IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S162 of 2013

BETWEEN:

TING LI
Appellant

and

CHIEF OF ARMY
Respondent

APPELLANT'S SUBMISSIONS

Part I: Publication on the internet

1. These submissions are in a form suitable for publication on the internet.

Part II: Statement of issues

2. This appeal raises the following issues:

   (a) Having regard to the proper construction of the *Criminal Code* (Cth) in its application to s 33(b) of the *Defence Force Discipline Act* 1982 (Cth) (the "*Discipline Act*"), does an offence under s 33(b) require proof that the accused intended to "create a disturbance"? Alternatively, does it require proof that the accused was reckless as to whether a disturbance was created?

   (b) Does creating a "disturbance" within the sense of 33(b) of the *Discipline Act* require that the "disturbance" involve an element of violence, in the sense of a breach of the peace?

   (c) Did the erroneous directions on these matters by the Judge Advocate cause the appellant's conviction by the Court Martial to be wrong in law, and result in a substantial miscarriage of justice?

3. In each of the Court Martial, the Defence Force Discipline Appeal Tribunal ("the Tribunal"), and the Full Court of the Federal Court, an erroneous assumption was made. The assumption was that the relevant physical element consisted only of "conduct" in the nature of physical acts, and did not include the "state of affairs" (alternatively, the "result of conduct") described in s 33(b) as "creates a disturbance". Because of that assumption, the Judge Advocate in the Court Martial wrongly directed that s 33(b) did not require the prosecution to prove that the accused intended to create a disturbance (or alternatively was reckless as to whether a disturbance was created), but only required proof that the accused intended to engage in specified physical acts.

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4. It was further held, at each stage below, that there did not need to be any element of violence in order for a "disturbance" to be created. Rather, a vigorous verbal interchange between two individuals, also described as "disorderly disputation", was considered sufficient. That conclusion is inconsistent with the proper construction of s 33 of the *Discipline Act*. The construction put forward by Logan J in dissent in the Full Court was, with respect, correct, and should be adopted.

5. Those errors, separately and together, establish that the appellant was convicted by a Court Martial of an offence under s 33(b) in circumstances where the Judge Advocate's directions were wrong in both respects, and there was no evidence satisfying either the physical element (that the accused "created a disturbance" in the relevant sense), or the corresponding fault element (an intention to create a disturbance, or alternatively recklessness as to whether the disturbance was created). The conviction was wrong in law in each respect, and a substantial miscarriage of justice occurred.

Part III: *Judiciary Act 1903* (Cth) section 78B

6. The appellant has considered whether any notice should be given in compliance with s 78B. No such notice should be given.

Part IV: Reasons for judgment below

7. The decision of the Court Martial is unreported.

8. The decision of the Tribunal is reported as *Li v Chief of Army* (2012) 261 FLR 226.

9. The decisions of the Full Court are reported as *Li v Chief of Army* (2013) 210 FCR 299 (appeal) and *Li v Chief of Army (No 2)* (2013) 210 FCR 356 (costs).

Part V: Factual background

The charges before the Court Martial

10. The appellant was tried before a Court Martial on a charge brought under s 33(b) of the *Discipline Act*. Section 33 is set out in full in the Annexure to these submissions at page 25.

11. The appellant pleaded not guilty to the following charge:

> Being a Defence member at Defence Legal Division, Level 4 Campbell Park Offices [Australian Capital Territory] on 3 February 2010 between approximately 10.30 and 11.00 in the vicinity of the office of Mr Andrew Snashall created a disturbance by causing a confrontation with Mr Snashall.

12. The amended particulars subjoined to the charge were that the appellant had:

    a. refused to leave Mr Snashall's office when requested to do so by Mr Snashall and continued speaking to Mr Snashall in a raised voice;
    b. followed Mr Snashall and continued the conversation when Mr Snashall left his own office, ostensibly because MAJ Li would not;
    c. forcefully pushed against Mr Snashall's office door placing his head and shoulder in the doorway while Mr Snashall was inside the office trying to close the door;
    d. re-entered Mr Snashall's office and again refused to leave when requested to do so;
    e. stood approximately three inches from Mr Snashall's face speaking with a raised voice and in an agitated and aggressive manner.

The evidence before the Court Martial

13. The appellant was a legal officer with the rank of Major in the Australian Army, working at the Campbell Park offices. Mr Snashall was a Commonwealth public servant holding the position of Director of Special Financial Claims within Defence Legal, and supervising staff on a floor above the appellant's place of work.[1] The appellant and Mr Snashall had previously encountered one another in the course of their respective duties.

14. In about July 2009, the appellant and his wife and infant child encountered Mr Snashall in the workplace, and Mr Snashall made a remark that "I see you have been polluting the world with your genes".[2] The appellant did not then formally complain about Mr Snashall's conduct.[3] In evidence before the Court Martial, Mr Snashall admitted making the remark.[4]

15. On the afternoon of 2 February 2010, Mr Snashall observed the appellant talking to Mr Snashall's staff. He considered that the appellant was distracting them from their work, and asked the appellant to leave. The appellant then went into a nearby office to make a telephone call. Mr Snashall entered the room, queried the appellant's presence, and asked him to leave. Each of the appellant and Mr Snashall gave evidence that the other spoke and acted aggressively.[5] The appellant gave evidence that Mr Snashall said words to the effect that "I meant everything I have ever said to you",[6] which, to the appellant, revived the racially flavoured remark of July 2009 and indicated that it was meant offensively.[7] Mr Snashall rejected that account of the conversation.

16. On the morning of 3 February 2010, according to Mr Snashall, the appellant first entered Mr Snashall's office while the latter was using the telephone.

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[1] Tribunal at [14] (261 FLR 226 at 230).
[2] Tribunal at [15] (261 FLR 226 at 230); Full Court at [12] (210 FCR 299 at 303).
[3] Full Court at [12] (210 FCR 299 at 303).
[4] See Tribunal at [98] (261 FLR 226 at 244).
[5] Tribunal at [17] (261 FLR 226 at 230); Full Court at [15] (210 FCR 299 at 303).
[6] Trial transcript ("T") 326 lines 23-25.
[7] Tribunal at [17] (261 FLR 226 at 230); Full Court at [16] (210 FCR 299 at 303).

The appellant saw that Mr Snashall was on the phone and left the office. Mr Snashall then spoke to a colleague, Mr Mark Smith, and asked him to wait. Mr Smith waited for a few minutes, then returned to his own office.[8]

17. The appellant returned to Mr Snashall's office a short time later, and initiated a conversation relating to the previous day's events and other matters.[9] Mr Snashall's evidence was that the appellant did not leave the office when Mr Snashall so requested.[10] The appellant's evidence was that Mr Snashall was dismissive of him at this stage of the conversation.[11]

18. Mr Snashall then left the office and walked along a hallway. The appellant followed. Mr Snashall returned to his office, still followed by the appellant.[12] The appellant's evidence was that he continued to ask Mr Snashall for an explanation for his conduct during this time, and that at one stage during this excursion Mr Snashall breached the appellant's personal space.[13]

19. Mr Snashall's evidence was that he then attempted to close his office door, but the appellant resisted and commenced to push against the door to prevent it closing, and after some seconds Mr Snashall released the door and stepped back.[14] The appellant's evidence was that, by the time Mr Snashall was in his office, the appellant was in the doorway, and notwithstanding that Mr Snashall could see where the appellant was, he attempted to shut the door onto him. The appellant raised his right arm to block the door, because if he had not done so it would have slammed into his shoulder.[15]

20. Mr Snashall's evidence was that, after he released the door, the appellant walked in and stood directly in front of and in close proximity to him and spoke in a loud voice. Mr Snashall also spoke loudly and demanded that the appellant leave his office.[16] The appellant's evidence was that Mr Snashall again breached his personal space and told him to leave the office.[17]

