

# *Hicks v Ruddock versus The United States v Hicks*

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## *Abstract*

[F]rom the beginning the Hicks case has been one of the most extraordinary in legal history. Even given his guilty plea, there could well be more twists to come.<sup>1</sup>

At the time of writing, David Hicks, the first person to be tried in accordance with the United States' *Military Commissions Act 2006*, has just been repatriated to Australia, where he will serve the remainder of his sentence for providing material support to a terrorist organisation.

The legal history of David Hicks is lengthy and involves several jurisdictions. This paper will focus on the Australian Federal Court judgment of March this year (*Hicks v Ruddock*),<sup>2</sup> with a coda on Hicks' guilty plea before the newly re-constituted US Military Commission. The Australian proceedings, which dismissed the Government's application for a summary judgment, would have allowed Hicks to bring a legal challenge to the Government as to its perceived failure in securing his release from Guantánamo Bay. This action became moot only weeks after Tamberlin J's decision was handed down, as the US Military Commission proceedings finally commenced and Mr Hicks entered a guilty plea. This effectively secured his release without the need for intervention by the Australian Government.

*Hicks v Ruddock* remains an important judgment nonetheless, and will be very relevant if Mr Hicks commences further legal action in the future. In this single-judge decision, Tamberlin J makes fairly strongly-worded observations on the foreign act of state doctrine, breaches of international law principles, and the notion of habeas corpus. This case note will comprise a summary and analysis of the 8 March judgment.

In addition, the pre-trial agreement and Military Commission proceedings will be discussed in a coda — not only to bring this paper up to date, but also with regard to the potential of further legal proceedings by Mr Hicks.

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1 George Williams, 'Australian Freedom Goes on Trial', *The Sydney Morning Herald* (31 March 2007) at 32.

2 *Hicks v Ruddock* [2007] FCA 299 ('Hicks').

## 1. *Hicks v Ruddock* — *Background*

At the commencement of the *Hicks v Ruddock* proceedings in December 2006, David Hicks had been in US custody under no valid charge since December 2001. In June 2004 he had been charged with three sequences which were subsequently withdrawn: conspiracy, attempted murder by an unprivileged belligerent, and aiding the enemy. The validity of these charges and of the continued detention was widely criticised, even against the ‘post- September 11’ international political climate:

[M]ost legal critics would agree that Hicks has admitted to many actions that are hard to support in any moral sense .... But a basic legal concern is that when Hicks was roaming around Afghanistan, guarding tanks and meeting Osama bin Laden, *he was doing nothing that was then illegal under US, Australian or international law*. Had he consulted a legal advisor before his journey, he would have been informed that his travels were dangerous and foolhardy, but not that they were illegal. [Emphasis added.]<sup>3</sup>

By June 2006, the original Military Commissions established in 2002 to prosecute non-US citizens detained at Guantánamo Bay as ‘enemy combatants’ had been adjudged by the US Supreme Court as failing to satisfy the Geneva Convention requirements for a fair trial. The Military Commissions were reconstituted in October under the *Military Commissions Act 2006*, but David Hicks remained without fresh, valid charges or a settled date for trial. On 6 December 2006, David Hicks commenced an action in the Federal Court of Australia against the Attorney-General Philip Ruddock, the Minister for Foreign Affairs Alexander Downer, and the Commonwealth.<sup>4</sup>

### A. *The Claims*

In essence, David Hicks was seeking an order of habeas corpus (an individual’s right to challenge his incarceration and have the charges against him presented in a court) and judicial review on several grounds of the Australian Government’s decision not to request his release and repatriation. The Respondents sought a summary judgment, under s 31A of the *Federal Court Act 1976* (Cth): that Mr Hicks’ case had no reasonable prospect of success and should not proceed to hearing.

#### (i) *The Applicant*

David Hicks sought four orders from the Federal Court:<sup>5</sup>

- 1) A declaration that the inability to prosecute him under Australian law was a consideration irrelevant to the Executive’s discretion to seek his release

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3 Hilary Charlesworth, ‘Destructive Hicks Saga Shakes Faith in Our Government’, *The Canberra Times* (9 April 2007) at [6], [8] <[http://canberra.yourguide.com.au/detail.asp?class=your%20say&subclass=general&story\\_id=573584&category=Opinion](http://canberra.yourguide.com.au/detail.asp?class=your%20say&subclass=general&story_id=573584&category=Opinion)>

4 David McLeod, ‘Hicks Asks Federal Court to Intervene’ (Media Statement, 6 December 2006).

5 See *Hicks* [2007] FCA 299 at [9].

and repatriation, constituting an improper purpose of the use of that discretion;

- 2) A declaration that the willingness to waive mandated trial standards (in allowing Mr Hicks to be tried by a Military Commission of ‘questionable legality’)<sup>6</sup> was similarly irrelevant and improper;
- 3) An order that Messrs Ruddock and Downer give proper consideration as to whether and how Mr Hicks should be protected by his own country; and
- 4) An order by way of relief, in the nature of a prerogative writ of habeas corpus, that the Respondents request the US authorities to release and repatriate Mr Hicks.

