



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

10

D10 of 2025

Josiah Binsaris

Appellant

and

Northern Territory of Australia

Respondent

D11 of 2025

Leroy O’Shea

Appellant

and

Northern Territory of Australia

Respondent

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D12 of 2025

Keiran Webster

Appellant

and

Northern Territory of Australia

Respondent

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APPELLANTS’ JOINT REPLY

These are the joint reply 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 – REPLY

- 2 **Ground 1** — RS[34] and [39] attempt to preserve a finding of “reasonableness” by artificially bifurcating the question of the lawfulness of the use of CS gas at Don Dale. However, if the Court of Appeal determined reasonable necessity as being referable to the implied limit on the use of force in s 153(2) of the *Youth Justice Act 2005* (NT), then that was contrary to express findings of each member of the High Court, including Gageler J.¹

- 3 RS[40] suggests a surprising basis on which to uphold the result below: namely, that reasonable necessity could be justified as a *new* finding of the Court of Appeal, made for the first time on appeal for the purpose of assessing damages. That is unsustainable. First, such a characterisation is inconsistent with the Court of Appeal’s reasons.² Second, the finding would also have been made without supporting evidence: neither the Director of Correctional Services nor the respondent’s expert gave evidence that the use of CS gas could be reasonably necessary if it were a criminal offence.³ Third, if the Court of Appeal *had* made a new finding on that basis, then it would have been procedurally unfair: it was a new point on which the appellants had no opportunity to make submissions. Finally, and fundamentally, such a finding would have to have been premised on the executive being conferred with power to dispense with criminal law prohibitions where this is considered “reasonably necessary”; which is contrary to longstanding constitutional principles.⁴

- 4 **Ground 2** — Judicial descriptions of the criteria for the award of exemplary damages are intended to operate at the level of a principle and should not be read as statutes.⁵

¹ *Binsaris v Northern Territory of Australia* (2020) 270 CLR 549 at 558-560 [10], [15]-[20] (Kiefel CJ and Keane J); 561 [25] (Gageler J); 577-579 [82]-[86] and 581-584 [94]-[103] (Gordon and Edelman JJ).

² Cf *Northern Territory of Australia v Austral* [2025] NTCA 3 (*NTA v Austral*) at [29], [36]-[37], [46]-[47]; CAB 121, 133, 139-140.

³ Their evidence at trial was on the opposite premise: see *NTA v Austral* at [39], CAB 135; *LO v Northern Territory of Australia* [2017] NTSC 22 at [147], ABFM at 170-171.

⁴ *A v Hayden* (1984) 156 CLR 532 at 540 (Gibbs CJ), 580 (Brennan J), 593 (Deane J).

⁵ *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 at 153 (Windeyer J).

Contrary to the implication of RS[43] and [47]-[49], no “single formula” could by itself identify the relevant criteria: that is why the commonly-invoked reference to conscious wrongdoing in disregard of another’s rights is not expressed to be exhaustive.⁶ Rather than apply a mechanical formula, the Court must identify from all the objective facts — which are inevitably variable — whether the relevant conduct meets the criteria at the level of principle and as explained in the cases.⁷ For the reasons explained at AS[37], to require a specific inquiry into what an individual thought about their conduct at the time risks distracting from that necessarily holistic assessment.

5 RS[44]-[46] is a further insistence — on the part of the executive government of the
10 Territory — that its officers’ deployment of CS gas in breach of a criminal prohibition was reasonably necessary,⁸ in the face of this Court’s decision to the contrary. That dogged insistence underscores why exemplary damages must be available in a case involving the unlawful use of force by the executive — *even if* an individual officer may have thought they had been acting lawfully. The award of exemplary damages in the context of executive wrongdoing serves the purposes of upholding the rule of law.⁹ Those purposes require that the Court have the power to punish the executive even if its officers believe that their wrongful actions were justified. That is consistent with this Court’s broader constitutional function of holding the balance between government and citizen according to law.¹⁰

20 6 **Ground 3** — In *Ibbett*, counsel for New South Wales submitted¹¹ that it was procedurally unfair for the New South Wales Court of Appeal to have taken into account the State’s failures in training its officers.¹² That submission, which is substantially indistinguishable

⁶ *Gray v Motor Accident Commission* (1998) 196 CLR 1 at 7 [14] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

⁷ See *Lamb v Cotogno* (1987) 164 CLR 1, 12-13 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ).

⁸ RS [44]-[46].

