

The right to repair: How to design new law reforms

Introduction

This article examines how law reforms should be made in New Zealand to enable right to repair measures so as to complement a recent article in the Journal that examined the shortcomings of New Zealand law in providing a right to repair. The aim of the article is to determine how to design a new right to repair law in New Zealand, along with the discussion of overseas approaches. Ideally, the right to repair law requires manufacturers to provide spare parts, diagnostic information and tools (WasteMINZ's Product Stewardship Sector Group Right to Repair working group "Pathways for Right to Repair in Aotearoa New Zealand" (2020)). To implement a right to repair law in New Zealand, this article suggests possible amendments to different areas of law such as consumer law, IP laws and the law of contract.

The right to repair concept has gathered a great deal of attention in recent years, with legislative initiatives or reforms worldwide. The right to repair entails strands of legal issues in several fields: (i) consumer protection, (ii) intellectual property rights, and (iii) contractual and (iv) competition issues. Right to repair movements focus not only on consumer autonomy but also on environmental issues. A right to repair law can preserve consumer property rights over the purchased devices and provide incentives to manufacturers for the design of durable or repairable products. A right to repair can also be viewed as an approach to address e-waste problems as part of measures to a Circular Economy (CE). Repair is one of the critical components of a CE where a more efficient use of resources is encouraged by reconsidering how products are designed (Ricardo J Hernandez, Constanza Miranda and Julian Goñi "Empowering Sustainable Consumption by Giving Back to Consumers the 'Right to Repair'" (2020) 12 Sustainability 850). Compared to other recovery activities such as recycling, repair is environmentally a more beneficial option. It avoids complex reverse logistic processes and take-back systems that return products to remanufacturing facilities; it saves transportation expenses, materials, energy and water required to put a product back into use. While no country has set targets for repair, the importance of repair in a CE is growing.

New right to repair law and its relationship with the Consumer Guarantees Act 1993

Key components of right to repair measures are mandatory repairability requirements for products, including design for easier dismantling for repair and the availability of spare parts, diagnostic tools and information. These measures enhance access to repair for consumers even if manufacturers are not willing to perform repairs beyond their warranties. They provide consumers with benefits from a wide range of repair choices, increased convenience and lower cost of repair (Joshua Turiel “Consumer Electronic Right to Repair Laws: Focusing on an Environmental Foundation” (2021) 45(2) William & Mary Environmental Law and Policy Review 579). To promote right to repair measures, New Zealand needs to ensure that consumers and independent repairers have access to spare parts, diagnostic tools and information. While there are limitations under the Consumer Guarantees Act 1993 (the CGA), that Act can be an avenue for reform. This section discusses how right to repair measures can be designed and its relationship with the CGA.

Establishment of minimum lifetime of products

Establishing a minimum lifetime requirement of a product is a critical measure that would provide legal clarity for consumers to enforce their rights over purchased devices. Some states in the United States have designed minimum lifetime requirements for specific electronic products. In California, such requirements are established for the next generation of light bulbs including general purpose light-emitting diodes called LEDs. New Zealand should consider minimum lifetime requirements for certain types of products such as electronics or electrical appliances; a new right to repair law should require manufacturers to provide warranties of minimum product lifetime and information about product’s durability and feasibility of repair. The critical issue is to determine the liability period for manufacturers, during which a consumer has access to repair as a remedy for a defective product. This period can be tied to minimum product lifetimes or other forms of period (Sahra Svensson-Hoglund and others “The Emerging ‘Right to Repair’ Legislation in the EU and the U.S” (Paper presented at Going Green Care Innovation Conference, Austria, November 2018). The period after which the burden of proof is required for the product’s fault should also be determined. For example, the product is presumed to be defective at the time of purchase if a defect occurs within one year after purchase. After such a period, consumers need to prove the pre-existing defect.

In New Zealand, setting a minimum product lifetime requirement will provide clarity of the warranty of acceptable quality offered by s 6 of the CGA. New Zealand's consumers frequently find it difficult to exercise their rights under the warranties offered by the CGA; the uncertainty about acceptable product quality or durability timeframe often makes consumers confused about whether the products they purchased are being offered as a remedy under the CGA (Kate Tokeley "Defective Goods and Services" in Kate Tokeley (ed) *Consumer Law in New Zealand* (LexisNexis, Wellington, 2014) 39). A minimum product lifetime requirement will provide consumers certainty for accessing product warranties while enhancing access to repair.