With regard to the first order, the NSW Director of Public Prosecutions Nicholas Cowdery, had commented in September 2006:

The Prime Minister and Foreign Minister say that Hicks ... should face a trial (any sort of trial, it would seem) in the USA before he can return to Australia because we cannot try him here. No, we cannot try him here because he has not committed an Australian criminal offence. Nor, it seems, is he amenable to a proper criminal trial in the USA.<sup>7</sup>

Mr Hicks’ defence team noted similar issues in January 2007:

The Attorney-General tries to claim that David cannot come home because “*The US made it clear early on that a detainee would not be repatriated unless the detainee would be prosecuted.*” Never mind the case of the British citizens and [Australian citizen Mamdouh] Habib proving him wrong. But what about the more than 300 detainees that have been released from Guantánamo and not been prosecuted [?] [Emphasis added.]<sup>8</sup>

These inconsistencies remain unaddressed by the Australian Government. One legal academic has concluded that

[i]t was *precisely because no Australian law clearly made Hicks’ 2001 activities criminal*, that the Australian Government refused to seek his return to face charges in Australian courts (although the Government’s justification for this proposition has never been made public). [Emphasis added.]<sup>9</sup>

(ii) *The Respondents*

The Ministers’ and the Commonwealth’s claim that Mr Hicks’ case would have no reasonable prospect of success was submitted on the primary grounds that:<sup>10</sup>

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6 See Charlesworth, above n3 at [12].

7 Nicholas Cowdery, ‘Australian Avoidance of the Rule of Law’ (2006) 44 *Law Society Journal* 63 at 64.

8 David McLeod, ‘A Fair Go for Hicks? Comment by the Hicks Legal Defence Team: January 2007’ (2007) 29 *Law Society of South Australia Bulletin* 14 at 15.

9 Charlesworth, above n3 at [9].

10 See *Hicks* [2007] FCA 299 at [5].

- 1) It would be contrary to the Act of State doctrine of international law, which requires that one State's courts not adjudicate upon an act done by a foreign state in a sovereign capacity in its own territory; and
- 2) The case pertained to foreign relations ('delicate ... diplomatic negotiation between Australia and the US')<sup>11</sup> and would give rise to political and therefore non-justiciable questions, such that there would be 'no matter' falling within the court's jurisdiction.

(An alternative claim was that the Applicant's claim was not properly pleaded<sup>12</sup> — his Honour deals with this issue in a few short paragraphs toward the end of the judgment, finding any pleading deficiencies on the part of Mr Hicks to be insufficient for this alternative claim to be accepted and a summary judgment granted on its grounds.)<sup>13</sup>

With regard to the Act of State doctrine, it should be noted that Guantánamo Bay is not within the sovereign territory of the US — rather, the US military uses and occupies it under a lease from Cuba.<sup>14</sup> This, it has been found, removes the jurisdiction of US courts to hear cases brought by Guantánamo detainees.<sup>15</sup> But in relation to the Act of State doctrine for the purposes of *Hicks v Ruddock*, the fact that the US is *in control* of the territory is apparently enough for the doctrine to be invoked.<sup>16</sup> Tamberlin J does not cite the case, but the definition of the doctrine (or rather, a confirmation of its very ambiguity!) in *R v Bow Street Stipendiary Magistrate; Ex Parte Pinochet (No. 1)*<sup>17</sup> lends supports for this proposition:

[A] common law principle of *uncertain application* which prevents [a municipal court] from examining the legality of certain acts performed in the exercise of sovereign authority within a foreign country *or, occasionally, outside it*.  
[Emphasis added.]

### **B. The Explanatory Statement**

Noting the 'significant public interest' in the case,<sup>18</sup> Tamberlin J includes a preface to the judgment proper, in which he outlines the above claims and makes a very brief summary of his reasoning. In the third paragraph, his Honour states that Mr Hicks is being held 'without any valid charges'. The effect of this simple phrase is to bring into question *right from the start* the legality of the US authorities' actions. The phrase appears *before* his Honour presents the summary of Mr Hicks' claim,<sup>19</sup> thus giving it a degree of support (whether intended or not). It follows that when

11 *Hicks* [2007] FCA 299, Explanatory Statement at [8].

12 *Hicks* [2007] FCA 299 at [6].

13 *Hicks* [2007] FCA 299 at [87–9].

14 See Andrew Kent, 'DC Circuit Upholds Constitutionality of Military Commissions Act Withdrawal of Federal Habeas Jurisdiction for Guantanamo Detainees' (2007) 11(8) *American Society of International Law Insight* <<http://asil.org/insights/2007/03/insights070320.html>>

15 *Ibid*.

16 *Hicks* [2007] FCA 299 at [24].

17 [2000] 1 AC 61 at 106 (Nicholls LJ).

18 *Hicks* [2007] FCA 299, Explanatory Statement at [1].

