THE LAW IN AUSTRALIA RELATING TO THE UNLAWFUL SEIZURE OF AIRCRAFT

by

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INTRODUCTION

A person who unlawfully sizes or attempts to seize control of an aircraft in flight, and who uses or threatens to use force or violence in the process, commits the offence of hijacking. The offence has been alternatively referred to as 'skyjacking', 'aerial piracy' or simply 'unlawful seizure'; nevertheless it is appropriate, at least in the Australian context, to refer to the crime as 'hijacking' as this term has been incorporated into relevant Commonwealth legislation.

Commonwealth legislation relating to hijacking is contained in the *Crimes (Aircraft) Act,* 1963,[1] the *Civil Aviation (Offenders on International Aircraft) Act,* 1970[2] and the *Crimes (Hijacking of Aircraft) Act,* 1972,[3] in addition to minor provisions inserted into the *Air Navigation Regulations* in 1960.

The Commonwealth does not have a general legislative power over aviation. Its legislation cannot extend to flights within State boundaries, except to the extent authorized by s. 51 (i), (xxix) and (xxxix) of the Constitution. Flights within Australia which are beyond Commonwealth jurisdiction must accordingly be regulated by complementary State legislation.

Complementary State legislation exists in all six States with respect to the *Air Navigation Regulations*[4] and in five States with respect to the *Crimes (Aircraft) Act.*[5] The *Civil Aviation (Offenders on International Aircraft) Act* was enacted especially to give effect to an international convention,[6] pursuant to s. 51 (xxix) of the Constitution, and hence complementary State legislation is unnecessary.

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1 No. 64 of 1963.

2 No. 17 of 1970.

3 No. 101 of 1972.

4 *Air Navigation Act,* 1938-1964 (N.S.W.); *Air Navigation Act,* 1958 (Vic.); *Air Navigation Acts,* 1937 to 1947 (Qld.); *Air Navigation Act,* 1937 (S.A.); *Air Navigation Act,* 1937-1945 (W.A.); *Air Navigation Act,* 1937 (Tas.).

5 Complementary State legislation introduced by the following enactments: *Crimes (Aircraft) Act,* 1963 (Vic.); *Criminal Code Amendment Act of 1964,* (Qld); *Criminal Code Amendment Act,* 1964 (W.A.); *Criminal Code Act,* 1965 (Tas.); *Crimes (Amendment) Act,* 1967 (N.S.W.). South Australia has not enacted complementary legislation.

6 i.e. *Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft,* 1963.

The *Crimes (Hijacking of Aircraft) Act* was enacted partly to give effect to an international convention[7] and partly to extend Commonwealth jurisdiction to situations not referred to in the convention. To the extent which the Act gives effect to the convention, complementary State legislation is again unnecessary; on the other hand, such legislation would be required if the States wished to give intrastate effect to the other provisions of the Act. However, the States have refrained from enacting complementary legislation, because the relevant Commonwealth provisions are of little significance.

The extensive legislation in Australia relating to hijacking is discussed below, together with an assessment of the impact of the two international conventions.

A: CRIMES (AIRCRAFT) ACT, 1963 (CTH.)

Australia's first hijacking incident, in July 1960, emphasised the urgent need for Commonwealth legislation relating specifically to the unlawful seizure of aircraft. Russian immigrant Alex Hildebrandt attempted to hijack a T.A.A. Electra aircraft during a flight between Sydney and Brisbane. He threatened to blow up the aircraft unless he was flown to Singapore. The attempt was aborted when he was knocked unconscious by a crew member. Hildebrandt subsequently served ten years imprisonment, but only after protracted legal proceedings.

In October 1960 Hildebrandt was sentenced in Brisbane District Court to five years imprisonment for the attempted murder of the pilot. In November 1960 he was sentenced to an additional ten years imprisonment for attempting to destroy the aircraft. However, in April 1961, the Queensland Criminal Appeals Court quashed the conviction on the latter charge on the grounds that the incident had occurred minutes before the aircraft had entered Queensland jurisdiction.[8] Upon his release from gaol in February 1963, Hildebrandt had to be immediately rearrested and extradited to Sydney in order to stand trial again on the charge of attempting to destroy the aircraft. In May 1963 he was accordingly sentenced in Darlinghurst Quarter Sessions to seven years imprisonment.[9]

Clearly the confusion in this case could have been avoided if the Commonwealth had been able to initiate proceedings. The Commonwealth may exercise jurisdiction over interstate flights pursuant to s. 51 (i) of the Constitution, but no appropriate legislation existed with respect to hijackings and related acts of violence. It was thus left to the

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7 i.e. *Hague Convention for the Suppression of Unlawful Seizure of Aircraft, 1970.*

8 *R.* v. *Hildebrandt* [1964] Qd. R. 43.

9 Further difficulties were encountered by the prosecution. In November 1963 Hildebrandt's conviction was quashed by the N.S.W. Court of Criminal Appeal, due to a misdirection to the jury concerning the onus of proof. *Reg.* v. *Hildebrandt* (1963) 81 W.N. (N.S.W.) 143. However, the court rejected a plea of autrofois acquit, and in April 1964 refused leave to appeal to the High Court on this ground. Hildebrandt was again sentenced to 7 years imprisonment in May 1964.

States to prosecute the offender, with the attendant difficulty of establishing jurisdiction over the offence.

As a result of the Hildebrandt incident, the Commonwealth hastily inserted provisions into the *Air Navigation Regulations* relating to dangerous acts by persons on board aircraft,[10] and to the powers of the aircraft commander over disorderly passengers.[11] However, this measure was only an interim one, filling the gap in Commonwealth law whilst more extensive legislation was being prepared. The first major piece of Commonwealth legislation came into force on 25 November 1963, in the form of the *Crimes (Aircraft) Act*. This statute was drafted independently of the Tokyo Convention which was drawn up in September of the same year.

The *Crimes (Aircraft) Act* is not solely concerned with the crime of hijacking, although there can be no doubt that this is its primary function.[12] The Act contains two principal Parts: Part 2 which is concerned with the criminal character and consequences of any act done aboard an aircraft in flight, and Part 3, which deals with acts affecting specifically the safety of the aircraft or passengers. These Parts may embrace acts unconnected with hijacking. At the same time, both Parts are relevant to hijacking for whilst the specific crime of unlawful seizure is dealt with in Part 3, incidental crimes such as murder, assault and robbery, which often occur during a hijacking incident, are covered by Part 2. The discussion below is restricted to the extent of the Act's application to the unlawful seizure of aircraft.

Before examining these two Parts in detail, the interaction of Commonwealth and State law envisaged by the Act should be noted. It is possible for an incident to occur within the territorial jurisdiction of a State, yet at the same time in circumstances embraced by the Commonwealth Act. An offence committed during an interstate flight is a clear example. Accordingly, s. 28 of the *Crimes (Aircraft) Act* provides that an offender may not be convicted twice, under State and Federal law, for the same act or omission. It is possible for either law, but not both, to apply.

