IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

No. S162 of 2013

BETWEEN:

TING LI
Appellant

and

CHIEF OF ARMY
Respondent

RESPONDENT'S SUBMISSIONS

Part I: Publication on the Internet

1. This submission is in a form suitable for publication on the internet.

Part II: Summary of Issues

2. As to the issues raised by the Appellant, set out at [2] of his submissions.

3. First, the phrase "creates a disturbance" in s 33(b) of the *Defence Force Discipline Act 1982* (Cth) (**DFDA**) comprises conduct and an intention to engage in that conduct, as upheld by the majority of the Full Court.[1] If that analysis does not find favour with this court, the alternate contention is that the phrase attracts physical elements of conduct and result – the latter attracting a fault element of recklessness. On the facts of the case, the failure by the Judge Advocate to so direct did not give rise to a substantial miscarriage of justice – as found by the Defence Force Discipline Appeals Tribunal (**Tribunal**).[2]

4. Second, a "disturbance" for the purposes of s 33(b) of the DFDA does not necessarily involve an element of violence in the sense of a breach of the peace – the majority of the Full Court of the Federal Court correctly construed the phrase.[3]

5. In addition, the Respondent raises a jurisdictional issue by way of Notice of Contention.[4] The Federal Court's jurisdiction was limited to questions of law involved in the decision of the Tribunal: s 52(1) of the *Defence Force Discipline Appeals Act 1955* (Cth) (the **Appeals Act**). The grounds of appeal raised by the Appellant in this Court were not put, in the manner now contended, in the Federal Court or the Tribunal. Neither ground was the subject of a question of law forming the foundation for the appeal to the Court below,[5] and hence constrains this Court.

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1 *Li v Chief of Army* [2013] FCAFC 20 at [57] (AB 2 / 793-794)
2 *Li v Chief of Army* [2013] ADFDAT 1 at [61] (AB 2 / 604)
3 *Li v Chief of Army* [2013] FCAFC 20 at [62] – [78] (AB 2 / 795-800)
4 filed on 6 September 2013 (AB 2 / 877)
5 the Respondent filed a Notice of Objection to Competency to the Notice of Appeal in the Federal Court – see AB 2 / 655 and formulated Questions of Law (at AB 2 / 683) provided to the Full Court

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Part III: 78B of the Judiciary Act 1903

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

Part IV: Facts

7. In relation to paragraphs [11] and [12] of the Appellant's submissions, the Appellant was charged with "Creating a disturbance on service land", with the balance of the language constituting particulars of that charge.[6] The Appellant also pleaded not guilty to the alternative charge of prejudicial conduct contrary to s.60 of the DFDA.[7]

8. In relation to [14] of the Appellant's submissions and the background to the events of 3 February 2010, there was no dispute at trial that Mr Snashall made the statement to the Appellant in July 2009.[8] There was also evidence that it was said in the context of a jovial discussion, immediately followed by Mr Snashall saying "No, seriously, congratulations on having a baby, she is very cute. You must be very proud."[9] The Appellant did not complain at the time about the remark.[10] And after the events of 3 February 2010 Mr Snashall apologised for any unintended offence caused by his remark.[11]

9. As to [16], the evidence was that the Appellant returned to Mr Snashall's office on 3 February 2010 to put his concerns,[12] subsequently characterised by the Appellant as being to "confront" him.[13] When Mr Snashall got off the phone he asked colleagues Mark Smith and Donna Webster to, if the Appellant returned, place themselves so they could observe or at least hear what was said, as he was concerned the situation would escalate.[14]

10. Further to [20], the Appellant acknowledged in his evidence that during the course of the incident there was a degree of "loss of self-control", both had lost a degree of control.[15]

11. Finally, addressing [23] of the Appellant's submissions, the effect of the confrontation between Mr Snashall and the Appellant on 3 February 2010 on colleagues in the vicinity included:

    a) Mr Mark Smith was alerted to the confrontation by a Ms Webster; it was then that he heard raised voices and walked to Mr Snashall's office, where

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at the hearing of the appeal at AB 2 / 735. This issue of jurisdiction was resolved in the manner identified in the judgment of the majority at [38]-[39] (AB 2/ 786); see also Logan J at [142] (AB 2 / 828); but see Dowsett J at [123] (AB 2 / 820) and Logan J at [216] (AB 2 / 853).

6 *Li v Chief of Army* [2013] FCAFC 20 at [42] (AB 2 / 787)

7 Amended Charge Sheet dated 4 April 2011 at AB 1 / 41 - 42

8 T274.20-.32 (AB 1 /285)

9 Exhibit H – Email from Mr Snashall to Jana Li dated 8 February 2010 (AB 1 / 394)

10 *Li v Chief of Army* [2013] FCAFC 20 at [12] (AB 2 / 779) and see T322.27 -.38 (AB 1/ 343), T327.27-.33 (AB 1 / 348) and T344.30-345.11 (AB 1 / 365-366)