⁹ *State of New South Wales v Ibbett* (2006) 229 CLR 638 at 649-650 [39]-[41] (Gleeson CJ, Gummow, Kirby, Heydon and Crennan JJ). Cf RS [52].

¹⁰ *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 187-188 (Dixon J), 207 (McTiernan J), 223-226 (Williams J), 242 and 244 (Webb J), 262-265 (Fullagar J), 272-3, 282-283 (Kitto J). See TT Arvind and Jenny Steele, “*Huckle v Money* (1763): Exemplary Damages and the Liberty of the Subject” in Goudkamp and Katsampouka (Ed), *Landmark Cases in the Law of Punitive Damages* (2023), 1-17, 3-9; 12.

¹¹ *Ibbett* (2006) 229 CLR 638 at 639-640 (Mr Maconachie QC).

¹² *New South Wales v Ibbett* [2005] NSWCA 445 at [74]-[75] and [79] (Spigelman CJ), [278] (Basten JA).

from RS[59]-[60], was unanimously rejected in terms by this Court.¹³ The same follows in this case: there is nothing inappropriate in giving heed to the Territory's responsibility for the proper training and supervision of its own officers.

7 With the result in *Ibbett* in mind, RS[56]-[58] reverses the appropriate onus. It is for the plaintiff to plead and prove conduct which satisfies the criteria for the award of exemplary damages. However, no part of those criteria requires the plaintiff to plead any lack of training. Instead, training can be relevant if the defendant chooses to rely (in effect, by way of confession and avoidance) on evidence of sufficient punishment through the criminal law,¹⁴ or of sufficient training before or after the incident¹⁵ as a mitigating factor

10 to suggest that the specific deterrence function of exemplary damages is unnecessary or that it should be given less weight. In turn, where, as here, the executive government chooses not to plead or lead evidence of mitigating factors and instead continues to justify or minimise its officers' illegal conduct, the Court is entitled to take that matter into account in assessing exemplary damages.

8 **Cross-Appeal Ground 1** — Leave to cross-appeal should be refused. The threshold for appellate intervention on grounds of manifest excess is high: the excess must be so obvious on the face of the award as to compel intervention.¹⁶ The statistical approach urged by RS[65]¹⁷ is wrong in principle;¹⁸ in any event the study referred to does not allow for analogical reasoning to cases¹⁹ and on its own methodology missed a police misconduct case against a State where the award was significantly higher than \$1 million.²⁰ These matters involve distinct intentional torts committed against distinct

20 plaintiffs who brought individual claims in respect of the individual wrongs done to them.

¹³ *Ibbett* (2006) 229 CLR 638 at 653 [54] (Gleeson CJ, Gummow, Kirby, Heydon and Crennan JJ).

¹⁴ *Gray* (1998) 196 CLR 1, 13-17 [38]-[56] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

¹⁵ *Ibbett* (2006) 229 CLR 638, 654-655 [60] (Gleeson CJ, Gummow, Kirby, Heydon and Crennan JJ).

¹⁶ *Rogers v Nationwide News Pty Ltd* (2003) 216 CLR 327 at 348 [64] (Hayne J; Gleeson CJ and Gummow J agreeing); *Nationwide News Pty Ltd v Rush* (2020) 380 ALR 432 at [472] (White, Gleeson and Wheelahan JJ); *Commonwealth of Australia v Murray* (1988) Aust Torts Reports [80-207], 68038 at 68052 (Priestley JA, Kirby P and Samuels JA agreeing).

¹⁷ RS [65], citing 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).

¹⁸ *Carson v John Fairfax and Sons Ltd* (1993) 178 CLR 44 at 115 (McHugh J).

¹⁹ The study adjusted awards for inflation to their real value in 2017 such that the relevant cases cannot be identified: see F Maher, "An Empirical Study of Exemplary Damages in Australia" (2019) 43(2) *Melbourne University Law Review* 694 at 709.

²⁰ *Nye v State of New South Wales* [2002] NSWSC 1270 (exemplary damages award for police misconduct of \$750,000, which translates to a real value of over \$1 million, adjusted for inflation to 2017).

