



HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
DARWIN REGISTRY

BETWEEN:

D9/2025

Ethan Austral

Appellant

and

Northern Territory of Australia

Respondent

D10/2025

Josiah Binsaris

Appellant

and

Northern Territory of Australia

Respondent

D11/2025

Leroy O’Shea

Appellant

and

Northern Territory of Australia

Respondent

12/2025

Keiran Webster

Appellant

and

Northern Territory of Australia

Respondent

RESPONDENT’S SUBMISSIONS

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PART I: CERTIFICATION

1. These submissions, which respond to the joint submissions of the appellants in the four related appeals (AS), are in a form suitable for publication on the internet.

PART II: ISSUES ARISING

2. The respondent agrees with the appellants' identification of the first issue arising: AS[3]. The appellants' framing of the second and third issues, however, mischaracterises the Court of Appeal's reasoning and thereby obscures the issues arising in this Court.

3. Contrary to AS[4], the Court of Appeal's assessment of the relevant officers' conduct was not confined to their belief that their actions were lawful. Rather, the Court holistically reviewed all the circumstances, including the officers' correct assessment that they were dealing with a dangerous situation which needed to be brought to a quick conclusion and that the use of CS gas was the safest way of achieving this (CA[61]), and the care taken to ensure that only the minimum amount of CS gas necessary was used (CA[70]). The real issue is whether the Court of Appeal erred in concluding that in all the circumstances, including the officers' beliefs, an award of exemplary damages was not justified.

4. Contrary to AS[5], the Court of Appeal did not hold that exemplary damages can only be awarded against a state defendant if the state is directly as distinct from vicariously liable for the tort ([53] below). Rather, the Court found that the appellants had not alleged or proved fault by the Territory giving rise to exemplary damages (CA[75]-[76]). The issue raised by this ground is whether, where the conduct of the relevant officers did not justify exemplary damages, the appellants nonetheless alleged and proved fault by the Territory capable of enlivening the power.

5. If they arise, the respondent's notices of cross-appeal (CAB 226-237) raise three issues. First, did the assessing judge err in quantifying the amount of exemplary damages without having regard to the cumulative size of the four awards of \$200,000 against the respondent? Second, and in any event, was the total exemplary damages award of \$800,000 manifestly excessive? Third, did the assessing judge err by declining to award interest on general damages, having regard to the practical effect of the substantial award of exemplary damages?

PART III: SECTION 78B NOTICES

6. The respondent agrees that notice is not required under s 78B of the *Judiciary Act 1903*.

PART IV: FACTS

7. The appellants' narrative of events is incomplete in important respects. Engagement with the grounds of appeal requires a more complete factual narrative.
8. In 2014 the Behaviour Management Unit (**BMU**) at Don Dale Youth Detention Centre was used to accommodate detainees whose behaviour in detention threatened the good order of the centre or the superintendent's ability to maintain the safe custody of detainees.¹
9. Ethan Austral's behaviour in detention in the six months prior to 21 August 2014 was "extremely problematical".² He assaulted staff and other detainees on multiple occasions, including with improvised weapons. He had unsuccessfully attempted to escape on one
10 occasion and had successfully escaped on another.³
10. Between 24 March 2013 and 21 August 2014, Josiah Binsaris had been involved in three attempts to escape from Don Dale, one successful escape from Don Dale and a further successful escape from courtroom custody. During each attempt to escape from Don Dale he caused damage to the centre. He was overheard on a number of occasions planning further escapes, including by attacking staff members.⁴
11. Leroy O'Shea had a history of non-compliance and abuse towards staff, including threatening staff.⁵
12. On 2 August 2014 each of the appellants escaped from Don Dale. In the course of the escape they armed themselves with improvised weapons, threatened staff and damaged
20 property. They were accommodated in the BMU after their recapture and return to custody between 4 and 6 August 2014.⁶ Two other detainees were also accommodated in the BMU, including Jake Roper. Jake Roper had hospitalised another detainee two weeks before the 2 August 2014 escape.⁷ Detention centre staff and management held concerns about where they could safely and securely accommodate this cohort of detainees.⁸
13. The events leading to the use of CS Gas on 21 August 2014 began when Jake Roper, Ethan Austral and Josiah Binsaris covered up the CCTV cameras in their cells with toilet paper.

¹ *LO v Northern Territory of Australia* [2017] NTSC 22 at [21], [23] and [27] **ABFM 127-9, 130-1**.

² *LO* at [5] **ABFM 121**.

³ *LO* at [5] **ABFM 121**.

⁴ *LO* at [7] **ABFM 122-3**.

⁵ *LO* at [9] **ABFM 124**.

⁶ *LO* at [13]-[14] **ABFM 125-6**.

⁷ *LO* at [12] **ABFM 125**.

⁸ *LO* at [21], [23]-[24], [26] **ABFM 127-30**.

Ethan Austral and Josiah Binsaris, who shared a cell, subsequently refused to return their dinner plates.⁹

14. Thereafter one of the detainees in the BMU said words to the effect: “Fuck’em. Let’s just run amok”. All of the detainees in the BMU except for Leroy O’Shea and Kieran Webster, who shared a cell, then proceeded to shout and damage their cells. Ethan Austral and Josiah Binsaris broke their light fitting and smashed a soccer ball-sized hole through the metal mesh on their cell door. They subsequently used the hole to throw projectiles at staff attempting to enter the BMU.¹⁰
15. At this point, Don Dale staff had lost the ability to effectively supervise detainees in the BMU. A number of cameras had been obscured and staff were unable to safely enter the BMU to manually observe the detainees. At approximately 5pm the shift supervisor telephoned AGM Sizeland to report the situation.¹¹
16. Jake Roper then escaped from his cell using a hole he had forced through the metal mesh door.¹² He broke into the adjacent admissions area where he damaged property and took a fire extinguisher which he used as an improvised weapon to damage property and threaten staff. He broke all of the available windows.¹³
17. At approximately 8pm AGM Sizeland returned to Don Dale to address the situation but was unable to view what was happening in the BMU due to the cameras being covered and Jake Roper throwing and poking improvised weapons towards staff on entry.¹⁴ AGM Sizeland directed available staff to each of the BMU exit points to try to contain Jake Roper.¹⁵ He was able to see a lot of broken glass on the floor which he assessed as a hazard and potential weapon.¹⁶ Jake Roper threatened to stab him.¹⁷
18. YJO Kelleher tried to negotiate with Jake Roper, in particular to allow the broken glass to be removed. Jake Roper responded with violence.¹⁸

⁹ LO at [60] **ABFM 137**.

¹⁰ LO at [61] **ABFM 138**. The hole is shown in exhibit D10: Respondent’s Book of Further Material (**RBFM**) 5.

¹¹ LO at [62] **ABFM 138**.