11 Exhibit H – Email from Mr Snashall to Jana Li dated 8 February 2010 (AB 1 / 394)

12 T328.4-.13 (AB 1 /349)

13 Appellant's Submissions in Tribunal at [26] (AB 2 / 474)

14 T235.41-236.5 (AB 1 / 246-247)

15 T336.4-.7 (AB 1 / 357), T353.40-.45 and T355.17-.18 (AB 1 / 374 and 376)

he saw "a bit of argy-bargy", "push and shove" – their faces no more than 20 cm apart. At no time did he observe physical contact between them; [16]

b) Ms Chloe Librando, heard, by their tone, that the two were quite angry with each other and "both quite fired up". She felt "quite uncomfortable and scared that something might happen – between the both of them" so she removed herself from the situation;[17]

c) Ms Sandra Bennett, the Director of Litigation in Defence Legal, heard raised voices, which were getting louder and more aggressive. Upon her intervening, the Appellant became calm and left;[18]

d) Mr Omar Khan denied the suggestion that what occurred between the Appellant and Mr Snashall was 'unremarkable', referring to the context of the public service and the "certain decorum" to be followed, so it was "a bit out of the ordinary for that sort of conversation to take place, particularly as it went on further";[19]

e) Mr Matthew Pearson said initially the conversation was no louder than normal in an office environment but it eventually got louder than what would be normal,[20] and that it escalated to the point where it would not have been hard for one or either to push or punch the other, which he was concerned about but then Mr Smith and Ms Bennett stepped in.[21]

Part V: Applicable Statutory Provisions

12. The provisions identified by the Appellant in his submissions are accepted.

Part VI: Notice of Contention

13. As noted above,[22] an appellant from the Tribunal "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": s 52(1) of the Appeals Act.

14. On such an appeal, the Federal Court is exercising its original jurisdiction (s 19, *Federal Court of Australia Act 1976* (Cth)) as vested in it by s 52(3) of the Appeals Act: *Hembury v Chief of General Staff* (1998) 193 CLR 641, Gummow and Callinan JJ at [30]-[31].

15. Their Honours observed at [31] that the subject matter of such an "appeal" is "a question of law involved in a decision of the Tribunal". Such an appeal is a matter "arising under" the Appeals Act, within the meaning of s 76(ii) of the Constitution. Further, the requirement for a question of law contained in s 52 of the Appeals Act

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16 T88.35-89.18 (AB 1 / 102), T91.41-92.16 (AB 1 / 104-105), T95.13-.17 (AB 1 / 108), T97.5-.28 (AB 1 /110), T100.12-14 (AB 1 / 113), T102.24-.40 (AB 1 / 115)

17 T125.33-.42, T127.35 and T128.16-.20 (AB 1 / 135, 137-138)

18 T156.10-.40 (AB 1/ 170)

19 T181.41-182.2 (AB 1 / 197-198)

20 T189.10-.17 (AB 1 / 206)

21 T192.6-40 (AB 1 /209)

22 at paragraph [5]

amounts to the defining of the jurisdiction of the Federal Court pursuant to s 77(i) of the Constitution. Their Honours made clear:

> *The content of the constitutional matter was limited to determination of a question of law involved in the decision of the Tribunal. The Full Court was not exercising any jurisdiction analogous to that of a Court of Criminal Appeal.*

16. In *Hoffman v Chief of Army* (2004) 137 FCR 520 at [44] (Black CJ, Wilcox and Gyles JJ) it was observed by reference to *Hembury* that the Federal Court does not exercise general supervisory jurisdiction.

10 17. The terms of s 52(1) of the Appeals Act – which sets the jurisdiction of the Federal Court – invite consideration of authorities on three points:

a) "question of law";

b) "involved in a decision of the Tribunal"; and

c) matters not raised before or dealt with by the Tribunal.

Questions of law

18. Where a statute confers a right of appeal on a question of law, it is necessary for the applicant to identify a decision on a question of law said to have been erroneously determined by the court or tribunal below. This is because it is the question of law that is the subject matter of the appeal itself: *Jones* at [24]-[25].[23]

20 19. In *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority* [2009] NSWCA 178, (2009) 168 LGERA 1, the Court of Appeal was considering an appeal under s 57 of the *Land and Environment Court Act 1979* which permitted an appeal "against an order or decision... on a question of law". Justice Basten (Beazley and Young JJA agreeing) observed at [20] that this conferred jurisdiction falling into one of three categories, namely an appeal where:

a) identification of a question of law is a precondition to engaging the court's jurisdiction, but is not a limitation on that jurisdiction, once engaged;

b) the question of law is not a mere precondition to ground an appeal but is the sole subject matter of the appeal, and

30 c) it is the decision of the Tribunal on a question of law which is the subject matter of the appeal.

20. His Honour observed at [21]-[22] that, in relation to the last category, it was necessary for the appellant to identify a decision on a question of law said to have been erroneously determined by the court below.

21. In *TNT Skypak International (Aust) Pty Ltd v FCT* (1988) 82 ALR 175 at 178, Gummow J observed that the existence of a question of law was not merely a

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23 citing *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority* [2009] NSWCA 178, (2009) 168 LGERA 1 at [19]-[22] (Basten JA, Beazley and Young JJA agreeing) and *TNT Skypak International (Aust) Pty Ltd v FCT* (1988) 82 ALR 175 at 178.

qualifying condition to ground an appeal under s 44 of the *Administrative Appeals Act 1975* (Cth) (the **AAT Act**), "*but also the subject matter of the appeal itself.*"

22. His Honour's comments were referred to with approval in *Birdseye v Australian Securities and Investment Commission* (2003) 76 ALD 321 at [11], and see more recently *Australian Postal Corporation v Sellick* (2008) 246 ALR 561, Bennett J at [92] and following.