The choice as to whether an offender will be dealt with under Commonwealth or State legislation is left to the Commonwealth Attorney-General. The Act gives no indication as to the criteria upon which his decision will be based. However, it is anticipated that where an offence is committed in a known geographical location, and where there is a State law adequately dealing with the crime, the Commonwealth will prefer the State to proceed against the offender.[13] The Commonwealth legislation will thus only be invoked when, as in the Hildebrandt incident, it is unclear in which State the offence occurred, or when the offence is committed in areas of exclusive Commonwealth jurisdiction.

10 *A.N.R.* 312C.
11 *A.N.R.* 330.
12 *Hansard*, Senate, Oct. 1972, p. 1415 (Sen. Greenwood).
13 *Hansard*, Senate, Oct. 1963, p. 1083 (Sen. Gorton).

The function and effect of Part 2 of the Act is clear. Experience has shown that when the unlawful seizure of an aircraft occurs, additional crimes are likely to be committed in the process. Of these, murder, robbery, extortion, kidnapping and other forms of assault are the most common. It is necessary for the Act to indicate which system of criminal law the Commonwealth is to apply if it chooses to prosecute the offender for these crimes. Part 2 (ss. 6-9) specifies that the criminal law of the Australian Capital Territory shall be adopted in such circumstances.

Section 6 of the Act delimits the scope of application of Part 2. The effect is to create concurrent Commonwealth and State jurisdiction over interstate flights and over international flights if the aircraft is still within the territory of the State, and exclusive Commonwealth jurisdiction over flights within a Territory or otherwise beyond State jurisdiction.

Section 6 (1) (a) extends Commonwealth jurisdiction to any aircraft which, 'is engaged in a flight between two States in the course of trade and commerce with other countries or among the States'. States will generally possess concurrent jurisdiction over such flights. Meanwhile, if an aircraft is hijacked during an intrastate flight and is forced to fly interstate, the Commonwealth will lack jurisdiction because the interstate element is not related to trade and commerce. In such a situation, only the subjacent State could exercise jurisdiction over the offence.

Section 6 (1) (b) extends the operation of Part 2 to any aircraft 'engaged in a flight within a Territory, between two Territories or between a State and a Territory'. Again, when an aircraft engaged in such a flight is within the airspace of a State, both State and Commonwealth laws are operative. Furthermore, if an aircraft is hijacked during an intrastate flight and is forced to fly to a Territory (as opposed to another State), the Commonwealth may still exercise jurisdiction under this sub-section. This conclusion is consistent with judicial interpretation of s. 122 of the Constitution, from which the sub-section derives its validity.[14]

Section 6 (1) (b) should be read subject to s. 3 (3) of the Act, which provides that:

> ... a flight of an aircraft shall be taken to be a flight between two geographical areas and ends, or is, at the commencement of the flight, intended to end, in the other of those areas.

Hence, although the Commonwealth may exercise concurrent jurisdiction over a crime committed aboard an aircraft which has been hijacked during an intrastate flight and forced to fly to a Territory, it is essential for this purpose that the aircraft subsequently lands in the Territory. As such a flight is not intended at its commencement to end in the Territory, it must end there in fact if the Commonwealth legislation is to apply, and it would not be sufficient if the hijacker merely attempts to make the flight end in the Territory.

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14 Section 6 (1) (a), of course, derives its validity from s. 51 (i) of the Constitution.

Sub-sections (1) (c) and (d) and (2) (a) and (b) of s. 6 provide for Commonwealth jurisdiction over crimes committed aboard aircraft engaged in certain flights beyond the jurisdiction of any State. These flights are principally all those by aircraft which are registered in Australia, plus those by foreign aircraft which are on their way to or from Australia.

Sub-sections (1) (c) and (d) refer to an aircraft which may be foreign, and which may be flying above the high seas or above a foreign country, if such a flight commences or ends in Australia. It is worth noting that although these provisions fall within the scope of s. 51 (i) of the Constitution, and although the *Statute of Westminster*[15] supports the right of the Commonwealth to enact extraterritorial legislation,[16] the degree of extraterritorial application claimed here is unsupported by customary international law. The tenuous relationship between an aircraft and the port of embarkation or disembarkation hardly forms a sound basis upon which to assert jurisdiction.[17] Nevertheless, a conflict between customary international law and *intra vires* Commonwealth legislation does not invalidate the latter[18] although the assertion of jurisdiction in such circumstances might have diplomatic repercussions.

If the Commonwealth was to institute proceedings on the strength of s. 6 (1) (c) or (d) alone, it is conceivable that a foreign country posessing a greater interest in the matter would object. However, the provisions at least reduce the likelihood of an offender going unpunished. They ensure that the offender will at least be criminally liable under Australian law when there is doubt as to whether other countries possess jurisdiction, or when the authorities in other countries are unwilling or unable to enforce their jurisdiction. Of course, enforcement of the Commonwealth Act in such circumstances is contingent upon obtaining custody of the offender.

Section 6 (2) extends the application of Part 2 to Australian aircraft flying outside Australia. There is a presumption against the application of the laws of a flag State to its aircraft extraterritorially in flight,[19] and specific legislative provisions such as s. 6 (2) are required in rebuttal. Again, of course, the exercise of jurisdiction is contingent upon custody of the offender.

Section 7 provides that the criminal law of the Australian Capital Territory will apply to acts which are committed during flights within

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15 22 Geo. V. c. 4 1931); *cf. Crimes (Aircraft) Act*, s. 5.

16 *Statute of Westminster*, s. 3.

17 See, generally, Harvard Draft Convention on Jurisdiction with Respect to Crime (1935) 29 *American Journal of International Law (Supplement)* 439, 445; *cf.* C. Pholien, 'Des crimes et delits commis a board d'aeronefs en vol', (1929) 13 *Revue de Droit Aerien* 289.

18 A. Wynes, *Legislative, Executive and Judicial Powers in Australia* (4th ed. 1970) 64-5.

19 *United States* v. *Cordova* (1950) 89 F. Supp. 298; *Reg.* v. *Martin* [1956] 2 Q.B. 272; *Reg.* v. *Naylor* [1962] 2 Q.B. 527.

the scope of Part 2. The criminal law of the Australian Capital Territory embraces:

(a) a law of the Commonwealth in force in that Territory;
(b) the *Crimes Act*, 1900 of the State of New South Wales, in its application to that Territory, as amended or affected by Ordinances from time to time in force in that Territory; or
(c) the *Police Offences Ordinance* 1930-1961 of that Territory, as amended from time to time.[20]

The decision to adopt the criminal law of the Australian Capital Territory is open to criticism. The prime objection is that the *Crimes Act*, 1900 (N.S.W.) is obsolete in its application to the Territory. Under the *Seat of Government Acceptance Act*, 1909-1955 (Cth.)[21] the criminal law of the Territory is that which was in force in New South Wales as at 1 January 1911, as amended or superseded by legislation issued in the Territory from time to time. Amendments to the *Crimes Act* (N.S.W.) will affect the Territory only if there is a Territory ordinance applying to it. There have been many amendments to the *Crimes Act* (N.S.W.) since 1911, but few have been extended to the Territory.