¹² LO at [63] **ABFM 138**.

¹³ LO at [64], [80] **ABFM 139, 144-5**. Cf AS[11]-[12], euphemistically referring to his actions as “caus[ing] a disturbance”. The Court of Appeal, who had the footage before it, aptly described his conduct as a “rampage”: CA[3]. Some of the damage is depicted in photographs comprising trial exhibit D18 **RBFM 10-24**.

¹⁴ LO at [66] **ABFM 139**.

¹⁵ LO at [72] **ABFM 141**.

¹⁶ LO at [67] **ABFM 140**.

¹⁷ LO at [68] **ABFM 140**.

¹⁸ LO at [69]-[70] **ABFM 140**.

19. By this stage, Commissioner Middlebrook was notified, and he and correctional officers attended Don Dale by around 8:30pm.¹⁹ Commissioner Middlebrook was briefed on what had occurred and the inability to negotiate with Jake Roper.²⁰ His greatest concern was that the events (ongoing since at least 5pm) were inciting other detainees outside of the BMU and could significantly escalate if others became involved. He was concerned about a mass escape or a fire in the centre based on his knowledge of the limitations of the infrastructure and past events.²¹ Commissioner Middlebrook determined that he needed to resolve the situation in the BMU quickly to avoid those risks.²²
- 10 20. The BMU had two entry points.²³ Commissioner Middlebrook determined the safest means to resolve the situation in the BMU was to enter from both entry points at the same time, using a dog at one end as a distraction while correctional officers entered from the other door to physically restrain Jake Roper. The plan was attempted but could not be executed because the lock on one of the doors had been damaged.²⁴
- 20 21. Commissioner Middlebrook and AGM Sizeland evaluated the remaining options. They considered it was unsafe to order officers to enter the BMU and attempt to tackle Jake Roper to the ground. He was armed with improvised weapons, there was a large amount of broken glass on the floor, and Austral and Binsaris had long metal brackets they had broken from the lights which they could thrust through the hole they had made in the door. The officers had shields and batons; however, Middlebrook and Sizeland assessed that in the event of a physical confrontation between the officers and Jake Roper, there was a high risk of serious injury, especially to Roper.²⁵
22. AGM Sizeland suggested the use of CS gas. Commissioner Middlebrook confirmed that the correctional officers had CS gas in aerosols which allowed them to control the amount of gas. He knew that the officers were trained in how much gas to use.²⁶ Based on those considerations, Commissioner Middlebrook authorised the use of CS gas in the BMU.
23. Commissioner Middlebrook and AGM Sizeland believed that CS gas could be used lawfully by correctional officers in a detention centre.²⁷

¹⁹ LO at [74]-[75] **ABFM 142-3**.

²⁰ LO at [80]-[82] **ABFM 144-5**.

²¹ LO at [77]-[78] **ABFM 143-4**.

²² LO at [79] **ABFM 144**.

²³ LO at [71] **ABFM 141**; Exhibit D3: Plan of the BMU **RBFM 4**.

²⁴ LO at [84] **ABFM 146**.

²⁵ LO at [85]-[88] **ABFM 146-7**.

²⁶ LO at [86] **ABFM 147**.

²⁷ *Northern Territory of Australia v Austral* [2025] NTCA 3 at [54]-[58] Core Appeal Book (CAB) 148-50.

24. Before deployment of the gas, Jake Roper was twice warned that if he did not surrender, gas would be used. He responded: “come and get me dog cunts”.²⁸ The CS gas was deployed in a graduated series of bursts with time allowed in between to see whether Roper would comply.²⁹ No further gas was deployed after he complied. Care was taken “to ensure that only the minimum amount of the gas necessary to subdue Roper was used”.³⁰
25. Officers then entered the BMU, restrained Roper and took him outside. They then removed the other occupants of the BMU, including the appellants. Officers did so “as quickly as they could consistent with maintaining security”.³¹ Several YJOs, including AGM Sizeland, exposed themselves to the gas in order to help with removing the detainees as quickly as possible.³² Once removed, the detainees were washed using a nearby hose readied in advance for that purpose.³³
26. Both AGM Sizeland and Commissioner Middlebrook gave evidence, accepted by the primary judge, about their decision-making process – in particular, why they considered that CS gas presented “the least hazardous option available, constituted the least degree of force which could be used in the circumstances, and carried the least risk of serious injury to Jake Roper and to staff”.³⁴ The prison officers who deployed the gas agreed.³⁵ The decision-makers balanced what they understood from their own experiences of exposure³⁶ to be “temporary discomfort” against the risk of “serious, perhaps long lasting or permanent injury to Jake Roper and/or the prison officers” which they associated with the alternatives available to them.³⁷
27. The decision-making was examined by an independent expert, Mr Colin Kelaher who concluded: “weighing up all these scenarios and risks to all concerned, the most reasonable option was the deployment of the CS gas”.³⁸
28. The decision-making was further tested at trial, and each of the alternative options advanced by the appellants was rejected.³⁹

²⁸ *LO* at [96]-[97] **ABFM 151**.

²⁹ *LO* at [98]-[100] **ABFM 151-2**.

³⁰ *Austral* at [70] **CAB 160-1**.

³¹ *LO* at [103]-[104] **ABFM 153**.

³² *LO* at [101] **ABFM 152**.

³³ *LO* at [107], [86] fn 13 **ABFM 154-5, 147**.

³⁴ *LO* at [87]-[90], [152], [165], [166e] **ABFM 147-50, 172, 179, 180**.

³⁵ *LO* at [91] **ABFM 150**.

³⁶ *LO* at [90] **ABFM 149-50**.

³⁷ *LO* at [139] **ABFM 168**.

³⁸ *LO* at [147], [152]-[153] **ABFM 170-72**.

³⁹ *LO* at [154]-[166] **ABFM 173-9**.