Guarantees as to spare parts

Another important aspect is to establish a mandatory requirement for manufacturers to make spare parts accessible to consumers or third parties. The proposed US Right to Repair legislation requires manufacturers to make spare parts available to consumers and independent manufacturers (Turiel). The majority of the American bills do not specify a predetermined period which means that they only require manufacturers to provide spare parts to consumers and third parties as long as their authorised providers are supplied. However, there are some bills that are proposed differently. For example, California's bill requires at least seven years' availability of parts for products costing more than \$100 after the date a product model was manufactured. This is similar to the European Union Ecodesign Regulations which mandate the availability of spare parts for a predetermined period of time. The EU Ecodesign Regulations establish the minimum time period for spare parts; it requires manufacturers to provide spare parts for a period of 7 to 10 years after the last model unit leaves the factory (Turiel). For instance, refrigerator manufacturers are required to provide thermostats, light sources, printed circuit boards and temperature sensors for a minimum of seven years, and to provide trays, door handles, baskets and door hinges for a minimum of ten years after the last model unit is sold (Commission Regulation 2019/2019 on Ecodesign Regulations [2019] OJ L315/198). The EU approach requires manufacturers to ensure that spare parts are delivered within a 15-day timeframe. Failure to meet these requirements can lead to a prohibition on the sale of non-compliant products within the EU. The EU regulations are primarily concerned with environmental benefits whereas the US proposed laws emphasise consumer rights.

While the US and the EU approaches to the right to repair are different, they are both better than anything New Zealand provides. This article recommends the EU approach in the consideration of environmental concerns, thereby promoting a circular economy concept. A

new right to repair law should specify a certain minimum period for spare parts to be available. A new law should also determine the period within which spare parts are delivered. A further in-depth analysis would be required for product industries. In addition, the Consumer Guarantees Act 1993 should be amended. Section 12 of the CGA requires manufacturers to comply with guarantee requirements as to repair and spare parts; they are required to provide repair facilities and spare parts for a reasonable period after they supply the goods to consumers. However, the exception imposed by s 42 allows manufacturers to take reasonable actions to notify purchasers about the unavailability of spare parts or repair facilities at the point of the sale. The CGA should be amended to make it mandatory for spare parts to be available by removing s 42. The amendment will ensure that manufacturers cannot get out of the obligations the CGA imposes on them.

As part of right to repair measures, some advocates have also suggested that the use of proprietary parts should be restricted so that parts can be replaced with common tools without permanent damage to the devices. The EU has planned to require mobile phone manufacturers to use common power charging ports and cords, and to use user-replaceable batteries. The idea is to ensure that consumers can more easily change parts of the mobile phones without going to a technician. New Zealand should consider restricting the use of proprietary parts and mandating the use of parts that are easy to replace, such as user-replaceable batteries.

Guarantees as to repair information and tools

A mandatory obligation for manufacturers to offer repair information and diagnostic repair tools could also enhance access to repair for consumers and independent repairers. The EU Ecodesign Regulations impose requirements for manufacturers of refrigerators, dishwashers, washing machines and servers to provide firmware updates, data deletion tools, repair tools and information to independent repairers. The US proposed bills also mandate manufacturers to provide diagnostic documentation and diagnostic repair tools to consumers and third parties until those are provided to their authorised repair providers (Turjel). New Zealand's new right to repair law should consider mandatory requirements for manufacturers to provide diagnostic or repair documentation to consumers and third parties. A new law would require identifying what constitutes repair documentation or what types of documentation the manufacturers must provide. For instance, the European and the American approaches detail the types of information the manufacturers must provide. While the EU Ecodesign Regulation (Commission Regulation 2019/2023 on Ecodesign Regulations [2019] OJ L 315/ 299-300)

requires manufacturers to provide manuals, disassembly maps, wiring and connection diagrams, error codes, and instructions for installation of relevant software and firmware, the US's proposed right to repair law defines repair documentation as any diagram, manual, service code description, reporting output, schematic diagram, or similar kinds of information (Turiel). Beyond repair information, a mandatory requirement to make repair tools accessible to consumers and third parties should also be introduced. This requirement will not only make sure that consumers and third parties have access to required tools for repairs but also address the issue of manufacturers' claims that products are not repairable due to the lack of tools and repair equipment.

