HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
DARWIN REGISTRY

BETWEEN:

D9 of 2025
Ethan Austral
Appellant
and
Northern Territory of Australia
Respondent

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D10 of 2025
Josiah Binsaris
Appellant
and
Northern Territory of Australia
Respondent

D11 of 2025
Leroy O'Shea
20 Appellant
and
Northern Territory of Australia
Respondent

D12 of 2025
Keiran Webster
Appellant
and
Northern Territory of Australia
30 Respondent

APPELLANTS' JOINT SUBMISSIONS

These are the joint submissions of each appellant in the four related appeals.

PART I—CERTIFICATION

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

PART II—ISSUES ARISING

2 In this Court's 2020 decision in ***Binsaris*** *v Northern Territory of Australia*,[1] the majority found that the Northern Territory Director of Correctional Services contravened s 6(e) of the ***Weapons Control Act*** *2001* (NT), a criminal prohibition, by authorising prison officers to use CS gas on children at the Don Dale Youth Detention Centre (***Don Dale***).[2] The conduct was thus found to be unlawful, and hence tortious; and the original trial judge's findings to the contrary were reversed.

3 The remitter judge was, like the Court of Appeal, bound by s 37 of the *Judiciary Act 1903* (Cth) to execute the judgment of this Court. Did the Court of Appeal err in holding that — notwithstanding this Court's finding of unlawfulness — the use of CS gas at Don Dale was, by reason of the trial judge's original finding, "reasonable and necessary"; and that this Court's finding on liability was not "a relevant circumstance in determining whether exemplary damages should be awarded"?[3]

4 In determining that exemplary damages were not available, the Court of Appeal focused on the belief of the individual officers who authorised the use of CS gas that its use was not prohibited. Given this Court's determination that the use of CS gas was unlawful conduct on the part of officers of the state, was that the correct, or relevant, inquiry into state of mind for an award of exemplary damages?

5 The Court of Appeal held that exemplary damages could only be awarded against a state defendant in respect of its institutional responsibility for its officers if the officers were

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1 (2020) 270 CLR 549.

2 (2020) 270 CLR 549 at 559-60 [15]-[20] (Kiefel CJ and Keane J); 570 [53], 585–6 [107]–[109] (Gordon and Edelman JJ).

3 *Northern Territory of Australia v Austral* [2025] NTCA 3 (***NTA v Austral***) at [50]: CAB 146.

subjectively conscious of their wrongdoing, or if the state was liable for a separate "direct", and not vicarious, liability for breach of duty. Is the award of exemplary damages against the state limited in that way?

PART III—SECTION 78B NOTICE

6 No notice is required under s 78B of the *Judiciary Act 1903*.

PART IV—CITATIONS

7 The judgment of the primary judge is unreported. The medium neutral citation is [2023] NTSC 79. The judgment of the Court of Appeal is unreported. The medium neutral citation is [2025] NTCA 3.

PART V—FACTS

8 On 21 August 2014, the appellants were children.[4] Each appellant was detained at Don Dale and at the relevant time was being held in the Behavioural Management Unit (**BMU**). Each appellant had been held in the BMU for more than two weeks.[5] Ethan and Josiah shared one cell in the BMU; Keiran and Leroy another.[6]

9 The appellants' cells had no windows.[7] Although the BMU was hot, there was no air-conditioning.[8] They had no running water for washing hands or for drinking.[9] They had a toilet, but no privacy when the cell was shared.[10] Their bedding was a mattress on a raised concrete slab for one child, and a mattress on the floor for the other.[11] They ate their meals in their cells.[12]

10 Each day, the appellants were allowed out for one hour, although sometimes this was cut short.[13] During this time, they were permitted to use the "exercise yard" — an enclosed

4 ***LO*** *v Northern Territory of Australia* [2017] NTSC 22 at [2], [6], [8], [10]; ABFM at 119–24.
5 *LO* [2017] NTSC 22 at [14]; ABFM at 126.
6 *LO* [2017] NTSC 22 at [14]; ABFM at 126.
7 *LO* [2017] NTSC 22 at [16]; ABFM at 126.
8 *LO* [2017] NTSC 22 at [20]; ABFM at 127.
9 *LO* [2017] NTSC 22 at [15]; ABFM at 126.
10 *LO* [2017] NTSC 22 at [15]; ABFM at 126.
11 *LO* [2017] NTSC 22 at [16]; ABFM at 126.
12 *LO* [2017] NTSC 22 at [17]; ABFM at 126.
13 *LO* [2017] NTSC 22 at [18]; ABFM at 126–7.

room outside the cells in the BMU — to make telephone calls.[14] They could also shower in the exercise yard.[15] A glass panel above the exercise yard was the only source of natural light in the BMU.[16]

11 Two other boys were detained in separate cells. One of them was Jake Roper. In the early evening of 21 August 2014, Jake escaped from his cell, damaged property, broke windows and caused a disturbance.[17] Ethan and Josiah remained in their cell at all times.[18] Keiran and Leroy also remained in their cell at all times; were at various times playing cards; and did not participate in the disturbance.[19]

12 Jake continued to create a disturbance through the evening. Shortly after 8:30pm, three
10 correctional services officers in the Immediate Action Team (***IAT***) from Berrimah Correctional Centre (an adult prison) arrived at Don Dale, as did the Director of Correctional Services.[20] The IAT and the Director had been called to assist by Don Dale's Superintendent.[21] The members of the IAT were equipped with masks, helmets, protective vests, shields, batons, and CS foggers (devices used to deploy CS gas).[22]

13 CS gas, a form of tear gas made from o-chlorobenzylidene malononitrile, disables those who breathe it by inducing uncontrollable burning and tearing of the eyes, and intense irritation of the nose and throat, causing profuse coughing and difficulty breathing.[23] A training manual for the use of the IAT officers stated these and other effects. It made clear that if used in large enough concentrations, the gas could cause serious injury or death,

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14 *LO* [2017] NTSC 22 at [16]; ABFM at 126.

