard warranties are so inadequate. Why is it I can get a 7-year warranty on a [low price] Kia car, but can only get a 12-month warranty on an \$800,000 header?"

GrainGrowers recommends that the potential purchasers are provided sufficient information that is clear, concise and outlines the protocol which can be followed by a farm business should they need to exercise the provisions of the extended warranty. A cooling-off right, oral disclosure and written disclosure should be provided, and there should be an opt-in process of 10 days to purchase extended warranty.

GrainGrowers recommends that:

- A review be conducted of current warranties for agricultural machinery and equipment to ensure they provide appropriate coverage, and
- A cooling-off right, oral disclosure and written disclosure are provided to consumers with an opt-in process of 10 days to purchase an extended warranty on agricultural machinery and equipment.

Access to consumer guarantees for goods sold at auctions

For goods sold at auctions, GrainGrowers' members who have provided input to this submission are satisfied that new goods, whether sold online or at a traditional auction, should be provided full protections under ACL consumer guarantees for businesses. For items purchased overseas or that are used goods, there does not need to be provisions to provide consumer guarantees. However, if the business consumer is misled or suffers from unconscionable conduct during the transaction, then a level of protection under ACL should be provided. GrainGrowers therefore recommends that sale by auction exemptions should be modernized to take account of the increasing number of online auctions which do not allow for prior inspection of goods, and that protections are offered against unconscionable or misleading conduct during a sale by auction.

GrainGrowers recommends that:

- Sale by auction exemptions are modernized, accounting for the increasing number of online auctions that do not allow prior inspection of goods and applying to both traditional and online auctions, and
- Protections are offered against unconscionable or misleading conduct during a sale by both online and traditional auctions.

Summary

In summary, GrainGrowers seeks for the Review to:

- 1) Provide adequate consumer guarantees for farm businesses on purchases of agricultural machinery and equipment;
- 2) Clarify the consumer guarantees as they relate to agricultural machinery and equipment so that remedies for issues are provided that are appropriate and minimize production losses, additional expenses and downtime;
- 3) Encourage improvements in the provision of remedies by suppliers, which can be achieved through a review of manufacturer and extended warranties;
- 4) Ensure that extended warranties allow for consumers to opt-in within 10 days of the purchase of a good, instead of offering an opt-out option; and
- 5) Ensure that sale by auction purchases made at traditional and online auctions have the same protections as direct purchases.