"involved" in a decision

23. In *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, Mason CJ at 353-354, observed that s 5(1)(f) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) – which permits a person aggrieved by a decision to seek review on the basis that "the decision involved an error of law" – contains a stipulation in the word "involved" that the error be material in contributing to the decision so that but for the error, the decision might have been different." This was referred to with apparent approval by Gummow and Hayne JJ in *East Australian Pipeline Pty Ltd v ACCC* (2007) 239 ALR 50 at [71].

24. In *Lombardo v Federal Commissioner of Taxation* (1979) 28 ALR 574, Bowen CJ observed at 578 that, without attempting an exhaustive summary, a "question of law" will be involved in a decision in several circumstances, including:

a) if it was expressly raised and the Board made a ruling on it as a relevant factor in its decision; and

b) if it is obvious from the decision or transcript of the case that the Board in arriving at its decision has misunderstood the law in some relevant particular.

25. His Honour went on to note at 579 that:

> *... for an appeal to this court the question of law must have been 'involved' in the decision of the Board. 'Involvement' indicates that the question of law must have been an integral part of the decision of the Board, adopted or rejected as a step in arriving at the final conclusion. Even if a question was raised before the Board and they gave a ruling on it in the course of proceedings before them, it can only be 'involved' in the final decision if it was relevant to it:* Kew v FC of T *(1971) 71 ATC 4213 at 4215.*

26. Justice Toohey made observations to similar effect at 584. The decision was referred to with approval in *New York Properties Pty Ltd v Federal Commissioner of Taxation* (1985) 61 ALR 345.

Matters not raised before or dealt with by the Tribunal

27. In *Jones,* the Full Federal Court noted at [169]-[170] that an argument put by the Applicant in support of one of the grounds of appeal did not appear to have been put to the Tribunal. Accordingly, it was not apt to give rise to a question of law involved in the decision of the Tribunal within s 52 of the Appeal Act since the Tribunal was not even invited to decide the issue.

28. In *Repatriation Commission v Warren* (2008) 167 FCR 511, Lindgren and Bennett JJ at [78] set out some guiding principles relevant to when a matter could be raised on a s 44 appeal, including that the Court will more readily permit a matter to be raised for the first time in this Court on an appeal from a tribunal where the matter is a pure question of law.

29. However, unlike the AAT, the Tribunal does not undertake a *de novo* merits review with all issues being before it. The more limited nature of the Tribunal's function justifies the view expressed in *Jones* that an argument not put to the Tribunal is not one involved in its decision and therefore any question of law pertaining to that argument is likewise not involved in the Tribunal's decision.

30. It is not enough that a point of construction now sought to be agitated could conceivably have been taken in the Court Martial or the Tribunal; if the point was not taken it is not properly characterised as a question of law involved in a decision of the Tribunal. An appeal under s 52 is not available to run new points in civil courts, which points were not relied upon or advanced within the military justice system.

31. As pointed out in *Lane v Morrison* (2009) 239 CLR 230 at [10] per French CJ and Gummow J, the special position of military justice, which is given by the defence power, is confined to that which, as a matter of history, answers the description given by Dixon J in *R v Cox; Ex parte Smith* (1945) 71 CLR 1 at 23 – namely "to ensure that discipline is just, tribunals acting judicially are essential to the organization of an army or navy or air force. But they do not form part of the judicial system administering the law of the land."[24]

Amended Notice of Appeal and Questions of Law before the Federal Court

32. The Amended Notice of Appeal in the Federal Court[25] abandoned a number of the grounds, and the Appellant indicated a further amendment to be made during the hearing before the Federal Court.[26] But the Respondent's Objection to Competency was maintained in respect of those "questions" which remained (Questions 1, 7, 14 and 19),[27] on the basis that these did not identify a decision on a question of law said to have been erroneously made by the Tribunal.

33. In part, the premise of the Notice of Objection to Competency was that the questions of law needed to be posed as a question of law faced by the Tribunal or falling for its determination (see the third approach discussed in *Walker*, above) and not a question whether the Tribunal had made an error of law in the manner in which it had dealt with a topic. In this way, the "question of law" should be formulated in a manner similar to one that could have been referred by the Tribunal under s 51 of the Appeals Act.

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24 Their Honours went on to observe at [12] that this description of the military justice system was adopted in *White v Director of Military Prosecutions* (2007) 231 CLR 570 by Gleeson CJ at [12] – [13] and underpinned the emphasis by Gummow, Hayne and Crennan JJ upon an understanding of that system in 1900 and that system was, their Honours observed at [52] "*directed to the maintenance of the defining characteristic of armed forces as disciplined forces organised hierarchically*".

25 AB 2 / 643-654

26 Federal Court hearing 13 November 2012 at T49 (AB 2 / 735)

27 Federal Court hearing 13 November 2012 at T38 (AB 2 / 724)

34. In the course of the Respondent's oral submissions in the Federal Court, it was acknowledged that some of the matters raised by the Appellant could be re-formulated as pure questions of law and invited such amendment.[28] Immediately after the lunch adjournment, counsel for the Appellant stated that the Respondent had provided a separate document *"that I think summarises effectively the grounds of error between us except that I have indicated to my learned friend I still think my grounds 7 and 14 have to be separately identified."*[29]

35. That formulation of questions of law was handed up,[30] and are referred to in the reasons of the majority at [38]-[39]. Their Honours then address each of the questions (A to C) identified by the Respondent only.