Enhancing enforcement mechanisms

When implementing right to repair measures, it is important that effective and efficient enforcement mechanisms are put in place. The majority of the current enforcement mechanisms accessible to consumers in New Zealand are ineffective or impractical for low-value disputes; consumers rarely exercise remedies for the enforcement of the rights provided in the CGA (Trish O'Sullivan "Enforcement and Effectiveness of Consumer Law in New Zealand" in Micklitz and Saumier (eds) *Enforcement and Effectiveness of Consumer Law* (Springer, online, 2018) 415). This section highlights the shortcomings of current enforcement mechanisms suitable for consumer disputes, especially for low-value disputes. These methods include claims through the District Court and the Disputes Tribunal. The author suggests better enforcement options to improve the practical resolution of low-value disputes in the consumer field.

Consumers can make a claim in a District Court, which has jurisdiction for any claims up to \$350,000 under the CGA, in order to resolve their disputes (s 47(2)(b)). However, they need to pay a fee of \$200 to commence the proceeding (District Courts Fees Regulations 2009, sch 1) and they are also subject to cost orders if they are unsuccessful. There is no free legal representation and no waiver of court fees (Sullivan). Consumers are reluctant to bring low-value disputes to the District Court due to the expenses of litigation and time delay. Furthermore, consumers who purchase low-value products can lodge a claim to the Disputes Tribunal with a reasonable fee ranging from \$45 to \$180 (the Disputes Tribunal Rules 1989, Rule 5). The Disputes Tribunal has a maximum jurisdiction of \$ 30,000 under the CGA (s 47(4)). The Tribunal is the most appropriate forum for hearing low-value consumer disputes, but even then it is affected by some problems. Firstly, despite the inexpensive fee, consumers

cannot claim the fee back even if they win (Consumer “Disputes Tribunals” <<<https://www.consumer.org.nz/articles/disputes-tribunals>>>). Secondly, legal representation is not permitted in the Tribunal hearing, which exacerbates the imbalance in power between the parties. The manufacturers or suppliers have more resources than consumers in seeking legal assistance prior to the hearing (Jessica Palmer “Access to Justice for Consumers” in Kate Tokeley (ed) *Consumer law in New Zealand* (LexisNexis, Wellington, 2014) 495 at 507). The final concern is that few Dispute Tribunal cases are published; only a selection of “decisions of interest” have been published on the Disputes Tribunal website since 2009 and only some of these are related to consumer products (Sullivan). Consumers have little access to information about how the Tribunal responds to disputes; they face challenges in identifying similar cases resolved by the Tribunal.

To improve the practical functioning of consumer low value disputes, better enforcement options are required. Consumers who purchase low value products should have better access to justice at a cost which is considerably less than the value of the product or at no cost. The author proposes three main options. Firstly, the Commerce Commission should have the ability to aid consumers in resolving consumer disputes relating to consumer guarantees imposed by the CGA. The Commerce Commission has the authority to enforce consumer issues under the Commerce Act 1986, the Fair Trading Act 1986 and the Credit Contracts and Consumer Finance Act 2003; it can file a claim against manufacturers or suppliers in the relevant court regarding competition, fair trading and consumer credit contracts matters. However, the CGA does not confer such power on the Commerce Commission. Consumers cannot complain to the Commerce Commission regarding guarantee issues as the Commission has no jurisdiction to bring actions on behalf of them for the breach of the CGA. The jurisdiction of the Commerce Commission should be expanded under the CGA so that consumers would obtain advantages with the offer of free legal advice.