Accordingly, the system of criminal law adopted by Part 2 of the *Crimes (Aircraft) Act* is substantially that of New South Wales in 1911. It may justifiably be asserted that both the offences and the penalties are outmoded.[22] On the other hand, it has been argued in defence of the decision that it was necessary to choose some identifiable and definable area of criminal law, and the selection of the law of the Australian Capital Territory was the logical choice because it is an area of general criminal law over which Federal Parliament has control.[23]

Sections 8 and 9 of the Act contain self-explanatory procedural rules. Section 8 is concerned with the question of whether an offence against Part 2 is to be prosecuted or dealt with on indictment or summarily; s. 9 relates to proceedings under Part 2 in a court other than a court of the Australian Capital Territory.

Overall, Part 2 establishes sound legislative control over incidental crimes committed aboard an aircraft during a hijacking. Commonwealth jurisdiction is extended to almost every conceivable situation over which Federal Parliament has constitutional authority to legislate. This jurisdiction is concurrent with State criminal jurisdiction if the incident occurs within the airspace of a State. The only defects in Part 2 are inherent ones, flowing from constitutional limitations upon the extent of Commonwealth aviation legislation, and the obsolescent criminal law of the Australian Capital Territory.

To establish effective control over acts such as hijacking, however, it is necessary to do more than merely extend Commonwealth jurisdiction

20 *Crimes (Aircraft) Act*, s. 7 (1).
21 *Seat of Government Acceptance Act*, s. 6 (1).
22 *Hansard*, H. of R., Sept. 1963, p. 1474 (Mr. Whitlam); *cf.* J. E. Richardson, 'Aviation Law in Australia' (1965) 1 *Federal Law Review* 242.
23 *Hansard*, Senate, Oct. 1972, p. 1417 (Sen. Greenwood).

to common law crimes committed aboard aircraft. It is necessary to create new crimes and prescribe appropriate penalties. Thus Part 3 (ss. 10-20) of the *Crimes (Aircraft) Act* introduces various offences relating to acts which might interfere with the safety of air travel, including the unlawful seizure of aircraft, accompanied by severe penalties. The result is that a hijacker will generally be charged with offences under both Part 2 and Part 3 of the Act.

It is necessary for the States to similarly create new offences with respect to flights within their exclusive jurisdiction. Five States have now enacted appropriate legislation.[24] South Australia has so far declined and thus the only specific hijacking provisions affecting intrastate flights in that State are those introduced by the *Air Navigation Act*, 1937 (S.A.).[25]

Section 10 sets out the scope of application of Part 3 of the *Crimes (Aircraft) Act*, just as s. 6 does with Part 2. It would seem expedient for Part 3 to apply in exactly the same circumstances as Part 2; however, s. 10 (1) (a) purports to give Part 3 a slightly wider application. The remainder of s. 10 is in effect the same as s. 6 and comments made above concerning the latter section are similarly applicable.

Section 10 (1) (a) purports to extend Commonwealth jurisdiction under Part 3 to

> ... an Australian aircraft (other than a Commonwealth aircraft or a defence aircraft) that is used principally for the purpose of prescribed flights, or is engaged or is intended or likely to be engaged, in a prescribed flight.

Section 10 (2) defines a 'prescribed flight', being in effect any flight over which the Federal Parliament has power to legislate pursuant to ss. 51 and 122 of the Constitution. Section 10 (1) (a) is accordingly of doubtful constitutional validity because it requires only that an aircraft be engaged 'principally' in flights within Commonwealth jurisdiction. Thus, for example, an aircraft which is used principally on interstate flights would, if temporarily transferred to an intrastate route, fall within the scope of s. 10 (1) (a) during the intrastate flight.

In the *Second New South Wales Airlines Case*,[26] the High Court sanctioned a significant degree of Commonwealth encroachment upon State aviation jurisdiction. It was considered that in view of rapid expansions in the aviation industry, it is often illogical to differentiate between interstate and intrastate flights. However, in the context of s. 10 (1) (a), an interstate flight and an intrastate flight are hardly indistinguishable when the only common factor is an interchangeable aircraft. It is submitted that the provision is constitutionally unsound.[27]

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24 *supra* n. 5.

25 *Air Navigation Act*, 1937 (S.A.), s. 5, applies Commonwealth Air Navigation Regulations, from time to time in force, to intrastate flights, *cf. A.N.R.* 312C, 330.

26 *Airlines of New South Wales Pty Ltd.* v. *New South Wales (No. 2)* (1965) 113 C.L.R. 54.

27 *cf. Hansard*, H. of R., Sept. 1963, at p. 1408-1 (Mr. Snedden).

It may become necessary for the High Court to sever the words, '. . . used principally for the purpose of prescribed flights . . .' and '. . . intended or likely to be engaged, in a prescribed flight . . .'. By severing these phrases, the validity of the remainder of s. 10 (1) (a) would be preserved.[28]

The provision in Part 3 which is directly relevant to hijacking is s. 11 (3):

> A person shall not, without lawful excuse, by force or violence or threat of force or violence, or by any trick or false pretence, take or exercise control, whether direct or through another person, of an aircraft to which this Part applies while another person, not being an accomplice of the first mentioned person, is on board the aircraft. Penalty, for any contravention of this sub-section: Imprisonment for twenty years.

Section 11 (3) was designed specifically to deal with the problem of hijacking,[29] and was modelled on a similar provision in the United States *Federal Aviation Act*.[30] Identical or similar definitions of the offence are now contained in all the complementary State Acts.[31] The intent of s. 11 (3) is clear and the language, although criticised as being too wide in its definition of the offence[32] at least embraces every conceivable method of hijacking an aircraft.

Section 11 (3) prescribes a penalty of imprisonment for twenty years. However, a hijacker might conceivably incur a more severe penalty under Part 3. Sections 14 to 17 deal with acts in general which might prejudice the safe operation of an aircraft and which might be committed by a hijacker. Of these, s. 15 is of particular interest:

> A person who does an act or thing capable of prejudicing the safe operation of an aircraft to which this Part applies —
> (a) with intent to prejudice the safe operation of that aircraft; and
> (b) with intent to cause the death of a person or with reckless indifference to the safety of the life of a person,
> is guilty of an indictable offence punishable by death.[33]

A hijacking which is perpetrated by a sane offender will almost certainly involve an intent to prejudice the safe operation of the aircraft, thus fulfilling the requirements of s. 15 (a). Violence need not occur. A simple unscheduled diversion may create navigational difficulties, increasing the risk of aerial collision. If the diversion is a lengthy one, there is a risk of mechanical failure through lack of servicing, or of the aircraft having insufficient fuel. The diversion may be across water, although the aircraft is not equipped for emergency landings at sea.

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28 *Acts Interpretation Act*, 1901-1966 (Cth.), s. 15A.