21. Some of Mr Snashall's co-workers, including Mr Smith, became aware of the incident over the course of these events. After the appellant and Mr Snashall had returned to the office, Mr Smith entered the office and tried to stand between the appellant and Mr Snashall. Another co-worker, Ms Bennett, then also entered the office. Upon Ms Bennett requesting the appellant to leave Mr Snashall's office, he apologized to her and left the office.[18]

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[8] Tribunal at [20] (261 FLR 226 at 231); T88.29-30, 235.29-33.
[9] Tribunal at [20]-[21] (261 FLR 226 at 231) ; Full Court at [18]-[19] (210 FCR 299 at 304).
[10] Tribunal at [21] (261 FLR 226 at 231); Full Court at [19] (210 FCR 299 at 304).
[11] Tribunal at [29] (261 FLR 226 at 232-233); Full Court at [26] (210 FCR 299 at 305).
[12] Tribunal at [22] (261 FLR 226 at 231); Full Court at [20] (210 FCR 299 at 304).
[13] Tribunal at [29] (261 FLR 226 at 232-233); Full Court at [26] (210 FCR 299 at 305).
[14] Tribunal at [22] (261 FLR 226 at 231); Full Court at [20] (210 FCR 299 at 304).
[15] Tribunal at [29] (261 FLR 226 at 232-233); Full Court at [27] (210 FCR 299 at 305). See also T96.25-42 (cross-examination of Mark Smith).
[16] Tribunal at [22] (261 FLR 226 at 231); Full Court at [20] (210 FCR 299 at 304).
[17] Tribunal at [29] (261 FLR 226 at 232-233); Full Court at [27] (210 FCR 299 at 305).
[18] Tribunal at [24] (261 FLR 226 at 231-232); Full Court at [21] (210 FCR 299 at 304). Subsequently, the appellant also apologized to Mr Smith: T90.24-25.

22. It may be accepted that this evidence, taken as a whole, conformed to the particulars of the charge – which, as the Tribunal described them, "each identified different acts by the appellant in the course of his short but rowdy pursuit of Mr Snashall".[19] However, there are two critical shortcomings of both the charge and the evidence.

23. First, the prosecution did not contend, nor did any witness assert, that there was actual violence, or that anyone present feared violence to themselves. In his evidence in chief, Mr Smith made colloquial references to "a bit of argy-bargy" or "push and shove". But, when cross-examined on these statements, Smith agreed that he had observed no physical contact, nor even uncouth language.[20] He was referring only to the fact that Mr Snashall had tried to close the door to his office while the appellant was standing in the doorway.[21] Other witnesses stated only that they were "scared that something might happen", that the situation was "probably getting a bit out of hand", or that they were concerned that matters might escalate to physical contact.[22] But they did not. Nor did any witness say they were concerned for their own safety – these were references only to the confrontation between the two men.

24. Secondly, the prosecution did not contend that the appellant intended to cause any consequences for or reaction by his co-workers – violent or otherwise – nor even that he was aware that they might react. The prosecution case went no further than to say that the appellant lost his self-control.[23] The appellant accepted that, by the time they returned to Mr Snashall's office, both he and Mr Snashall had lost control of the situation.[24] But he gave evidence that "I did not mean for the situation to deteriorate to that level and for everyone in the workplace to see that", and "I never even anticipated he would not listen to me".[25] That evidence was not challenged in cross-examination.

The Judge Advocate's directions, the conviction and the penalty

25. The Judge Advocate's directions to the Court Martial panel stated that the charge contained, among other things, a physical element of[26]

> conduct – that is, that the defendant engaged in conduct which created a disturbance – and the accompanying physical element is an intention, that is, he meant to engage in that conduct, not that he intended to create a disturbance, that he intended to engage in the conduct. ...
>
> ... I can say that creating a disturbance includes brawling and violent or disorderly disputation.

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[19] Tribunal at [51] (261 FLR 226 at 236).
[20] T201.25-37.
[21] T97.9-15.
[22] See Tribunal at [25]-[28] (261 FLR 226 at 232).
[23] See T336.4-6.
[24] T336.1-7. There "was a degree of loss of self-control once we moved into the corridor": T353.36-45.
[25] T333.10-11; 333.33-34.
[26] See T393-395.

> Here, the prosecution case is that it involved violent or disorderly disputation. The conduct must be such as to be likely to cause a response from anyone present who saw or heard the incident ...
>
> You must also be satisfied of the fault element, which is intention. That does not mean the prosecution has to prove the defendant intended to create a disturbance. The prosecution has to prove the accused intended to engage in the act that amounted to a disturbance if you find the conduct amounted to a disturbance. ...
>
> ... What you are required to find is, having regard to the particulars, has the prosecution proved beyond reasonable doubt that the accused created a disturbance by conduct that he intended to engage in at that time.
>
> ... The question then is, are you satisfied beyond reasonable doubt that the accused created a disturbance by [his] conduct and that he intended to engage in that conduct at that time.

26. The appellant was found guilty. He was sentenced to be severely reprimanded and fined $5,000 (suspended as to $3,000).

27. An alternative charge of an offence under s 60(1) of the *Discipline Act* was also proffered (to which the appellant also pleaded not guilty), but due to the conviction on the first charge, no finding was made.[27]

The appeal to the Tribunal

28. An appeal to the Tribunal under s 20 of the *Defence Force Discipline Appeals Act* 1955 (Cth) (the "*Appeals Act*") was dismissed.

29. As to the fault element of the s 33(b) offence, the Tribunal upheld the Judge Advocate's direction set out above.[28] The Tribunal further held that, even if this direction was erroneous, "failure to direct on 'recklessness' did not give rise to any miscarriage of justice."[29]

30. As to the meaning of s 33(b), in particular "disturbance", the Tribunal again rejected the argument that the Judge Advocate's direction was erroneous,[30] and made observations as to the evidence which sustained the conclusion that the case fell within the scope of the offence so directed.[31]

31. Accordingly, and having rejected other grounds of appeal, the Tribunal was not satisfied that "as a result of a wrong decision on a question of law, or of mixed law and fact, the conviction was wrong in law and that a substantial miscarriage of justice has occurred" (*Appeals Act*, s 23(1)).

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[27] Tribunal at [7]-[10] (261 FLR 226 at 229-230).
[28] See Tribunal at [58]-[59] (261 FLR 226 at 237-238).
[29] Tribunal at [61] (261 FLR 226 at 238).
[30] Tribunal at [75] (261 FLR 226 at 241).
[31] Tribunal at [76]-[77] (261 FLR 226 at 241).

The appeal to the Full Court

32. The Full Court (Keane CJ, Jagot and Yates JJ; Dowsett and Logan JJ dissenting) dismissed the appellant's appeal from the Tribunal under s 52(1) of the *Appeals Act*.

33. The questions of law before the Full Court, as articulated in the Amended Notice of Appeal to that Court, included whether:[32]

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- "the charge upon which the applicant was convicted was the subject of a fault element under s5.6.2 of the Criminal Code as to intention or recklessness in creating a result of conduct and upon which no direction was given to the Restricted Court Martial";

- "the charge upon which the applicant was convicted was the subject of an erroneous direction that an intention to create a result of conduct was irrelevant";

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- "the charge upon which the applicant was convicted was the subject of an erroneous direction as to the meaning of disturbance".

34. As to the elements of the offence, the majority reasoned that:[33]

> For the purposes of ss 3, 4 and 5 of the *Criminal Code* the physical element of the [s 33(b)] offence is **the creation of a disturbance**. The physical element is **conduct, albeit conduct of a particular kind**. One would not accurately or sensibly state the physical element of the offence in question as "creating". The relevant physical element of the offence is
30 **conduct which "creates a disturbance"**. For conduct, the fault element is intention. As the Tribunal explained, the relevant intention is the **intention to engage in the conduct alleged in the particulars**...

35. Accordingly, the majority (like the Tribunal) ultimately considered there was no need to look beyond whether the acts alleged in the particulars were intentional, to whether the appellant *intended to create a disturbance* or else was reckless in that respect. They considered that the elements of the offence were proved by the fact that:[34]

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> There could be no doubt that the appellant intended to confront Mr Snashall in his office, to insist that Mr Snashall address the appellant's concerns rather than his ordinary duties, and to persist in that confrontation "in the course of his short but rowdy pursuit of Mr Snashall".