29. Consequently, the primary judge concluded that CS gas was “reasonable and necessary” *because* “there was no other option reasonably available involving less force and less risk to the safety of detainees and staff”.⁴⁰

PART V: ARGUMENT

A. Ground 1 – Execution of this Court’s judgment on remitter

30. This ground is framed (AS[26]) as a failure on remitter to execute this Court’s judgment in *Binsaris v Northern Territory of Australia* (2020) 270 CLR 549 in accordance with s 37 of the *Judiciary Act 1903* (Cth). There is no dispute that on remitter the assessing judge and the Court of Appeal were duty bound to give effect to this Court’s judgment,⁴¹ including the reasons for decision.⁴² However, there was no contravention of that requirement. Rather, the rejection of the primary judge’s undisturbed findings now urged⁴³ by the appellants would itself impermissibly “go outside the scope of what [was] remitted” and involve the reconsideration of “previous findings that have not been disturbed by the appellate courts”.⁴⁴
31. The appellants’ argument (AS[29]-[31]) is that the findings in *LO* that CS gas was “reasonable and necessary” and that there was “no other option reasonably available” were disturbed by this Court’s finding in *Binsaris* that CS gas was unlawful. The argument is functionally put in answer to the Court of Appeal’s conclusions that the “evidence did not reveal ‘conscious wrongdoing in contumelious disregard’” and that the evidence “did not reveal high-handed or outrageous conduct showing contempt for the rights of the respondents”: CA[72]-[73] (CAB 162-3).
32. The relevant parts of the judgment of the Court of Appeal begin with the uncontroversial identification of the nature and standard of the appeal as requiring a “real review” of the evidence and the judgment, including by drawing “its own inferences from the evidence”.⁴⁵
33. The Court then summarised the primary judge’s findings in *LO* concerning the decision to deploy CS gas broadly as set out above at [13]-[26] above: CA[33(a)-(v)] (CAB 123-31).

⁴⁰ *LO* at [166(e)] **ABFM 180**.

⁴¹ *Peacock v DM Osborne & Co* (1907) 4 CLR 1564 at 1567-1568.

⁴² *Austral* at [49] (CAB 143), citing *Harvard Nominees Pty Ltd v Tiller (No 4)* (2022) 403 ALR 498 at [45]-[49] upheld on this issue in *Harvard Nominees Pty Ltd v Nicolleti* [2022] FCAFC 179.

⁴³ Contrary to what the appellants urged before Blokland J: transcript, 27.07.2020, 4.31-41, **RBFM 28**.

⁴⁴ *Harvard Nominees Pty Ltd v Tiller (No 4)* (2022) 403 ALR 498 at [47]. See also *Toyota Motor Corporation Australia Limited v Williams* (2023) 296 FCR 514 at [320]; *R v Carroll* (2010) 77 NSWLR 45 at [27].

⁴⁵ *Austral* at [19]-[24] (CAB 114-7); see *Lee v Lee* (2019) 266 CLR 129 at [55].

34. Next, the Court examined how issue was joined at trial on the lawfulness of the use of CS gas in terms of two discrete inquiries: first, “whether the use of CS gas was a type of force permitted by law”, and second, whether the use of CS gas was reasonable and necessary as required by s 153(2) of the *Youth Justice Act 2005* (NT): CA[34]-[36] (CAB 132-3).
35. The Court of Appeal then recorded the primary judge’s conclusions (including the conclusion that the use of CS gas was reasonable and necessary) based on the underlying findings of fact, before noting that on appeal from the decision in *LO* the appellants disavowed any challenge to the primary judge’s conclusion that the use of the CS gas was reasonable and necessary, and consequently, the subsequent appeal to this Court in *Binsaris* also did not concern that issue: CA[41]-[43] (CAB 136-8). The Court of Appeal explained the finding of illegality in *Binsaris* as a finding that the “type of force” used was impermissible rather than engagement with an argument, explicitly disavowed by the appellants, that the force was “in excess of that called for by the situation” – that is, excessive, disproportionate or not reasonable or necessary: CA[42]-[44] (CAB 137-9). Consequently, the primary judge’s conclusions that the “level of force used was not disproportionate”,⁴⁶ that “there was no other option reasonably available involving less force and less risk to the safety of detainees and staff”⁴⁷ and that this was the belief of AGM Sizeland and Commissioner Middlebrook, were not displaced.
36. Those matters, and the additional findings reached on the evidence at CA[54]-[58] (CAB 148-50) (concerning the officers’ beliefs that the use of CS gas was lawful), and CA[70] (CAB 160-1) (concerning the graduated deployment of the gas), from which there is no appeal, led the Court to reject a characterisation of the deployment of CS gas as demonstrating either conscious wrongdoing in contumelious disregard or high-handed or outrageous conduct showing contempt for another’s rights: CA[72]-[73] (CAB 162-3).
37. The Court summarised its key conclusions as involving, first, a finding that the assessing judge had made multiple findings of fact inconsistent with undisturbed findings of the primary judge, and in doing so had acted beyond the scope of the remitter limited to an assessment of damages, and second, a conclusion that, in any event, on its own review of the evidence and the assessing judge’s decision, her Honour had erred in her dispositive factual conclusions: CA[74] (CAB 163-4). The appellants’ submissions in this Court impugn the first of those conclusions, but fail to engage with the second of them.

⁴⁶ *Austral* at [60] (CAB 150-1).

⁴⁷ *Austral* at [61] (CAB 151).

38. The reasons of the Court of Appeal are correct. The appellants' submissions to the contrary should be rejected for the following reasons.

39. First, contrary to the way the trial was run, the submissions collapse and conflate the two discrete inquiries going to the legality of the use of CS gas. On any fair reading of the judgment in *LO*, the conclusion of reasonable necessity was directed to questions of reasonableness and proportionality. Those matters were not in issue or disturbed by this Court's decision in *Binsaris*. They were not within the scope of that appeal. Consequently, it was not merely permissible but mandatory on remitter to assess damages on the basis of those findings.

10 40. Second, even if it were accepted that the conclusion in *LO* that CS gas was "reasonable and necessary" was inextricably tied to liability and displaced by the judgment in *Binsaris*, it was nevertheless open to the Court of Appeal in discharging its appellate functions to reach that finding as to the reasonableness and proportionality of the force used for the purpose of the assessment of damages based on its own review of the evidence, the judgment of the assessing judge, and the factual findings of the primary judge. That is what the Court did at CA[61] (CAB 151): "The regrettable fact that the safest method of dealing with the situation was contrary to the provisions of the *Weapons Control Act* did not bespeak malice or conscious wrongdoing in contumelious disregard of the respondents' rights".

20 41. Third, the conclusion that CS gas was "reasonable and necessary" as an assessment of the reasonableness and proportionality of the conduct followed from the preceding unchallenged findings of fact made by the primary judge set out above at [13]-[28]. In particular, the conclusions followed from the Court's rejection of there being any less dangerous alternative, and the Court's acceptance of the evidence of the decision-making of AGM Sizeland and Commissioner Middlebrook.

B. Ground 2 – State of mind requirement for exemplary damages

30 42. The focus of the appellants' argument in support of this ground is the state of mind required to enliven the Court's power to award exemplary damages. The appellants appear to accept that an inquiry into the wrongdoer's state of mind is highly relevant to an award of exemplary damages.⁴⁸ Contrary to the appellants' submissions, in its inquiry into the wrongdoers' states of mind the Court of Appeal applied orthodox principles stated and

⁴⁸ See AS[32(b)] (urging consideration of what "the relevant objective circumstances ... revealed about the officers' states of mind"), AS[33] ("the relevant question is whether the defendant's conduct illustrated a state of mind with the requisite high-handedness").

restated by this Court. On no reasonable view of those principles were the states of mind of the relevant officers in this case capable of enlivening the power to award exemplary damages.