19 *Hicks* [2007] FCA 299, Explanatory Statement at [4–7].

his Honour then summarises the Respondents' application,<sup>20</sup> it is necessary to read this with that prefatory phrase in mind — 'delicate questions of diplomatic negotiation' may be involved, but Mr Hicks remains nonetheless 'without any valid charges'. In this way, even without the benefit of the full judicial reasoning, the Respondents' arguments are from the very start presented as less convincing than those of the Applicant.

Thus the inclusion of the Explanatory Statement not only denotes the significant public interest in the case, but also indicates the forcefulness of the judgment — in Mr Hicks' favour — to follow.

### **C. 'No Reasonable Prospect of Success'**

This is the first of the identified 'issues for determination'<sup>21</sup> which his Honour will address in the judgment. This issue in fact provides a framework to the entire reasoning — that the Respondents must overcome a heavy burden of proof in order to succeed in their application for summary judgment. Although his Honour says initially that the statutory test is lower than the original common law test,<sup>22</sup> he then cites two judgments<sup>23</sup> and makes his own summaries of general principle which emphasise the difficulty of overcoming the threshold.<sup>24</sup> This rather ominous paragraph may be taken, perhaps, as an indication that the Respondents' application is unlikely to succeed.

### **D. Act of State and Justiciability**

His Honour deems it appropriate to deal with the two grounds of the Respondents' application as one issue, noting that:

[t]he two principles of Act of State and justiciability are to some extent distinct but they are interrelated in the present case.<sup>25</sup>

His Honour cites the House of Lords decision of *Buttes Gas & Oil Co v Hammer*<sup>26</sup> as authority for such interrelation: there exist neither judicial nor manageable standards by which a municipal court can adjudicate upon Acts of State. This English principle was applied by the High Court of Australia in *Attorney-General (UK) v Heinemann Publishing Australia Pty Ltd* ('*Spycatcher*'),<sup>27</sup> where the majority found that some claims could, by their very subject matter, 'embarrass' the municipal court (presumably because it would lack the necessary adjudication standards) and 'prejudice' foreign relations (presumably because the adjudicating

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20 *Hicks* [2007] FCA 299, Explanatory Statement at [8–12].

21 *Hicks* [2007] FCA 299 at [11].

22 *Hicks* [2007] FCA 299 at [12].

23 *Boston Commercial Services Pty Ltd v G E Capital Finance Australia Pty Ltd* [2006] FCA 1352 at [45]; *General Steel Industries Inc v Commissioner of Railways (NSW)* (1964) 112 CLR 125 at 129–30.

24 See *Hicks* [2007] FCA 299 at [13].

25 *Hicks* [2007] FCA 299 at [14].

26 [1982] AC 888 at 938 (Wilberforce LJ) ('*Buttes*').

27 (1986) 165 CLR 30 at 44.

state would be seen as interfering with the foreign state's sovereignty, thus disrupting the international spirit of comity).

Tamberlin J paraphrases the submission of the Respondents as follows:

[the principle in *Spycatcher*] applies in this case in respect of a request to the United States, given the complex considerations that attach to the making of a request for the return of Mr Hicks.<sup>28</sup>

Perhaps tellingly, his Honour does not go into these 'complex considerations', whereas later in this section he reproduces at some length the submissions of Mr Hicks.<sup>29</sup> Whether or not the Respondents had elaborated upon these considerations in their submissions is not revealed by the judgment. What *is* revealed is that even if the submissions *were* more comprehensive, his Honour was not moved enough to work them into his judgment in any great detail. The next time the Respondents' submissions are reproduced, it is with a similar lack of particulars:

The respondents submit that for an Australian court to determine the lawfulness of the applicant's detention ... is in breach of the Act of State doctrine.<sup>30</sup>

This lack of substantive argument on the part of the Respondents does not auger well for their satisfying the heavy burden of proof (as noted by his Honour early in the judgment)<sup>31</sup> that the proceedings should be summarily dismissed.

Having identified the *general* principle of Acts of State and their non-justiciability — and noted the Respondents' reliance upon this — Tamberlin J then introduces the idea of exceptions. *Kuwait Airways Corporation v Iraqi Airways Company (Nos 4 and 5)*<sup>32</sup> is cited in comparison with *Buttes* and *Spycatcher*: whereas in the latter cases the adjudication standards were deemed to be too problematic, in *Kuwait Airways* there was a 'plain and ... acknowledged' breach of an established principle of international law to which a municipal court could not 'shut [its] eyes'.<sup>33</sup> Tamberlin J also notes that in an earlier decision the House of Lords had found that an act of a foreign state becomes justiciable when it constitutes a 'grave ... infringement of human rights': *Oppenheimer v Cattermole (Inspector of Taxes)*.<sup>34</sup>

At this point, having noted exceptions and raised the issue of human rights, Tamberlin J's reasoning appears to be heading very much in the direction of Mr Hicks' claim. He pauses to consider the Australian jurisprudence, citing two cases which promoted the general principle on Acts of State,<sup>35</sup> but quickly returns his focus to exceptions to the rule, distinguishing the most recent Australian case as not involving 'a question of deprivation of personal liberty' — the issue, of course,

28 *Hicks* [2007] FCA 299 at [16].