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[32] Grounds 1(e), (g), (h).
[33] Full Court at [57] (emphasis added) (210 FCR 299 at 314).
[34] Full Court at [58] (210 FCR 299 at 314).

36. As to the proper construction of the expression "create a disturbance", the nub of the majority's reasoning was that s 33(b)[35]

> encompasses, as a matter of ordinary language, conduct whereby defence personnel and those with whom they work on service land **are disrupted in, or distracted from**, the performance of their duties...

37. That conclusion was based on dictionary definitions of "disturbance"; the surrounding paragraphs of s 33; and the broader content of Div 3 of Pt III of the *Discipline Act*.[36] Consequently, their Honours concluded[37]

> that [s 33(b)] is not limited to "tumults" or "riots" or breaches of the peace, but is, as a matter of ordinary parlance, apt to proscribe **the disruption of the orderly conduct of defence personnel**.

38. The majority went on to say that the Tribunal "was entitled to conclude that if the direction [as to the meaning of 'creates a disturbance'] were deficient it did not lead to a substantial miscarriage of justice".[38] This conclusion was supported only by reference to particular features of the facts; there is no reference to authorities such as *Hembury v Chief of the General Staff*.[39] The majority did not consider the consequential reduction in the burden of proof if the directions were wrong. Their Honours also did not refer to the substantial miscarriage of justice requirement in relation to the fault element issue.

39. Dowsett and Logan JJ, dissenting, each held that the physical element of the offence under s 33(b) was conduct, namely, "creating a disturbance"; the fault element was therefore "intention to create a disturbance"; and the Tribunal and Judge Advocate had erred in law in "concluding that the fault element was an intention to perform the acts comprising or causing the disturbance".[40] A substantial miscarriage of justice resulted.[41]

40. Logan J further held that the expression "creates a disturbance" in s 33(b) should be given "a meaning commensurate with a breach of the peace", that is, it involves an element of violence.[42] Again, a substantial miscarriage of justice occurred since the evidence did not, at its highest, establish such an element.[43]

Costs

41. In a separate judgment delivered on 19 April 2013, the Full Court ordered that the appellant pay the respondent's costs of the appeal to the Full Court.

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[35] Full Court at [63] (210 FCR 299 at 315).
[36] Full Court at [63], [64]-[65], and [66]-[68] respectively (210 FCR 299 at 315-317).
[37] Full Court at [69] (emphasis added) (210 FCR 299 at 317).
[38] Full Court at [72] (210 FCR 299 at 317).
[39] (1998) 193 CLR 641. But see Full Court at [44]-[45] (210 FCR 299 at 309-310), quoting *Hembury* in the course of discussing a submission which is not now advanced before this Court.
[40] Full Court at [115] and [122]; [198]-[199] (210 FCR 299 at 328-329, 332-333, 351-352).
[41] Full Court at [135] (see also at [137] in relation to the alternative conclusion that a fault element of recklessness applied) (210 FCR 299 at 335-336).
[42] See especially Full Court at [169], [176], [190], [193] (210 FCR 299 at 342, 345, 350).
[43] Full Court at [194] (210 FCR 299 at 350-351).

Part VI: The appellant's argument

Chapter 2 of the *Criminal Code*

42. The first significant issue in this appeal is whether the Judge Advocate's directions were incompatible with the terms of Chapter 2 of the *Criminal Code*, as they apply to the offence under s 33(b) of the *Discipline Act*. The appellant submits that the directions misconceived the physical element of the offence and, as a result, also misconceived the fault element.

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43. An offence to which the *Criminal Code* applies[44] "consists of physical elements and fault elements" (s 3.1(1)). As a result of s 3.1(2), s 5.6 and Div 6 of Ch 2, an offence presumptively includes a fault element "for" each physical element, unless the law creating the offence provides that the offence is one of strict or absolute liability. As Dowsett J pointed out below, the elements of the offence must be defined by reference to what is identified within the statutory provision which creates the offence.[45] The expression "creates a disturbance or takes part in creating or continuing a disturbance" in s 33(b) must contain at least one physical element.

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44. A physical element may be "conduct", "a result of conduct", or "a circumstance in which conduct, or a result of conduct, occurs" (s 4.1(1)). "Conduct" means "an act, an omission to perform an act or a state of affairs" (s 4.1(2)). Conduct "can only be a physical element if it is voluntary", i.e. "if it is a product of the will" of the person (s 4.2(1), (2)). In particular, if "conduct constituting an offence consists only of a state of affairs", it "is only voluntary if it is one over which the person is capable of exercising control" (s 4.2(5)).

45. A fault element for a particular physical element may be intention, knowledge,
30 recklessness or negligence, or another fault element as specified by the law that creates the offence (s 5.1(1), (2)). If a law does not specify a fault element for "a physical element that consists only of conduct", intention is the fault element for that physical element (s 5.6(1)); or if the physical element "consists of a circumstance or a result", recklessness applies (s 5.6(2)).

46. A person has intention with respect to conduct "if he or she means to engage in that conduct" (s 5.2(1)). To "engage in conduct" is defined for the purposes of the *Criminal Code* generally as meaning to "do an act" or "omit to perform an act" (s 4.1(2)). This definition cannot apply to s 5.2(1) insofar as the
40 relevant "conduct" is a "state of affairs".

47. A person is reckless with respect to a "result" if "he or she is aware of a substantial risk that the result will occur", and, "having regard to the circumstances known to him or her, it is unjustifiable to take the risk" (s 5.4(2)). "The question whether taking a risk is unjustifiable is one of fact" (s 5.4(3)). If recklessness is a fault element, "proof of intention, knowledge or recklessness will satisfy that fault element" (s 5.4(4)).

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[44] See *Criminal Code* s 2.2(2), Dictionary ("offence"); *Discipline Act* s 10.
[45] Full Court at [122] (210 FCR 299 at 333).

48. These provisions ought to be approached in the manner described by this Court in *R v LK*.[46] They ought also to be viewed in light of the law creating the particular offence to which the general provisions of the *Criminal Code* apply in the particular case: s 33 of the *Discipline Act*, construed in context.

Section 33 of the *Discipline Act*

49. As both the majority in the Full Court and Logan J recognized,[47] the central expression in s 33 – "creates a disturbance" – is open to at least two constructions. "Disturbance" may mean "[t]he interruption and breaking up of tranquility, peace, rest or settled condition; agitation (physical, social or political)". A particular instance of this is "a breach of public peace, a tumult, an uproar, an outbreak of disorder".[48] In other words, the choice is between a broader definition which simply means "something that disturbs", and the narrower sense of "an outbreak of disorder; a breach of public peace".[49]

50. The threshold question when construing s 33(b) is which of those meanings is intended. The appellant submits that the latter meaning, which Logan J preferred, is correct, and that the Judge Advocate's directions were wrong in endorsing a broader meaning akin to the first definition set out above.

51. All the words of s 33(b) should be given effect. Thus, "creates a disturbance" must be understood in light of the fact that a person can also "take[] part in creating or continuing a disturbance". This suggests that the section is proscribing something which is larger than just one person's physical acts.

52. The context of the expression "the person ... creates a disturbance or takes part in creating or continuing a disturbance" in s 33(b) of the *Discipline Act* includes the other paragraphs of s 33, surrounding provisions of *Discipline Act* (most pertinently those of Div 3 of Part III), the amendments and repeals which led to the current form of the section, and the antecedent common law.

53. Taken as a whole, Div 3 of Pt III of the *Discipline Act* deals with what the majority in the Full Court described as "a broad range of behaviour that may be characterised as violent or insubordinate".[50] Some of the conduct proscribed in Div 3 of Pt III of the Discipline Act may be characterized as "violent" (ss 25, 30, 33(a) and (d), 34). Some may be characterized as "insubordinate" (ss 25-29, 31-32). Some are both violent and insubordinate (ss 25, 30, 34). It does not follow that any particular provision extends to conduct which is *either* violent *or* insubordinate.