29 *Hansard*, Senate, Oct. 1963, p. 969 (Sen. Paltridge).

30 49 U.S.C. s. 1472 (1) (2) (inserted in 1961).

31 *Crimes Act*, 1958 (Vic.), s. 83A (4); *Queensland Criminal Code*, s. 317A; *Tasmanian Criminal Code*, s. 276D (1); *Crimes Act*, 1900 (N.S.W.), s. 154B (4). *Western Australian Criminal Code*, s. 390B.

32 *Hansard*, H. of R., Sept. 1963, p. 1481 (Mr. Snedden).

33 *cf. Crimes Act*, 1958 (Vic.), s. 16A; *Tasmanian Criminal Code*, s. 276B (1).

The hijacker may order a landing at an airstrip which is too small, or which lacks adequate markings or telecommunications equipment. Above all, the mental and physical strain experienced by the crew is likely to impair their efficiency.

When a hijacker additionally has an intent to cause the death of a person, or a 'reckless indifference' to the safety of a person, he is guilty of a capital offence under s. 15. It is arguable that every hijacking, in view of the inherent dangers involved, constitutes a reckless disregard for the safety of the passengers and crew. However, s. 15 (b) obviously contemplates an element of aggravation, in order to justify the difference in penalties prescribed by ss. 15 and 11 (3). The hijacker must add to the peril in which he has already placed the flight. For example, if he assaults an important crew member, particularly the pilot or co-pilot, he increases the danger to which he has already exposed the aircraft.

Again, it is not necessary for violence to exist if an act is to be classified within s. 15 (b). The mere unlawful possession of explosives or loaded firearms, even if not revealed by the hijacker, could be described as reckless. An accidental detonation or discharge might precipitate aircraft depressurization with fatal consequences. On the other hand, a threat to detonate non-existent explosives, or the use of an empty or toy firearm, would not be a reckless act for the purposes of s. 15 (b) as in reality this does not aggravate the danger to which the aircraft is already exposed.

Section 18 is also of significance in the context of hijacking, prescribing seven years imprisonment for a person who smuggles 'dangerous goods' aboard an aircraft. Sub-section (3) defines 'dangerous goods' in such a way as to include all weapons and other objects which might be employed by a hijacker.[34] In particular, sub-section (3) (b) is sufficiently broad to encompass unconventional weapons, which in the past have included such unlikely items as nail scissors and sharpened toothbrushes; it would also embrace, for example, a toy pistol which, although not harmful in itself, may be responsible for endangering the lives of persons on board.

Finally, s. 19 prescribes a penalty of two years imprisonment for a person convicted of making certain threats or false statements. Although the section was designed primarily to deal with 'bomb hoaxes', subsection 2 (a) makes specific reference to false statements from which it could be reasonably inferred that a hijacking might be committed.[35]

It is clear, therefore, that Part 3 of the *Crimes (Aircraft) Act* enables the Commonwealth to exert sufficient control over the crime of hijacking. Interspersed amongst a number of provisions of lesser significance,

34 *cf. Crimes Act*, 1958 (Vic.), s. 246D; *Queensland Criminal Code*, s. 317A; *Western Australian Criminal Code*, s. 294A; *Tasmanian Criminal Code*, s. 276G; *Crimes Act*, 1900, (N.S.W.), s. 204C; *cf. A.N.R.* 120, 120A.

35 *cf. Crimes Act*, 1958 (Vic.), s. 246F (a); *Western Australian Criminal Code*, s. 463B (a); *Tasmanian Criminal Code*, s. 276F (2) (a); *Crimes Act*, 1900 (N.S.W.), s. 204E (a).

ss. 11 (3) and 15 are the most important. Severe penalties are prescribed. Adequate complementary legislation exists in five States. Initial defects in the law, exposed by the Hildebrandt incident, are largely remedied.

Part 4 of the Act (ss. 21-29) contains miscellaneous provisions of a procedural nature which are considered necessary for the proper working of the legislation. It is generally self-explanatory, but certain provisions invite special comment.

Section 21 (1) provides that no prosecution for an offence under the Act may be instituted before the consent of the Commonwealth Attorney-General has been obtained. Sub-sections (2) and (3) add that the alleged offender may be charged, arrested and remanded without the consent of the Attorney-General, but no further action may be taken until such consent is obtained; he must be released if proceedings are not continued within a reasonable time.

Sub-sections (2) and (3) are particularly important in view of s. 25, which grants the aircraft commander the power to arrest a suspect without a warrant. The commander may hold in custody any person whom he reasonably suspects of having committed, or having attempted to commit, an offence against the Act, and he may retain custody until that person can be brought before the proper authorities.[36] In the absence of sub-sections (2) and (3) of s. 21, which in fact were missing from the original *Crimes (Aircraft) Bill*, it would be possible for an alleged hijacker to be arrested without a warrant and then detained indefinitely without being informed of the nature of the charge, and without legal proceedings being instituted against him, pending the decision of the Attorney-General as to whether or not the Commonwealth would prosecute.

Section 26 (1) gives certain persons the power, during a flight, to search the aircraft, individuals and luggage if they reasonably suspect that an offence has been committed, or may be committed, on board or in relation to the aircraft. Sub-section (2) provides that a female shall not be searched under sub-section (1) except by a female.[37] It has been suggested that sub-section (2) is impractical, for there may be occasions when no female other than the suspect is available.[38] However, it would be unusual for such a problem to arise on an Australian aircraft. Hostesses must be present during all flights by Australian airlines,[39] and legal complications with respect to searching female passengers would thus arise only in the event of all hostesses being incapacitated.

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36 *cf. Crimes Act*, 1958 (Vic.), s. 463A (1); *Queensland Criminal Code*, s. 547A; *Western Australian Criminal Code*, s. 565A; *Tasmanian Criminal Code*, ss. 27 (10), 39A; *Crimes Act*, 1900 (N.S.W.), s. 353C.

37 *cf. Crimes Act*, 1958 (Vic.) s. 469A; *Queensland Criminal Code*, s. 679A; *Western Australian Criminal Code*, s. 711A; *Tasmanian Criminal Code*, s. 39B; *Crimes Act*, 1900 (N.S.W.) s. 367A.

38 *Hansard*, Senate, Oct. 1963, p. 1073-4 (Sen. Murphy).

39 *Air Navigation Order* 20.16, made pursuant to *A.N.R.* 194.

Finally, s. 29 deals with the execution of death penalties imposed under the Act. Section 29 (2) provides that the sentence shall be executed in accordance with the law of the State or Territory in which the offender is convicted. Moreover, to meet the situation in which an offender is convicted under the Commonwealth Act in a State or Territory which has abolished capital punishment, sub-section (3) enables the Governor-General to order such a State or Territory to carry out the sentence regardless. The latter provision is a potential source of great controversy, and only a strong or totally insensitive federal government would consider invoking it.

