dismissal of Hicks's claim on the ground that it disclosed no reasonable prospects of success. This application hinged on the submissions that allowing the matter to proceed to hearing would:

- contravene the 'act of state' doctrine by requiring the Federal Court to pass judgment on the legality of acts of the United States, a foreign government; and
- result in the court hearing a proceeding impacting on foreign relations giving rise to non-justiciable questions over which it has no jurisdiction.

The practical argument behind these submissions was that Hicks's continuing internment was a political question concerning the foreign relations between Australia and the United States involving the application of non-justiciable standards.

In analysing the principles of 'act of state' and justiciability, Tamberlin J referred to the key decisions of the House of Lords in *Buttes Gas & Oil Co v Hammer* [1982] AC 888 and *Kuwait Airways Corporation v Iraqi Airways Company* [2002] 2 AC 883. *Buttes Gas* concerned questions of the boundary of the continental shelf between two former sovereign states and whether Buttes had fraudulently conspired with one of those states to defraud the other. Lord Wilberforce held (at 938) that these issues only had to be stated for their non-jusitciable nature to be evident and that there were 'no judicial or manageable standards' to judge them by. The principles stated in *Buttes Gas* were qualified in *Kuwait Airways*, involving the seizure of a Kuwait Airlines aircraft by Iraq. After referring to the statement of Lord Wilberforce, Lord Nicholls stated (at 1080-1081):

> *In appropriate circumstances it is legitimate for an English court to have regard to the content of international law in deciding whether to recognise a foreign law...* Nor does the 'non-justiciable' principle mean that the judiciary must shut their eyes to a breach of an established principle of international law committed by one state against another *when the breach is plain and, indeed, acknowledged. In such a case the adjudication problems confronting the English court in the Buttes litigation do not arise. The standard being applied by the court is clear and manageable, and the outcome is not in doubt. That is the present case.'* (Emphasis added)

Tamberlin J referred to *Re Ditfort; Ex parte Deputy Commissioner of Taxation* (1988) 19 FCR 347 in which Gummow J (at 369-370), although observing that a breach of Australia's international obligations would not of itself 'be a matter justiciable at the suit of a private citizen' was careful not to foreclose argument on the question of justiciability in 'exceptional circumstances'. The argument that Hicks had no reasonable prospects of establishing the existence of such exceptional circumstances was rejected by Tamberlin J in the following passage (para. 91):

> In *Kuwait Airways*, a clear acknowledged breach of international law standards was considered sufficient for the court to lawfully exercise jurisdiction over the sovereign act of the Iraq state. In that case, the clear breach of international law was the wrongful seizure of property. It is clear in the case before me that the deprivation of liberty for over five years without valid charge is an even more fundamental contravention of a fundamental principle, and is such an exceptional case as to justify proceeding to hearing by this court.

By Chris O'Donnell

Tully v The Queen (2006) 81 ALJR 391, 231 ALR 712

The question of whether or not a *Longman* warning should be given by a trial judge has been considered once again by the High Court in *Tully v The Queen*.

In *Tully* the accused faced a series of charges relating to alleged serious sexual misconduct with the daughter of his then partner. The complainant was no older than 10 years of age when the alleged offences ended.

No independent evidence confirmed the allegations made by the complainant except for some photographs that showed some intimate physical features, which could only reasonably have been seen if the offences had occurred.

The alleged offences occurred in 1999 and 2000. The complainant first made a complaint to her mother in April 2002. She said she did not tell her mother earlier because she was afraid of the appellant, threats he had made to her and the fact that he possessed guns and ammunition. There was evidence at the trial that the accused possessed many handguns and rifles and at the relevant time slept with a handgun under his pillow.

By a majority (Hayne, Callinan and Crennan JJ) the High Court decided that a warning as discussed in *Longman v The Queen* (1989) 168 CLR 79 was not required.

Crennan J made reference to a *Longman* warning in these terms:

> In *Longman* the majority, Brennan, Dawson and Toohey JJ, said it was imperative for a trial judge to warn a jury of the danger of convicting on uncorroborated evidence when an accused lost the means of adequately testing a complainant's allegations by reason of a long delay 'of more than 20 years' in prosecution.

Her Honour was of the view that there was nothing in the circumstances of this case which made it imperative for the trial judge to give such a warning. Her Honour considered the question of forensic disadvantage and said:

> The critical issue in relation to the need for a warning in accordance with *Longman* is whether any delay in complaint (and/or prosecution), be it 20 years, or two or three years, creates a forensic disadvantage to an accused in respect of adequately testing allegations or adequately marshalling a defence, compared with the position if the complaint were of 'reasonable contemporaneity'.

By Keith Chapple SC