15 *LO* [2017] NTSC 22 at [18], [71]; ABFM at 126–7, 141.

16 *LO* [2017] NTSC 22 at [16]; ABFM at 126.

17 *LO* [2017] NTSC 22 at [60]; ABFM at 137–8; *Binsaris* (2020) 270 CLR 549 at 571 [58] (Gordon and Edelman JJ); ABFM at 380.

18 *LO* [2017] NTSC 22 at [59]–[61]; ABFM at 137–8; *Binsaris* (2020) 270 CLR 549 at 571–2 [59] (Gordon and Edelman JJ); ABFM at 380–1.

19 *LO* [2017] NTSC 22 at [59]–[61]; ABFM at 137–8; *Binsaris* (2020) 270 CLR 549 at 571–2 [59] (Gordon and Edelman JJ); ABFM at 380–1.

20 *LO* [2017] NTSC 22 at [75], [77]–[82]; ABFM at 143–5.

21 *LO* [2017] NTSC 22 at [75] [77]–[82]; ABFM at 143–5; *Binsaris* (2020) 270 CLR 549 at 572 [61] (Gordon and Edelman JJ); ABFM at 381.

22 *LO* [2017] NTSC 22 at [75]; ABFM at 143; *Binsaris* (2020) 270 CLR 549 at 572 [61] (Gordon and Edelman JJ); ABFM at 381.

23 *LO* [2017] NTSC 22 at [74]; ABFM at 142; *Binsaris* (2020) 270 CLR 549 at 569–70 [51] (Gordon and Edelman JJ); ABFM at 378–9. Material Safety Data Sheet, ABFM at 273–6; Immediate Action Team Course Material, ABFM at 277–353.

especially if used in a confined space.[24] The BMU was a confined space.[25] The training material also stated that chemical agents should not be used where prisoners were "compliant or physically restrained" or "otherwise under control".[26]

14 The Director told members of the IAT to deploy CS gas into the BMU.[27] When an IAT officer asked him whether they would "gas the lot of them" — that is, not just Jake, but also the appellants and another boy — he responded "I don't care how much gas you use".[28]

15 An IAT officer deployed the CS gas ten times into the BMU.[29]

16 Before the deployment of CS gas, a youth justice officer said, in relation to Jake, "[n]ah, let the fucker come through because while he's coming through, he'll be off balance. I'll pulverise the little fucker. Oh shit, you're recording".[30] Another officer said "[g]o grab the fucking gas, we'll gas him through fucking, get Jimmy to gas him through here."[31] Later, officers watching Jake react to the gas laughed and said "that'll learn you" and "[n]ow he's shitting himself".[32] Prior to deploying the CS gas, the appellants' medical records were not checked to identify any unacceptable risk to health of using the gas (if they had been, the records would have revealed Leroy and Ethan had asthma).[33]

17 Ethan and Josiah were exposed to CS gas for between 3 minutes and 5 ½ minutes; Leroy and Keiran for between 4 ½ minutes to about six or 6 ½ minutes.[34] Closed circuit television footage shows Leroy and Keiran covering their faces with their hands and either clothes or bedding.[35] Leroy, who suffered from asthma, said that the CS gas caused his throat to burn, his eyes to sting and his nose to run:[36]

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24 *Binsaris v Northern Territory of Australia* [2023] NTSC 79 (***Binsaris v NTA***) at [88]–[89]; CAB 53–5; Immediate Action Team Course Material, ABFM at 318.
25 *LO* [2017] NTSC 22 at [71]; ABFM at 141.
26 *LO* [2017] NTSC 22 at [138]; ABFM at 167.
27 *LO* [2017] NTSC 22 at [87]–[88]; ABFM at 147–9.
28 *LO* [2017] NTSC 22 at [86]; ABFM at 147; *Binsaris v NTA* [2023] NTSC 79 at [87]; CAB 52–3.
29 *LO* [2017] NTSC 22 at [98]–[99]; ABFM at 151–2.
30 *Binsaris v NTA* [2023] NTSC 79 at [28]; CAB 21–2.
31 *Binsaris v NTA* [2023] NTSC 79 at [85]; CAB 52.
32 *Binsaris v NTA* [2023] NTSC 79 at [85]; CAB 52.
33 *LO* [2017] NTSC 22 at [141]–[142]; ABFM at 168–9.
34 *Binsaris v NTA* [2023] NTSC 79 at [102]; CAB 62.
35 *Binsaris v NTA* [2023] NTSC 79 at [86]; CAB 52.
36 *Binsaris v NTA* [2023] NTSC 79 at [20]; CAB 16–18.

> I felt complete fear. I thought I was going to die. The worst thing was not knowing how long it was going to last and how long we were going to have to sit there and burn.

18 Keiran said that he was:[37]

> affected immediately. I couldn't breathe properly. It felt like an anxiety attack … It was so hard to breathe that Leroy and I thought we were going to die. At first we were kind of joking about dying and then we started to seriously believe it because it was just so hard to breathe. I thought that I was eventually going to stop breathing. We started shaking each other's hands and saying our goodbyes.

19 Ethan said that he "felt pain on my face and it was hurting my eyes".[38]

10 20 After they were subjected to CS gas, the appellants were handcuffed behind their backs and taken to the basketball court, where they were made to lie on their stomachs on the ground and sprayed with water from a hose.[39] They were provided brief access to a nurse[40] before being transferred, still in handcuffs, to Berrimah (the adult prison).[41]

21 In 2015, the four appellants commenced proceedings relevantly alleging battery by the Director's use of CS gas.[42] In each matter, the Territory denied liability.[43]

22 On 21 March 2017, Kelly J dismissed the appellants' claims in respect of the use of CS gas.[44] On 24 August 2017, the Northern Territory Court of Appeal unanimously dismissed their appeals.[45] On 3 June 2020, this Court unanimously allowed their appeals,

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37 *Binsaris v NTA* [2023] NTSC 79 at [25]; CAB 20.