43. Consistently with a line of decisions of this Court now spanning over a century, the majority in *Gray* confirmed that the power to award exemplary damages may be engaged by a finding of “conscious wrongdoing in contumelious disregard of another’s rights.”⁴⁹ It is “chiefly, if not exclusively” in such cases where exemplary damages are available.⁵⁰ This “classical formulation” places the wrongdoer’s state of mind at the centre of the inquiry, as distinct from an objective assessment of “severity or seriousness, absent a particular state of mind”.⁵¹

44. On the facts as found in the present case, the relevant officers’ states of mind cannot satisfy this test. Three key findings lead inexorably to that conclusion. First, there was “no doubt that the officers in question considered the deployment of CS gas was lawful at the time”: CA[29] (CAB 121). That is, the relevant officers had a positive belief that the use of CS gas was authorised (as distinct from understanding that the lawfulness was dubious and proceeding anyway, or not caring one way or the other): CA[58], [73] (CAB 149-50, 163). There is no basis to attribute this belief to “obtuseness, or arrogance”: cf AS[37]. This characterisation is manifestly inapt where the question of legality turned on a technical point of statutory construction on which the original primary judge, three intermediate appellate judges and one justice of this Court agreed that the use of CS gas was authorised: CA[38] (CAB 134). Second, there was also “no doubt that [the deployment of CS gas] was necessary in the circumstances”: CA[29] (CAB 121). The Courts below examined extensive evidence as to the contemporaneous exploration of other options to address the dangerous situation occurring in the BMU, concluding that there was “no other option reasonably available involving less force and risk to the safety of detainees and staff”: CA[41] (CAB 136). Accordingly, the Court of Appeal found that the relevant officers “held the reasonable belief that it was necessary to bring the situation with Roper in the BMU to a quick conclusion and that the use of CS gas was the safest method of dealing with the

⁴⁹ *Gray v Motor Accident Commission* (1998) 196 CLR 1 at [14], quoting *Whifield v De Lauret & Co Ltd* (1920) 29 CLR 71 at 77 (Knox CJ). See also *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 at 122 (McTiernan J), 138 (Taylor J), 147 (Menzies J), 154 (Windeyer J), 160 (Owen J); *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1985) 155 CLR 448 at 471 (Brennan J); *Lamb v Cotogno* (1987) 164 CLR 1 at 13 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ).

⁵⁰ *Gray* at [20].

⁵¹ *State of New South Wales v Ibbett* (2005) 65 NSWLR 168 at [233]-[234] (Basten JA).

situation”: CA[61] (CAB 151). Third, the officers responsible for the decision to deploy CS gas, and the officers who deployed it, took care to ensure that only the minimum amount to subdue Roper was used: CA[70], [73] (CAB 160-1, 163). The exchange between Commissioner Middlebrook and the dog handler from which the appellants selectively quote at AS[14] and on which they rely at AS[38] has to be viewed in the context of the whole of the evidence identified by the Court of Appeal⁵² which answered any suggestion that Commissioner Middlebrook approved of the administration of an excessive quantity of CS gas, and indeed supported the inverse finding: CA[70] (CAB 160-1).

- 10 45. These findings as to the states of mind of the relevant officers show why the Court of Appeal was plainly correct to conclude that their conduct did not involve conscious wrongdoing in contumelious disregard of another’s rights: CA[29], [61], [72] (CAB 121, 151, 162). Conduct engaged in with a positive belief that it is both within the officers’ lawful authority and the safest means of addressing a dangerous situation is the antithesis of “conscious wrongdoing in contumelious disregard of another’s rights”.⁵³ Against those matters, the appellants’ reliance at AS[38] on the comments referred to at AS[16] ignores that the comments were made by persons not involved in the deployment of CS gas, were about Jake Roper not the appellants, and were made in a storeroom away from the detainees and the decision-makers. They were irrelevant to the “states of mind of those involved in approving the use of CS gas”.⁵⁴
- 20 46. The appellants contend that the Court of Appeal erred by, in effect, placing an inappropriate gloss on the test so as to require proof of consciousness of the unlawfulness of the deployment of CS gas on the part of the relevant officers: AS[33], [37]. This mischaracterises the Court of Appeal’s reasoning. That is clear from CA[72]-[73] (CAB 162-3), where the Court expressly proceeded on the basis — favourably to the appellants — that it is unnecessary to prove consciousness of wrongdoing.⁵⁵ On no available reading of the judgment below is the outcome attributable to a finding that the appellants were required to establish that the relevant officers were conscious of the unlawfulness of their conduct. Rather, the outcome is attributable to the Court’s assessment of all the circumstances, including the officers’ positive belief in the lawfulness of the conduct and

⁵² LO at [86] incl fn 13 **ABFM 147**.

⁵³ *Austral* at [61] (CAB 151), citing *Victoria v Horvath* (2002) 6 VR 326 at [60].

⁵⁴ *Austral* at [53] (CAB 147).

⁵⁵ Citing *New South Wales v Ibbett* (2005) 65 NSWLR 168 at [34]-[52] (Spigelman CJ). Spigelman CJ was in the minority on that question of law: see footnote 59, below.

the fact that their actions were the safest way of addressing an emergency situation: CA[73] (CAB 163).

47. Accordingly, the question of law sought to be raised by ground 2 does not arise on the facts of this case and is not necessary to decide. If this Court were to address it, the better view would be that conscious wrongdoing in contumelious disregard of the plaintiff's rights does require the plaintiff to show that the wrongdoers knew of, or were reckless as to, the wrongfulness of their conduct. This Court has never sanctioned an award of exemplary damages for less than conscious wrongdoing.⁵⁶ This is consistent with the composite nature of the phrase "conscious wrongdoing in contumelious disregard" of another's rights.⁵⁷ The appellants' argument derives no support from, and is in fact contradicted by, *Lamb v Cotogno*, where the Court found "the intention or recklessness necessary to justify an award of exemplary damages" in "contumelious behaviour" engaged in by the defendant without malice.⁵⁸ To the extent the point has arisen for decision at the intermediate appellate level, the prevailing view is that consciousness of wrongdoing (extending to recklessness) is required.⁵⁹ In a comprehensive survey of the relevant Anglo-Australian and North American sources, the English Law Commission concluded that "deliberate and outrageous disregard of the plaintiff's rights" was the clearest formulation reconciling the various expressions of the test, with a "minimum threshold" of subjective recklessness on the wrongdoer's part.⁶⁰ Requiring subjective fault also best coheres with the punitive nature⁶¹ of exemplary damages.⁶²

⁵⁶ A Doecke, "Exemplary damages: Retribution and condemnation – the purpose controlling the scope of the exemplary damages award" (2017) 38 *Adelaide Law Review* 87 at 105.