Secondly, providing government funded alternative dispute resolution mechanisms could help consumers resolve their claims and expand their access to remedies. Although private alternative dispute resolution is currently available, there is no access to government-funded dispute resolution mechanisms to address minor consumer disputes (Sullivan). A conciliation could be arranged when a dispute cannot be solved between consumers and the manufacturers or suppliers privately. The Commerce Commission should be empowered to compel firms to engage in conciliation processes, thereby making it easier for consumers to obtain a remedy. For online shopping disputes, calls have been made to establish Online Dispute Resolution

(ORD) platforms in New Zealand similar to that created in the European Union. The ORD is a method where technology or computer software operates as a mediator using information management systems; parties can negotiate directly via a variety of web forms, chats and other web-based communication tools. This approach is financially viable if the parties can reach settlement themselves without outside professionals.

Finally, a “super complaints” system should be designed, which enables designated consumer organisations, such as ConsumerNZ or Citizens’ Advice Bureau, to lodge a complaint on issues related to consumer guarantees with the Commerce Commission. Once a complaint is lodged by a consumer group, the Commerce Commission would be required to fast track the complaint and response within a certain period. The Commerce Commission would also be required to provide how they propose to deal with the complaint and whether any action will be taken. The super complaints system would enhance consumers’ ability to exercise their existing rights under guarantees. However, to be effective and efficient the system needs proper operational principles and guidance such as criteria for the designation of consumer bodies, evidentiary requirements to support a complaint, and the process by which the Commerce Commission should respond.

These enforcement options would reduce the cost and time barriers faced by consumers when they make complaints under the CGA. The practical functioning of consumer guarantees would be improved.

Changes to intellectual property law to enable the right to repair

Manufacturers can use intellectual property (IP) rights conferred by different IP laws to exercise the degree of control over products after they sell them. When manufacturers’ IP rights extend beyond the original product market into the secondary repair market, obstacles to repair occur. Some manufacturers refuse to provide spare parts, tools and repair information, relying on IP rights. The right to repair could be challenging to reconcile with IP laws; some types of repair activities would constitute the infringement of IP laws. This section suggests how to address the limitation of IP laws on right to repair measures.

Exceptions for circumventing digital locks

Consumers or third parties who wish to diagnose or repair an electronics or electronic appliances often face Technological Protection Measures (TPMs) such as software code or digital locks. The Copyright Act 1994 limits the circumvention of TPMs for repair purposes; any actions attempting to make, import, sell or distribute circumvention tools and offer services to circumvent TPMs are prohibited (s 226A). While there are some exceptions, the Copyright Act is silent on circumvention for repair purposes. In the context of the right to repair, accessing a product's software or circumvention of TPMs for repair purposes should be permissible under the Copyright Act. In the US, a new regulation issued by the US Copyright Office expands consumers' rights to repair software-enabled devices by establishing exemptions to s 1201 of the Digital Millennium Copyright Act 1998 which prohibits the circumvention of technological protection measures ("Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies," Title 36 *Code of Federal Regulations*, Pt. 201. 2021 ed.).

New Zealand should consider establishing a new exception like the US regulation does. It should allow for product owners to circumvent TPMs such as proprietary software or digital lock for repairs. The right should be transferable to a third party to perform the circumvention on behalf of the product owners. Consumers or third parties should be permitted to procure tools required to access repair information protected by TPMs or to use their own tools to circumvent TPMs without infringement of copyright. Accordingly, the Copyright Act should be modified by introducing these exceptions. For this purpose, the New Zealand Government should clarify the scope of the existing exception relating to the circumvention of TPMs for repair purposes.

Beyond a legitimate circumvention of TPMs to repair products, a problem of lock resetting should be addressed (Leah Chan Grinvald and Ofer Tur-Sinai "Right to Repair: Perspectives from the United States" (2020) 31 AIPJ 98 at 107). Manufacturers often require consumers or third parties to reset the digital lock after the initial circumvention. For instance, after having the screen of one of the latest iPhones repaired by third party repairers, a message pops up on the screen stating "Unable to verify this iPhone has a genuine Apple display". To eliminate these messages or to authorise repair, additional software is required. A third party repair also makes all functionality of a device inaccessible; for example, it disables the use of the Face ID on iPhones. A new right to repair law should require manufacturers to make such resetting software available to consumers and third parties.