38 *Binsaris v NTA* [2023] NTSC 79 at [31]; CAB 23–4.

39 *LO* [2017] NTSC 22 at [107]; ABFM at 154–5; *Binsaris v NTA* [2023] NTSC 79 [26]; CAB 20.

40 *Binsaris v NTA* [2023] NTSC 79 at [25]; CAB 20.

41 *LO* [2017] NTSC 22 at [25], [107]; ABFM at 129, 154–5.

42 Second Further Amended Statement of Claim in *Leroy O'Shea v Northern Territory of Australia* No.14 of 2015, ABFM at 5; Second Further Amended Statement of Claim in *Ethan Austral v Northern Territory of Australia* No.15 of 2015, ABFM at 15; Second Further Amended Statement of Claim in *Keiran Webster v Northern Territory of Australia* No.19 of 2015, ABFM at 28; Second Further Amended Statement of Claim in *Josiah Binsaris v Northern Territory of Australia* No.26 of 2015, ABFM at 39.

43 Fourth Further Amended Defence in *Leroy O'Shea v Northern Territory of Australia* No.14 of 2015, ABFM at 50; Third Further Amended Defence in *Ethan Austral v Northern Territory of Australia* No.15 of 2015, ABFM at 60; Third Further Amended Defence in *Keiran Webster v Northern Territory of Australia* No.19 of 2015, ABFM at 73; Third Further Amended Defence in *Josiah Binsaris v Northern Territory of Australia* No.26 of 2015, ABFM at 83. Amended Reply in *Leroy O'Shea v Northern Territory of Australia* No.14 of 2015, ABFM at 94; Amended Reply in *Ethan Austral v Northern Territory of Australia* No.15 of 2015, ABFM at 98; Amended Reply in *Keiran Webster v Northern Territory of Australia* No.19 of 2015, ABFM at 104; Amended Reply in *Josiah Binsaris v Northern Territory of Australia* No.26 of 2015, ABFM at 109.

44 *LO* [2017] NTSC 22, ABFM at 114. The orders of Kelly J are at ABFM 261–72.

45 *JB v Northern Territory* (2019) 343 FLR 41.

entered judgment on the claims in favour of each appellant, and remitted the matters to a different judge for assessment of damages.[46] This Court unanimously found that the use of CS gas against the appellants was an unlawful battery.[47] The majority found its use was unauthorised, and contrary to the criminal prohibition in s 6 of the *Weapons Control Act*.[48]

23 On remitter, Blokland J relevantly awarded each of the appellants exemplary damages of $200,000.[49] The Northern Territory again appealed, and the Northern Territory Court of Appeal unanimously allowed that appeal. It held that, having regard to the "conduct and states of mind of the individual officers", exemplary damages were not available[50] and in any event could not be given against a state defendant in respect of its institutional responsibility for its officers on a vicarious liability basis.[51]

24 No officer has been prosecuted for the offence constituted by the use of the CS gas;[52] none of the Territory, the Director, nor any officer involved, has apologised to the appellants;[53] the Territory did not lead evidence that any disciplinary action was taken in relation to the Director or the IAT; and the Territory has maintained a position that the Director's actions were "reasonable and necessary" in the face of this Court's decision to the contrary.

PART VI—ARGUMENT

Ground 1 – Court of Appeal's failure to execute this Court's judgment on remitter

25 Justice Kelly's reasoning at trial was that:

(a) The use of CS gas was not prohibited by s 6 of the *Weapons Control Act*.[54]

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46 *Binsaris* (2020) 270 CLR 549 at 586–7 [112] (Gordon and Edelman JJ); see also at 560 [21] (Kiefel CJ and Keane J) and 569 [50] (Gageler J); ABFM at 395, 369, 378. The orders in each matter are at ABFM 397–408.

47 *Binsaris* (2020) 270 CLR 549 at [20] (Kiefel CJ and Keane J), [46] (Gageler J), [53], [110] (Gordon and Edelman JJ); ABFM at 369, 377, 379–80, 395.

48 *Binsaris* (2020) 270 CLR 549 at 557–60 [3]–[10], [15]–[20] (Kiefel CJ and Keane J), 585–6 [107]–[109] (Gordon and Edelman JJ); ABFM at 366–9, 394–5.

49 *Binsaris v NTA* [2023] NTSC 79 at [119] (Blokland J); CAB 67.

50 *NTA v Austral* [2025] NTCA 3 at [74]; CAB 163–4.

51 *NTA v Austral* [2025] NTCA 3 at [75]–[76]; CAB 164–5.

52 *Binsaris v NTA* [2023] NTSC 79 at [26]; CAB 20.

53 *Binsaris v NTA* [2023] NTSC 79 at [26]; CAB 20.

54 *LO* [2017] NTSC 22 at [110]–[125]; ABFM 156–61.

