

132APC Circumventing an access control technological protection measure

- (1) A person commits an offence if:
- (a) the person engages in conduct; and
 - (b) the conduct results in the circumvention of a technological protection measure; and
 - (c) the technological protection measure is an access control technological protection measure; and
 - (d) the person engages in the conduct with the intention of obtaining a commercial advantage or profit.

Penalty: 60 penalty units.

Defence—permission

- (2) Subsection (1) does not apply to the person if the person has the permission of the copyright owner or exclusive licensee to circumvent the access control technological protection measure.

Note: A defendant bears an evidential burden in relation to the matter in subsection (2) (see subsection 13.3(3) of the *Criminal Code*).

Defence—interoperability

- (3) Subsection (1) does not apply to the person if:
- (a) the person circumvents the access control technological protection measure to enable the person to do an act; and
 - (b) the act:
 - (i) relates to a copy of a computer program (the **original program**) that is not an infringing copy and that was lawfully obtained; and
 - (ii) will not infringe the copyright in the original program; and
 - (iia) relates to elements of the original program that will not be readily available to the person when the circumvention occurs; and
 - (iii) will be done for the sole purpose of achieving interoperability of an independently created computer program with the original program or any other program.

Note: A defendant bears an evidential burden in relation to the matter in subsection (3) (see subsection 13.3(3) of the *Criminal Code*).

Defence—encryption research

- (4) Subsection (1) does not apply to the person if:
- (a) the person circumvents the access control technological protection measure to enable:
 - (i) the person; or
 - (ii) if the person is a body corporate—an employee of the person; to do an act; and
 - (b) the act:
 - (i) relates to a copy of a work or other subject-matter that is not an infringing copy and that was lawfully obtained; and
 - (ii) will not infringe the copyright in the work or other subject-matter; and
 - (iii) will be done for the sole purpose of identifying and analysing flaws and vulnerabilities of encryption technology; and
 - (c) the person or employee is:
 - (i) engaged in a course of study at an educational institution in the field of encryption technology; or

- (ii) employed, trained or experienced in the field of encryption technology; and
- (d) the person or employee:
 - (i) has obtained permission from the owner or exclusive licensee of the copyright to do the act; or
 - (ii) has made, or will make, a good faith effort to obtain such permission.

In this subsection, **encryption technology** means the scrambling and descrambling of information using mathematical formulas or algorithms.

Note: A defendant bears an evidential burden in relation to the matter in subsection (4) (see subsection 13.3(3) of the *Criminal Code*).

Defence—computer security testing

- (5) Subsection (1) does not apply to the person if:
 - (a) the person circumvents the access control technological protection measure to enable the person to do an act; and
 - (b) the act:
 - (i) relates to a copy of a computer program that is not an infringing copy; and
 - (ii) will not infringe the copyright in the computer program; and
 - (iii) will be done for the sole purpose of testing, investigating or correcting the security of a computer, computer system or computer network; and
 - (iv) will be done with the permission of the owner of the computer, computer system or computer network.

Note: A defendant bears an evidential burden in relation to the matter in subsection (5) (see subsection 13.3(3) of the *Criminal Code*).

Defence—online privacy

- (6) Subsection (1) does not apply to the person if:
 - (a) the person circumvents the access control technological protection measure to enable the person to do an act; and
 - (b) the act:
 - (i) relates to a copy of a work or other subject-matter that is not an infringing copy; and
 - (ii) will not infringe the copyright in the work or other subject-matter; and
 - (iii) will be done for the sole purpose of identifying and disabling an undisclosed capability to collect or disseminate personally identifying information about the online activities of a natural person; and
 - (iv) will not affect the ability of the person or any other person to gain access to the work or other subject-matter or any other work or subject-matter.

Note: A defendant bears an evidential burden in relation to the matter in subsection (6) (see subsection 13.3(3) of the *Criminal Code*).

Defence—law enforcement and national security

- (7) Subsection (1) does not apply in relation to anything lawfully done for the purposes of:
 - (a) law enforcement; or
 - (b) national security; or
 - (c) performing a statutory function, power or duty;by or on behalf of the Commonwealth, a State or a Territory, or an authority of one of those bodies.

Note: A defendant bears an evidential burden in relation to the matter in subsection (7) (see subsection 13.3(3) of the *Criminal Code*).

Defence—libraries etc.

- (8) Subsection (1) does not apply in respect of anything lawfully done by the following bodies in performing their functions:
- (a) a library (other than a library that is conducted for the profit, direct or indirect, of an individual or individuals);
 - (b) a body mentioned in:
 - (i) paragraph (a) of the definition of *archives* in subsection 10(1); or
 - (ii) subsection 10(4);
 - (c) an educational institution;
 - (d) a public non-commercial broadcaster (including a body that provides a national broadcasting service, within the meaning of the *Broadcasting Services Act 1992*, and a body that holds a community broadcasting licence within the meaning of that Act).

Note 1: A library that is owned by a person conducting a business for profit might not itself be conducted for profit (see section 18).

Note 2: A defendant bears an evidential burden in relation to the matter in subsection (8) (see subsection 13.3(3) of the *Criminal Code*).

- (8A) This section does not apply in respect of anything lawfully done by a person in connection with a work or other subject-matter if:
- (a) the person has custody of the work or other subject-matter under an arrangement referred to in section 64 of the *Archives Act 1983*; and
 - (b) under subsection (8), it would be lawful for the National Archives of Australia to do that thing.

Note: A defendant bears an evidential burden in relation to the matter in subsection (8A) (see subsection 13.3(3) of the *Criminal Code*).

Defence—prescribed acts

- (9) Subsection (1) does not apply to the person if:
- (a) the person circumvents the access control technological protection measure to enable the person to do an act; and
 - (b) the act will not infringe the copyright in a work or other subject-matter; and
 - (c) the doing of the act by the person is prescribed by the regulations.

Note 1: A defendant bears an evidential burden in relation to the matter in subsection (9) (see subsection 13.3(3) of the *Criminal Code*).

Note 2: For the making of regulations prescribing the doing of an act by a person, see section 249.