



HIGH COURT OF AUSTRALIA

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**IN THE HIGH COURT OF AUSTRALIA
DARWIN REGISTRY**

D9 of 2025

Between **ETHAN AUSTRAL** Appellant
and **NORTHERN TERRITORY OF AUSTRALIA** Respondent

No D10 of 2025

Between **JOSIAH BINSARIS** Appellant
and **NORTHERN TERRITORY OF AUSTRALIA** Respondent

No D11 of 2025

Between **LEROY O'SHEA** Appellant
and **NORTHERN TERRITORY OF AUSTRALIA** Respondent

No D12 of 2025

Between **KEIRAN WEBSTER** Appellant
and **NORTHERN TERRITORY OF AUSTRALIA** Respondent

APPELLANTS' OUTLINE OF ORAL SUBMISSIONS

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1 This is the outline of oral submissions for each appellant in the four related appeals.

PART I: CERTIFICATION

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

PART II: OUTLINE OF ORAL SUBMISSIONS

(1) Ground 1

3 The Court of Appeal erred by failing to execute this Court's judgment:

3.1 The majority of this Court found that the officers' use of CS gas was contrary to a criminal prohibition.

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3.2 Justice Kelly's reasonable necessity finding assumed that using CS gas was not criminally prohibited.

3.3 Therefore, Justice Kelly's finding could not stand: **AS[25], [28]-[31]**.

(2) Ground 2

4 The Court of Appeal erred by holding that exemplary damages were unavailable in light of the officers' state of mind, being their subjective belief in the lawfulness of the use of CS gas: **AS[32]-[33]**. In adopting this overly narrow approach, the Court of Appeal erroneously focused on subjective consciousness of unlawfulness, rather than looking to the objective circumstances as a whole. The deployment of CS gas was deliberate conduct, and the objective circumstances were sufficient to demonstrate conscious and contumelious disregard for the appellants' rights. The Court of Appeal's failure to refer to much of the objective circumstances demonstrates their error: **AS[33]-[35]**.

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Lamb v Cotogno (1987) 164 CLR 1 at 12-13 (**JBA 286-287**)

NSW v Ibbett [2005] NSWCA 445 at [35]-[52] (Spigelman CJ) and [234] (Basten JA) (**JBA 630-633; 662**)

Gray v Motor Accident Commission (1998) 196 CLR 1 at [12], [14] (Gleeson CJ, McHugh, Gummow and Hayne JJ); [86] (Kirby J) (**JBA 228-229; 250-251**)

5 Contrary to the respondents' submissions, the phrase 'conscious wrongdoing in contumelious disregard of another's rights' does not exhaust the circumstances in which exemplary

damages may be awarded: **Reply [4]; cf RS [43]; [47]-[49]**. So to confine the test would undermine the purposes of the remedy in executive wrongdoing cases, namely, vindication of the rule of law and deterrence directed to governmental institutions: **AS[35]-[37]**.

Uren v John Fairfax & Sons Pty Ltd (1966) 117 CLR 118 at 138 (Taylor J), 153-154 (Windeyer J), 158 and 160-161 (Owen J), (**JBA 347, 362-363, 367, 369-370**).

NSW v Ibbett (2006) 229 CLR 638 at [38]-[40], [51], [54] (Gleeson CJ, Gummow, Kirby, Heydon and Crennan JJ) (**JBA 319-321, 324-325**).

Wilkes v Wood (1763) Lofft 1 at 9-10, 18; 98 ER 489 at 493-4, 498 (Lord Pratt CJ) (**JBA 679-680, 684**)

10 **(3) Ground 3**

6 The Court of Appeal erred by overturning Justice Blokland's award of exemplary damages on the basis that they were not available to be awarded on a vicarious liability basis.

7 The Court of Appeal's pleading point was misconceived:

7.1 The appellants pleaded battery solely against the respondent and not against individual officers (**AS[40]**).

7.2 It was for the respondent to plead and prove facts to show that an award of exemplary damages should not be awarded: **Reply [7]**.

7.3 Indeed, it was the respondent who put in issue its officers' training, and its highest-ranking officers gave evidence.

20 7.4 In those circumstances, Justice Blokland's award of exemplary damages against the institution, for deterrence purposes aimed at that institution, was orthodox and should not have been disturbed: **AS[40] and [42]**.

Gray v Motor Accident Commission (1998) 196 CLR 1 at [38]-[56] (Gleeson CJ, McHugh, Gummow and Hayne JJ) (**JBA 235-238**)

NSW v Ibbett (2006) 229 CLR 638 at [60] (Gleeson CJ, Gummow, Kirby, Heydon and Crennan JJ) (**JBA 325-326**).

NSW v Ibbett [2005] NSWCA 445 at [264]-[271] (Basten JA) (**JBA 670-671**)

LO v Northern Territory of Australia [2017] NTSC 22 at [22], [40], [74], [86], [90], [99] and [248] (**ABFM 128, 133, 142, 147, 149-150, 152, 207**).

(4) Cross-appeal

8 Special leave to cross-appeal should be refused. No question of principle arises.

9 The quantum of exemplary damages was not manifestly excessive, whether by reference to the individual awards or otherwise: **Reply[8]-[10]**.

10 Pre-judgment interest on the appellants' compensatory damages was justly awarded: **Reply [11]**.

11 March 2026

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Kathleen Foley



James McComish



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