(b) The IAT officers were lawfully called upon by the Superintendent to assist under s 157(2) of the ***Youth Justice Act*** *2005* (NT), which meant they were delegated the Superintendent's statutory power (in s 152(1)) to do everything "necessary or convenient" to maintain order and ensure safe custody and protection of all persons within the detention centre, including their power as prison officers to use CS gas.[55]

(c) The Superintendent's "necessary and convenient" power in s 152(1) of the *Youth Justice Act* could authorise the use of CS gas, but only if this was "reasonable and necessary in the circumstances".[56]

(d) The use of the CS gas was "reasonable and necessary in the circumstances".[57]

(e) The use of the CS gas was thus authorised as a valid exercise of the superintendent's power delegated to the prison officers.[58]

26 With respect, Blokland J on the remitter correctly determined that Kelly J's finding that the use of the CS gas was "reasonable and necessary" could not stand in light of the appellate decision of this Court.[59] The Court of Appeal erred by finding to the contrary.[60] By doing so it failed to perform its duty to "execute the judgment of the High Court in the same manner as if it were its own judgment."[61] A lower court "has no authority, though it may have formal power, to make any order inconsistent with the order of this Court".[62] Rather, "when a judgment is pronounced by this Court, it is the duty of the Supreme Court to obey, and not to make an order inconsistent with obedience."[63] Contrary to the view of the Court of Appeal, it was not merely "[i]n an abstract sense" that "the use of CS gas could never have been reasonably necessary as its use was

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55 *LO* [2017] NTSC 22 at [126]–[136]; ABFM 161–7. See also *Youth Justice Act 2005* (NT) s 151(3)(c).

56 *LO* [2017] NTSC 22 at [108], [109], [137]–[167]; ABFM 155–6, 167–80. See also *JB v Northern Territory* (2019) 170 NTR 11 at 39 [118]; *Binsaris* (2020) 270 CLR 549 at 555 (Mr McLure SC); ABFM 364.

57 *LO* [2017] NTSC 22 at [151]–[166]; ABFM 172–80.

58 *LO* [2017] NTSC 22 at [166]; ABFM 180.

59 *Binsaris v NTA* [2023] NTSC 79 at [74]–[77]; CAB 40–2.

60 *NTA v Austral* [2025] NTCA 3 at [46]–[47]; CAB 139–40.

61 *Judiciary Act 1903* (Cth) s 37.

62 *Peacock v D M Osborne & Co* (1907) 4 CLR 1564 at 1568 (Griffith CJ; Barton, O'Connor, Isaacs and Higgins JJ agreeing).

63 *Peacock* (1907) 4 CLR 1564 at 1567 (Griffith CJ; Barton, O'Connor, Isaacs and Higgins JJ agreeing).

prohibited by statute":[64] rather, that was the concrete consequence of this Court's orders.

27 This Court held by majority that Kelly J's first premise (that the use of CS gas at Don Dale was not prohibited by s 6 of the *Weapons Control Act*) was incorrect.[65] By contrast, Gageler J upheld Kelly J's first premise,[66] but "[l]ike other members of this Court", rejected Kelly J's finding that the use of CS gas could be authorised by the Superintendent's "necessary and convenient" power in s 152(1) of the *Youth Justice Act*.[67] Instead, his Honour upheld part of the reasoning contained in the respondents' notice of contention, finding that an exemption to the criminal prohibition was engaged because the prison officers were validly exercising the powers of police officers to respond to a breach of the peace.[68] As a result, his Honour went on to characterise the facts based on a different legal premise to Kelly J, albeit that the test for that premise was substantially the same, such that his Honour could adopt Kelly J's finding in concluding that the use of CS gas was "reasonably necessary" force to restrain a breach of the peace.[69]

28 With respect, Kelly J's "reasonable and necessary" finding was a legal conclusion which could not stand if the appellants' *Weapons Control Act* argument succeeded. This was the basis on which the parties conducted the case: the Territory did not demur when, during opening addresses at trial, Kelly J herself described the *Weapons Control Act* argument as a "killer point" on the question of liability which if successful would obviate the need to consider reasonable necessity.[70] Similarly, the Court of Appeal (on appeal from the remitter) correctly understood that if the Territory had won on the *Weapons Control Act* point, it would *also* need to have won on reasonable necessity.[71]

29 Given this Court's determination that the use of CS gas at Don Dale was unlawful and contrary to the criminal prohibition in the *Weapons Control Act*, the Director had no

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64 *NTA v Austral* [2025] NTCA 3 at [47]; CAB 140.

65 *Binsaris* (2020) 270 CLR 549 at 560–1 [15]–[20] (Kiefel CJ and Keane J), 585–6 [107]–[109] (Gordon and Edelman JJ); ABFM 368–9, 394–5.

66 *Binsaris* (2020) 270 CLR 549 at 564 [32] (Gageler J); ABFM 373.

67 *Binsaris* (2020) 270 CLR 549 at 563 [25] (Gageler J), 559 [13] (Kiefel CJ and Keane J), 586 [100]–[102] (Gordon and Edelman JJ); ABFM 370, 368, 392–3.

68 *Binsaris* (2020) 270 CLR 549 at 565 [28]. Justice Gageler ultimately rejected the notice of contention (at 569 [50]), as did the majority: at 559–60 [16]–[20] (Kiefel CJ and Keane J); 582 [96]–[99], 584–5 [104]–[106] (Gordon and Edelman JJ); ABFM 371, 378, 368–9, 391–4.

69 *Binsaris* (2020) 270 CLR 549 at 564 [30]–[31] (Gageler J); ABFM 372–3.

70 Excerpt of transcript 26 September 2016, 24–25, 26; ABFM at 355–7.

71 As the Court of Appeal recognised: *NTA v Austral* [2025] NTCA 3 at [45]; CAB 139.

power to authorise the IAT to use the CS gas in that way,[72] and Kelly J's finding of "reasonable necessity" could not stand. But the Court of Appeal maintained Kelly J's determination of reasonable necessity as a freestanding finding that was "not linked" to the *Weapons Control Act* argument.[73] In doing so, the Court of Appeal failed to give effect to this Court's judgment.

30 The true position was that Kelly J's *legal conclusion* was "disturbed"[74] by this Court's decision that the use of CS gas was criminally prohibited. The Court of Appeal wrongly treated reasonable necessity as a purely factual finding[75] and thereby "slip[ped] across the boundary that must be maintained between the evaluation of the legal consequences of facts already found and the making of findings of fact".[76]

31 The Court of Appeal also erred by finding that the use of CS gas was "reasonable and necessary" in circumstances where (so it was said) there was "no other option reasonably available".[77] This aspect of the Court's reasoning equally cannot stand in light of this Court's decision that the use of CS gas was contrary to a criminal prohibition. Thus, far from faithfully executing the judgment of this Court, the Court of Appeal wrongfully departed from it. That was contrary to s 37 of the *Judiciary Act*, and of the duties of a lower court on remitter from this Court.

