THE UNIVERSITY OF MELBOURNE
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5th July 2011

Jane Hearn
Inquiry Secretary
Joint Select Committee on Cyber Safety

Dear Ms Hearn,

Submission – Cybercrime Legislation Amendment Bill 2011

Thank you for your phone call and email concerning the Joint Select Committee's Inquiry into the Cybercrime Legislation Amendment Bill 2011. I am happy to make a brief submission on the implications for the bill for the constitutional validity of state offences.

In the interests of making a timely submission (and making one at all, given other demands on my time), I've opted for a speedy, but perhaps somewhat unpolished submission. However, I'm happy to respond to further queries that arise. Also, I'd advise that my submission be read in conjunction with a general paper I presented earlier this year on Dickson. It is available online at: http://www.gtcentre.unsw.edu.au/sites/gtcentre.unsw.edu.au/files/2011%20Con%20Law%20Conference%20Paper%20J%20Gans_0.pdf.

Possible invalidity of state cybercrime offences under current law

Like many other parts of the *Criminal Code 1995* (Cth), Division 477 (on serious computer offences) is mirrored in at least some state and territory criminal law statutes (e.g. subdivision 3 of division 3 of Part 1 of the *Crimes Act 1958* (Vic).) This mirroring reflects a desirable effort by SCAG to modernise and unify criminal law across Australia. Having similar or identical laws at both the federal and state level also ensures that there are no gaps in the Australian offence regime due to constitutional limits on the powers of the Commonwealth Parliament. (I understand that the current Bill removes those gaps altogether by the familiar device of relying on an international treaty and the federal external affairs power. I have no comment on the legality or merits of that device in this circumstance.) Until last year, I was not aware of any serious questions or criticisms raised about this arrangement.

Unfortunately, last September, the High Court issued a surprising and, in my view, poor judgment in *Dickson v R* [2010] HCA 50. The judgment concerned the validity of the Victorian offence of conspiracy to steal (at least as it applies to the theft of property that a federal agency has an interest in, such as property seized by Customs.) However, its reasoning has a much broader potential application. While, the judgment is very tersely written and its precise scope is difficult to discern, it appears to stand for the proposition that a state criminal law will be invalid to the extent of its overlap with federal criminal law if the federal criminal law includes protections for criminal defendant that aren't available under the state law. Note that it does not matter whether or not those protections are at issue in any way in a trial prosecuted under the state law. For example, Dickson himself had has conviction under Victorian law for conspiracy to steal quashed because of four (in my view) minor (indeed trivial) differences between federal and Victorian conspiracy law, even though none of those matters made any difference at all in Dickson's trial. All that mattered was that the charge of conspiracy to steal could have been charged (successfully or otherwise) under federal law, because of the link to Customs. The Court reached its conclusion that part of Victoria's criminal law was invalidated by the federal code

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despite the presence of a savings clause for state criminal offences in the theft provisions of the *Criminal Code 1995* (Cth).

If the High Court's reasoning about theft in *Dickson* was applied to serious computer offences (and it's not apparent why it wouldn't), then it would seem that, under the existing law:

- At the very least, no-one can be validly prosecuted under state law for conspiracy to commit a serious computer offence (assuming that the state laws mirror the federal ones and the prosecution could have been prosecuted federally, i.e. it involved a planned federal crime, a federal computer or the telecommunications network.)
- Possibly, no-one can be validly prosecuted under mirrored state criminal offences at all (again assuming the prosecution could have occurred federally), because – despite the mirroring – there are inevitably differences between the federal and state offences, in part due to the fact that Chapter 2 of the *Criminal Code 1995* (Cth) applies to federal, but not state, offences. I have not compared the various federal and state offences in detail. However, at least one difference is the definition of recklessness, which includes a test of 'justifiability' in the federal code, but is simply a test of foresight in the state one. In my view, this is a less trivial difference than those that the High Court considered significant in *Dickson*.

Two practical problems raised by *Dickson* are worth noting. First, defendants who have been prosecuted under state law appear to be free to challenge the constitutionality of their convictions well after their trial, including at the High Court, even if no objection was raised at their original trial. That is what occurred in *Dickson* itself. Second, any existing invalidity of state laws cannot be retrospectively remedied. That is a consequence of an earlier High Court decision barring such retrospective removals of invalidity (the *Metwally* decision of 1984.)