In conclusion, it is submitted that the *Crimes (Aircraft) Act* is an impressive piece of legislation. Its primary function is to give jurisdiction to the Commonwealth over hijackings and related acts of violence which occur beyond the jurisdiction of the States, or which occur in such circumstances that it is unclear which State possesses jurisdiction. Supplemented to a large degree by State legislation, it ensures that adequate penalties exist for hijackers and other criminal offenders on board aircraft in Australia. The foresight of the drafters is demonstrated by the subsequent insubstantial additions to the law relating to hijacking.

B: THE TOKYO CONVENTION 1963

The *Crimes (Aircraft) Act*, in so far as it relates to hijacking, is supplemented to a degree by Australia's obligations under the *Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft, 1963*.[40] No attempt is made below to analyze or assess the international significance of the Convention, as this has been adequately discussed by other writers.[41] This Part is concerned merely with the effect of the Convention on pre-existing Australian law relating to the unlawful seizure of aircraft.

The Tokyo Convention deals with two unclear aspects of international air law, namely, jurisdictional competence over criminal acts perpetrated during a flight, and the powers of an aircraft commander to control disorderly passengers. The Convention is not a 'hijacking convention', although it has been referred to as such.[42] Apart from one article dealing specifically with hijacking, the provisions of the Convention refer

40 ICAO Doc. 8364.

41 *e.g.* G. F. Fitzgerald, 'The Development of International Rules Concerning Offences and other Acts Committed on Board Aircraft' (1963) 1 *Canadian Yearbook of International Law* 230; Ryuichi Hirano, 'Convention on Offences and Certain Other Acts Committed on Board Aircraft of 1963' (1964) 8 *Japanese Annual of International Law* 44; R. P. Boyle and R. Pulsifer, 'The Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft' (1964) 30 *Journal of Air Law and Commerce* 305; J. J. Gutierrez, Should the Tokyo Convention of 1963 be Ratified?' (1965) 31 *Journal of Air Law and Commerce* 1; A. I. Mendelsohn, 'In-Flight Crime: The International and Domestic Picture under the Tokyo Convention' (1967) 53 *Virginia Law Review* 509; J. M. Denaro, 'In-Flight Crimes, The Tokyo Convention, and Federal Judicial Jurisdiction' (1969) 35 *Journal of Air Law and Commerce* 171.

42 e.g. comments of R. F. Klimek, (1971) 20 *De Paul Law Review* 485, at p. 488.

generally to any criminal acts which may be committed aboard aircraft. However, because hijacking is the most frequent, most publicized and probably most dangerous form of criminal activity within the scope of the Convention, most countries regard the Convention as being primarily directed towards the suppression of that crime.

The Convention came into force on 4th December, 1969; on 20th September, 1970 Australia became the twenty third party to the Convention, ninety days after the enactment of the *Civil Aviation (Offenders on International Aircraft) Act*. Australia acceded to the convention because of its concern over the increasing number of hijacking incidents throughout the world.[43] However, the Convention in fact adds little to the provisions of the *Crimes (Aircraft) Act* and supplementary State Acts. In practical terms, the Convention affects pre-existing Australian law in only four respects.

1. *Right of Aerial Interception*

The right of an Australian aircraft to intercept a hijacked foreign aircraft flying within Australian airspace is limited by the Convention.[44] Article 4 of the Convention prohibits interference with a foreign aircraft in flight, except in specified circumstances. The provision extends to intrastate flights, in addition to flights within exclusive or concurrent Commonwealth jurisdiction. Such flights may only be intercepted when a criminal offence committed on board affects subjacent Australian territory; the offence is committed by or against an Australian citizen; Australian security is threatened; flight regulations are breached; or where interference is necessary to ensure observance of a multilateral international agreement. Reciprocal restraint must be exercised when an Australian aircraft is in flight above another Contracting State.

With respect to the offence of hijacking, the right of interception is virtually precluded. Although a hijacking incident may fall within one of the above categories, it will be rare that the authorities are sufficiently acquainted with the facts at the time to risk interference. Furthermore, any interference with a hijacked aircraft would necessitate an exceptional degree of care, as Article 11 of the Convention obliges Contracting States to restore control of a hijacked aircraft to the lawful commander, and this cannot eventuate if the aircraft is destroyed along with the commander.

2. *Rights and Duties of Passengers and Crew*

Chapter III (Articles 5 to 10) of the Convention relates to the powers of the aircraft commander. The Chapter adds little to what is already

43 *Hansard*, Senate, Mar. 1970, p. 327 (Sen. Cotton); *Hansard*, H. of R., June 1970, at pp. 3141-53.

44 The 'right' to intercept such an aircraft is derived from the customary international legal concept of territorial sovereignty, and has been invoked in the past. *e.g.* Soviet MIG aircraft attempted to intercept a hijacked Polish airliner over East Germany in October 1969: *New York Times*, 22 Oct. 1969; South Korean airforce jets intercepted a hijacked Japanese airliner over South Korea in March 1970: *New York Times*, 31 Mar. 1970.

contained in s. 25 of the *Crimes (Aircraft) Act*. Furthermore, the innovations contained in the Chapter are of only limited application as Chapter III does not apply to domestic flights within Australia by Australian aircraft.[45] Subject to this limitation, the Chapter effects three minor changes to the pre-existing Australian legislation.

First, passengers on Australian aircraft are granted immunity in respect of action reasonably taken to preserve the safety of the aircraft. Under Article 6 (2), the commander may order the assistance of crew members and request the help of passengers in restraining the offender, but any other measure must be conducted by the commander himself; however, any crew member or passenger may undertake reasonable preventive measures without prior authorization when this is immediately necessary to preserve the safety of the aircraft or the persons on board. Section 25 of the *Crimes (Aircraft) Act* similarly gives the aircraft commander the power to authorize others to assist him, but no general power is granted to persons other than the aircraft commander to act without prior authorization. Chapter III of the Convention thus broadens the pre-existing law to this extent.

Secondly, the commander of an Australian aircraft is obliged to notify the next State of landing if a person on board is being held under restraint.[46] Such notification must be given as soon as practicable, and if possible before landing; the reasons for restraint should also be given. The duty extends to situations where the landing State is a Non-Contracting State. The commander thus loses his authority to restrain an offender if he fails to provide the landing State with a minimum of information concerning the offence. This obligation is a constructive, though not necessarily indispensable, innovation.

Thirdly, if a passenger aboard an Australian aircraft is to be actually delivered over to the authorities of a Contracting State, the commander is required to give prior notification of his intention, if possible, and to furnish the authorities in that State with any information lawfully in his possession.[47] The question of what evidence is 'lawfully' in the possession of the commander is regulated by Australian law. Again, this is a relatively minor duty not previously imposed upon the aircraft commander.

Finally, it should be noted that reciprocal rights and obligations attach to the passengers and crew of an aircraft registered in other Contracting States and which are within Australian airspace. Chapter III applies to all flights by such aircraft, including intrastate journeys. Commonwealth jurisdiction is thus extended into the intrastate sphere to a limited degree, although occasions for its application are so remote that it is of little significance.