36. It is apparent from the reasons of the majority that they regarded the issues raised by the Notice of Objection to Competency to have been resolved by the identification of "questions" (A to C) identified by the parties. They saw the Appellant's adoption of the revised questions as disposing of the Notice of Objection to Competency. They effectively answered the two propositions derived from grounds 7 and 14 in the context of answering the three revised questions. In this way, their Honours dealt comprehensively with the various grounds of appeal raised in the Appellant's Amended Notice of Appeal.

37. On appeal to this Court, the Appellant puts his case differently to that pursued by him below, which creates difficulties.

38. The first difficulty that arises is in the way the Appellant has pursued his case on the elements of s 33(b). As discussed in the next section of these submissions, in the Tribunal and in the Federal Court, the Appellant contended that the Judge Advocate's misdirection was in his failure to direct on recklessness.

39. Accordingly, the Tribunal, and the majority in the Full Court, confined their consideration of the "elements" of s 33(b) to this argument about "recklessness". Justices Logan and Dowsett undertook a comprehensive analysis of the physical and fault elements of "creates a disturbance" in s 33(b), irrespective of how the matter had been advanced in the Tribunal.

40. The Appellant now relies upon a multitude of additional alternative constructions, different from that previously advanced.

41. Given the Federal Court's jurisdiction was confined to questions of law *involved* in the Tribunal's decision, and the Tribunal's decision only dealt with the "recklessness" question (that being the only argument before it from the Appellant), the Federal Court had no jurisdiction to approach the broader issue of the correct elements of "creates a disturbance".

42. The decision in *Lombardo* lends firm support to the argument that "involved" means a question of law that was an integral part of the Tribunal's decision – adopted or rejected as a step in arriving at its final conclusion. Here, it is plain that the Tribunal's consideration of the elements of s 33(b) was limited to whether "recklessness" was a component.

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28 Federal Court hearing 13 November 2012 at T42.42-.47, T43.18-T46.8 (AB 2 / 728 to 732)

29 Federal Court hearing 13 November 2012 at T49.35-.38 (AB 2 / 735)

30 Federal Court hearing 13 November 2012 at T50.24-.26 (AB 2 / 736) and see document at AB 2 / 683

43. The second difficulty that arises is in relation to the argument now made by the Appellant about the meaning of the term "disturbance". The issue raised by the Appellant in the Tribunal was to the effect that the Court Martial should have adopted the approach to that term taken in decisions of the Canadian Supreme Court and the Supreme Court of New Zealand, namely *R v Lohnes* [1992] 1 SCR 167 and *Brooker v Police* [2007] 3 NZLR 91. The Tribunal dealt with it on that basis.

44. Materially the same submissions were made by the Appellant to the Federal Court.[31] Indeed, the Appellant eschewed arguments in the Federal Court that are now relied upon.[32] Again, the Federal Court lacked jurisdiction to deal with the point beyond that raised/involved in the decision of the Tribunal.

45. The majority Justices were correct to have treated the Appellant as having clarified the questions of law that were agitated by the adoption of the questions set out at [38] of the majority judgment, as an effective summary of the questions raised in the Amended Notice of Appeal. The dissenting Justices erred in considering questions of law not properly agitated or available for agitation in that Court. Their Honours should have upheld the Notice of Objection to Competency or to have treated the questions of law as constrained in the same manner as did the majority Justices. The questions agitated in the present appeal were outside the questions of law that formed the basis of the jurisdiction of the Federal Court. The Respondent's Notice of Contention ought be upheld and the appeal dismissed.

Part VII: Argument in answer to the Appellant's grounds of appeal

Meaning of "create a disturbance"

46. This Court would not accept the Appellant's submission that a "disturbance" in s 33(b) requires something tantamount to a breach of the peace. In contending that a "disturbance" means a "breach of the peace", the Appellant has travelled too far from the text of the Act, and replaced one term "disturbance" with the term of art "breach of the peace".[33] This in turn leads to an erroneous conclusion that the offence requires actual harm or some other form of violent disorder.

47. As pointed out by Logan J in the decision of the Federal Court, the word "disturbance" is capable of a range of definitions, from the interruption or breaking up of tranquillity, to a less expansive, special meaning "*a breach of public peace, a tumult, an uproar, an outbreak of disorder*".[34]

48. In *R v Lohnes* [1992] 1 SCR 167 at 171, it was observed that the word "disturbance" may be something as innocuous as a false note or a jarring colour. At the other end of the spectrum it denotes incidents of violence, inducing disquiet, fear and apprehension of physical safety. The question was where, on the spectrum, the line should be drawn. In the context of that case, it was concluded that to amount to a disturbance, conduct must "*cause an externally manifested*

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31 AB 2/664 [24]
32 AB 2/799 [76]
33 a point made by the majority of the Full Court at [77] (AB 2 / 800)
34 at [146] (AB 2 / 828)

disturbance of the public peace, in the sense of an interference with the ordinary and customary use by the public of the place in question."

49. The majority of the Full Court[35] undertakes a sound and persuasive exercise in statutory construction of the word "disturbance" as used in s 33(b), based primarily on the immediate and broader context in which the provision appears in Division 3 of Part III of the DFDA. For the reasons expressed therein, it is submitted that the word bespeaks an interruption of the order of a given social setting. It does not require violence; it encompasses conduct whereby defence personnel are disrupted in and distracted from the performance of their duties and includes *"a disorderly disputation".*[36] This fits with the mischief to which each of the subsections of s 33 is directed (as to which see below). If Parliament had meant the offence in s 33(b) to be concerned with a "breach of the peace", it would have used those words.