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[46] (2010) 241 CLR 177, especially at 219 [96]-[97]; *Boughey v The Queen* (1986) 161 CLR 10 at 30-31 per Brennan J; Pearce & Geddes, *Statutory Interpretation in Australia* (6th ed, 2006) at pp273-274; see now 7th ed (2013) at pp285-286. See also the history of the *Criminal Code* as set out in *LK* (2010) 241 CLR 177 at 220-223 [99]-[102].

[47] Full Court at [63], [65] (majority); [146] (Logan J) (210 FCR 299 at 315-316, 337).

[48] *Oxford English Dictionary* (2nd ed) vol IV, p872. The *Shorter Oxford English Dictionary* (5th ed, 2002) vol 1, p717 similarly gives a definition of "interruption and breaking up of a settled condition or of proper functioning; agitation (physical or social)" and *spec.* "a breach of the public peace".

[49] *Macquarie Dictionary* (5th ed), p487.

[50] Full Court at [66] (210 FCR 299 at 316).

54. Thus, Div 3 of Pt III does not support the view that s 33(b) extends to violent *or disorderly* (in the loose sense of loud and passionate) disputation.

55. In paragraph (a) of s 33, "assaults another person" has a clear meaning. There is an element of actual or feared violence. "Assault" is also a word with a long history of common law and statutory usage. Similarly, the expression in paragraph (d) "uses insulting or provocative words to another person" is linked to a well-established family of statutory provisions directed to considerations of public order; this is an expression which connotes the use of words which are calculated or likely to provoke a violent response.[51] In paragraph (c), "obscene" is also a term of art of long standing which is directed not to avoiding hurt feelings but to preserving public morality.[52]

56. As Logan J pointed out,[53] the current form of s 33 of the *Discipline Act* was inserted by the *Defence Legislation (Application of Criminal Code) Act* 2001 (Cth). This was intended to "harmonise the offence-creating and related provisions within the Act with the general principles of criminal responsibility as codified in Ch 2 of the *Criminal Code*, whilst at the same time ensuring that the offences continue to operate as intended by Parliament".[54]

57. However, the version of the section as in effect before 2001 made no material changes to s 33(b). By contrast, the words of s 33(c) were changed so as to replace "behaves in an obscene manner" with "engages in conduct that is obscene" – apparently to separate the circumstance that the conduct is obscene from "engag[ing] in [the] conduct" (i.e. "do[ing] an act") itself, to conform to the framework of Ch 2 of the *Criminal Code*. The fact that no such amendment was made to the words of s 33(b) suggests that those words, taken together, have a special, composite meaning.

58. The antecedents of s 33 of the *Discipline Act* were as follows:

(a) 13 Car II c 9 (the *Naval Discipline Act* 1661), s 22, which, in the context of dissatisfaction with conditions in the fleet, referred to a person "privately attempt[ing] to stir up any disturbance"; and s 23:

> None shall quarrell or fight in the Ship nor use reproachfull or provokeing speeches tending to make any **quarrell or disturbance** upon paine of Imprisonment and such other punishment as the Offence shall deserve and the Court martiall shall impose. [emphasis added]

(b) Those two provisions were substantially continued in subsequent *Naval Discipline Acts*: 22 Geo II c 33, ss 21 and 23; 23 & 24 Vict c 123, ss 18 and 30; 24 & 25 Vict c 115, ss 18 and 33; 28 & 29 Vict c 119, ss 18 and 33; and 29 & 30 Vict c 109, ss 18 and 37.

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[51] *Coleman v Power* (2004) 220 CLR 1 at 77 [193]; 98 [254].
[52] See *Crowe v Graham* (1968) 121 CLR 375 at 392-393 per Windeyer J; *Monis v The Queen* (2013) 87 ALJR 340 at 402 [312] per Crennan, Kiefel and Bell JJ.
[53] Full Court at [148] (210 FCR 299 at 338).
[54] Explanatory Memorandum, Defence Legislation (Application of Criminal Code) Bill 2001, p2.

(c) *Naval Discipline Act* 1957 (UK) c 53, s 13 (applied in Australia by the *Naval Defence Act* 1910 (Cth) s 34):

> Every person subject to this Act who –
>
> (a) fights or quarrels with any other person, whether subject to this Act or not; or
>
> (b) uses threatening, abusive, insulting or provocative words or behaviour **likely to cause a disturbance**,
>
> shall be liable to imprisonment for a term not exceeding two years or any less punishment authorised by this Act.[55]

59. As Logan J also pointed out, s 33 of the *Discipline Act* is in narrower terms than s 13 of the *Naval Discipline Act* 1957 in several respects (the excessive breadth of the latter having been explicitly acknowledged in the Explanatory Memorandum to the Bill for the *Discipline Act*):[56]

(a) "Quarrelling", as opposed to "fighting", was omitted from s 33 – as were "threatening" or "abusive", as opposed to "insulting or provocative", words and behaviour. "Fighting" was rephrased with more precision as "assault".

(b) The words "...words or behaviour likely to cause" a disturbance became "create" a disturbance. Conduct "likely" to cause a breach of the peace may now be viewed as covered only by the reference in s 33(d) to using "insulting or provocative words to another person".[57]

(c) Such conduct was made a service offence only when it occurred on service land (etc) and public places.

60. The inclusion of a provision dealing with obscenity in s 33(c) does not detract from these observations. Obscenity is a form of offensive behaviour, and to attract criminal penalties such behaviour should be of a serious kind.[58]

61. The long legislative history recounted above suggests that, even before the enactment of the narrower s 33 of the *Discipline Act* in place of s 13 of the 1957 Act, the term "disturbance" was used in its more confined sense as something involving a breach of the peace.

62. To say this is not to change the words used in the statute. It is simply to recognize that various words may be used to import the same or closely related concepts. There is a long history of such variations on a theme of provisions seeking to preserve the peace. The word used in s 33(b) conserves the drafting history of provisions which sought to prevent fights, quarrels and brawls – save that, now, mere quarrels are not enough to

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[55] Emphasis added. See now *Armed Forces Act* 2006 (UK) c 52 s 21(2)(a)(ii).
[56] See Full Court at [152] (210 FCR 299 at 339).
[57] Cf *Coleman v Power* (2004) 220 CLR 1 at 77 [193]; 98 [254].
[58] Cf *Monis v The Queen* (2013) 87 ALJR 340 at 402 [312]; cf 350-351 [12]; 358-359 [58]-[59].

engage the provision. The exclusion of the language of "behaviour likely to cause a disturbance" indicates that it is insufficient to focus on the character of the accused's behaviour; rather, a disturbance must have occurred.

63. A common way of using the term "disturbance" has been as a generalization embracing a set of specific common law offences relating to public order (riot, rout, unlawful assembly and affray).[59] The concept of a breach of the peace is commonly an element of such offences (under common law and statute).[60] Thus, authorities indicating the content of the notion of breach of the peace should be considered in interpreting statutory offences concerning disturbances.

64. In *R v Howell* – a case involving binding-over powers – the English Court of Appeal held that:[61]

> [T]here is a breach of the peace whenever harm is actually done or is likely to be done to a person or in his presence to his property or a person is in fear of being so harmed through an assault, an affray, a riot, an unlawful assembly or other disturbance.