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45 Tokyo Convention, art. 5 (1).

46 Tokyo Convention, art. 7 (2).

47 Tokyo Convention, art. 9.

3. *Restoration of Control to Aircraft Commander*

Article 11 is the only provision in the Tokyo Convention dealing specifically with the unlawful seizure of aircraft, and it introduces obligations not previously laid down in Australian legislation. It provides that if an aircraft is unlawfully commandeered, no matter which is the State of registry, all Contracting States are obliged to take 'appropriate measures' to restore or preserve the commander's control.[48]

The scope of this provision is not as extensive as it may appear. It is unlikely to be deemed 'appropriate', in the sense of being 'feasible', for any Contracting State to act unless the aircraft is currently within its territory. There is little it could be expected to do, or indeed permitted to do under international law, when the aircraft is within the territory of another country. Thus the obligation for Australia to use 'appropriate measures' will, as a matter of practice, only arise if the hijacked aircraft happens to land in Australian territory.[49]

The Convention does not define 'appropriate measures'. However, the *Civil Aviation (Offenders on International Aircraft) Act* provides that 'such force and assistance' as is considered necessary by an authorized person may be employed to ensure compliance with Article 11.[50] This would presumably include the right to kill or otherwise incapacitate the hijacker in order to terminate his unlawful control of the aircraft.

Article 11 further requires that when a hijacked aircraft lands in a Contracting State, that State must permit the passengers and crew to continue their journey as soon as practicable, and return the aircraft and its cargo to the persons lawfully entitled to possession.[51] This provision is important in view of previous incidents in which the authorities of the State of landing have detained passengers and crew for lengthy periods, or have authorised the destruction of the aircraft and its cargo. Similarly, if a robbery has been committed by the hijacker, the State of landing must promptly return the stolen goods, even if it chooses to retain custody of the offender.

4. *Treatment of Offenders*

Chapter V (Articles 12 to 15) of the Convention has the most complex effect on pre-existing Australian Law. The Australian authorities are obliged to permit disembarkation of a disorderly passenger from a foreign aircraft, and to take delivery of a passenger who is actually delivered to them by the commander of a foreign aircraft.[52] No such obligation existed previously.

Under Article 13 (4), if a person is accused of a serious offence (such as hijacking) and is delivered over to the Australian authorities, or if a hijacked aircraft lands in Australia, the authorities 'shall immediately

48 Tokyo Convention, art. 11 (1).
49 *c.f.* Comment, (1971) 20 *De Paul Law Review* 485, at p. 502.
50 *Civil Aviation (Offenders on International Aircraft) Act*, s. 8 (1).
51 Tokyo Convention, art. 11 (2).
52 Tokyo Convention, art. 12.

make a preliminary enquiry into the facts'. This requirement has necessitated detailed legislation in Australia. Section 15 of the *Civil Aviation (Offenders on International Aircraft) Act* includes the following provisions:

> 15. (1) This section applies to proceedings under — (b) the *Crimes (Aircraft) Act;*
> (2) A document certified by the Attorney-General to be a record of evidence sent to him under sub-section (2) of section 10 of this Act is admissible in evidence in proceedings to which this section applies and, when admitted, the evidence recorded in it is evidence of the proceedings.

Section 10 (1) of the Act authorizes an enquiry by a magistrate for the purposes of Article 13 (4). Section 10 (2) (a) provides for evidence to be taken in the same manner as it is taken in any other court; sub-section (2) (b) requires a record to be made of the evidence, and sub-section (2) (c) requires this record to be sent to the Attorney-General. According to s. 15 (1) (b) and (2), this evidence may be used in proceedings against a hijacker under the *Crimes (Aircraft) Act.*

Section 10 (3) of the *Civil Aviation (Offenders on International Aircraft) Act* does not require that the enquiry under Article 13 (4) be a formal one:

> The evidence of such a witness may be taken in the presence or absence of the person (if any) in custody in connection with the circumstances that led to the holding of the inquiry, and the certificate by the Magistrate under the last preceding sub-section shall state whether a person was so in custody and, if so, whether that person was present or absent when the evidence was taken.

It is undesirable that such evidence, which may have been taken at an informal enquiry, without cross-examination and in the absence of the accused, should be subsequently admitted as evidence at the trial of the accused for the unlawful seizure of an aircraft. Of course this evidence would not be conclusive, and an important factor affecting its weight and credibility would be the Magistrate's certificate under s. 10 (3). Furthermore, under s. 10 (4), the evidence cannot be taken at the earlier enquiry in the absence of the accused unless the Magistrate is satisfied that there is good reason for his absence. However, to ensure that the accused is not unfairly prejudiced, s. 15 (3) of the *Civil Aviation (Offenders on International Aircraft) Act* states;

> In the proceedings under the *Crimes (Aircraft) Act,* 1963, the Magistrate or court hearing the proceedings shall not admit in evidence a document referred to in the last preceding sub-section, or a part of such a document, unless it appears to the magistrate or court that, having regard to all the circumstances, it would be contrary to the interest of justice not to do so.

It is unlikely that in any proceedings under the *Crimes (Aircraft) Act,* the court will interpret s. 15 (3) of the *Civil Aviation (Offenders on International Aircraft) Act* as rejecting all evidence taken under s. 10 of the latter Act, even if the accused was present at the time, unless such

evidence speaks in his favour. It is rare that the admission of a document produced at an informal hearing, which is prejudicial to the accused, and which might cause the accused to be convicted of the serious offence of hijacking, would be regarded as being in the interests of justice.

The four aspects of the Tokyo Convention discussed above represent the only original contributions by the Convention to the Australian law relating to the unlawful seizure of aircraft. No new offences or penalties are introduced. Commonwealth jurisdiction over hijacking is only marginally increased. Generally, the Convention is a restatement of existing Australian law. This is not an indictment of the Convention; rather, it is evidence of the breadth of the *Crimes (Aircraft) Act.*

C: THE HAGUE CONVENTION, 1970

Unlike the Tokyo Convention, the *Hague Convention for the Suppression of Unlawful Seizure of Aircraft, 1970,*[53] deals specifically and solely with hijacking. The aim of the Convention, as expressed in the preamble, is to deter acts of unlawful seizure of aircraft by providing appropriate measures for punishment of offenders. Contracting States are encouraged to either prosecute an offender or extradite him to a State which possesses a greater interest in the offence. The overall intention of the Convention is to eliminate 'havens' for hijackers.

The Convention came into force on 11 October, 1971; Australia acceded to it on 9 November, 1972, following the enactment of the *Crimes (Hijacking of Aircraft) Act,* 1972. Again, no attempt is made below to analyse the Convention;[54] again, the discussion is restricted to an assessment of its innovatory effect on pre-existing Australian law. The Convention makes five innovations, of varying significance.