The supposed issue of principle at RS[62] does not arise: all potential plaintiffs are before the court²¹ and there are four individual proceedings, which are not representative proceedings.²² To the contrary, cumulation would be directly inconsistent with *Ibbett* — where two separate awards of exemplary damages were made in respect of different causes of action²³ — and also *Adams v Kennedy*²⁴ and *Lee v Kennedy*²⁵ — where two separate awards (\$100,000 and \$120,000, respectively) were made in respect of two different proceedings with the same underlying facts.²⁶ *Adams* was unanimously endorsed in *Ibbett*.²⁷

9 The amount of \$200,000 awarded to each claimant in this case was well inside the range
10 of contemporaneous awards,²⁸ having regard to the seriousness of the conduct. While
ordinarily it can “confidently be expected” that the chiefs of police and prison systems
will not be personally at fault,²⁹ here the highest-ranking prison officer in the Northern
Territory gave the direction to deploy the CS gas.³⁰ To this may be added, among other
things, the offensive comments by the Director and other officers, the callous treatment
of the appellants after the CS gas was deployed and the respondent’s continued refusal to
accept that its Director of Correctional Services did anything wrong in the face of this
Court’s decision that he authorised criminal conduct.

²¹ Cf *R (on the application of Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245 at [152] (Lord Dyson JSC), citing the Court of Appeal’s judgment (*R (on the application of WL) v Secretary of State for the Home Department* [2010] 1 WLR 2168 at [122]-[123] (Lord Neuberger of Abbotsbury MR, Carnwath and Stanley Burton LJ)).

²² Cf *Meredith v State of New South Wales (No 5)* [2025] NSWSC 1133 at [687]-[698] (Yehia J).

²³ See *New South Wales v Ibbett* [2005] NSWCA 445 at [280] and [284] (Basten JA). Cf *Ibbett* (2006) 229 CLR 638 at 655 [60] (upholding the “awards” (plural) of exemplary damages) and [61] (orders dismissing the appeal with costs) (Gleeson CJ, Gummow, Kirby, Heydon and Crennan JJ).

²⁴ (2000) 49 NSWLR 78.

²⁵ [2000] NSWCA 153.

²⁶ *Adams* (2000) 49 NSWLR 78 at [2] (Priestley JA); *Lee* [2000] NSWCA 153 at [2] (Priestley JA).

²⁷ *Ibbett* (2006) 229 CLR 638 at 653 [51]-[54] (Gleeson CJ, Gummow, Kirby, Heydon and Crennan JJ).

²⁸ See, e.g., in other cases of assault or battery: *Ms P v Mr D* [2020] NSWSC 224 (\$400,000); *Erlich v Leifer* [2015] VSC 499 (\$400,000); *APC v Mr B (No 3)* [2025] NSWSC 142 (\$300,000); *Knight v State of New South Wales* [2004] NSWSC 791 (\$200,000). Other recent cases include: *Directed Electronics OE Pty Ltd v OE Solutions Pty Ltd (No 10)* [2023] FCA 1656 (\$1,500,000 – inducing breach of contract); *Seaforth Securities Pty Limited v Zoya Investments Pty Ltd* [2024] NSWSC 1061 (\$700,000 – nuisance); *Re Iderful Pty Ltd (No 2)* [2024] NSWSC 1670 (\$500,000 – conspiracy); *Spedding v State of New South Wales* [2022] NSWSC 1627 (\$300,000 – malicious prosecution); *Amaca Pty Ltd v Latz* (2017) 129 SASR 61 (\$250,000 – negligence).

²⁹ *Rowlands v Chief Constable of Merseyside Police* [2007] 1 WLR 1065 at 1080 [47] (Moore-Bick LJ).

³⁰ *Prisons (Correctional Services) Act* (NT) (as in force on 21 August 2014), s 6.

10 Remarkably, RS[65] seeks a *second* remitter on damages. That cannot be in the interests of justice, when this straightforward matter remains unresolved after 11 years.

11 **Cross-Appeal ground 2** — This ground seeks improperly to equate two distinct concepts. Compensatory damages compensate for the underlying wrong; by contrast, an award of interest compensates “a plaintiff for the loss or detriment which he or she has suffered by being kept out of his or her money during the relevant period”.³¹ In this case, that period now exceeds 11 years. It was an error of principle for Blokland J to use the size of the exemplary damages award — the purposes of which were not compensation but appropriate punishment of the respondent, deterrence of future such wrongs and upholding the rule of law — to reduce the amount of compensation to which the appellants were entitled.

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³¹ *MBP (SA) Pty Ltd v Gogic* (1991) 171 CLR 657 at 663 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ), referring to *Batchelor v Burke* (1981) 148 CLR 448 at 455 (Gibbs CJ).