65. In *Percy v Director of Public Prosecutions* the touchstone was simply phrased as "violence or threats of violence".[62] Subsequently, in *R (Laporte) v Chief Constable of Gloucestershire Constabulary*[63] (another case about police powers), Lords Brown and Mance pointed out that the *Howell* definition conflated an *apprehended* breach of the peace (a circumstance sufficient to engage binding-over powers) with an *actual* breach of the peace, which means when there is actual violence.[64]

66. The authorities make a sharp distinction between the limited scope of a breach of the peace and mere rowdy speech. In Tasmania, Crawford CJ said in *Nilsson v McDonald* that "I am unaware of any authority in which it was held that a breach of the peace can occur in circumstances where the person concerned is merely argumentative or making excessive noise, without a consequent likelihood of violence or harm to any person or property, or of persons being put in fear of such violence or harm".[65] To the contrary, there is long-standing authority that shouting loudly, even if a crowd is attracted, cannot constitute an offence framed in terms of disturbance of the peace.[66]

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[59] See, eg, Brownlie, *The Law Relating to Public Order* (1968) at 39, 47, 55 and the sources cited; *Jowitt's Dictionary of English Law* (3rd ed, 2010) vol 1, p736 (meaning (4)).
[60] See generally Brownlie, *The Law Relating to Public Order* (1968) at 4-5, 37-59, 119-120; see also D G T Williams, "Freedom of Assembly and Free Speech: Changes and Reforms in England" (1975) 1 *University of New South Wales Law Journal* 97 at 100.
[61] [1982] QB 416 at 427.
[62] [1995] 1 WLR 1382 at 1394.
[63] [2007] 2 AC 105. See Full Court at [179]-[181] per Logan J (210 FCR 299 at 345-346).
[64] [2007] 2 AC 105 at 150-152 [111]-[113] (Lord Brown); 159-160 [137] (Lord Mance). Lord Bingham was similarly careful to distinguish between actual and imminent breaches of the peace: see at 124-126 [29]-[33].
[65] (2009) 19 Tas SR 173 at 177 [7].
[66] See, eg, *Falvey v Burns* [1939] St R Qd 217. See also *Williams v Pinnuck* (1983) 68 FLR 303, *Neave v Ryan* [1958] Tas SR 58, and *Beaty v Glenister* (1884) 51 LT(NS) 304 (in each case, loud shouting was held not to amount to disturbing the public peace). Cf *Deevy v Abrahams; Ex parte Abrahams* [1896] 7 QLJ 30 (threatened violence was sufficient to sustain a conviction).

67. The adoption of the narrower meaning is further supported by the consideration, to which Logan J pointed, that "a soldier is gifted with all the rights of other citizens".[67] That being so, there is no reason to think that the presumption that freedom of expression is not intended to be curtailed[68] applies with any lesser force to a statute dealing with military discipline.

68. The appellant therefore submits that, in the context of "creating a disturbance", there must have been actual violence, or a person must have feared violence to themselves, in the course of the disturbance. This may not exhaustively define the content of s 33(b), although it is not necessary to do so to decide this appeal.

69. If this submission is accepted, it alone is sufficient to conclude that the Full Court should have held that the Tribunal erred on a question of law relating to the Judge Advocate's direction on the content of the offence under s 33(b).

The physical element of the offence under s 33(b)

70. The framework of Chapter 2 of the *Criminal Code* should be applied to the offence under s 33(b) by reference to the substance of the offence, not by reference to some parsing of the literal words of the section. The applicant submits that s 33(b), properly construed, requires that there be a physical element consisting of a "state of affairs" within the sense of s 4.1(2) of the *Criminal Code*. As indicated above, that state of affairs involves (at least) a breach of the peace.

71. In *Agius v The Queen*,[69] this Court accepted that the ordinary meaning of a "state of affairs" for the purposes of the *Criminal Code* (Cth) is "the way in which events or circumstances stand disposed (at a particular time or within a particular sphere)." The Court did not exhaustively define the content of the expression but held that it is capable of accommodating the concept of a continuing offence. It is also capable of accommodating the notion of creating a disturbance or taking part in creating or continuing a disturbance, which, of necessity, requires a person's involvement.

72. The rationale for an offence framed in terms of a state of affairs is that the state of affairs is more readily fixed upon as proof of the offence than are the underlying acts.[70] This rationale would seem to apply to the creation of a disturbance, given that a state of affairs involving a breach of the peace could be brought about in a multitude of subtle ways, which are often not readily susceptible to description in evidence.

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[67] *Burdett v Abbot* (1812) 4 Taunt 401 at 449-450 [128 ER 384 at 403]; *Groves v Commonwealth* (1982) 150 CLR 113 at 125-126; *Re Tracey; ex parte Ryan* (1989) 166 CLR 518 at 538, 546, 575, 584; see Full Court at [165] (210 FCR 299 at 341-342).

[68] See, eg, *Coco v The Queen* (1994) 179 CLR 427 at 436-438; *Al-Kateb v Godwin* (2004) 219 CLR 562 at 577; *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309 at 328; *Evans v State of New South Wales* (2008) 168 FCR 576 at 593-595 [68]-[75].

[69] (2013) 87 ALJR 906 at 912 [42].

[70] See *R v Grant* [1975] 2 NZLR 165 at 170: "...seems plainly due to the practical necessity of punishing in certain circumstances a person against whom nothing can be proved except possession."

73. Thus, the physical element of the s 33(b) offence amounts to, to paraphrase Brennan J in *He Kaw Teh v The Queen*,[71] a state of affairs that exists because of what the person to whom the state of affairs is attributed does in relation to it. As was said in the New Zealand decision of *R v Grant*, it "represents not an act but the passive consequences of a prior act".[72] The accused's involvement in that state of affairs may make the accused criminally liable for it, but without the need to define the specific acts or omissions as an element of the offence. On this approach, a particular person's involvement in the state of affairs is a matter for evidence only.[73]

74. Alternatively, the physical element of "creates a disturbance" may be treated as comprising conduct consisting of *both* an act or acts *and* a state of affairs. This would be at odds with the rationale for a state of affairs offence described above. But it would be consistent with the terms of s 33(b), if read in a more literal fashion, and it would more readily provide for attribution of blame for the state of affairs to a particular person who was involved in it.

75. As a further alternative, the physical element of "creates a disturbance" may be treated as purely an "act" or "acts", but in an extended sense which incorporates elements of the factual context and surrounding circumstances connected with the accused's physical movements. Such an approach to defining the *actus reus* is known at common law, although it is not without difficulty.[74] That would mean that the "act" of the accused incorporated the consequent breach of the peace.

76. Each of the approaches outlined above produces the result that s 33(b) contains a physical element in the form of "conduct" as defined in s 4.1(2) of the *Criminal Code*. When the Full Court majority described s 33(b) as prescribing a physical element of "conduct, albeit conduct of a particular kind", the last-mentioned approach seems to have been in mind. However, their Honours went on to commit the critical error of bifurcating the appellant's "conduct" from the statutory words: "The relevant physical element of the offence is *conduct which 'creates a disturbance'*".[75] As it had done in both the Court Martial and the Tribunal, this error in relation to the physical element caused the Full Court majority's error in relation to the fault element.

The fault element

77. If it is accepted that the relevant physical element of the offence constitutes "conduct" within Ch 2 of the *Criminal Code*, in any of the three alternative ways described above, then it follows under s 5.6(1) that the corresponding fault element is "intention". The question then becomes what was the content of the required "intention".

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[71] (1985) 157 CLR 523 at 564.
[72] *R v Grant* [1975] 2 NZLR 165 at 169; see *Beckwith v The Queen* (1975) 135 CLR 569 at 575.
[73] Cf Brownlie, *The Law Relating to Public Order* (1968) at 51-52.
[74] See Glanville Williams, *Criminal Law: The General Part* (1953) at 15-21.
[75] See Full Court at [57] (210 FCR 299 at 314) (emphasis added).

78. As indicated earlier, the nature of an intention to engage in conduct in the form of a state of affairs is not spelled out in the *Criminal Code*. By reference to s 4.2(5) (voluntariness), "means to engage in that [state of affairs]" may be thought to mean that the person means to exercise control over it.[76]

79. By analogy to the fault element of the offence in *R v Tang*,[77] to which Dowsett J referred,[78] it may be that the requisite intention could be sufficiently proved by inference from knowledge as to the existence of a breach of the peace. The authorities on other offences framed in terms of creating disturbances or breaching the peace offer limited assistance, but would be consistent with the use of knowledge of the state of affairs as a basis for inferring the relevant intention.[79]

80. The alternative approach of treating the physical element as comprising both an act or acts and a state of affairs would equally engage s 5.6(1) of the *Criminal Code*, since the physical element still consists "only of conduct". On this basis the requisite intention would apply both to the acts and to the state of affairs. Thus, the Full Court majority would have been right to the extent that it said that the appellant had to intend to engage in the acts particularized in the charge; but it was still wrong in denying that an intention *to create a disturbance* was also necessary.