29 See *Hicks* [2007] FCA 299 at [22–3], [29–31].

30 *Hicks* [2007] FCA 299 at [24].

31 See above n24 and accompanying text.

32 [2002] 2 AC 883 ('*Kuwait Airways*').

33 *Kuwait Airways* [2002] 2 AC 883 at 1080–1 (Nicholls LJ).

34 [1976] AC 249 at 277–8 (Cross LJ).

35 *Hicks* [2007] FCA 299 at [19–20].

in the present matter — and noting where the judges had accepted the idea of exceptions.<sup>36</sup> His Honour then makes his own contribution to this line of jurisprudence:

It is arguable that the necessity for ‘judicial or manageable standards’ by which to decide the issues in a given case are satisfied when those issues involve *consideration of the Constitutional reach of, and limitations on, executive power*. [Emphasis added.]<sup>37</sup>

This is an explicit nod to the very heart of Mr Hicks’ submissions: that Executive inaction is the reason for his ongoing wrongful internment.<sup>38</sup> Throughout the rest of this section, his Honour works Mr Hicks’ detailed submissions into his own reasoning — and not always prefacing the submissions with reference to Mr Hicks. In this way, it is not always clear where the deictic orientation lies: for example, paragraph 23 begins with ‘The case for Mr Hicks is ...’, but the beginning of the next sentence is simply ‘It follows, therefore ...’. By comparison, in paragraphs 24 and 25 each new sentence is prefaced with ‘The respondents submit that’ or ‘...it is said, ...’. In this way, his Honour’s syntax is again tending to betray the conclusion he will reach, but more importantly, Mr Hicks’ detailed submissions are clearly the more convincing, in that Tamberlin J can so readily work them into his line of reasoning.

The one point at which the Respondents’ submissions (as reproduced in this part of the judgment) comprise more sustained argument rather than the simple reiteration of general principles is where they attempt to distinguish *Kuwait Airways*<sup>39</sup> on the grounds that the breach of international law ‘was *accepted* by all parties’.<sup>40</sup> His Honour makes nothing of this argument, moving on instead to an Australian decision<sup>41</sup> which supports his own, earlier suggestion that constitutional questions of executive power are (arguably) justiciable.<sup>42</sup> Without wishing to presume what his Honour was thinking in not commenting on the ‘acceptance of breach’ argument, it is suggested that this argument is a very weak one. The Respondents place unwarranted significance on the idea of acceptance, where the House of Lords did not. The House of Lords was concerned with the ‘flagrant’ and ‘gross’ character of the breach of an international rule of law — the state-sanctioned seizure of property by force. That this breach was accepted by Iraq was *not* the key to their decision on the justiciability of an Act of State (indeed, Iraq *had* to accept the breach, in the context of its military defeat).<sup>43</sup> The principle propounded in *Kuwait Airways* (and raised repeatedly in the present matter)<sup>44</sup> is

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36 *Hicks* [2007] FCA 299 at [21].

37 *Hicks* [2007] FCA 299 at [21].

38 See *Hicks* [2007] FCA 299s, Explanatory Statement at [3].

39 [2002] 2 AC 883.

40 *Hicks* [2007] FCA 299 at [24].

41 *Re Diford; Ex parte Deputy Commissioner of Taxation* (1988) 19 FCR 347 at 369–70 (Gummow J).

42 Above n37 and accompanying text; see also *Hicks* [2007] FCA 299 at [26–8].

43 See Reid G Mortensen, *Private International Law in Australia* (2006) at 222.

44 His Honour returns to *Kuwait Airways* [2002] 2 AC 883 at [78] and [91].

that by breaching international standards of law, the standards by which a municipal court can adjudicate upon an Act of State may thus be engaged. The acceptance of the breach by the State does not engage any further, necessary standard.

In contrast to the silence with which this argument of the Respondents is met, his Honour has much to say on Mr Hicks' submissions, agreeing with his choice of authorities and citing them at length.<sup>45</sup> Unsurprisingly, the section concludes with his Honour finding that

neither the Act of State doctrine nor the principle of non-justiciability justify summary judgment at this stage of the proceeding.<sup>46</sup>

### *E. Habeas Corpus*

Similarly to how he set up his discussion of '*No reasonable prospect of success*', Tamberlin J begins the section on habeas corpus by emphasising the importance of the writ in our legal system, perhaps obliquely indicating the difficulty the Respondents will have in arguing against a petition for it — given that his Honour has already expressly stated that Mr Hicks is 'without any valid charges':<sup>47</sup>

It is a writ antecedent to statutes, and throwing its roots deep into the genius of our common law ... It is perhaps the most important writ known... affording as it does a swift remedy in all cases of illegal restraint or confinement. [Emphasis added.]<sup>48</sup>

#### *(i) Custody or Control*

In contention is whether or not Mr Hicks is within the 'custody or control' of the Respondents, such that the writ might be issued against them.<sup>49</sup> Mr Hicks submits that 'actual custody' is not necessary, and the alternate element of control is satisfied by the Respondents' having 'sufficient power' to procure his release.<sup>50</sup> Again it is interesting to note that his Honour does not consistently cite Mr Hicks when presenting his submissions, with the effect that the following quote sounds more like a judicial pronouncement than a party's submission:

The question of 'control' in the present case is one of fact and degree, so that the applicant should not be blocked at the pleading stage from adducing and testing evidence as to the sufficiency of the control ...<sup>51</sup>

His Honour explores at length the primary authority upon which Mr Hicks relies: *The King v Secretary of State for Home Affairs; Ex parte O'Brien*,<sup>52</sup> in which the

45 See *Hicks* [2007] FCA 299 at [29–34].

46 *Hicks* [2007] FCA 299 at [34].