⁵⁷ See *New South Wales v Ibbett* (2005) 65 NSWLR 168 at [234] (Basten JA).

⁵⁸ *Lamb v Cotogno* (1987) 164 CLR 1 at 13; cf AS[34].

⁵⁹ *New South Wales v Ibbett* (2005) 65 NSWLR 168 at [137], [177]-[181] (Ipp JA: finding conscious wrongdoing for the assault, but no conscious wrongdoing or recklessness for the trespass, thus awarding exemplary damages for the former but not the latter), [222], [233]-[234], [244], [257] (Basten JA: finding conscious wrongdoing for the assault and the trespass, and thus awarding exemplary damages for both). See A Doecke, "Exemplary damages: Retribution and condemnation – the purpose controlling the scope of the exemplary damages award" (2017) 38 *Adelaide Law Review* 87 at 102-104.

⁶⁰ Law Commission, *Aggravated, Exemplary and Restitutionary Damages*, Law Com No 247, (London, 1997) Pt V at [1.46]-[1.48]. This report was cited in the joint judgment in *Gray* at [19] and [39].

⁶¹ *Gray* at [6], [12], [26].

⁶² *A v Bottrill* [2003] 1 AC 449 at [76] (Lords Hutton and Millett), quoting *Sweet v Parsley* [1970] AC 132 at 156 (Lord Pearce): "The notion that some guilty mind is a constituent part of crime and punishment goes back far beyond our common law." Lords Hutton and Millett were in dissent in finding that intentional or reckless wrongdoing is required for exemplary damages under New Zealand law, but Professor Luntz has assessed this dissent as better reflecting Australian law following *Gray*: H Luntz and S Harder, *Damages for Personal Injury and Death* (5th ed, 2021) at [1.9.4] (fn 1137).

48. Beyond the contention that knowledge of the unlawfulness of the conduct is not required, the appellants' position as to what is required to engage the power to award exemplary damages is elusive. They rely on the caveats in *Gray* as to the exclusivity of the classical test.⁶³ This reliance is misplaced. The majority in *Gray* held that “[s]omething more must be found” than mere fault to support exemplary damages.⁶⁴ On no available reading of the majority judgment were their Honours approving a broad discretion to award exemplary damages without a clearly expressed justification. On the contrary, their Honours elaborated on the notoriously problematical features of awards of exemplary damages,⁶⁵ which make them an “exceptional remedy”⁶⁶ “awarded rarely”.⁶⁷ Their Honours emphasised that the remedy cannot be governed by the Court’s discretion at large, even informed by the broader considerations and purposes for its award; what is required is identification of specific features permitting the making of an award.⁶⁸ Properly understood, *Gray* offers no support for an ill-defined range of circumstances in which exemplary damages may be awarded even without showing conscious wrongdoing in contumelious disregard of another’s rights.
49. There is no support in authority or principle for the contention that “the relevant question is whether the defendant’s conduct illustrated a state of mind with the requisite high-handedness”: cf AS[33]. Even putting aside the significant divergence between English and Australian law since *Uren*, the two United Kingdom sources cited for that proposition do not support it.⁶⁹ To say that the inquiry searches for “the requisite high-handedness” is to introduce a vague and unworkable test at odds with the majority’s emphasis in *Gray* on the need for clarity in the identification of features permitting an award of exemplary damages.⁷⁰ “High-handed” is but one of the “gamut of dyslogistic judicial epithets”⁷¹ used

⁶³ AS[33], citing *Gray* at [14] (“at least the greater part of the relevant field”) and [20] (exemplary damages are awarded “chiefly, if not exclusively” in such cases).

⁶⁴ *Gray* at [12].

⁶⁵ *Gray* at [11]-[20].

⁶⁶ *Gray* at [20].

⁶⁷ *Gray* at [12]. See also *Watkins v Secretary of State for the Home Department* [2006] 2 AC 395 at [26] (Lord Bingham, Lords Hope, Rodger and Carswell agreeing), observing that “the policy of the law is not in general to encourage the award of exemplary damages”.

⁶⁸ *Gray* at [25], [30].

⁶⁹ AS fn 86: citing, in particular, J Edelman, *McGregor on Damages* (22nd ed, 2024) at [14-019] (fn 110). That footnote explains that where the category of “oppressive, arbitrary or unconstitutional conduct by government servants” (which is a discrete category for exemplary damages under English law) is relied upon, the “unconstitutional” head will only be engaged where the plaintiff shows the conduct to be “outrageous”, which may be characterised by malice, fraud, insolence, cruelty and the like.

⁷⁰ *Gray* at [30].

⁷¹ *Broome v Cassell & Co Ltd* [1972] AC 1027 at 1129 (Lord Diplock).

to describe conduct, without identifying the particular features of the conduct justifying that description. Any attempt to give content to the epithet ultimately redirects attention to “the knowledge, intention or recklessness (in other words, the state of mind)” of the wrongdoer.⁷² Further, and in any event, the Court of Appeal (again, favourably to the appellants) expressly considered whether the evidence in this case revealed “high-handed or outrageous conduct”, and gave cogent reasons why it did not: CA[73] (CAB 163).

50. The appellants appear to suggest that different considerations and principles may apply in cases of “executive wrongdoing”: AS[34]-[36]. While it may be accepted that awards of exemplary damages may have “particular significance in restraining executive power”,⁷³ this Court’s precedents deny the notion that the substantive principles change depending on whether the defendant is an emanation of the executive. In *Uren*, the Court declined to follow the shift in the United Kingdom towards categorisation of executive wrongdoing outside of the ordinary realm of tortious conduct, holding that the requirements for exemplary damages apply equally to all defendants.⁷⁴ Nothing in this Court’s decision in *State of New South Wales v Ibbett* supports the contrary view.⁷⁵ The issue in that case concerned awards of exemplary damages for vicarious liability; there was no issue in this Court as to the state of mind inquiry or the general test for exemplary damages.⁷⁶ To resolve the particular legal issue concerning vicarious liability the Court considered the purposes of awards of exemplary damages in cases involving executive wrongdoing,⁷⁷ but it did not suggest that those purposes resulted in different substantive principles governing the general test. Insofar as the appellants advance an approach placing exemplary damages within the discretion of the Court, informed by the purposes identified in *Kuddus* and *Ibbett*,⁷⁸ this is directly contrary to the statement of the majority in *Gray* that such an approach “gives insufficient guidance as to how the power should be exercised”.⁷⁹

⁷² *Port Stephens Shire Council v Tellamist Pty Ltd* [2004] NSWCA 353; 135 LGERA 98 at [401] (Ipp JA, Giles JA agreeing); *New South Wales v Ibbett* (2005) 65 NSWLR 168 at [231] (Basten JA).