81. The other alternative analysis, at para 75 above, of treating "creates a disturbance" as an "act" in a sense which incorporates certain elements of the factual context and surrounding circumstances, would again engage s 5.6(1). If that view is taken, it is not possible to separate the physical acts of the accused from the context and circumstances, so as to regard the fault element as attaching to the former but not the latter. The accused must intend his physical movement together with what follows from it.

82. The conclusion of Dowsett and Logan JJ in the Full Court expresses the last point concisely. As their Honours put it, the fault element is an "intention to create a disturbance".[80] It is not an intention to engage in specified physical acts, where those acts result in a disturbance.[81] That distinction encapsulates the error on a question of law which the Tribunal and the Full Court ought to have found occurred here. Chapter 2 of the *Criminal Code* provides that a fault element is "for" a particular physical element. It does not accord with the framework of the *Criminal Code*, nor with the proper construction of s 33 of the *Discipline Act*, to require no more than an intention to engage in particular "acts", when those "acts" are either not part of, or not the whole of, the physical element of the offence.

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[76] Cf *Agius v The Queen* (2013) 97 ALJR 906 at 913 [44].
[77] (2008) 237 CLR 1.
[78] Full Court at [119]-[120] (210 FCR 299 at 331-332).
[79] As Brownlie observes of unlawful assembly, historically "the sources have not paid much, or any, attention to the *mens rea* of the offence": *The Law Relating to Public Order* (1968) at 40. Brownlie also quotes J C Smith and Brian Hogan, *Criminal Law* (1965) at 554, stating that the *mens rea* of unlawful assembly was that the accused "intended to use or to aid and abet the use of violence" or "to do or aid and abet acts which he knows to be likely to cause a breach of the peace".
[80] Full Court at [115], [122], [199], [216] (210 FCR 299 at 329, 332-333, 352, 355).
[81] Full Court at [57] (210 FCR 299 at 314).

83. For those reasons, the Full Court majority erred in holding that there was no error by the Tribunal on a question of law. The Judge Advocate's direction to the Court Martial was wrong, and the Tribunal erred in dismissing the appeal to it. However the physical element is defined, the fault element was not proved.

Alternatively, s 33(b) prescribes a physical element of a "result of conduct" and a fault element of "recklessness"

84. The Judge Advocate's direction, and the decisions of the Tribunal and the Full Court, had the effect that no fault element at all needed to be proved in relation to the "disturbance" itself, as opposed to the specific physical acts attributed to the appellant. For that reason, if this Court holds that *any* fault element – be it intention, knowledge or recklessness – attaches to the physical element that an accused person "create[d] a disturbance", then there was an error of law below.

85. In particular, the appellant submits, in the alternative, that the physical element of the offence could be regarded as comprising both conduct (the "acts" of the appellant) and a result of conduct (the "disturbance" thereby created). This analysis may be preferable to the first alternative approach, noted at paragraph 74 above, of defining the physical element as including both "acts" and a "state of affairs", since the rationale for a "state of affairs" offence is that the underlying "acts" need not be proved. The matter described by s 33(b) as a disturbance meets the descriptions of both a "state of affairs" in the ordinary sense and also a "result of conduct". But if the act or acts comprising the "conduct" in the latter sense must also be proved, then it accords with the framework of the *Criminal Code* to treat the disturbance as a result of conduct. The word "only" in s 5.6(1) supports this approach.

86. That would lead to the conclusion that there was a fault element of recklessness for the physical element which consisted of a result of conduct (under s 5.6(2) of the *Criminal Code*). It would have to be proved that the appellant was aware of a substantial risk that a breach of the peace would result from his acts, and that it was unjustifiable to take that risk having regard to the circumstances known to the appellant.

87. Any proposition that the appellant was aware of such a risk is contrary to his unchallenged evidence that he expected that Mr Snashall would listen to him. And the circumstances (including, for example, Mr Snashall's racially flavoured remarks, dismissive attitude, equally raised voice, and refusal to proffer the explanation the appellant sought from him) cannot support a conclusion that it was unjustifiable to take that risk.

88. The charge against the appellant, of course, particularized no result of conduct at all. No attempt was made to prove that the appellant was even aware of any such result, or even likely result. The Judge Advocate's directions were incompatible with the view that the appellant's awareness of such results or likely results was even relevant. Accordingly, again, the Full Court, the Tribunal and the Judge Advocate erred, and, however the physical element is defined, the fault element was not proved.

A substantial miscarriage of justice occurred

89. In this Court, *Hembury v Chief of the General Staff*[82] describes principles for determining whether "a substantial miscarriage of justice has occurred", for the purposes of s 23(1)(b) of the *Appeals Act*. That was a case in relation to s 23(1)(c) of the *Appeals Act* ("material irregularity"),[83] but the appellant submits that the test is the same in respect of s 23(1)(b).

10 90. In *Hembury* Gummow and Callinan JJ (Hayne J concurring) referred to an observation of Cussen J that a miscarriage occurs "if, as a final result of what has been said by the [presiding judge], the jury retire to their room under a wrong impression in relation to these matters, and the result of the case is such as to show that they may have been influenced in their verdict by the misdirection".[84] Their Honours also approved of Windeyer J's point that, where the complaint was of misdirection of law, "there has been an error in law; and the court must assume that it has, or may have, resulted in a miscarriage of justice, for a party has a right to have his case tried according to law"; that observation applied "with added force" to military tribunals.[85]

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91. In *Jones v Chief of Navy*, the Full Court of the Federal Court expressed the test as being whether the appellant was "deprived of a fair chance of acquittal".[86] Reference was also made to *Weiss v The Queen*.[87] The present case does not require any decision as to whether the analysis in *Weiss* of principles relating to the common form "proviso" provisions warrants any refinement of the principles as stated in *Hembury*. That is because, even if adoption here of what was said in *Weiss* would lead to a standard more favourable to the appellant,[88] in this case the appellant succeeds either way.

30 92. The Judge Advocate explicitly disavowed any need for the Court Martial panel to decide whether the appellant had an "intention to create a disturbance" (or indeed recklessness), as distinct from the intention to engage in the various "acts" set out in the particulars to the charge.

93. The charge did not particularize the "disturbance". It simply assumed that the appellant's physical acts sufficed – perhaps on the basis that whatever "disturbed" was a "disturbance". And the charge did not particularize any state of mind in relation to the putative disturbance, however that disturbance is defined. Again it assumed that an intention to engage in the specified
40 physical acts sufficed. For the reasons given above, it did not.

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[82] (1998) 193 CLR 641.
[83] See also Dowsett J's discussion of *Hembury* at [132]-[134] (210 FCR 299 at 334-335).
[84] *Hembury* (1998) 193 CLR 641 at 656 [38]; *Holford v Melbourne Tramway and Omnibus Co Ltd* [1909] VLR 497 at 526 per Cussen J; *Balenzuela v De Gail* (1959) 101 CLR 226 at 233 per Dixon CJ.
[85] *Hembury* (1998) 193 CLR 641 at 656 [39]-[40].
[86] (2012) 205 FCR 458 at 471 [54]. Cf *Mraz v The Queen* (1955) 93 CLR 493 at 514 per Fullagar J. See also *Hembury* (1998) 193 CLR 641 at 649 [15]-[17].
[87] (2005) 224 CLR 300.
[88] Cf *Jones v Chief of Navy* (2012) at 471-472 [54]-[56].