Ground 2 – consciousness of illegality not required for exemplary damages for executive wrongdoing

32 The Court of Appeal wrongly found that exemplary damages were "unavailable" by reason of the "conduct and states of mind of the individual officers".[78] This was because, for the Court of Appeal:

(a) The officers' "conduct" was the deployment of CS gas, erroneously characterised as "reasonable and necessary". The Court of Appeal did not in its judgment refer to much of the objective circumstances surrounding the tort, including the Director's comments "I don't mind how much gas you use" or other disturbing

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72 See, e.g., *A v Hayden* (1984) 156 CLR 532 at 540 (Gibbs CJ), 580 (Brennan J), 593 (Deane J).
73 *NTA v Austral* [2025] NTCA 3 at [46]; CAB 139–40.
74 *Harvard Nominees Pty Ltd v Tiller (No 4)* (2022) 403 ALR 498 at [47] (Jackson J).
75 *NTA v Austral* [2025] NTCA 3 at [46]–[47]; CAB 139–40.
76 *Bill Williams Pty Ltd v Williams* (1972) 126 CLR 146 at 156 (Walsh J).
77 *NTA v Austral* [2025] NTCA 3 at [61]; CAB 151.
78 *NTA v Austral* [2025] NTCA 3 at [74], [75]; CAB 163–4.

comments of other prison and youth justice officers in the lead up to and after the use of CS gas.[79] To the extent that the Court considered the objective circumstances after the use of CS gas, its consideration was cursory and attended by doubt that the children's treatment after they were gassed could be described as callous.[80]

(b) The officers' "states of mind" were their subjective belief that the use of CS gas was lawful.[81] Because the Court of Appeal either did not refer to, or only cursorily considered, the relevant objective circumstances surrounding the tort, it did not consider what those circumstances and facts revealed about the officers' states of mind.

33 Regardless of the Court of Appeal's recitation of principle,[82] its dispositive reasoning thus reveals an inappropriate focus on the individual officers' subjective beliefs as to the lawfulness of their conduct, even though individual subjective consciousness of unlawfulness has never been a requirement for the award of exemplary damages.[83] In particular, "conscious wrongdoing" and "contumelious disregard" do not require consciousness of each of the elements of a crime or tort, nor does "disregard of a person's 'rights' require identification of a particular legal right".[84] The existence of conscious wrongdoing may of course be highly relevant, and perhaps describes "the greater part of the field"; but it has never described its entirety.[85] Rather, the relevant question is whether the defendant's conduct illustrated a state of mind with the requisite high-handedness.[86]

34 Thus, in *Lamb v Cotogno*, this Court upheld an award of exemplary damages against a driver who had left the scene of an accident. The wrong was not intentional or reckless,[87] but the defendant's behaviour in leaving demonstrated a "wanton disregard of the

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79 See paragraphs 8–10, 14 and 16 above.

80 *NTA v Austral* [2025] NTCA 3 at [79]; CAB 166.

81 *NTA v Austral* [2025] NTCA 3 at [51]–[58] and [61]; CAB 146–51.

82 *NTA v Austral* [2025] NTCA 3, [72]-[73]; CAB 162–163.

83 *Lamb v Cotogno* (1987) 164 CLR 1 at 13 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ).

84 *New South Wales v Ibbett* [2005] NSWCA 445 at [234] (Basten JA).

85 *Gray v Motor Accident Commission* (1998) 196 CLR 1 at 7 [14]; *State of New South Wales v Riley* (2003) 57 NSWLR 496 at [138] (Hodgson JA); *State of New South Wales v Ibbett* [2005] NSWCA 445 at [35]–[47] (Spigelman CJ).

86 J Edelman (ed.), *McGregor on Damages* (22nd ed, 2024) at [14-001], [14-019] (especially footnote 10). See also *Muuse v Secretary of State for the Home Department* [2010] EWCA Civ 453 at [68]–[71] (Thomas LJ; Morritt C and Sir Scott Baker agreeing).

87 *Lamb v Cotogno* (1987) 164 CLR 1 at 13 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ).

plaintiff's welfare" and justified the award.[88] The same is revealed in the many cases of police and prison officer misconduct in which exemplary damages are awarded without findings that the officers *knew* they were acting contrary to law.[89]

35 This is consistent with the historical position, particularly in the context of executive wrongdoing. In the celebrated cases of *Wilkes v Wood*[90] and *Huckle v Money*,[91] the executive's subjective belief that general warrants were lawful — indeed, the "constant practice of the office"[92] — did not stand in the way of an award of exemplary damages.[93]

36 As for principle, in *State of New South Wales v Ibbett* — an executive wrongdoing case — this Court approved Lord Hutton's analysis in *Kuddus v Chief Constable of Leicestershire*[94] that the purposes of the award in the context of executive wrongdoing are primarily (a) deterrence directed to the institution of which the officer is part and (b) vindication of the rule of law.[95] In the case of wrongdoing by government, these purposes are interrelated, and are not uniquely focussed on punishment of the individual officer: an award of exemplary damages serves "to indicate the Court's disapproval of the conduct, to uphold and vindicate the rule of law and to encourage the State to take steps

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88 Ibid. See also *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1985) 155 CLR 448 at 461 (Gibbs CJ).