47 *Hicks* [2007] FCA 299, Explanatory Statement at [3].

48 *Hicks* [2007] FCA 299 at [35], citing *Secretary of Home Affairs v O'Brien* [1923] AC 603 at 609 (Birkenhead LJ).

49 *Hicks* [2007] FCA 299 at [36–7].

50 *Hicks* [2007] FCA 299 at [37].

51 *Hicks* [2007] FCA 299 at [37].

52 (1923) 2 KB 361 ('*O'Brien*').

English Court of Appeal found that ‘an oral “arrangement” may be sufficient to constitute control’.<sup>53</sup> Keeping in mind that the present matter also concerns a summary dismissal application, his Honour notes that in *O’Brien*, the ‘importance of evidence to a determination was a point also stressed’.<sup>54</sup> Indeed, in his analysis of *O’Brien* and a subsequent case, *Foday Saybana Sankoh*<sup>55</sup> there are several references to evidentiary materials being brought before the court in those proceedings.<sup>56</sup> Again one is reminded of his Honour’s warning, so to speak, that ‘a person should not lightly be shut out from a hearing’.<sup>57</sup>

The key paragraph in this section is 47, in which Tamberlin J summarises Mr Hicks’ habeas petition, not always specifically referencing Mr Hicks at each point, repeating the argument made earlier at paragraph 37 (that the question of control is one of fact and degree, necessitating the adducing and testing of evidence) and including (perhaps of his own volition) an academic authority which supports Mr Hicks’ line of argument:

The role of ‘doubt’ and ‘control’...was succinctly summarised by Justice Sharpe...in *The Law of Habeas Corpus* (2<sup>nd</sup> ed, 1989) at 179: *The writ will issue even where the respondent’s control is doubtful*[.]

This forceful paragraph is followed by the reproduction of the Respondents’ submissions, the first of which is the distinction of *O’Brien* on the grounds that there is no similar ‘agreement or arrangement’<sup>58</sup> between the Australian and US governments regarding Mr Hicks. This, it would seem, is a rather poor argument (indeed, his Honour makes nothing of it) because it fails to address the point being made by Mr Hicks (with authority) that where control is in contention, as it is here and as it was in *O’Brien*, evidence should be admitted in order to make a proper determination. Instead, the Respondents are apparently attempting to distinguish *O’Brien* on its facts whilst arguing that the relevant facts of David Hicks’ case ought not be adduced as evidence.

Again, unsurprisingly, his Honour is ‘not persuaded, having regard to the authorities and the line of reasoning, that there is no reasonable prospect of success’ on this issue of custody or control.<sup>59</sup>

#### (ii) *Unlawfulness of Detention*

This is the other essential element of a habeas petition. The fact that Tamberlin J in his own words described Mr Hicks in the Explanatory Statement as ‘an Australian citizen who has been *confined* ... for more than five years *without any valid charges* being brought against him’<sup>60</sup> is a clear indication that the

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53 *Hicks* [2007] FCA 299 at [43].

54 *Hicks* [2007] FCA 299 at [43].

55 [2000] EWCA Civ. 386.

56 See *Hicks* [2007] FCA 299 at [40], [43], [44].

57 *Hicks* [2007] FCA 299 at [13].

58 *Hicks* [2007] FCA 299 at [48].

59 *Hicks* [2007] FCA 299 at [50].

60 *Hicks* [2007] FCA 299, Explanatory Statement at [3].

Respondents' submissions on this point have not been successful. It follows that his Honour deals with the issue with some expedience. The section comprises six very succinct paragraphs: the Respondents' submission,<sup>61</sup> Mr Hicks' contention,<sup>62</sup> his Honour's opinion ('Deprivation of liberty is *prima facie* unlawful ... There is at present no ... rebuttal evidence before me'),<sup>63</sup> two lots of citations of the 'clear line of authority' supporting this,<sup>64</sup> conclusion.<sup>65</sup> The conclusion comprises the strongest wording Tamberlin J has used in his decision thus far:

I find that the matter should not be prevented from consideration at a hearing and therefore *refuse to strike out the matter* on this ground. The proceeding *should go to a hearing* on the question of the availability of the writ of habeas corpus. [Emphasis added.]<sup>66</sup>

The conviction with which his Honour finds for Mr Hicks on the issue of habeas corpus suggests, perhaps, that like many legal thinkers (not to mention concerned citizens) Tamberlin J has also been disquieted by the question of why an Australian citizen was being interned indefinitely by the US without valid charge. Unlike Messrs Ruddock and Downer, Tamberlin J is unwilling to ignore the basic rule of law that any detention *must* be justified by 'evidence of lawful authority'<sup>67</sup> — such as a valid charge.