94. There was no evidence whatsoever before the Court Martial which might have disclosed that the appellant had any intention to create a disturbance, or knowledge of the likelihood of a disturbance or a breach of the peace arising from his actions. The appellant's direct evidence of his state of mind in this respect, which was unchallenged, was that he "did not mean for the situation to deteriorate to that level and for everyone in the workplace to see that".[89] The fact that he and Mr Snashall had both lost control of the situation does not, on any view, rise so high as to prove that he intended to create a disturbance, or was even reckless – especially given the fact that the appellant's intention was to seek an explanation as to Mr Snashall's racial slur, but he "never even anticipated he would not listen to me".[90]

95. If the Court accepts the submission above that s 33(b) requires that there be a breach of the peace, then it was not possible on the evidence for the Court Martial to conclude that the appellant had in fact "created a disturbance".

96. It was also impossible for the Court Martial to conclude that the appellant either intended to create a disturbance, or was reckless as to whether he created a disturbance. That is so irrespective of the view one takes on what constitutes a "disturbance".

97. For those reasons, the appellant submits that a substantial miscarriage of justice occurred. This is, moreover, not just a case in which an erroneous direction worked in favour of the prosecution and deprived the appellant of a fair chance of acquittal. It is a case where the charge and the evidence could not possibly sustain a conviction. The appellant was entitled to an acquittal.

Part VII: Applicable statutory provisions

98. The Annexure to these submissions sets out verbatim the applicable statutory provisions as they existed at the relevant time, together with the relevant date and reprint number, and their current status.

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[89] T333.10-11.
[90] T333.33-34.

Part VIII: Orders sought

99. The appellant seeks the following orders:

1. That the appeal be allowed with costs.

2. That the orders of the Full Court of the Federal Court dated 26 February 2013 and 19 April 2013 be set aside, and in lieu thereof it be ordered that:

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1. The appeal to that Court be allowed, with costs.

2. Save to the extent that it granted leave to appeal, the order of the Tribunal made on 16 March 2012 dismissing the appeal to it be set aside.

3. In lieu of that order, it be ordered that:

(a) The appellant's appeal to the Tribunal be allowed.

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(b) The appellant's conviction and penalty in respect of the offence of creating a disturbance on service land on 3 February 2010 contrary to s 33(b) of the *Defence Force Discipline Act* 1982 (Cth) be quashed.[91]

Part IX: Time required for oral argument

100. The appellant estimates that one and a half hours will be required for oral
30 argument on behalf of the appellant.

Dated: 20 September 2013

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[91] See Full Court at [214]-[215] (Logan J); [136] (Dowsett J) (210 FCR 299 at 354-355, 335).

Annexure: Relevant legislative provisions

1. *Criminal Code* (Cth), as at 3 February 2010 (Reprint 4)

[None of the following provisions have been amended as at the date of these submissions.]

Chapter 2—General principles of criminal responsibility

Part 2.1—Purpose and application

Division 2

2.1 Purpose

The purpose of this Chapter is to codify the general principles of criminal responsibility under laws of the Commonwealth. It contains all the general principles of criminal responsibility that apply to any offence, irrespective of how the offence is created.

2.2 Application

(1) This Chapter applies to all offences against this Code.

(2) Subject to section 2.3, this Chapter applies on and after 15 December 2001 to all other offences.

(3) Section 11.6 applies to all offences.

2.3 Application of provisions relating to intoxication

Subsections 4.2(6) and (7) and Division 8 apply to all offences. For the purpose of interpreting those provisions in connection with an offence, the other provisions of this Chapter may be considered, whether or not those other provisions apply to the offence concerned.

Part 2.2—The elements of an offence

Division 3—General

3.1 Elements

(1) An offence consists of physical elements and fault elements.

(2) However, the law that creates the offence may provide that there is no fault element for one or more physical elements.

(3) The law that creates the offence may provide different fault elements for different physical elements.

3.2 Establishing guilt in respect of offences

In order for a person to be found guilty of committing an offence the following must be proved:

(a) the existence of such physical elements as are, under the law creating the offence, relevant to establishing guilt;

(b) in respect of each such physical element for which a fault element is required, one of the fault elements for the physical element.

Note 1: See Part 2.6 on proof of criminal responsibility.

Note 2: See Part 2.7 on geographical jurisdiction.

Division 4—Physical elements

4.1 Physical elements

(1) A physical element of an offence may be:

(a) conduct; or

(b) a result of conduct; or

(c) a circumstance in which conduct, or a result of conduct, occurs.

(2) In this Code:

conduct means an act, an omission to perform an act or a state of affairs.

engage in conduct means:

(a) do an act; or

(b) omit to perform an act.

4.2 Voluntariness

(1) Conduct can only be a physical element if it is voluntary.

(2) Conduct is only voluntary if it is a product of the will of the person whose conduct it is.

(3) The following are examples of conduct that is not voluntary:

(a) a spasm, convulsion or other unwilled bodily movement;

(b) an act performed during sleep or unconsciousness;

(c) an act performed during impaired consciousness depriving the person of the will to act.

(4) An omission to perform an act is only voluntary if the act omitted is one which the person is capable of performing.

(5) If the conduct constituting an offence consists only of a state of affairs, the state of affairs is only voluntary if it is one over which the person is capable of exercising control.

(6) Evidence of self-induced intoxication cannot be considered in determining whether conduct is voluntary.

(7) Intoxication is self-induced unless it came about:

(a) involuntarily; or

(b) as a result of fraud, sudden or extraordinary emergency, accident, reasonable mistake, duress or force.

...

Division 5—Fault elements

5.1 Fault elements

(1) A fault element for a particular physical element may be intention, knowledge, recklessness or negligence.

(2) Subsection (1) does not prevent a law that creates a particular offence from specifying other fault elements for a physical element of that offence.

5.2 Intention

(1) A person has intention with respect to conduct if he or she means to engage in that conduct.

(2) A person has intention with respect to a circumstance if he or she believes that it exists or will exist.

(3) A person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events.

5.3 Knowledge

A person has knowledge of a circumstance or a result if he or she is aware that it exists or will exist in the ordinary course of events.

5.4 Recklessness

(1) A person is reckless with respect to a circumstance if:

(a) he or she is aware of a substantial risk that the circumstance exists or will exist; and

(b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.

(2) A person is reckless with respect to a result if:

(a) he or she is aware of a substantial risk that the result will occur; and

(b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.

(3) The question whether taking a risk is unjustifiable is one of fact.

(4) If recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness will satisfy that fault element.

...

5.6 Offences that do not specify fault elements

(1) If the law creating the offence does not specify a fault element for a physical element that consists only of conduct, intention is the fault element for that physical element.

(2) If the law creating the offence does not specify a fault element for a physical element that consists of a circumstance or a result, recklessness is the fault element for that physical element.

Note: Under subsection 5.4(4), recklessness can be established by proving intention, knowledge or recklessness.

2. *Defence Force Discipline Act* 1982 (Cth), as at 3 February 2010 (Reprint 2)

[None of the following provisions have been amended as at the date of these submissions.]

3 Interpretation

(1) In this Act, unless the contrary intention appears: ...

defence member means:

(a) a member of the Permanent Navy, the Regular Army or the Permanent Air Force; or

(b) a member of the Reserves who:

(i) is rendering continuous full-time service; or

(ii) is on duty or in uniform. ...

service land means land (including a building or other structure) used or occupied by:

(a) the Defence Force;

(b) an allied force; or

(c) an institution of the Defence Force or of an allied force.

33 Assault, insulting or provocative words etc.

A person who is a defence member or a defence civilian is guilty of an offence if the person is on service land, in a service ship, service aircraft or service vehicle or in a public place and the person:

(a) assaults another person; or

(b) creates a disturbance or takes part in creating or continuing a disturbance; or

(c) within the view of hearing of another person, engages in conduct that is obscene; or

(d) uses insulting or provocative words to another person.

Maximum punishment: Imprisonment for 6 months.

3. *Defence Force Discipline Appeals Act* 1955 (Cth), as at 3 February 2010 (Reprint 2)

[None of the following provisions have been amended as at the date of these submissions.]