89 See, eg, *Romani v State of New South Wales* [2023] NSWSC 49 (exemplary damages awarded in respect of police who unknowingly trespassed on property); *State of New South Wales v Ibbett* [2005] NSWCA 445 (exemplary damages awarded without findings of conscious wrongdoing in an officer pointing a gun at a bystander in the course of conducting a traffic-related arrest); *New South Wales v Delly* (2007) 70 NSWLR 125 (exemplary damages awarded in respect of police officer who, without malice, detained a woman for 90 minutes after he formed view that there was no basis for her to have been charged: at [85]–[96] (Tobias JA); cf at [115]–[120] (Basten JA)); *Zaravinos v State of New South Wales* (2004) 62 NSWLR 58 (exemplary damages awarded in respect of unjustified decision to arrest plaintiff, where no findings referred to subjective consideration by police of power to arrest: at 73); *Coffey v State of Queensland* [2012] QCA 368 (exemplary damages awarded against police and correctional services officers who "had not meant to injure the appellant": at [13]).

90 (1763) Lofft 1 at 10–11; 98 ER 489 at 494.

91 *Huckle v Money* (1763) 2 Wils KB 206; 95 ER 768.

92 *Wilkes v Wood* (1763) Lofft 1 at 19; 98 ER 489 at 494.

93 *Huckle v Money* (1763) 2 Wils KB 206 at 207; 95 ER 768 at 769; *Wilkes v Wood* (1763) Lofft 1 at 19; 98 ER 489 at 498-9. See N Sinanis, "The North Briton No 45 and the doctrinal origins of Exemplary Damages" (2023) 82(2) *Cambridge Law Journal* 321, 326; D Ibbetson, "*Wilkes v Wood* (1763) General Warrants and Punitive Damages" in J Goudkamp and E Katsampouka, eds, *Landmark Cases in the Law of Punitive Damages* (Bloomsbury Collections, 2023), 19–25, 21.

94 [2002] 2 AC 122 at 147 (Lord Hutton).

95 *Ibbett* (2006) 229 CLR 638 at 649 [40] (Gleeson CJ, Gummow, Kirby, Heydon and Crennan JJ). See also *New South Wales v Bryant* (2005) 64 NSWLR 281 at 288 [23]-[24] (Basten JA). Cf the position where exemplary damages are directed to individuals who are not part of the executive, where punishment and deterrence are the primary purposes of the award: *Lamb v Cotogno* (1987) 164 CLR 1 at 9 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ); *Gray v Motor Accidents Commission* (1998) 196 CLR 1 at 6 [12], 7 [15] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

to ensure that such reprehensible conduct does not recur."[96] The reality is that exemplary damages for executive wrongdoing have always been paid for by the state, not the individual officer concerned,[97] so the deterrence purpose in such cases is generally directed to the institution and only indirectly to the individual wrongdoer.[98] This coheres with the other ways in which tort law operates as an important means to hold the executive government to account.[99]

37 Both the rule of law, and the deterrent purposes of an award of exemplary damages, would be subverted by a condition that the individual wrongdoer must be aware their behaviour is unlawful. Often enough, the individual wrongdoer will be following instructions (as occurred here), or implementing a broader practice, that is shown to be illegal.[100] If that instruction or practice involves contumelious disregard of another's rights, that it was implemented by individual officers ought not to permit the state to avoid liability for exemplary damages.[101] Similarly, there are many circumstances where individual wrongdoers do not turn their mind to the issue of legality,[102] or wrongly convince themselves of the appropriateness of their action.[103] In such cases, "obtuseness, or arrogance" on the part of the officers "may itself require condemnation".[104]

38 The Court of Appeal's error is revealed by its failure to refer to, or disturb, factual findings made by both Kelly J (at trial) and Blokland J (on remitter) that the Director had

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96 *State of New South Wales v Spedding* [2023] NSWCA 180 at [318] (Bell CJ, Ward P and Adamson JA).

97 Atiyah, *Vicarious Liability in the Law of Torts* (London, Butterworths, 1967), 434; TT Arvind, "Restraining the State Through Tort? The Crown Proceedings Act in Retrospect" in TT Arvind and J Steele (eds), *Tort Law and the Legislature: Common Law, Statute and the Dynamics of Legal Change* (Oxford, Hart Publishing, 2013) 407.

98 *Ibbett* (2006) 229 CLR 638 at 649 [51], referring to *Adams v Kennedy* (2000) 49 NSWLR 78 at 87 [36] (Priestley JA). See C Sharkey, "Punitive Damages Transformed into Societal Damages", in E Bant et al (eds) *Punishment and Private Law* (Hart Publishing, 2021), 155–85, 157.

99 See, eg, *Ibbett* (2006) 229 CLR 638 at 648 [38] (Gleeson CJ, Gummow, Kirby, Heydon and Crennan JJ); *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501 at 558 (Gummow J); *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135 at 143–4 [17] (Gleeson CJ, Gummow, Kirby and Hayne JJ).

100 *Wilkes v Wood* (1763) Lofft 1 at 19; 98 ER 489 at 499 (issuing the warrants a "constant practice of the office"); *Huckle v Money* (1763) 2 Wils KB 206, 95 ER 768.

101 *Couch v Attorney-General (No 2)* [2010] 3 NZLR 149 at [24] (Elias CJ), [59] (Blanchard J).

102 *Romani v State of New South Wales* [2023] NSWSC 49; *Ibbett* (2006) 229 CLR 638; *Zaravinos v State of New South Wales* (2004) 62 NSWLR 58.

103 *Adams v Kennedy* (2000) 49 NSWLR 78 (officer "wrongly persuaded himself" that the plaintiff had committed a technical assault: at [30]).