Exceptions for access to copyrighted repair manuals and other information

Some manufacturers are claiming copyright in repair information such as manuals, guides, schematics, diagnostic data and software in a way that copying, sharing or distributing such repair information could amount to copyright infringement. To establish a mandatory requirement for repair information, these copyright restrictions should be addressed. The Australian Productivity Commission recommended “a fair use exception” that would allow for copying and sharing repair information and a ban on contractual terms that attempt to restrict these rights (Productivity Commission “Draft Report Right to Repair Overview” (June 2021, Australia)). To promote right to repair measures, New Zealand should consider introducing a new fair use exception on copyright protection of repair information; the exception allows consumers and third parties to share and access information for repair purposes. The Copyright Act 1994 should be modified to ensure that copying or sharing information for repair purposes does not constitute copyright infringement. Regarding computer programs, s 80B of the Copyright Act allows copying or adapting computer programs for lawful uses or for correcting an error in the program. However, this exception is too broad so that it is uncertain whether all types of repair activities are covered. Accordingly, s 80B should be amended to allow copying or adapting computer programs for repair purposes. However, the Copyright Act appears to acknowledge the ability of copyright holders to use contract law to prevent users from taking advantage of copyright exceptions; copyright holders can override the exceptions through contractual provisions. The Copyright Act should ensure that none of the exceptions can be contracted out of, which can be done through introducing a new exception or amending s 80D.

Spare parts exceptions

The current IP laws allow manufacturers to assert exclusive rights over the replacement parts they produce. The manufacture, sale or import of those parts by third parties could infringe manufacturers’ IP rights in New Zealand; manufacturers can claim IP right infringement where there are unauthorised replications of such spare parts. Manufacturers’ exclusive rights over spare parts hinder right to repair measures. Even when spare parts are offered to consumers, they are not sold in a competitive market so that the charges for repairs of consumer electronics can become exorbitant.

Firstly, Patent Act 2013 (s 20) allows manufacturers to apply for patents on product parts, which gives them the exclusive right to commercially exploit an invention for up to 20 years.

Replication or copying patented product parts is illegal. The Patent Act should be amended by introducing a new exception that allows for repairs of products without infringing patents on that product or process. Secondly, manufacturers can obtain trademark protection over product parts. Under the Trade Marks Act 2002, selling or importing trademarked refurbished spare parts without the permission of the original manufacturers is illegal. The Trade Mark Act should establish a new exception that allows the sale or import of spare parts manufactured by third parties if those parts are used by repairers. Finally, the Copyright Act 1994 prohibits the creation of copies of original parts without the permission of the original manufacturer of the product. The Copyright Act is currently under review so it should consider introducing a new exception to allow spare parts to be made in or imported into New Zealand without infringing copyright. To enhance better access to spare parts and to promote competitions, these IP laws should be modified.

Limiting repair restrictive contractual clauses

Some manufacturers include terms and conditions that restrict consumers' rights and limit available remedies if the product develops a fault by using end-user licence agreements for software enabled devices (Turiel). These terms often prohibit unauthorised repair, the disassembly or the use of non-authorised parts. The purpose is to limit or exclude manufacturers' obligations, to allow them to void the warranties; the manufacturers are not liable for the remedies in the case of unauthorised repair or modification or the use of non-authorised parts. Whether these terms are enforceable is questionable. The issue of whether or how far to control the operation of these terms in a contract is based on the nature of the transaction and the circumstances surrounding it under the law of contract that enables parties to a contract to establish the rules of transactions (Stephen Todd "Exclusion clauses" Finn, Todd, Barber (eds) *Law of Contract in New Zealand* (LexisNexis, Wellington, 2018) 227.). However, the CGA establishes non-excludable guarantees for products and services offered within its jurisdiction (Todd at 228). The CGA prevails over the common law principles; the suppliers or manufacturers cannot contract out of the obligations the CGA imposes on them (Consumer Guarantees Act 1993, s 5). The Fair Trading Act 1986 (the FTA) also allows a court, on the application of the Commerce Commission, to declare that a term in a "standard form contract" that involves various forms of excluding terms is "an unfair term" (Todd; Fair Trading Act 1986, s 46I). However, the current CGA and FTA requirements are not sufficient to fully implement the right to repair. The law of contract should ensure that any contractual provisions that restrict the use of third party repairers have no effect. A new exception should

be established to make such contractual terms void and to create an offence for the use or the attempt to use such terms.