50. The source of s 33(b) was s 13 of the *Naval Discipline Act 1957* (UK),[37] which created an offence if a person (a) fights or quarrels; or (b) *"uses threatening, abusive, insulting or provocative words or behaviour likely to cause a disturbance*". Its antecedents may be traced to provisions of the English Navy Discipline Act 1661 (commencing with 13 Car II c 9) which, in the context of dissatisfaction with conditions in the fleet, requires a member to "quietly" make this known to his superior, and creates an offence if a member "shall privately attempt to stir up any disturbance" (s 22). The next provision creates an offence if persons quarrel or fight or use reproachful or provoking speeches tending to make a quarrel or disturbance (s 23).

51. It is submitted that the mischief being addressed in these predecessors to s 33 is the maintenance of order and discipline. Nothing in the context or use of the term "disturbance" indicates that the word is to given a confined construction in the nature of violence, breach of the peace, or an outbreak of disorder. The term can readily be seen as encompassing conduct that disrupts and distracts personnel from their duties.

52. The Explanatory Memorandum to the DFDA indicates (at para 353) that in framing s 33 of the DFDA, the legislature considered the terms "fighting and quarrelling" in s 13 of the *Naval Discipline Act 1957* (UK) to be excessively wide, as this could include relatively inoffensive conduct and apply to conduct wherever it occurred, including a private residence. The Memorandum indicated (at para 354):

> *Clause 33 accordingly spells out the elements of reprehensible conduct embraced by fighting and quarrelling and confines the ambit of offences to service land, etc, and public places.*

53. That is to say, s 33 was framed to capture what was regarded as reprehensible about "fighting or quarrelling" – namely conduct on service land which (a) amounts to assault (b) creates a disturbance (c) is obscene, or (d) involves the use of insulting or provocative words. It is submitted that each can be seen as interfering with discipline, disrupting or distracting personnel from their duties. There is nothing in

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35 see the majority of the Full Court at [62]-[69] and [75]-[78] (AB 2 / 795-796 and 799-800)

36 see [63] and [65] of the reasons of the majority of the Full Court (AB 2 / 796). See also *R v Lohnes* [1992] 1 SCR 167 at 168

37 which had applied in Australian by operation of s 34 of the *Naval Defence Act 1910* (Cth)

the legislature's rationale to suggest that the "disturbance" in s 33(b) was intended to be confined, in the way the Appellant contends, to a breach of the peace.

54. Indeed, if a disturbance was construed as requiring a breach of the peace, that is threats of or actual harm, such instances would constitute assault under s 33(a), leaving s 33(b) with little work to do.

55. In *Re Anning* (unreported, Defence Force Discipline Appeal Tribunal, 11 May 1990) it was observed that the effect of the enactment of s 33 was to define with more precision the conduct formerly embraced by the wide terms "fighting" and "quarrelling". The Tribunal went on to state:

> *... the omission of the references to threatening or abusive words, and to "behaviour likely to cause a disturbance", does not in our view alter the essential character of the conduct the section was designed to prohibit. That character is indicated by the context in which the section appears and by consideration of the kind of behaviour specifically mentioned... The behaviour described in (a) and (b) connotes actual force or disturbance while that contemplated in (c) and (d) is of a kind likely to cause others to take offence in such a way that the use of force, violence or the creation of a disturbance might reasonably be expected to ensue.*

56. The distinction drawn by the Tribunal between force, violence, or the creation of a disturbance lends weight to the Respondent's contention that the phrase "disturbance" is not used in s 33(b) as meaning violence.

57. Furthermore, insofar as authorities concerning a breach of the peace (including those referred to in the Appellant's submissions at [64] to [66]) indicate that a breach of the peace may be in the form of a "disturbance",[38] that does not lead to the converse conclusion. Certainly, a disturbance may constitute a breach of the peace – but a disturbance is not confined to that.

58. Finally, it may be noted that the term "create a disturbance" appears elsewhere in legislation, in statutory provisions regarding contempt.[39] Although there does not appear to have been judicial consideration of the ambit of the phrase, it is readily apparent that, in that statutory context, the term would not be construed as narrowly as requiring violence (that is, a breach of the peace) but connotes conduct that disrupted or disturbed the orderly processes of the court or tribunal.

59. Concepts of what amounts to a "disturbance" vary with time and place, and may be affected by the circumstances in which the relevant conduct occurs. However, in this case, as observed by the majority of the Full Court at [78], on any view of the evidence, the Appellant's conduct is fairly described as creating a disturbance. Accordingly, there was no error in the direction given by the Judge Advocate as to the meaning of a "disturbance" in s 33(b).

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38 for instance, in *R v Howell* [1982] QB 416 427

39 see, for example, s 63 of the *Administrative Appeals Tribunal Act 1975* (Cth) and s 264E of the *Bankruptcy Act 1966* (Cth) and s 25AB of the *Broadcasting Act 1942* (Cth)

Element(s) of "create a disturbance"

60. Chapter 2 of the *Criminal Code 1995 (*Cth) applies to all service offences: s 10 of the DFDA. The offence created by s 33(b) of the DFDA does not specify the fault elements for the physical elements that constitute it, so s 5.6 of the Code applies.