An important caveat on the above is that the High Court may well 'clarify' its earlier judgment in a future case in a way that avoids some of the above consequences, for example in its present appeal in a Victorian drug case (*Momcilovic v R*.) While there seems to be no way (short of the High Court overruling *Dickson*) to avoid the first of the above two consequences (the invalidity of state conspiracy prosecutions), it is possible that the broader second consequence listed (the invalidity of most state computer offence prosecutions) could be avoided by the High Court 'clarifying' its unwise reasoning in *Dickson*. I cannot predict whether this will occur or not. Indeed, the *Momcilovic* decision may be decided on non-constitutional grounds, or one grounds specific to drug law. It certainly seems doubtful that there will be unanimity on the constitutional issues (as there unfortunately was in *Dickson* itself.) Also, because *Momcilovic* is (or was) largely a test case on Victoria's human rights Charter, the judgment might be a long time coming.

Possible consequences for the Cybercrime Legislation Amendment Bill 2011

The important point for the Joint Select Committee to note is that *Dickson* already poses a potential problem for most state computer offence prosecutions (notably ones that involve some use of the internet, which I imagine is most of them.) Here are some quick thoughts on what difference the Bill might make:

First, and most obviously, the Bill would widen the area of overlap between federal and state offences (and, hence, the area of possible invalidity of state offences.) That is, the state prosecutions that will be potentially invalid once the Bill has passed will include computer offences that involve neither federal crimes, federal computers nor the internet. This may well be only a slight difference in practice. Indeed, the widening of the federal offences may make it easier to cope with *Dickson* in practice, if one solution – prosecuting ALL serious computer offences in Australia under federal law, rather than state law – was

adopted (as that solution is much easier to implement if there are no inconvenient 'gaps' in the federal law.)

Second, speculatively, it is also possible that the Bill might reduce the prospect of any invalidity of state laws. That is because, in the recent *Momcilovic* hearings concerning the validity of state drug laws, some advocates and judges appeared to suggest that the *Dickson* approach might not apply in the case of federal laws that were enacted pursuant to the external affairs power, rather than one of the other powers of the Commonwealth parliament. (Quite why this would be so isn't clear to me, but then there is little about the High Court's views on this subject that make much sense to me.)

What to do

I don't see the *Dickson* problem as any reason not to pass this Bill. Whatever damage has been wrought by *Dickson* has already largely been done by the enactment of Division 477 (and mirroring state legislation) in the first place. The Bill will, at worst, do a small amount of additional damage (and might ultimately lessen the practical burden of *Dickson*.)

Nevertheless, I am heartened to see some attention being paid to the problem posed by *Dickson*. While I appreciate that the ramifications of this decision remain unclear at present, I am shocked that neither the federal nor state parliaments have responded to it to date. The longer those parliaments wait, the more state convictions will be left open to belated (and, in most cases, entirely technical) constitutional objections down the track.

I also appreciate that the *Dickson* problem is actually quite difficult to manage (as the best solutions, short of a High Court change of heart, involve either a complete federal take-over of the prosecution of areas of concurrent criminal law, or complete federal legislative retreat from those areas.) However, the High Court itself suggested a couple of harmless reforms that might reduce some of the damage in the near future-term:

- Augmenting the savings clauses in the federal code. At present, many such clauses (including the one for computer offences in s.476.4) are brief, a matter that Gummow J bewilderingly criticised in one the hearings in *Dickson*. So, why not change all the clauses (including s. 476.4) to the much fuller clause in s300.4?
- Putting a savings clause in Chapter 2 of the federal code. The *Dickson* judgment gave a number of reasons for disregarding the savings clause for the state property offences. One of those (at [37]) was that that cause could not have any effect on the validity of state conspiracy offences, as those are set out in the Code's 'general' Chapter 2, rather than in the later Chapters. While I think that this reasoning is flawed and silly, I simply cannot fathom why the Commonwealth hasn't already responded by putting a savings clause for state conspiracy laws in Chapter 2. What's the harm? (Perhaps I've missed the Bill that proposes to do this.)

I hasten to say that neither of these reforms would be needed if we had a more sensible High Court. But we don't. So, why hasn't the federal Parliament acted?

Thank you for considering this submission. I am happy to answer further queries the Committee may have. I can be contacted by phone on 8344 1099 or by e-mail: Jeremy.Gans@uimelb.edu.au.

Yours Sincerely,

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