#### ***F. Judicial Review — Irrelevant Considerations***

This section concerns the exercise of the right to diplomatic protection, which according to public international law falls within the discretion of the national state of the person who has allegedly been mistreated by the foreign state; the national state therefore having *no duty to intervene*: *Barcelona Traction, Light and Power Company*.<sup>68</sup> Mr Hicks does not appear to dispute this principle, but he argues that the Respondents *must consider* whether or not to exercise their discretion.<sup>69</sup> The Respondents submit that there are no such 'constraints or criteria imposed on that discretion', but authority for Mr Hicks' claim is found in *Joyce v DPP*,<sup>70</sup> where Jowitt LJ observed 'that the state *must consider* the request for protection' although its response is entirely discretionary.<sup>71</sup>

Mr Hicks' main submission is that if the Respondents have such a duty to *consider* exercising their protective discretion, any consideration must be made in accordance with administrative law principles, meaning it must not contain irrelevancies.<sup>72</sup> Curiously, Mr Hicks also raises the issue of a constitutionally-

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61 *Hicks* [2007] FCA 299 at [51].

62 *Hicks* [2007] FCA 299 at [52].

63 *Hicks* [2007] FCA 299 at [53].

64 *Hicks* [2007] FCA 299 at [54–5].

65 *Hicks* [2007] FCA 299 at [56].

66 *Hicks* [2007] FCA 299 at [56].

67 *Hicks* [2007] FCA 299 at [53].

68 (1970) Second Phase, Judgment, ICJ Reports at 3.78–9 ('*Barcelona Traction*').

69 *Hicks* [2007] FCA 299 at [57].

70 [1946] AC 347 at 371.

71 *Hicks* [2007] FCA 299 at [63].

implied ‘duty of protection’ to a citizen in his predicament, not just a duty to consider that citizen’s request.<sup>73</sup> Compared with the latter argument, this ‘protection’ argument (a ‘duty of imperfect obligation’<sup>74</sup> or ‘counterpart to the duty of allegiance’)<sup>75</sup> seems far more difficult to support. It is raised in the context of the impossibility of Mr Hicks’ being prosecuted in Australia as a reason why the Respondents have not sought his release and repatriation. The Respondents, whilst arguing that their discretion is free from constraints, do seem to accept Mr Hicks’ original ‘duty to consider’ argument by stating that the unlikelihood of an Australian criminal trial has been a ‘significant consideration’ in their not requesting his release.<sup>76</sup> Instead of answering this on the same grounds, Mr Hicks constructs a complicated and even tenuous argument about the executive’s duty to protect him, as implied by s 61 of the Constitution.<sup>77</sup> A better answer, it is suggested, arises from the point made by Professor Charlesworth, quoted earlier in this paper, that Mr Hicks had not actually committed any crime recognised under Australian, US nor international law.<sup>78</sup> Thus the impossibility of Mr Hicks’ being prosecuted in Australia cannot be seen as a consideration made ‘in accordance with law’ and is thus irrelevant to the Respondents’ duty to consider Mr Hicks’ plight.

Mr Hicks does eventually touch on this in a later submission that his five-year internment at Guantánamo Bay is a form of punishment in itself; that the Respondents have been assisting in the administration of this punishment by not seeking his release; that only a Chapter III court may administer punishment; and so the Respondents’ argument that Mr Hicks must be tried by a US Military Commission in the absence of an Australian prosecution case is not one which they are entitled to make as part of their duty of consideration.<sup>79</sup> One not only queries again the necessity of Hicks’ raising earlier that complicated and less convincing ‘duty of protection’ argument, but also sympathises with his Honour for not having been presented instead at this point with the ‘Professor Charlesworth argument’ — arguably more succinct than this line on Chapter III courts.

Mr Hicks does, however, make a strong submission on the Respondents’ desire that he be the subject of US Military Commission proceedings as constituting another irrelevant consideration.<sup>80</sup> By allowing Mr Hicks to be tried by a 2006 US Military Commission — the legality of which has not yet been tested by the US Supreme Court — the Respondents are effectively allowing him to be deprived of a fair trial, contrary to the Geneva Convention provisions as incorporated into Australian law by the *Criminal Code Act 1995* (Cth).<sup>81</sup> This constitutes unlawful conduct, which therefore cannot be taken into account as a consideration relevant

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72 *Hicks* [2007] FCA 299 at [57–9].

73 *Hicks* [2007] FCA 299 at [61].

74 *Hicks* [2007] FCA 299 at [61].

75 *Hicks* [2007] FCA 299 at [62].

76 *Hicks* [2007] FCA 299 at [60].

77 *Hicks* [2007] FCA 299 at [61–2].

78 See above n3 (also n8) and accompanying text.

79 *Hicks* [2007] FCA 299 at [76].

80 *Hicks* [2007] FCA 299 at [58].