61. At trial, the Appellant's submissions about the Judge Advocate's directions raised no issue with the analysis of the elements of the offence.[40]

62. Before the Tribunal and in the Full Court, the Appellant contended that the phrase "creates a disturbance" comprised two physical elements – conduct and result – and that a further direction ought to have been give to the panel as to recklessness (the fault element for a result: s 5.6(2)).[41]

63. It is only in the High Court that the Appellant argues that the phrase "creates a disturbance" consists of a "state of affairs" (being one of the definitions of "conduct" in s 4.1(2) of the Code), or alternatively an act and a state of affairs or as a further alternative, an act which incorporates the factual context and surrounding circumstances (submissions [70]-[76]). The Appellant also relies, by way of yet a further alternative, on his argument in the Tribunal and Federal Court that the phrase comprises two physical elements – conduct and result (submissions [84]-[88]).

64. The analysis of s 33(b) of the DFDA in accordance with Chapter 2 of the Code is not, to adopt the words of Bell J in *R v Saengsai-Or* (2004) 61 NSWLR 135 at [61], free from difficulty. However, the Appellant's reliance on multiple alternatives does little to assist resolution of the issue.

65. The submission that "creates a disturbance" comprises a "state of affairs" is not, on scrutiny, persuasive.

66. The expression "state of affairs" in s 4.1(2) of the Code is not defined. It picks up the observation of Brennan J in *He Kaw Teh v The Queen* (2985) 157 CLR 523 at 564 that having something in possession is not easily seen as an act or omission and is more easily seen as a state of affairs that exists because of what the person who has possession does in relation to the thing possessed.[42]

67. The ordinary meaning of the phrase "state of affairs" is "*the way in which events or circumstances stand disposed (at a particular time or within a particular sphere)*": *Agius v the Queen* (2013) 298 ALR 165 at [42].[43] In that case, an ongoing conspiracy to defraud was found to have been appropriately characterised as a "state of affairs" under s 4.1 of the Code. As with possession, it is readily apparent

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40 T414-416 (AB 2 / 444-445)

41 Appellant's submissions in the Tribunal at [14] (AB 2 / 470), "Elements" provided to the Full Federal Court (AB 2 / 685) and in oral submissions at AB 2 / 705-706

42 *R v Tang* (2008) 237 CLR 1 at [46] per Gleeson CJ and see *R v Saengsai-Or* (2004) 61 NSWLR 135 per Bell J at [58]. Her Honour also referred to "status offences" such as being in a prohibited place or condition as constituting "state of affairs"

43 referring to cases involving "possession" offences-*Muslimin v R* (2010) 240 CLR 470 at [16] such an offence was found to be "*directed not to [an] activity but to the existence of a state of affairs*" and the observation of Gibbs J in *Beckwith v R* (1976) 135 CLR 569 at 575 that "*The words "has in his possession" are not synonymous with "gets possession of"; the latter expression connotes activity, the former a state of affairs*".

how a continuing offence may most appropriately be characterised this way – described by Street CJ in *Sloggett v Adams* (1953) 70 WN (NSW) 206 at 208 as "*committed day by day so long as the state of affairs which is forbidden continues to exist, and the person responsible for creating that state of affairs is liable day by day for those offences*".

68. However the phrase "create a disturbance" in s 33(b) of the DFDA does not readily fit with such characterization. The word "create" connotes the bringing of something into existence or causing something to happen as a result of one's actions. The Oxford English Dictionary relevantly defines the word "create" as meaning "to cause, occasion, produce, give rise to (a condition or set of circumstances)."[44]

69. It is submitted that to "create a disturbance" is not a "state of affairs" but, more simply, conduct by way of an act or action[45] which causes something to happen (the disturbance).

70. The next question is whether the phrase connotes:

a) one physical element of conduct, in the form of an act which creates a disturbance;[46] or

b) two physical elements:

i) conduct, in the form of an act – "creates"; and

ii) result of conduct – "disturbance",

and accordingly, what fault element(s) arise.

71. The Respondent's principle position is the former. The majority of the Full Court correctly concluded at [57] that, for the purposes of ss 3, 4 and 5 of the Code, the physical element is conduct in the form of an act or acts – the creation of a disturbance. The fault element is an intention to engage in the conduct, and on a fair reading, that is how the Judge Advocate directed the panel:[47] that the Appellant intended to do the things that created a disturbance.

72. However, the alternative – that there are two physical elements – may be regarded as consistent with a literal interpretation of the phrase. To "create a disturbance" suggests action that produces a result.

73. Delineating between a (complex) act (that is, one physical element), and an act which produces a result (that is, two physical elements) is not always straightforward.

74. Chapter 2 of the Code was based upon a draft set out in the Report of the Model Criminal Code Officers Committee (December 1992).[48] At pp.7 - 9 of that Report,

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44 noted by Dowsett J in *Li v Chief of Army* [2013] FCAFC 20 at [109] (AB 2 / 813)

45 no matter the "multitude of subtle ways" those acts may give rise to the disturbance – per [72] of the Appellant's submissions

46 the conclusion reached by the minority in *Li v Chief of Army* [2013] FCAFC 20 per Dowsett J at [115] (AB 2 / 815-816) and per Logan J at [198]-[200] (AB 2/ 847-849)

47 T393.44-T394.35 (AB 2 / 421-422)

48 the legislative history leading to the enactment of the Criminal Code is set out in *R v LK* (2010) 241 CLR 177 at [99]-[102] per Gummow, Hayne, Crennan, Kiefel and Bell JJ

the Committee addresses the distinction between an "act" and its result or the surrounding circumstances – concluding that it would not define the term "act" but would rely on courts to apply the interpretation in *R v Falconer* (1990) 171 CLR 30. In *Falconer* at 38-39, Mason CJ, Brennan and McHugh JJ held that the meaning of "act" was "*a bodily action which, either alone or in conjunction with some quality of action, or consequence caused by it, or an accompanying state of mind, entails criminal responsibility*" concluding in that case that the act with which they were concerned was the discharge by Mrs Falconer of the loaded gun – it was neither restricted to the mere contraction of the trigger finger nor did it extend to the fatal wounding of Mr Falconer.