104 *State of New South Wales v Ibbett* [2005] NSWCA 445 at [43] (Spigelman CJ).

commented "I don't mind how much gas you use";[105] Blokland J's findings about the other disturbing comments of other prison and youth justice officers in the lead up to the use of gas;[106] and other objective circumstances surrounding the tort. Applying the correct approach, these comments are central to the inquiry, because they demonstrate that the decision to use CS gas was not merely "unconstitutional" (in the sense of contrary to law), but took place in "outrageous" circumstances illustrated by a "wanton disregard of the [appellants'] welfare".[107]

Ground 3 – exemplary damages in the absence of "direct" liability

39 In addition to rejecting an award of exemplary damages because the Territory's senior officers did not subjectively appreciate the unlawfulness of the use of CS gas, the Court of Appeal also rejected the award of exemplary damages on a different basis: namely, that damages could not be awarded against the Northern Territory in respect of its institutional responsibility unless findings of liability had been made on a "direct", and not vicarious, basis.[108]

40 The Court of Appeal held that because Blokland J had referred to failures of training and failures to conduct a form of institutional review of the use of CS gas, her Honour had determined that the Territory was involved in direct wrongdoing.[109] The Court of Appeal held that exemplary damages could only be awarded against the state for training and disciplinary failures if the plaintiff had pleaded direct wrongdoing by reason of failures of training or discipline.[110] But as this Court's unanimous judgment in *New South Wales v Ibbett* shows, that approach is not justified by either precedent or by principle.[111]

41 The category of oppressive, arbitrary or outrageous use of executive power has always been a recognised basis for the award of exemplary damages.[112] Conduct may be "high-

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105 *LO* [2017] NTSC 22 at [86] (footnote 13); ABFM at 147; *Binsaris v NTA* [2023] NTSC 79 at [87]; CAB 52–3. Compare *NTA v Austral* [2025] NTCA 3 at [70]; CAB 160–1, where the comment was not considered.

106 *Binsaris v NTA* [2023] NTSC 79 at [85]; CAB 52. There was no discussion of this comment in *NTA v Austral* [2025] NTCA 3.

107 *Lamb v Cotogno* (1987) 164 CLR 1 at 13 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ).

108 *NTA v Austral* [2025] NTCA 3 at [75]–[76]; CAB 164–5, citing *Bird DP (a pseudonym)* (2024) 98 ALJR 1349.

109 *NTA v Austral* [2025] NTCA 3 at [75]; CAB 164–5.

110 *NTA v Austral* [2025] NTCA 3 at [76]; CAB 165.

111 *Ibbett* (2006) 229 CLR 638.

112 *Huckle v Money* (1763) 2 Wils KB 205 at 207; 95 ER 768 at 769; *Rookes v Barnard* [1964] AC 1129 at 1223, 1226 (Lord Devlin); *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 at 133 (Taylor J), 144

handed, outrageous, and show contempt for the rights of others, even if it is not malicious or even conscious wrong-doing."[113] Despite that understanding of the law — including unanimous High Court authority — the Court of Appeal has narrowed the circumstances in which exemplary damages may be awarded against government authorities. That was in error.

42 In the context of tort claims against state agents (including police and corrections officers), it is orthodox for an award of exemplary damages to take into account the government's responsibility for the training and discipline of its officers.[114] For example, in *Ibbett*, this Court expressly endorsed the approach taken by Priestley JA in *Adams v Kennedy*, that the amount of an award of exemplary damages "should also be such as to bring home to those officials of the State who are responsible for the overseeing of the police force that police officers must be trained and disciplined so that abuses of the kind that occurred in the present case do not happen."[115] Observations of this kind are consonant with this Court's emphasis in *Lamb v Cotogno* that "[t]he object, or at least the effect, of exemplary damages is not wholly punishment and the deterrence which is intended *extends beyond the actual wrongdoer and the exact nature of his wrongdoing*."[116]

43 Consistently with this, in *Ibbett*, this Court unanimously upheld an award of exemplary damages against the State of New South Wales for the actions of police on a vicarious liability basis.[117] Although in *Ibbett* the State was made liable directly by statute,[118] this

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(Menzies J), 159–60 (Owen J); *New South Wales v Ibbett* (2006) 229 CLR 638 at 648–50 [38]–[40] (Gleeson CJ, Gummow, Kirby, Heydon and Crennan JJ).

113 *New South Wales v Riley* (2003) 57 NSWLR 496 at 530 [138] (Hodgson JA; Sheller JA and Nicholas J agreeing).

114 *Ibbett* (2006) 229 CLR 638 at 653 [54] (Gleeson CJ, Gummow, Kirby, Heydon and Crennan JJ); *Adams v Kennedy* (2000) 49 NSWLR 78 at 87 [36] (Priestley JA); *New South Wales v Zreika* [2012] NSWCA 37 at [62], [75] (Sackville AJA; Macfarlan and Whealy JJA agreeing); *South Australia v Holder* [2019] SASCFC 135 at [27] (Kelly J; Kourakis CJ and Stanley J agreeing); *Kuddus v Chief Constable of Leicestershire* [2002] 2 AC 122 at 147–9 [75]–[79] (Lord Hutton); *Lavery v Ministry of Defence* [1984] NI 99 at 106 (Kelly LJ); *Peeters v Canada* (1993) 108 DLR (4th) 471 at 482 (Heald, MacGuigan and Linden JJA).

115 (2006) 229 CLR 638 at 653 [54] (Gleeson CJ, Gummow, Kirby, Heydon and Crennan JJ), approving *Adams v Kennedy* (2000) 49 NSWLR 78 at 87 [36] (Priestley JA).

116 *Lamb v Cotogno* (1987) 164 CLR 1 at 9 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ) (emphasis added), referring to *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 at 138 (Taylor J).

117 *New South Wales v Ibbett* (2006) 229 CLR 638 at 653–5 [54]–[60] (Gleeson CJ, Gummow, Kirby, Heydon and Crennan JJ).