1. *Jurisdiction over Aircraft*

Pursuant to Article 4 (1) (c) of the Convention, the Commonwealth may now exercise jurisdiction over a hijacking or related act of violence committed on board a foreign aircraft during a domestic flight outside Australia, if that aircraft has been 'dry-leased'[55] to Australia. This provision is the product of concern, expressed throughout the drafting stages of the Convention, over the fact that where an aircraft is 'dry-leased', the State of which the operator is a national is likely to possess a greater interest in prosecuting a hijacker than will the State of registration. Furthermore, it may often be a practical impossibility for the

53 ICAO Doc. 8920.

54 For general comments on the Hague Convention, see R. H. Mankiewicz, 'The 1970 Hague Convention' (1971) 37 *Journal of Air Law and Commerce* 195; G. White, 'The Hague Convention for the Suppression of Unlawful Seizure of Aircraft' (1971) No. 6, *International Commission of Jurists* (Review) 38; W. November, 'Aircraft Piracy; the Hague Hijacking Convention' (1972) 6 *The International Lawyer* 642.

55 *i.e.* leased without crew. Qantas, Australia's international airline, periodically 'dry-leases' aircraft from overseas operators when considered necessary to increase its capacity.

State registration to prosecute because the crew, who will usually be essential witnesses in the prosecution, are likely to have returned to their home country. Article 4 (1) (c) clarifies an uncertain area of customary international law, and extends Commonwealth jurisdiction accordingly.

2. *Jurisdiction over Offenders*

Pursuant to Article 4 (2), the Commonwealth may now assert jurisdiction over a person who is responsible for the unlawful seizure of an aircraft belonging to a Contracting State, even if the offence occurred outside Australia and had no connection with Australia, if the offender is subsequently found in Australian territory. The Commonwealth in fact has a duty to establish such jurisdiction if it decides not to extradite the offender. This provision represents a radical departure from customary international law, which traditionally requires a readily identifiable link between the actual offence and the State which is claiming jurisdiction.[56]

3. *Prosecution of Offenders*

Whenever an offender is found in Australian territory, his case must be submitted to the competent prosecuting authorities. This obligation is governed by Article 7:

> The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State.

Despite the immediate impression that the Commonwealth must accordingly prosecute or extradite an offender in every case, Article 7 in fact reserves a right to refuse to initiate proceedings in the case of a political offence. At the Hague Diplomatic Conference, Australia was amongst the countries which proposed a revised wording of Article 7 to make it clearer that Contracting States retained a discretion not to prosecute in such circumstances.[57] The proposal was rejected, but it would appear nevertheless that such a discretion remains, to the extent which it is authorized under general criminal law.[58]

4. *Extradition of Offenders*

Article 8 of the Convention relates to extradition of offenders. The effect of this provision is to increase the number of countries with which Australia has extradition treaties relating to hijacking. Hijacking is

56 See, generally, Harvard Draft Convention on Jurisdiction with Respect to Crime. (1935) 29 *American Journal of International Law (Supplement)* 439.

57 Reported in Mankiewicz, *op. cit.* 294.

58 Mankiewicz, *op. cit.* 205; White *op. cit.* 43; C. Jacobsen, 'From Piracy on the High Seas to Piracy in the High Skies; a Study of Aircraft Hijacking', (1972) 5 *Cornell International Law Journal* 161, at pp. 184-5.

deemed to be an extraditable offence in extradition treaties existing between Contracting States, and Contracting States are required to specifically include it as such in future extradition treaties negotiated between themselves.[59] If a Contracting State makes extradition conditional upon the existence of a treaty and receives a request for extradition from another Contracting State with which it has no treaty, it may, at its option, consider the Convention itself as a treaty basis for granting extradition.[60] States which do not make extradition conditional upon the existence of a treaty are to recognize the offence as extraditable between themselves.[61]

Article 8, 'serves the purpose of a multilateral extradition treaty between Contracting States'.[61a] Australia now in effect has extradition agreements relating to hijacking with all the Contracting States of the Hague Convention.

Again, it should be emphasised that there is no obligation on Australia to grant extradition, nor does it possess a right to be granted extradition. Article 8 creates an extraditable offence between Contracting States, but the decision whether or not to grant extradition rests with the discretion of the State with custody of the hijacker.

5. *Reports to the ICAO Council*

Article 11 requires all Contracting States to report certain information to the ICAO Council relating to hijacking incidents and measures taken in relation to the offender and the offence.[62] The provision is designed to facilitate the collection and centralization of information on hijacking by the ICAO Committee on Unlawful Interference with International Civil Aviation. This obligation is hardly onerous, and the least significant of innovations produced by the Convention.

The Hague Convention has a greater impact than the Tokyo Convention on the law in Australia relating to hijacking. As with the Tokyo Convention, there are some superfluous provisions which have no affect in Australia, either because they already form part of Australian law[63] or because they envisage conditions which do not exist in Australia.[64] On the other hand, the innovatory aspects discussed above are generally significant, if not substantial, and form a useful supplement to the *Crimes (Aircraft) Act.*

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59 Hague Convention, art. 8 (1).

60 Hague Convention, art. 8 (2).

61 Hague Convention, art. 8 (3) Prior to 1974 extradition to and from Australia was conditional upon the existence of a treaty. But *cf. Extradition (Foreign States) Act.* 1974, 9 (4).

61a Jacobsen, *op. cit.* 87.

62 This obligation does not arise with respect to flights purely within Australian territory: Hague Convention, art. 3 (3).

63 *e.g.* Hague Convention, arts. 6, 9.

64 *e.g.* Hague Convention, art 5.

D: CRIMES (HIJACKING OF AIRCRAFT) ACT, 1972 (CTH.)

The *Crimes (Hijacking of Aircraft) Act* has two functions. First, it is the instrument by which Australia accedes to the Hague Convention. Secondly, it deals with various situations not covered by the Hague Convention. It is the latter aspect which is presently under discussion. The relevant provisions of the Act are contained in ss. 8, 9 and 12. It is submitted that these sections effect only a minimal change to the existing law with respect to unlawful seizure of aircraft.

First, it should be noted that the definition of hijacking is slightly different in the *Crimes (Hijacking of Aircraft) Act* from that which is contained in s. 11 (3) of the *Crimes (Aircraft) Act*. Section 7 of the *Crimes (Hijacking of Aircraft) Act*, adopting the terminology of the Hague Convention, provides that a hijacking is committed by a person if, while on board he

> (a) unlawfully, by force or threat of force, or by any form of intimidation, seizes, or exercises control of, that aircraft, or attempts to perform any such act;
> or
> (b) is an accomplice of a person who performs or attempts to perform any such act.

On the other hand, the definition in s. 11 (3) of the *Crimes (Aircraft) Act* refers additionally to the gaining of unlawful control of an aircraft 'by trick of false pretence'. Furthermore, whereas s. 11 (3) of the *Crimes (Aircraft) Act* prescribes a penalty of twenty years imprisonment, s. 8 (3) of the *Crimes (Hijacking of Aircraft) Act* provides a maximum penalty of life imprisonment. The significance of these divergences is revealed below.