⁷³ *Lewis v Australian Capital Territory* (2020) 271 CLR 192 at [111] (Gordon J).

⁷⁴ *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 at 137 (Taylor J), 159-160 (Owen J). An appeal to the Privy Council was dismissed: *Australian Consolidated Press Ltd v Uren* (1967) 117 CLR 221.

⁷⁵ (2006) 229 CLR 638; cf AS[36].

⁷⁶ At the special leave hearing the State abandoned a ground of appeal contending that the Court of Appeal erred by awarding exemplary damages without finding conscious wrongdoing, because the State accepted that at least a majority (Spigelman CJ and Basten JA) had made findings of conscious wrongdoing by the officers: *State of New South Wales v Ibbett* [2006] HCATrans 319 at 12 (lines 438-446), 15 (lines 573-583).

⁷⁷ *State of New South Wales v Ibbett* (2006) 229 CLR 638 at [38]-[48].

⁷⁸ AS[36], citing *Kuddus v Chief Constable of Leicestershire* [2002] 2 AC 122 at 147 (Lord Hutton) and *State of New South Wales v Ibbett* (2006) 229 CLR 638 at [40].

⁷⁹ *Gray* at [30].

51. There are sound reasons not to dilute the state of mind requirement for cases involving wrongs by police or corrections officers. As in the present case, such officers frequently have to make quick decisions in emergency situations. Where the evidence discloses no more than reasonable, albeit wrongful, conduct in response to the officers' perceptions and decision-making in the "agony of the moment",⁸⁰ any justification for exemplary damages falls away.⁸¹ Granting exemplary damages in such cases is not required to "vindicate the rule of law" or "hold the executive government to account" (cf AS[36]): those objectives are adequately protected by the non-exceptional heads of damages available to any successful plaintiff.
- 10 52. The cases of exemplary damages for executive wrongdoing cited at AS[34]-[35] do not establish any principle supporting an award in the present case. The appellants cite those cases as instances where exemplary damages have been awarded for police or prison officer wrongdoing "without findings that the officers *knew* they were acting contrary to law": AS[34]. Taking that submission at its highest, it could not sustain an award of exemplary damages in the present case, where there is a finding that the relevant officers had a positive belief in the lawfulness of their conduct ([44] above). Further, and in any event, the cases cited at AS fn 89 have characteristics distinguishing them from the present case.⁸² The appellants' argument also derives no support from *Wilkes v Wood* and *Huckle v Money* (cf AS[35]). Whatever substantive guidance may be derived from the reports of those
- 20 decisions (which is slight indeed),⁸³ they do not support the proposition that exemplary

⁸⁰ *Woodley v Boyd* [2001] NSWCA 35 at [37] (Heydon JA); *Carter v Walker* (2010) 32 VR 1 at [142].

⁸¹ H Luntz and S Harder, *Damages for Personal Injury and Death* (5th ed, 2021) at [1.9.4] (and the cases cited at fn 1143). See, eg, *New South Wales v Riley* (2003) 57 NSWLR 496 at [139]-[140] (Hodgson JA, Sheller JA and Nicholas J agreeing), identifying a "fundamental difference" between cases where the tortfeasor is responding to an "emergency or difficult or dangerous situation", and those where there is no such situation.

⁸² *Romani v State of New South Wales* [2023] NSWSC 49 (police had published advice showing knowledge that such conduct would be a trespass, yet individual officers did not know about or follow that advice: [78]); *State of New South Wales v Ibbett* (2005) 65 NSWLR 168 (conscious wrongdoing by officer intending to cause the plaintiff to apprehend immediate personal violence: [28] (Spigelman CJ), [137] (Ipp JA), [233]-[234], [244] (Basten JA)); *New South Wales v Delly* (2007) 70 NSWLR 125 (wrongdoing in contempt of the plaintiff's rights was established by continuation of detention after officer formed subjective view that there was no basis to charge the plaintiff and she was legally free to leave: [27] (Ipp JA), [90] (Tobias JA), cf [118] (Basten JA, criticising the clarity of the basis for the award)); *Zaravinos v State of New South Wales* (2004) 62 NSWLR 58 (judge from whom leave to appeal refused did not distinguish the grounds for exemplary versus aggravated damages, but in any event found that there were no reasonable grounds for the arrest and rejected officers' evidence that they had requisite belief the plaintiff would abscond: [19]-[21], [39]); *Coffey v State of Queensland* [2012] QCA 368 (officers intentionally applied force "without any proper regard for the safety" of the plaintiff: [13]).

⁸³ See N Sinanis, "The North Briton No. 45 and the Doctrinal Origins of Exemplary Damages" (2023) 82(2) *Cambridge Law Journal* 321, explaining that exemplary damages awards at this time were the product of "legally

damages may be awarded even though the relevant officer had a positive belief in the lawfulness of his or her conduct.

C. Ground 3 – Vicarious liability for exemplary damages

53. Contrary to the appellants’ submissions, the Court of Appeal did not hold that exemplary damages could not, as a matter of principle, be awarded against the Territory “in respect of its institutional responsibility unless findings of liability had been made on a ‘direct’, and not vicarious, basis”: AS[39]. Rather, it held that the assessing judge had awarded exemplary damages on a basis different from that upon which the case was litigated, such that “[a]s a matter of pleadings and procedural fairness, it was not open to the assessing judge to award exemplary damages on a direct liability basis as opposed to a vicarious liability basis”: CA[75]-[76] (CAB 164-5). The submissions at AS[40]-[44] therefore raise a false issue.
54. There is no room for doubt, and it has never been in issue in this case, that exemplary damages may be awarded against a defendant notwithstanding that its liability is vicarious.⁸⁴ Such an award is available where the plaintiff establishes that the tortfeasor’s conduct satisfies the test to enliven the power to award exemplary damages.
55. That is the basis on which *New South Wales v Ibbett* was decided, where the State conceded in this Court that the officers for whom it was vicariously liable had engaged in conscious wrongdoing in contumelious disregard of the plaintiff’s rights.⁸⁵ That is fundamentally different from the present case, where the Court of Appeal held that exemplary damages were “unavailable by reference to the conduct and states of mind of the individual officers”: CA[75] (CAB 164-5).⁸⁶ What this Court decided in *Ibbett* was that, the power to award exemplary damages having been engaged by the officers’ conduct, the Courts below did not err in formulating the award by reference to the position and conduct of the State, as opposed to strictly limiting the analysis to the individual officers.⁸⁷ Nothing in the Territory’s position or in *Austral* is inconsistent with that. For example, the Territory has

undirected and uncontrolled” jury determinations (at 324), “outside any distinctly *legal* direction or control” (at 348). That historical position is very different to that under modern Australian law.

