

132APD Manufacturing etc. a circumvention device for a technological protection measure

- (1) A person commits an offence if:
 - (a) the person does any of the following acts with a device:
 - (i) manufactures it with the intention of providing it to another person;
 - (ii) imports it into Australia with the intention of providing it to another person;
 - (iii) distributes it to another person;
 - (iv) offers it to the public;
 - (v) provides it to another person;
 - (vi) communicates it to another person; and
 - (b) the person does the act with the intention of obtaining a commercial advantage or profit; and
 - (c) the device is a circumvention device for a technological protection measure.

Penalty: 550 penalty units or imprisonment for 5 years, or both.

Defence—no promotion, advertising etc.

- (2) Subsection (1) does not apply to the person if:
 - (a) the device is a circumvention device for the technological protection measure only because it was promoted, advertised or marketed as having the purpose of circumventing the technological protection measure; and
 - (b) both of the following apply:
 - (i) the person did not do such promoting, advertising or marketing;
 - (ii) the person did not direct or request (expressly or impliedly) another person to do such promoting, advertising or marketing.

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 circumvention device will be used to circumvent the technological protection measure to enable the doing of 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
 - (iii) relates to elements of the original program that will not be readily available to the person doing the act when the circumvention occurs; and
 - (iv) 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 technological protection measure is an access control technological protection measure; and
 - (b) the circumvention device will be used to circumvent the access control technological

- protection measure to enable a person (the *researcher*) to do an act; and
- (c) 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
 - (d) the researcher 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
 - (e) the researcher:
 - (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 technological protection measure is an access control technological protection measure; and
 - (b) the circumvention device will be used to circumvent the access control technological protection measure to enable the doing of an act; and
 - (c) 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—law enforcement and national security

- (6) 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 (6) (see subsection 13.3(3) of the *Criminal Code*).

Defence—libraries etc.

- (7) 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 (7) (see subsection 13.3(3) of the *Criminal Code*).

- (8) 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 (7), 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 (8) (see subsection 13.3(3) of the *Criminal Code*).