Section 8 (1) of the *Crimes (Hijacking of Aircraft) Act* provides that the Commonwealth will have jurisdiction over hijacking as defined in s. 7, in the circumstances described in sub-ss. (2) (a) to (e) of s. 8. Section 8 (2) (a) refers to flights within the scope of the Hague Convention, namely, those by an Australian aircraft, by an aircraft which lands in Australia with the hijacker in board, and by an aircraft which has been 'dry-leased' to an Australian enterprise.

Sub-sections (2) (b) to (e) refer to flights not dealt with by the Hague Convention. Generally, the provisions extend Commonwealth jurisdiction to the same situations encompassed by s. 10 of the *Crimes (Aircraft) Act*. Only s. 8 (2) (e) of the *Crimes (Hijacking of Aircraft) Act* extends Commonwealth jurisdiction beyond the jurisdiction established in the earlier Act. It refers to a hijacking perpetrated by an Australian citizen aboard an aircraft which would be considered to be in flight if the Hague Convention were applicable. Incidents falling within this paragraph will also be covered by the Convention, and hence sub-s. 2 (a), with one exception. This is the situation in which an Australian citizen hijacks a foreign aircraft which is making a domestic flight in a country other than Australia or the State of registration.

In this relatively uncommon circumstance, the Commonwealth may assert jurisdiction only under the *Crimes (Hijacking of Aircraft) Act.*

Meanwhile, s. 8 (2) of the *Crimes (Hijacking of Aircraft) Act* is narrower than s. 10 of the *Crimes (Aircraft) Act* in one respect. If a hijacking is committed aboard a privately owned foreign aircraft which is outside Australia during a flight which commenced in Australia or was intended to end in Australia, then the Commonwealth can assert jurisdiction only under the *Crimes (Aircraft) Act.*[65] In all other situations to which Part 3 of the *Crimes (Aircraft) Act* applies, the *Crimes (Hijacking of Aircraft) Act* now also applies.

The mutual applicability of relevant provisions of the *Crimes (Hijacking of Aircraft) Act* and the *Crimes (Aircraft) Act* results in a complex structure of maximum penalties for offences. If an offence falls within the scope of both acts, and prior to 1972 would have been punishable by twenty years imprisonment under s. 11 (3) of the *Crimes (Aircraft) Act,* the offender now faces a sentence of life imprisonment under s. 8 (3) of the *Crimes (Hijacking of Aircraft) Act*; on the other hand, if such an offence also falls within s. 15 of the *Crimes (Aircraft) Act,* the offender will still be guilty of a capital offence. Meanwhile, offences might still fall solely within the provisions of either s. 11 (3) of the *Crimes (Aircraft) Act* or s. 8 of the *Crimes (Hijacking of Aircraft) Act.*

Section 9 of the *Crimes (Hijacking of Aircraft) Act* corresponds to Part 2 of the *Crimes (Aircraft) Act.* The effect of s. 9 (1) is to extend Commonwealth jurisdiction to acts of violence committed on board an aircraft against the passengers or crew. To such offences, the law of the Australian Capital Territory is applied. The provision is slightly narrower than that contained in s. 7 of the *Crimes (Aircraft) Act,* because the latter incorporates any criminal act whilst the *Crimes (Hijacking of Aircraft) Act* refers only to criminal acts of violence.

The provisions of s. 9 (1) apply to flights described in s. 9 (2). Section 9 (2) (a), like s. 8 (2) (a), refers to flights within the scope of the Hague Convention.

Section 9 (2) (b) refers to flights not covered by the Convention. As with s. 8, it is apparent that the scope of Commonwealth jurisdiction over such acts is widened only to a minor extent by the *Crimes (Hijacking of Aircraft) Act.* The Commonwealth already asserts jurisdiction in most instances under s. 6 of the *Crimes (Aircraft) Act.* This jurisdiction is broadened in only one respect, namely, when an act of violence is committed by an Australian citizen aboard a foreign aircraft which is making a domestic flight within the State of registration.[66]

Meanwhile, only the *Crimes (Aircraft) Act* extends Commonwealth jurisdiction to acts of violence aboard a privately owned foreign aircraft outside Australia, during a flight which commenced in Australia or

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65 *Crimes (Aircraft) Act,* s. 10 (1) (d); *cf. Crimes (Hijacking of Aircraft) Act,* s. 8 (1) (d).

66 *Crimes (Hijacking of Aircraft) Act,* s. 9 (2) (b) (iv).

which was intended to end in Australia.[67] In all other situations falling within the Commonwealth jurisdiction, a person who commits an act of violence aboard an aircraft may be prosecuted pursuant to either the *Crimes (Aircraft) Act* or the *Crimes (Hijacking of Aircraft) Act.*

The final provision in the *Crimes (Hijacking of Aircraft) Act* which bears no relation to the Hague Convention is s. 12. Section 12 deals with the power of the pilot to arrest or control certain disruptive passengers. However, as the section is framed in terms narrower than s. 25 of the *Crimes (Aircraft) Act*, it is entirely impotent and does not warrant discussion.

Accordingly, although the *Crimes (Hijacking of Aircraft) Act* extends to situations not referred to in the Hague Convention, the extensions themselves add little to the contents of the *Crimes (Aircraft) Act.* The Act marginally broadens Commonwealth jurisdiction over hijackings and related acts of violence, but only in remote circumstances. The Act also marginally increases the maximum penalty for hijacking under certain conditions. Overall, the Act serves little purpose beyond effecting Australian accession to the Hague Convention.

CONCLUSION

The law in Australia relating to the unlawful seizure of aircraft is simple in content, but complex in form. Overall the law is embrasive, effective and almost exhaustive; constitutional limitations and a succession of federal enactments, however, cause it to be presented in a dislocated, untidy and sometimes confusing manner.

It is not possible to coherently summarize all the legislation, but perhaps a rather over simplified rule of interpretation can be formulated. Basically, the law is contained in the *Crimes (Aircraft) Act*, 1963. This is a Commonwealth statute and it does not extend into the intrastate sphere. However, five of the States have enacted complementary legislation which is virtually the same as the Commonwealth Act. The *Tokyo Convention on Offenders and Certain Other Acts Committed on Board Aircraft*, to which Australia acceded in 1970, adds very little to the *Crimes (Aircraft) Act.* The *Hague Convention for the Suppression of Unlawful Seizure of Aircraft*, to which Australia acceded in 1972, has slightly more impact, but in a rather restricted sphere. The *Crimes (Hijacking of Aircraft) Act*, 1972 makes some minor alterations to the *Crimes (Aircraft) Act.*

It is in this sequence that the law will be interpreted and applied in practice. It is unfortunate that it must be so dispersed, particularly as further rationalisation and simplification is unlikely. In view of the fact that the appropriate international conventions have now been ratified, and that the rate of hijackings overseas has now subsided, and that Australia has only experienced four such incidents in over fifty years of commercial aviation anyway, it is reasonable to predict that development of this area of law is now complete.

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67 *Crimes (Aircraft) Act*, s. (1) (c) (d).