⁸⁴ *New South Wales v Ibbett* (2006) 229 CLR 638 at [43]-[44], and the cases there cited.

⁸⁵ See footnotes 59 and 76 above. Hence this Court’s statement that “the State did not directly challenge the availability to the trial judge in this case and to the Court of Appeal of an award against the State of exemplary damages”: *New South Wales v Ibbett* (2006) 229 CLR 638 at [49].

⁸⁶ Even the assessing judge appears to have reached the same view, observing that “[i]f the Court were considering the liability for damages solely of the individual officers concerned a different view [as to an award of exemplary damages] might be taken”: AJ[93] (CAB 56).

⁸⁷ *New South Wales v Ibbett* (2006) 229 CLR 638 at [49]-[51], [54]-[55], [60]; cf AS[40], [43]-[44].

never submitted that the quantum of any award should be affected by the financial means of the officers, as opposed to the State;⁸⁸ nor has it denied that properly pleaded and proved allegations of relevant fault by the Territory could be relevant to an award.⁸⁹

56. To the extent the appellants' argument is capable of raising any point of principle, it is whether, even where the tortfeasor's conduct on its own does not justify exemplary damages, an award can be made against the vicariously liable principal by reason of its own conduct. On that question, the Territory accepts that where a plaintiff alleges and proves some relevant conduct by the principal which is, on orthodox principles, capable of supporting an award of exemplary damages, then such damages could be awarded notwithstanding that they would not have been available had the tortfeasor been sued directly. An example may be where it is shown that the principal is aware of a practice of its officers affecting the rights of others, knows or is reckless as to its unlawfulness, and allows it to continue. In such a case, the fact that the claim is framed as vicarious rather than direct liability likely would not preclude an award of exemplary damages for the principal's conscious fault in contumelious disregard of the plaintiff's rights.

57. But such a conclusion cannot be reached as a matter of presumption or assumption based on "the government's responsibility for the training and discipline of its officers": AS[42]. The case relied upon by the appellants to support an award by reference to that consideration went no further than referring to it in setting the amount of the award, which award had been justified by the officers' wrongdoing.⁹⁰ Whereas broad notions of executive responsibility for training and discipline may be a legitimate consideration in setting the amount, to treat them as independently sufficient to justify an award would radically expand the power to award exemplary damages. Nor does the submission at AS[41], relying on *New South Wales v Riley*,⁹¹ assist the appellants. On the contrary, that case exemplifies that the availability of exemplary damages where the executive is vicariously liable for an officer's conduct will be dictated by an assessment of that conduct, as shown by the dispositive reasoning that the officers "were faced with a difficult and potentially

⁸⁸ *New South Wales v Ibbett* (2006) 229 CLR 638 at [55].

⁸⁹ *New South Wales v Ibbett* (2006) 229 CLR 638 at [60].

⁹⁰ *Adams v Kennedy* (2000) 49 NSWLR 78 at [36], approved in *New South Wales v Ibbett* (2006) 229 CLR 638 at [51], [54]. See also *State of New South Wales v Zreika* [2012] NSWCA 37 at [62] (Sackville AJA, Macfarlan and Whealy JJA agreeing).

⁹¹ (2003) 57 NSWLR 496.

very dangerous situation”, with their conduct in response to that situation not going “beyond ordinary human fallibility so as to justify” exemplary damages.⁹²

58. As the Court of Appeal correctly found, if exemplary damages were to be awarded against the Territory on a basis other than the individual officers’ conduct, that was something required to be alleged and proved as a matter of fact: CA[75]-[76] (CAB 164-5). That is expressly required by r 13.07(3) of the *Supreme Court Rules 1987* (NT), which provides that claims for exemplary damages “shall be specifically pleaded together with the facts on which the party pleading relies.” That rule reflects basal requirements of procedural fairness which require a party to have notice of the factual basis of an award of damages (all the more so where the award is intended to punish the party).⁹³

59. At first instance the appellants did not rely on, and the parties did not litigate, the “failures of training” and “failures to conduct a form of institutional review” now relied on by the appellants for the award of exemplary damages.⁹⁴ The appellants’ submissions in this Court make no assertion to the contrary. Consistently with the pleading requirements referred to above, the appellants’ pleadings specifically identified the facts on which they relied for exemplary damages.⁹⁵ None of those facts (nor any facts alleged by the appellants) bore any resemblance to the findings upon which the assessing judge based her Honour’s exemplary damages award, namely that the Territory failed to review the lawfulness of CS gas use “at an institutional level”, and “allowed an environment to exist where senior officers did not know the extent of their powers”: AJ[77], [93] (CAB 42-3, 56-7).

60. The Court of Appeal was correct to find that, were those allegations made, “this would have opened up a wide range of potential evidence”: CA[76] (CAB 165). There was no such evidence because no such allegations were made. For this to be the basis of an exemplary damages award, procedural fairness required that the Territory have notice of the allegation and that there be an evidentiary basis for the finding. In the absence of an evidentiary basis, it cannot suffice to say that the exemplary damages award is made “in light of the Territory’s responsibility for statutory officers in charge of youth detention

⁹² *New South Wales v Riley* (2003) 57 NSWLR 496 at [141]-[142] (Hodgson JA, Sheller JA and Nicholas J agreeing).

⁹³ See, analogously, *Gray* at [102]-[103] (Kirby J), observing that “basic principle” precludes an application for aggravated damages being considered for the first time on appeal: see also at [7] (Gleeson CJ, McHugh, Gummow and Hayne J), [150] (Callinan J).

⁹⁴ CA[39] (CAB 135); cf AS[39], AJ[93], [96].

⁹⁵ See 2FASOC in Appellants’ Book of Further Material, pp 11-12 [41]-[45]. That the wrongdoing alleged was solely vicarious and not primary was also clear from other parts of the same pleading: [1], [3], [23]-[24].

facilities”: cf AS[45]. That would transform the power to award exemplary damages from an exceptional one arising rarely⁹⁶ into a commonplace award available whenever the state is vicariously liable for the torts of its officers.

PART VI: ARGUMENT ON THE CROSS-APPEAL

61. The respondent seeks special leave to cross-appeal⁹⁷ on two grounds which only arise if the Court allows the appeals and awards the appellants exemplary damages. Both grounds address issues concerning the quantum of liability which did not arise before the Court of Appeal because it set aside the awards of exemplary damages in whole.

10 62. By the first ground, the respondent submits that the assessing judge’s award of \$200,000 for exemplary damages per plaintiff, for a total sum of \$800,000, was manifestly excessive. The assessing judge’s reasons for the quantum of this award are, with respect, scant: AJ[114] (CAB 66). The Court of Appeal did not need to address the Territory’s appeal from that part of the judgment, although their Honours did make short observations identifying flaws in the assessing judge’s analysis: CA[78]-[81] (CAB 165-8).