75. Here, dividing the phrase "creates a disturbance" into conduct and result may fit more readily with the recognised distinction between conduct and consequences (for instance, in *Falconer*, between discharging the gun and the consequential fatal wounding) – in which case, the relevant fault elements would be:

a) intending to engage in conduct (s 5.6 and s 5.2 of the Code); and

b) knowing or reckless that a disturbance would be the result (s 5.6 and 5.4 of the Code).

76. This was the argument addressed by the Tribunal, which concluded at [61] that if correct, the Judge Advocate's failure to direct on "recklessness" did not give rise to a substantial miscarriage of justice.[49] The majority of the Federal Court at [61] and [72]–[73] endorse this conclusion – and is the next matter addressed in these submissions.

Substantial miscarriage

77. For the reasons which follow, it is submitted there was no error of law by the Tribunal in its conclusion that there had been no substantial miscarriage of justice. The Tribunal's reasons were short but its conclusion clear.

78. The jurisdiction of the Tribunal to quash a conviction is set out in s 23 of the Appeals Act. It may do so if the conviction appears unreasonable or cannot be supported on the evidence (s 23(1)(a)), or if in all the circumstances the conviction is unsafe or unsatisfactory (s 23(1)(d)).[50] The Tribunal asks whether upon the whole of the evidence it was open to the panel to be satisfied beyond reasonable doubt that the accused was guilty.[51] This is a question of fact,[52] so leave to appeal is required: s 20(1) of the Appeal Act.[53]

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49 under s 23(1) of the *Defence Force Discipline Appeals Act 1955* (Cth), the Applicant must establish not only that there has been a material irregularity (or error of law), but that it constituted a substantial miscarriage of justice.

50 little, if any, distinction tends to be drawn between these grounds - indeed, these are often expressed on appeal as a single ground. Both reflect the law as expounded by the High Court in *M v R* (1994) 181 CLR 487 and *MFA v R* (2002) 213 CLR 606

51 see, by way of analogy –*Whitehorn v The Queen* (1983) 152 CLR at 686; *Chamberlain v The Queen (No 2)* (1984) 153 CLR at 532; *Knight v The Queen* [1992] HCA 56; (1992) 175 CLR 495 at 504 - 505, 511

52 *M v The Queen* [1994] HCA 63; (1994) 181 CLR 487; *Van Damme v Chief of Army* [2002] ADFDAT 2

53 *Van Damme v Chief of Army* [2002] ADFDAT 2

79. The Tribunal will also quash a conviction if it appears that as a result of a wrong decision on a question of law, or a mixed law and fact, the conviction is wrong in law (s 23(1)(b); or there was a material irregularity in the proceedings (s 23(1)(c)); and, in both cases, a substantial miscarriage of justice has occurred.

80. In *Hembury v Chief of General Staff* (1998) 193 CLR 641, Gummow and Callinan JJ refer at 655-656 to authorities forming part of the lengthy history of the phrase "*miscarriage of justice*" at common law and in statute, noting that what will constitute a miscarriage of justice may vary, not only in relation to the particular facts but also with regard to the jurisdiction which has been invoked by the proceedings in question.[54]

81. At 656-657, their Honours reject the proposition that authorities regarding the *proviso* in criminal appeal statutes were equally applicable to explain what is meant by the term "substantial miscarriage of justice" in s 23 of the Appeal Act.

82. Their conclusion was that the misdirection in that case on a matter of law was a material irregularity in the course of the proceedings and amounted to a substantial miscarriage because the Appellant had the right to a court martial which proceeded according to the law of the Commonwealth.

83. Justice Hayne considered at 673 that there were difficulties attempting to draw analogies, particularly as the language of criminal appeal statutes was different to s 23 (eg "substantial miscarriage"). He agreed, for the reasons expressed by Gummow and Callinan JJ that there had been a substantial miscarriage of justice.

84. Justices McHugh and Kirby[55] displayed no such hesitation in having regard to the body of authorities regarding the *proviso* as to the test for a "substantial miscarriage of justice".

85. More recently, in *Jones v Chief of Navy* (2012) 205 FCR 458 at [54], the Federal Court observed that the Appellant must demonstrate that he has been deprived of a fair chance of acquittal.

86. It is submitted that the well-developed body of authorities that analyse the *proviso* is of assistance in approaching the "substantial miscarriage of justice" test in s 23 of the Appeals Act – whilst acknowledging the care that needs to be taken given the different statutory contexts.

87. In *Hembury,* McHugh J referred to the principles that emerge from *Mraz v R* (1955) 93 CLR 493 at 514 and *Wilde v R* (1988) 164 CLR 365 at 373 that some irregularities go to the root of the proceedings, such that the appellant has lost a fair chance of acquittal and it cannot be said that the accused has had a proper trial. This is broadly consistent with the approach taken by Gummow and Callinan JJ as to the Appellant's right to have a trial according to law.