118 *New South Wales v Ibbett* (2006) 229 CLR 638 at 654 [57] (Gleeson CJ, Gummow, Kirby, Heydon and Crennan JJ).

was not on the basis that it had breached a duty.[119] Rather, consistently with long-established legislative developments and practice,[120] the statute transferred the secondary duty of the police officer to pay damages to the plaintiff to the State, and conferred an immunity on the police officer from being sued other than in circumstances where the State denied vicarious liability.[121] In other words, *Ibbett* was a case of "true" vicarious liability in the sense of "attribution of liability, not attribution of acts".[122]

44 In *Ibbett,* this Court approved Lord Hutton's justification for exemplary damages in such cases, namely, that they serve to "uphold and vindicate the rule of law" and that they "bring home to officers in command of individual units that discipline must be maintained at all times".[123] The availability of exemplary damages also ensures that adequate awards can be made against those who bear public responsibility for the officers concerned.[124] If exemplary damages for that purpose could only be awarded where there had been a direct breach of duty by the state, no awards of exemplary damages against the state for the torts of police, prison or youth justice officers for which it has assumed responsibility could be sustained.[125]

45 Justice Blokland's findings were that exemplary damages should be awarded in light of the Territory's responsibility for statutory officers in charge of youth detention facilities.[126] An award of exemplary damages on that basis was orthodox and should not have been disturbed by the Court of Appeal. That it did so reveals a misunderstanding of principle, and a departure from appellate authority, that this Court should correct.

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119 Cf *Bird v DP (a pseudonym)* (2024) 98 ALJR 1349 at 1359–60 [36]–[37] (Gageler CJ, Gordon, Edelman, Steward and Beech-Jones JJ).

120 *Commonwealth v Mewett* (1997) 191 CLR 471 at 543 (Gummow and Kirby JJ); *New South Wales v Ibbett* (2006) 229 CLR 638 at 650 [41] and 654 [57] (Gleeson CJ, Gummow, Kirby, Heydon and Crennan JJ); *Binsaris* (2020) 270 CLR 549 at 567 [43]–[44] (Gageler J).

121 *Law Reform (Vicarious Liability) Act 1983* (NSW) s 9B.

122 *Bird v DP (a pseudonym)* (2024) 98 ALJR 1349 at 1361 [44] (Gageler CJ, Gordon, Edelman, Steward and Beech-Jones JJ).

123 *New South Wales v Ibbett* (2006) 229 CLR 638 at 650 [40]–[41] (Gleeson CJ, Gummow, Kirby, Heydon and Crennan JJ).

124 Ibid. See also *Rowlands v Chief Constable of Merseyside Police* [2007] 1 WLR 1065 at 1080 [47] (Moore-Bick LJ; Richards and Ward LJJ agreeing); J Edelman (ed), *McGregor on Damages* (22nd ed, 2024) at [14-049]-[14-050].

125 Cf *Enever v the King* (1906) 3 CLR 969 with *Commonwealth v Mewett* (1997) 191 CLR 471 at 543 (Gummow and Kirby JJ); *New South Wales v Ibbett* (2006) 229 CLR 638 at 650 [41] and 654 [57] (Gleeson CJ, Gummow, Kirby, Heydon and Crennan JJ) and *Binsaris* (2020) 270 CLR 549 at 567 [43]–[44] (Gageler J).

126 *Binsaris v NTA* [2023] NTSC 79 at [93]; CAB 56.

Respondent's proposed cross-appeal

46 Special leave in respect of the respondent's cross-appeal should be refused.

47 Proposed ground 1 raises no question of law of public importance, nor any matter affecting the interests of the administration of justice. The principles relevant to the question of manifest excess are not in doubt.[127] Especially in the factual circumstances set out in Part V above, the award of the primary judge was not manifestly excessive.

48 Proposed ground 2 raises no question of principle or public importance. Exemplary damages, and interest on compensatory damages, are entirely separate matters: the presence of the one cannot justify the absence of the other.

10 49 The appellants will respond to any point of substance in respect of the proposed cross-appeal in their reply.

PART VII—ORDERS

50 The appellants seek the following orders in each matter:

1. The appeal be allowed with costs.

2. Paragraphs 1 and 2 of the orders of the Court of Appeal made on 28 March 2025 be set aside, and in lieu thereof it be ordered that the appeal be dismissed with costs.

PART VIII – TIME ESTIMATE

51 It is estimated that up to 2.5 hours will be required for oral argument (including reply).

20 Dated: 25 September 2025



	Kathleen Foley	James McComish	Marcel Delany
T	(03) 9225 7999	(03) 9225 6827	(03) 9225 8444
E	kfoley@vicbar.com.au	jmccomish@vicbar.com.au	mdelany@vicbar.com.au

127 *Rogers v Nationwide News Pty Ltd* (2003) 216 CLR 327 at 348 [62] (Hayne J; Gleeson CJ and Gummow J agreeing); *Lee Transport Co Ltd v Watson* (1940) 64 CLR 1 at 13 (Dixon J); *Miller v Jennings* (1954) 92 CLR 190 at 197 (Dixon CJ and Kitto J).

ANNEXURE TO APPELLANTS' JOINT SUBMISSIONS

No	Description	Version	Provisions	Reason for providing this version	Applicable date or dates
1.	*Criminal Code Act 1983* (NT)	Current	s 43AY	Illustrative	Current
2.	*Judiciary Act 1903* (Cth)	Compilation No. 47, 25 August 2018	s 37	Act in force when matter remitted	2020
3.	*Law Reform (Vicarious Liability) Act 1983* (NSW)	Current	s 9B	Illustrative	Current
4.	*Prisons (Correctional Services) Act* (NT)	Version as in force at 1 July 2013	s 6	Act in force at time of BMU incident	21 August 2014
5.	*Weapons Control Act 2001* (NT)	Version as in force at 21 September 2011	s 6	Act in force at time of BMU incident	21 August 2014
6.	*Youth Justice Act 2005* (NT)	Version as in force at 1 July 2014	ss 151, 152, 153, 157	Act in force at time of BMU incident	21 August 2014