20 Appeals to Tribunal

(1) Subject to this Act, a convicted person or a prescribed acquitted person may appeal to the Tribunal against his or her conviction or his or her prescribed acquittal but an appeal on a ground that is not a question of law may not be brought except by leave of the Tribunal.

(2) An appeal does not lie to the Tribunal against a prescribed acquittal if, in the proceedings before the court martial or the Defence Force magistrate that resulted in the prescribed acquittal, evidence of the unsoundness of mind of the prescribed acquitted person was adduced by the defence.

23 Quashing of conviction etc.

(1) Subject to subsection (5), where in an appeal it appears to the Tribunal:

(a) that the conviction or the prescribed acquittal is unreasonable, or cannot be supported, having regard to the evidence;

(b) that, as a result of a wrong decision on a question of law, or of mixed law and fact, the conviction or the prescribed acquittal was wrong in law and that a substantial miscarriage of justice has occurred;

(c) that there was a material irregularity in the course of the proceedings before the court martial or the Defence Force magistrate and that a substantial miscarriage of justice has occurred; or

(d) that, in all the circumstances of the case, the conviction or the prescribed acquittal is unsafe or unsatisfactory;

it shall allow the appeal and quash the conviction or the prescribed acquittal.

(2) Subject to subsection (5), where in an appeal it appears to the Tribunal that there is evidence that:

(a) was not reasonably available during the proceedings before the court martial or the Defence Force magistrate;

(b) is likely to be credible; and

(c) would have been admissible in the proceedings before the court martial or the Defence Force magistrate;

it shall receive and consider that evidence and, if it appears to the Tribunal that the conviction or the prescribed acquittal cannot be supported having regard to that evidence, it shall allow the appeal and quash the conviction or the prescribed acquittal.

(3) Subject to subsection (5), where in an appeal against a conviction it appears to the Tribunal that, at the time of the act or omission the subject of the charge, the appellant was suffering from such unsoundness of mind as not to be responsible, in accordance with law, for that act or omission, the Tribunal shall:

(a) allow the appeal and quash the conviction;

(b) substitute for the conviction so quashed an acquittal on the ground of unsoundness of mind; and

(c) direct that the person be kept in strict custody until the pleasure of the Governor-General is known.

(4) Where in an appeal it appears to the Tribunal that the court martial or the Defence Force magistrate should have found that the appellant, by reason of unsoundness of mind, was not able to understand the proceedings against him or her and accordingly was unfit to stand trial, the Tribunal shall allow the appeal, quash the conviction or prescribed acquittal and direct that the appellant be kept in strict custody until the pleasure of the Governor-General is known.

(5) The Tribunal shall not quash a conviction under subsection (3) or (4) if there are grounds for quashing the conviction under subsection (1) or (2).

(6) Section 194 of the Defence Force Discipline Act 1982 applies to a direction under subsection (3) or (4) of this section as if that direction were a direction to which that section applied.

24 New trial

Where the Tribunal quashes a conviction, or a prescribed acquittal, of a person of a service offence, the Tribunal may, if it considers that in the interests of justice the person should be tried again, order a new trial of the person for the offence.

52 Appeal to Federal Court of Australia from decisions of the Tribunal

(1) An appellant or Chief of the Defence Force or a service chief may appeal to the Federal Court of Australia on a question of law involved in a decision of the Tribunal in respect of an appeal under this Act, not being a decision given by a single member exercising the powers of the Tribunal.

(2) An appeal under subsection (1) shall be instituted not later than the twenty-eighth day after the day on which a copy of a document setting out the terms of the decision of the Tribunal is furnished to the person or within such further time as the Federal Court of Australia (whether before or after the expiration of that day) allows.

(3) The Federal Court of Australia has jurisdiction to hear and determine matters arising under this section with respect to which appeals are instituted in that Court in accordance with this section and that jurisdiction shall be exercised by that Court constituted as a Full Court.

(4) The Federal Court of Australia shall hear and determine the appeal and may make such order as it thinks appropriate by reason of its decision.

(5) Without limiting by implication the generality of subsection (4), the orders that may be made by the Federal Court of Australia on an appeal include:

(a) an order affirming or setting aside the decision of the Tribunal;

(b) an order remitting the case to be heard and decided again by the Tribunal in accordance with the directions of the Court;

(c) an order granting a new trial by a court martial or a Defence Force magistrate; and

(d) where the Court sets aside a decision of the Tribunal quashing a conviction or quashing a prescribed acquittal—an order reinstating the conviction or the prescribed acquittal, as the case may be.

4. *Court Martial and Defence Force Magistrate Rules* (Cth), SLI 2009 No 296

[None of the following provisions have been amended as at the date of these submissions.]

8 Charge sheets

(1) A charge against an accused person must be entered in a charge sheet that is signed and dated by the Director of Military Prosecutions.

(2) A charge sheet for the trial of an accused person by a court martial or Defence Force magistrate may contain more than 1 charge if the offences charged:

(a) form, or are part of, a series of offences of the same or a similar character; or

(b) are founded on the same or closely related acts or omissions; or

(c) are founded on a series of acts done or omitted to be done in the prosecution of a single purpose; or

(d) are alternative to other charges in the charge sheet.

(3) At a trial before a court martial or Defence Force magistrate, 2 or more accused persons may be charged in the same charge sheet with offences alleged to have been committed by them separately if the acts or omissions on which the charges are founded are so connected that it is in the interests of justice that they be tried together.

(4) A charge sheet must be in accordance with Schedule 2.

(5) If charges against an accused are contained in more than 1 charge sheet, the Director of Military Prosecutions may direct the Registrar to:

(a) convene 1 court martial for the trial of the charges on all charge sheets; or

(b) refer all of the charges for trial before a single Defence Force magistrate; or

(c) do some combination of paragraph (a) and (b).

9 Charges

(1) A charge shall state 1 offence only.

(2) A charge shall consist of 2 parts, namely:

(a) a statement of the offence that the accused person is alleged to have committed; and

(b) particulars of the act or omission constituting the offence.

(3) A statement of an offence shall contain:

(a) in the case of an offence other than an offence against the common law — a reference to the provision of the law creating the offence; and

(b) in any case — a sufficient statement of the offence.

(4) Without prejudice to any other sufficient manner of setting out the statement of an offence, the statement of an offence shall be sufficient if it is set out in the appropriate form in Schedule 1.

(5) Particulars of an offence shall contain a sufficient statement of the circumstances of the offence to enable the accused person to know what it is intended to prove against that person as constituting the offence.

(6) At a trial by a court martial or Defence Force magistrate, 2 or more accused persons may be charged jointly in 1 charge of an offence alleged to have been committed by them jointly.

10 How charges to be construed

The statement of an offence and particulars of that offence, in a charge, shall be read and construed together.

...

Schedule 1 Statement of offences

(subrule 9 (4))

Part 1 Offences against Defence Force Discipline Act 1982

Item	Provision	Offence
... 48	Paragraph 33 (b)	Creating a disturbance [on service land] [in service ship] [in service aircraft] [in service vehicle] [in a public place] ...

Schedule 2 Form of charge sheet

(subrule 8 (4))

Charge sheet

[*Insert Accused's Service Details*], a member of the [*Royal Australian Navy*] [*Australian Army*] [*Royal Australian Air Force*] and at the time of the offence/*s* specified in the following charge/*s* a defence member under the *Defence Force Discipline Act 1982*, is charged as follows:

First charge [*Defence Force Discipline Act 1982*, subsection 61 (3) and *Crimes Act 1900* (ACT), section 23]	[*Engaging in conduct outside the Jervis Bay Territory that is a Territory offence, being the offence of inflicting actual bodily harm.*] Insert particulars of the offence.
Second charge [*Defence Force Discipline Act 1982*, paragraph 33 (a)]	[*Assaulting another person on service land etc.*] Insert particulars of the offence.

.....

Signed

Director of Military Prosecutions

Dated .....