Competition law prevents repair monopolies

While IP laws grant manufacturers exclusive rights over their innovations, competition regimes are designed to impose limits on exclusionary behaviour. Competition law can intervene to limit manufacturers' market dominance; it can challenge manufacturers' actions where they limit access to repair services and monopolise the repair market and spare parts market. In essence, monopoly characteristics of manufacturers' actions barring competitive and independent repairers on the markets could be challenged under the Commerce Act 1986. The Commerce Act makes it illegal for businesses to abuse a dominant market position with the purpose of encouraging competition in markets for the long-term benefit of consumers (s 1A). A new version of s 36 inserted by s 17 of the Commerce Amendment Act 2022 restricts a person with substantial market power from taking advantage of that power. Under s 36, a person that has a substantial degree of power in a market is prohibited from engaging in "a conduct that has the purpose or has or is likely to have the effect of substantially lessening competition in that market or any other market". Section 36 establishes an effects test to be conducted for its assessment. Claims under s 36 may offer a response where a manufacturer has a dominant position in the aftermarket. Some manufacturers' exclusive arrangements foreclose on competition while causing barriers to new competitors who may be scared off by a market already defined by exclusive deals (Aaron Perzanowski "Repair and Competition" in Aaron Perzanowski (ed) *The Right to Repair: Reclaiming the Things we Own* (Cambridge University Press, 2021)). While the precise legal requirements for the claims under s 36 may vary, the underlying theory of harm is logical. Private litigants or the Commerce Commission should be able to challenge manufacturers' actions where they lessen competition in the aftermarket.

Conclusion

The need for a proper right to repair grows when people become increasingly reliant on software-enabled devices. A right to repair law would ensure consumers and independent repairers have access to repair; it imposes repairability requirements for products and offers more access to repair. This article has proposed a new right to repair law that contains three main elements. Firstly, a minimum product lifespan should be established to provide legal

clarity for consumers to enforce their rights over purchased products. More importantly, the liability period during which manufacturers should be responsible for remedies regarding a defective product should be determined. Secondly, mandatory requirements for manufacturers to make spare parts accessible to consumers or third-party repair shops should be introduced. The new law should also determine the period of accessibility to spare parts. Thirdly, manufacturers should be required to provide repair documentation and tools to consumers and third parties. The new law would require identifying what includes repair documentation. For efficient and effective enforcement, the article suggests three enforcement options: expanding the jurisdiction of the Commerce Commission to enforce the CGA, providing government funded alternative dispute resolution mechanisms, and designing a “super complaints” system.

To enable full implementation of the right to repair in New Zealand, changes in the current legal framework are required. The Consumer Guarantees Act 1993 should be amended by removing s 42 to make it mandatory for spare parts to be available. Furthermore, IP laws that limit right to repair measures should be modified. A few new exceptions should be considered under the Copyright Act 1994 that is currently under review. The Copyright Act should allow product owners to circumvent TPMs or to use circumvention tools. It should also introduce a new fair dealing exception on copyright protection of repair information, which allows consumers and third parties to share and access information for repair purposes. In terms of spare parts, the Copyright Act should introduce a new exception to allow spare parts to be made in or imported into New Zealand. In addition, the Trade Marks Act 2002 should permit for the importation of spare parts by establishing a new exception that allows the import of spare parts manufactured by third parties if those parts are used by repairers. The Patents Act 2013 should also allow for repairs of products without infringing patents on that product or process. Regarding contractual provisions that prevent the use of third party repairs, a new exception should be established under the law of contract to make such contractual terms void and unenforceable by creating an offence for the use of such terms.

A right to repair law will enhance competition on the aftermarket by creating a healthy independent repair market in which independent repair shops can be competitive, with increased repair options for consumers. New Zealand must be mindful not only of protecting or promoting consumers’ right to repair the purchased products but also of addressing environmental issues of the disposable culture to contribute to a more circular economy. Although the government has proposed the right to repair as part of the review of waste

management legislation, New Zealand has a long way to go in terms of implementing the right to repair measures.