88. Justice McHugh went on to observe at [23] that leaving aside misdirections that go to the root of the proceedings, the common law has always refused to recognise an error as a miscarriage if it can be demonstrated the miscarriage could not have

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54 quoting *Wilson v Wilson* (1967) 69 SR (NSW) 23, per Asprey JA at 49

55 observing at [17] that there must be a remote and insubstantial possibility the drafter of s 23 used the term "substantial miscarriage of justice" in ignorance of or dismissive of the jurisprudence on that expression in the common form criminal appeal statutes.

affected the result. Furthermore, that because s 23 requires the appellant to prove that the material irregularity resulted in a substantial miscarriage, the burden is on the appellant to show that the irregularity may have affected the result. He went on to observe at [24] that if such a prima facie case is made out, the forensic burden is then cast on the respondent to point to other matters that indicate the appellant did not lose a fair chance of acquittal by reason of the material irregularity.

89. A misdirection relating to the elements of the offence will not necessarily amount to a fundamental flaw in the trial.[56] The task in considering whether there has been a substantial miscarriage of justice is undertaken in the same way a determination is made as to whether a verdict should be set aside on the ground it is unreasonable or cannot be supported having regard to the evidence. That is, an independent assessment of the evidence to determine whether the accused was proved beyond reasonable doubt to be guilty of the offence.[57]

90. Here, the Tribunal's jurisdiction under s 23 is explicitly acknowledged to extend to considering the whole of the evidence at trial for the purposes of s 23(1)(a) and (d). Having regard to the principles referred to above, for the Tribunal to properly undertake its task under s 23(1)(b) or (c) of considering whether there has been a "substantial miscarriage of justice", it would also be necessary for the Tribunal to have regard to the whole of the record.

91. At trial, the Appellant did not dispute that the conduct, particularized in the charge, had occurred. And there was no issue that that conduct was intentional.[58] The evidence before the Court Martial of both Mr Snashall and the Appellant gave rise to a compelling inference that the Appellant intended to undertake the conduct on 3 February 2010 that created a disturbance. The Appellant's own evidence was that:

a) he was upset by the exchange with Mr Snashall on 2 February 2010;[59]

b) he went to Mr Snashall's office on the morning of 3 February 2010 with the specific purpose of obtaining an explanation;[60]

c) when Mr Snashall refused, asked the Appellant to leave, and then left his office, the Appellant pursued him;[61] and

d) a degree of self control was lost and ultimately, both were speaking loudly.[62]

92. As observed in the reasons of the majority of the Full Court at [73], there is no room for doubt that the Appellant intentionally confronted Mr Snashall and persisted in conduct that was disruptive of Mr Snashall's conduct of his duties. Having regard to the evidence, it was open to the Tribunal to conclude that a failure to direct on "recklessness" did not give rise to any miscarriage of justice.

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56 *Krakouer v R* (1998) 194 CLR 202 at [23] and *Darkan v R* (2006) 227 CLR 373 at [84] and [94]
57 *Weiss v R* (2005) 224 CLR 300 at [41] - [47]
58 see *Li v Chief of Army* [2013] FCAFC 20 at [57]-[58] (AB 2 / 793-794)
59 T327.35 (AB 1 / 348)
60 T328.7-17 (AB 1 / 349)
61 T352.12-40 (AB 1 / 373)
62 T353.41-45 and T355.13-18 (AB 1 / 374); see also T329.33, T336.4-16 (AB 1 / 350 and 357)

Relief

93. If, contrary to the above, this Court was disposed to allow the appeal and quash the Appellant's conviction, the Respondent submits the appropriate orders would be to remit the matter to the Tribunal to make consequential orders. Namely – the Tribunal can order a new trial (s 24) or substitute a conviction for an available alternative offence: s 26(1) Appeals Act. The latter is the course which the Respondent would seek.

94. As noted above, an alternate charge was laid against Major Li of prejudicial conduct under s 60(1) of the DFDA. The particulars were identical to those in charge 1 and as noted in the Appellant's submissions at [22], the evidence conformed with these particulars. There was really no dispute at trial that the Appellant acted in the way particularised.

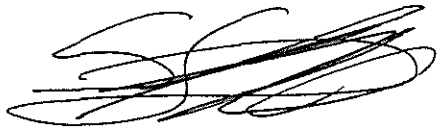
95. Prejudicial conduct under s 60(1) is a strict liability offence (s 60(2)). The question for the panel would have been whether the act or acts were likely to prejudice discipline of the Defence Force. Here, the nature of the Appellant's conduct and its effect on those in the vicinity would, it is submitted, comfortably meet that test.

96. There is a defence of "reasonable excuse for the relevant act" (s 60(3) DFDA). However, the Appellant's evidence of outrage at what he perceived to be unacceptable conduct of Mr Snashall is unlikely to have persuaded the panel on the balance of probabilities that there was a reasonable excuse for his conduct. Accordingly, it would be open to the Tribunal to substitute with a conviction on the alternate charge. For these reasons, the most that the Appellant can achieve, if he is otherwise wholly successful is to have the matter remitted to the Tribunal to have the appeal to it determined according to law.

Part VIII: Estimate for oral argument.

97. The respondent estimates that one and a half hours will be required for oral argument on behalf of the respondent.

Dated: 11 October 2013



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