81 See *Hicks* [2007] FCA 299 at [68] and [71].

to the exercise of executive discretion.<sup>82</sup> Mr Hicks submits that he should be given the opportunity to establish this as a matter of fact by having his case proceed to hearing and not be summarily dismissed.<sup>83</sup>

It has been suggested above that some of Mr Hicks' submissions on the issue of judicial review are not quite as convincing as others, but his Honour seems prepared to accept them regardless, for

[l]egal principle is developing in the case of judicial review of executive action and the law is far from settled.<sup>84</sup>

Once again he is not persuaded by the Respondents — whose submissions here comprise but one paragraph<sup>85</sup> — that Mr Hicks' claims do not have a reasonable prospect of success.<sup>86</sup>

### **G The Decision in *Abbasi***

At the denouement of his judgment, Tamberlin J pauses to give special attention to the related English case of *Abbasi v Secretary of State*,<sup>87</sup> also concerning an application for relief from detention at Guantánamo Bay. This case posed a challenge to the rule in *Barcelona Traction* noted above.<sup>88</sup> there may be, on the part of a detained national, a *legitimate expectation enforceable by judicial review* that his or her government will give proper consideration as to whether to make diplomatic representations to the detaining foreign state.<sup>89</sup> Although Mr Abbasi's petition was ultimately unsuccessful, the UK government had at least exercised its 'duty of consideration' and Mr Abbasi had been able to lead evidence before the court. His Honour observes that

the injustice in [Hicks'] case could be seen to be substantially greater than that in *Abbasi*, given [his] internment...for over five years...[with] no alleviation of his predicament<sup>90</sup>

— and finds this a compelling reason why the case ought not be summarily dismissed.

### **H. Justice Tamberlin's Conclusion**

One other special relevance of *Abbasi* to the present matter is that it invokes *Kuwait Airways* in its reference to 'a clear breach of a fundamental human right'.<sup>91</sup>

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82 See *Hicks* [2007] FCA 299 at [72].

83 *Hicks* [2007] FCA 299 at [72].

84 *Hicks* [2007] FCA 299 at [77].

85 See *Hicks* [2007] FCA 299 at [60].

86 *Hicks* [2007] FCA 299 at [77].

87 [2002] EWCA Civ 1598 (Phillips MR; Waller & Carnwath LJJ in agreement) ('*Abbasi*').

88 See above n68 and accompanying text.

89 See *Hicks* [2007] FCA 299 at [83], citing *Abbasi* [2002] EWCA Civ 1598 at [99].

90 *Hicks* [2007] FCA 299 at [86].

91 *Hicks* [2007] FCA 299 at [78], citing *Abbasi* [2002] EWCA Civ 1598 at [107].

And it is with reference to *Kuwait Airways* that Tamberlin J makes his powerful conclusion, extracted and reproduced below:

*It must be kept firmly in mind that this case concerns the fundamental right to have cause shown as to why a citizen is deprived of liberty for more than five years in a place where he has not had access to the benefit of a duly constituted court without valid charge.* Furthermore, it cannot be confidently predicted how much longer that detention will continue. .... *The courts have consistently held that questions of personal liberty are of primary importance and of the utmost urgency* and, arguably, if Mr Hicks can make good the facts in his Statement of Claim, trial by the new Military Commission and its procedures may be found to be contrary to the requirements of international law.

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.*

There is *no principle or authority precisely in point* on the issues raised in the exceptional circumstances of this case which mandate a conclusion that the application has no reasonable prospect of success. .... [Emphasis added.]<sup>92</sup>

Despite its not having the intended effect on David Hicks himself — his case perhaps ultimately too ‘difficult and novel’<sup>93</sup> to continue, hence the US plea agreement of 26 March — the decision of Tamberlin J is a significant contribution to Australian jurisprudence on international law. It extends the exception to the foreign Act of State doctrine found in *Kuwait Airways*.<sup>94</sup> In that case, the fundamental breach of an international law rule concerned title to property; here it concerns the liberty of an Australian citizen. Tamberlin J finds that a grave infringement of human rights such as Mr Hicks’ detention at Guantánamo Bay should engage the jurisdiction of the Australian courts.

Coincidentally, a little over a month after *Hicks v Ruddock* was handed down, a US Court of Appeals majority found in *Sarei v Rio Tinto PLC*<sup>95</sup> that the foreign Act of State doctrine will not apply where an act is in violation of *jus cogens* — the preemptory norms of public international law. Examples are the prohibition of such fundamentally immoral acts as genocide, torture and apartheid.<sup>96</sup> The *Sarei* case concerned state-sanctioned systematic racial discrimination, which was found by the court to be a violation of *jus cogens*.

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92 *Hicks* [2007] FCA 299 at [90]–[2].

93 *Hicks* [2007] FCA 299 at [92].

94 [2002] 2 AC 883.