20 63. While the ground of cross-appeal refers to manifest excess, the respondent does submit that there is at least one error of principle disclosed by the assessing judge’s reasons.⁹⁸ That error is her Honour’s apparent focus on each individual plaintiff’s entitlement to exemplary damages, without any consideration of the cumulative effect of the multiple awards from the Territory’s perspective. Nowhere in her Honour’s judgment is there any reference to or justification for the total \$800,000 sum.⁹⁹ This demonstrates error because in fixing an amount of exemplary damages, “the focus is on the conduct of the defendant.”¹⁰⁰ The correct approach, therefore, where multiple plaintiffs are entitled to exemplary damages for the same wrongdoing, is to decide the total amount appropriate for the defendant to pay, with that amount to be divided amongst the plaintiffs.¹⁰¹ *A fortiori* where, as here, there is a small cohort of plaintiffs all before the Court.¹⁰² Assessing the total appropriate

⁹⁶ *Gray* at [12], [20].

⁹⁷ *High Court Rules 2004* (Cth), r 42.08.4.

⁹⁸ Cf *Rogers v Nationwide News Pty Ltd* (2003) 216 CLR 327 at [62].

⁹⁹ The Court of Appeal appears to have accepted that her Honour erred in this respect, although it did not need to determine the ground: CA[80]-[81] (CAB 167-8).

¹⁰⁰ *New South Wales v Ibbett* (2006) 229 CLR 638 at [34].

¹⁰¹ *R (Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245 at [167] (Lord Dyson JSC, Lord Hope DPSC, Lords Walker, Collins and Kerr JJSC and Baroness Hale JSC agreeing), citing *Riches v News Group Newspapers Ltd* [1986] QB 256; A Burrows, “Reforming Exemplary Damages: Expansion or Abolition?” in P Birks (ed), *Wrongs and Remedies in the Twenty-First Century* (1996) at 172.

¹⁰² As was the case in *Riches v News Group Newspapers Ltd* [1986] QB 256. Cf where there are unidentified plaintiffs not before the Court: A Burrows, “Reforming Exemplary Damages: Expansion or Abolition?” in P Birks

punishment to be imposed on the defendant would cohere with the approach to the determination of civil penalties.¹⁰³

64. Even if this Court is not satisfied that her Honour made that specific error of principle, the total amount of the award is manifestly excessive. This Court has approved of setting aside an award on this ground, where “the award of exemplary damages was so large as to be unreasonable”.¹⁰⁴ Such appellate interference will be warranted where the amount awarded is, in all of the circumstances, “so extremely high or so very small” as to place it outside the range of a sound discretionary judgment.¹⁰⁵ A disproportionate award may tend to distort the judgment in other cases, in particular in a small jurisdiction with few comparative awards: cf AS[47].

65. As the Court of Appeal observed, by reference to a table produced by the respondent outlining awards in comparative cases,¹⁰⁶ the amount of exemplary damages awarded by the assessing judge “falls well above the outer limits of such awards in the comparative cases ..., including cases involving serious acts of gratuitous and brutal violence by law enforcement officers”: CA[81] (CAB 167-8). A 2019 empirical study of awards of exemplary damages in Australia found that the largest amount ever awarded by a State or Territory Court, and the largest amount awarded by any Court against a public body (including the police), was \$792,095.47; and the largest amount ever awarded for “interference with the person” (including assault, false imprisonment and wrongful arrest) was \$595,912.90 – both less than the award in the present case.¹⁰⁷ There is nothing in the judgments below, or the facts of this case, capable of justifying an award of this singular magnitude. If this ground is upheld, the Court should remit the matter for re-assessment of damages.

(ed), *Wrongs and Remedies in the Twenty-First Century* (1996) at 172-173; J Swanton and B McDonald, “Commentary on the report of the English Law Reform Commission on Aggravated, Restitutionary and Exemplary Damages” (1999) 7 *Torts Law Journal* 184 at 195-196; see, eg, *Meredith v State of New South Wales (No 5)* [2025] NSWSC 1133 at [687]-[699] (Yehia J).

¹⁰³ *Australian Building and Construction Commissioner v Pattinson* (2022) 274 CLR 450 at [45]; *Australian Building and Construction Commissioner v CFMEU* (2017) 254 FCR 68 at [116]-[121].

¹⁰⁴ *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1985) 155 CLR 448 at 463 (Gibbs CJ, Mason and Wilson JJ agreeing), finding that the Court of Appeal was correct to reduce the primary judge’s award of exemplary damages from \$400,000 to \$150,000 on the ground it was manifestly excessive.

¹⁰⁵ See *Northern Territory v Griffiths* (2019) 269 CLR 1 at [235].

¹⁰⁶ Appellant’s Outline of Submissions dated 16 October 2023 **RBFM 126-131**.

¹⁰⁷ F Maher, “An Empirical Study of Exemplary Damages in Australia” (2019) 43(2) *Melbourne University Law Review* 694 at 714-715 (Table 2), 717-718 (Table 2), 720-722 (Table 6).

66. By the second ground of cross-appeal the respondent seeks to uphold part of the assessing judge's decision which was only disturbed by the Court of Appeal because it set aside the award of exemplary damages. Her Honour held that the significant size of the exemplary damages awards was a discretionary reason not to award interest on general damages: AJ[115]-[116] (CAB 66). That is because the "windfall"¹⁰⁸ gain of exemplary damages sufficed to offset the appellants' disadvantage of being kept out of their general damages award, such that an award of interest was unnecessary. The Court of Appeal did not cast any doubt on this aspect of her Honour's decision; the only basis for the Court of Appeal's interference with the refusal of interest on general damages was its decision to set aside the exemplary damages awards, which removed the foundation for the assessing judge's exercise of discretion on this point: CA[82]-[86] (CAB 168-9). If this Court were to restore the assessing judge's award of exemplary damages, then the rationale for the refusal of interest would be re-enlivened, and her Honour's discretionary decision in that regard should be restored.

PART VII: ESTIMATE OF TIME

67. The respondent estimates that it will require 2.5 hours for its address.

Dated: 23 October 2025



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¹⁰⁸ *Gray* at [15].

ANNEXURE TO RESPONDENT'S SUBMISSIONS

No	Description	Version	Provision(s)	Reason for providing this version	Applicable date or dates (to what event(s), if any, does this version apply)
1	<i>Supreme Court Rules 1987</i> (NT)	28 July 2016 to 12 July 2017	r 13.07	Version in force when appellants' pleading finalised	20 September 2016: date of second further amended statement of claim
2	<i>Youth Justice Act 2005</i> (NT)	Version as in force at 1 July 2014	s 153	Version in force at time of BMU incident	21 August 2014