95 No. 02–56256, N 02–56390, 2007 US App LEXIS 8387 (9th Cir. Apr. 12, 2007) (*‘Sarei’*).

96 See Gillian D Triggs, *International Law: Contemporary Principles and Practices* (2006) at [2.19].

Building on the decision in *Kuwait Airways*, *Hicks* and *Sarei* together suggest an emerging trend (at least in Anglo-Australian and US law) towards international law norms being accepted, and exceptions to general principles being found, more readily by municipal courts, especially where human rights are in issue. Should Mr Hicks or other ex-Guantánamo Bay detainees commence future legal proceedings, or those still detained have the opportunity to be heard before a court, the line of jurisprudence to which *Hicks* contributes may be of particular assistance.<sup>97</sup>

## 2. Coda — *The United States v David Hicks*

David Hicks was finally charged by the US under the *Military Commissions Act 2006* in February 2007, shortly before Tamberlin J's decision was handed down, with attempted murder and providing material support for terrorism. The first charge was then dropped, and on 26 March Mr Hicks entered into an agreement to (inter alia) plead guilty to the remaining charge in exchange for a limited sentence to be served in an Australian gaol.

In the pre-trial agreement, Mr Hicks signed the statement that

I offer to plead guilty, freely and voluntarily, because I am guilty, *and because it will be in my best interest*. [Emphasis added.]<sup>98</sup>

— which does not sound like a normal guilty plea. This is because the US has an extra category of plea known as an *Alford* plea, pursuant to the Supreme Court ruling of *North Carolina v Alford*.<sup>99</sup> In that case, the defendant had maintained his innocence of the murder in question, but in the face of a strong prosecution case, said he was pleading guilty to *second-degree* murder in order to avoid the death penalty. The Supreme Court held that it was not unconstitutional for the trial judge to accept this plea: it is open for an individual to make an informed decision to plead guilty in order to avoid a maximum penalty, such as where the prosecution clearly has enough evidence to secure a conviction.

In Part II of the *Manual for Military Commissions*<sup>100</sup> ('Rules for Military Commissions'), Rule 910(e) states:

The military judge shall not accept a plea of guilty without making such inquiry of the accused as shall satisfy the military judge that either there is a factual basis for the plea *or the accused voluntarily agrees that, having viewed the evidence the Government intends to introduce against him, the accused is personally convinced that the Government could prove the accused guilty of the offenses* [sic] *to which he is pleading guilty, beyond a reasonable doubt*. ... The accused shall

97 See also Steven Tully, 'Australian Detainee Pleads Guilty Before the First Military Commission' (2007) 11 (11) *American Society of International Law Insight* <[www.asil.org/insights/2007/04/insights070423.html](http://www.asil.org/insights/2007/04/insights070423.html)>

98 *US v David Hicks*, Offer for a Pre-trial Agreement (26 March 2007) at [1], Transcript reproduced in full in *The Australian* (2 April 2007) <<http://www.theaustralian.news.com.au/story/0,20876,21486066-17281,00.html>>.

99 400 US 25 (1970).

100 Published in implementation of the *Military Commissions Act 2006* (US).

be questioned under oath about the offenses and/or the Government's averment of evidence, to ensure that there is a factual basis for the plea(s) *or that the accused has voluntarily elected to plead guilty because he is convinced that the government could prove its case beyond a reasonable doubt.* [Emphasis added.]

This is a provision for an *Alford* plea, and it is essentially an *Alford* plea which was made by David Hicks in his pre-trial agreement and then in front of the Military Commission on all 35 of the stipulations of alleged facts which supported the charge.<sup>101</sup> Those who had previously questioned Mr Hicks' lengthy incarceration at Guantánamo Bay are undoubtedly now questioning the 'voluntariness' of his plea and the origins of the prosecution's evidence.<sup>102</sup>

This being merely a coda, an attempt will not be made at this stage to elaborate on the particulars of the pre-trial agreement, nor the many points of contention arising from the Military Commission proceedings.<sup>103</sup> What will be noted, however, is the question implied by Mr Hicks' having entered a plea not recognised by Australian law to an offence not recognised by Australian law in front of a Commission and under an Act not necessarily conforming to the rule of law as recognised in Australia. That is: in the light of these submissions and with the authority of Tamberlin J's Federal Court decision that a challenge to the US could have a reasonable prospect of success, how can David Hicks, now back in Australia, be held to any part of his plea agreement with the US? The answer, it would seem, is that *he should not be* — and to return to the quote with which this paper began, in the case of David Hicks 'there could well be more twists to come.'<sup>104</sup>

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101 See Josh White, 'Australian to Return Home to Serve Shortened Term', *The Washington Post* (31 March 2007) <<http://www.washingtonpost.com/wp-dyn/content/article/2007/03/30/AR2007033002529.html>> and Amnesty International USA, 'Another Day in Guantánamo: David Hicks Sentenced by Military Commission' (2 April 2007) AI Index AMR 51/055/2007 <[www.amnestyusa.org/document.php?lang=e&id=ENGAMR510552007](http://www.amnestyusa.org/document.php?lang=e&id=ENGAMR510552007)>

102 See, for example, Amnesty International USA, above n101.

103 See instead, for example, Amnesty International USA, above n101; also Charlesworth, above n3.

104 Williams, above n1.

