HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	D9/2025
File Title:	Austral v. Northern Territory of Australia
Registry:	Darwin
Document filed:	Form 27F - Respondent's Outline of oral argument
Filing party:	Respondent
Date filed:	11 Mar 2026

Important Information

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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 OUTLINE OF ORAL SUBMISSIONS

PART I: PUBLICATION

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

PART II: OUTLINE OF ORAL ARGUMENT

Ground 1 – facts available to be used on remittal

2. The Territory's defence to the battery claims required it to establish two elements: *first*, that the prison officer was lawfully authorised to use the CS gas fogger in the detention centre; and *second*, if so authorised, that its use was reasonable and necessary in the circumstances: **RS [34]**. The primary judge found both elements established: PJ [166] (**ABFM 180**).

3. *Binsaris* determined the first issue against the Territory. Consequently, the Territory's defence failed and judgment was entered for the appellants. There was no appeal against the conclusion on the second issue, or challenge to any of the findings of fact that led to it: (2020) 270 CLR 549, Kiefel CJ and Keane J at [16] – [20] (**ABFM 368**); Gageler J at [28], [31], [33], [37], [46], [49] (**ABFM 371 – 378**); Gordon and Edelman JJ at [100] – [101], [105] – [106], [109] (**ABFM 392 – 395**); **RS [35]**.

4. On any formulation of the test for whether exemplary damages should be awarded, it was relevant to consider why the CS gas fogger was used instead of some other option, and whether the Territory's officers took steps to minimise the effect on the appellants. In considering those matters, the remittal court was bound not to depart from the primary judge's undisturbed findings of fact: CA [48] – [49] (**CAB 141 – 143**).

5. The primary judge made numerous findings of fact that overwhelmingly justify the Court of Appeal's determination not to award exemplary damages. On the night in question, there was a dangerous crisis affecting the entire detention centre that needed to be urgently brought to an end: PJ [159], [165] (**ABFM 175, 179**). Use of the CS gas was the least hazardous option considered, constituted the least degree of force, and carried the least risk of serious injury to Jake Roper and to staff: PJ [86] – [91], [152], [165] (**ABFM 147, 172, 179**). Care was taken to ensure that only the minimum amount of gas necessary to subdue Roper was used: CA [70], [73] (**CAB 160, 163**). The officers recognised that the appellants would experience temporary discomfort from the CS gas and so, implemented a plan to move them outside for decontamination as quickly as possible after Roper was brought under control: PJ [90], [92], [101], [104], [105] (**ABFM 149 – 150, 152 – 154**).

6. Ground 1 stands on the proposition that the Court of Appeal impermissibly adopted the primary judge's "legal conclusion" that the use of CS gas was reasonable and necessary in the circumstances: **AS [28], [30]**. No part of the Court of Appeal's reasons involved accepting that the use of the CS gas fogger was lawful. The Court of Appeal did not simply adopt the primary judge's ultimate conclusion that the force used was reasonable and necessary. Instead, the Court assessed the evidence and the primary judge's findings of fact and concluded that none of them showed conscious wrongdoing in contumelious disregard of the appellants' rights, or any other formulation of the test for exemplary damages: CA [2] – [6], [18], [19], [24], [29], [30], [33], [39], [41], [53] – [58], [60] – [74] (**CAB 105 – 164**). That was a proper execution of this Court's judgment.

Ground 2 – consciousness of illegality

7. Ground 2 is that the Court of Appeal adopted the wrong state of mind inquiry for exemplary damages: **CAB 218**.

8. The appellants do not challenge the statement in *Gray v Motor Accident Commission* that "conscious wrongdoing in contumelious disregard of another's rights describes at least the greater part of the [exemplary damages] field", or that the primary focus of the inquiry is on the wrongdoer, not the party wronged: (1998) 196 CLR 1, [14]-[15], [22] (**JBA vol 3, tab 7**).

9. The appellants accept that conscious wrongdoing is highly relevant to whether exemplary damages should be awarded: **AS [33]**. The appellants correctly observe that facts other than the wrongdoer's state of mind may be relevant: **Reply [4]**.

10. The unchallenged finding of fact is that the decision-makers believed that deploying the CS gas was lawful: CA [54] – [58], [73] (**CAB 148 – 150, 163**). No finding was sought, made, or available that their mistaken belief was the product of "obtuseness or arrogance": *contra* **AS [37]**.

11. The Court of Appeal did not confine its consideration to the decision-makers' belief that deploying the CS gas was lawful. The Court of Appeal also took into account the range of other facts referred to above at [5].

12. The appellants complain that the Court of Appeal "failed to refer to or disturb" findings about comments made by officers on the night of the incident: **AS [38]**. That complaint does not address the ground of appeal. In any event, it is misconceived. *First*, the CA

found that Middlebrook believed that only the minimum amount of gas necessary to subdue Roper would be used: CA [70], [73] (**CAB 160, 163**); **RS [44]**. *Second,* the comments made by the officer in the storeroom were not heard by the relevant decision-makers or the appellants and were not about them: **RS [45]**.

Ground 3 – vicarious liability for exemplary damages

13. There is no dispute that the Territory may be vicariously liable for an award of exemplary damages arising from the tortious conduct of its officers. Equally, there is no dispute that the factors justifying an award could include acts or omissions of the Territory that did not form part of the tort: *NSW v Ibbett* (2006) 229 CLR 638, [28], [49], [50], [54] (**JBA vol 3, tab 10**). However, *Ibbett* does not authorize an award of exemplary damages based on factors not alleged or proved: *contra* **Reply [6] – [7]**.

14. The Court of Appeal correctly held that the matters relied upon by the assessing judge in awarding exemplary damages (AJ [77], [93] (**CAB 42, 56**)) were not alleged or the subject of any evidence: CA [29] – [32] (**CAB 121 – 122**), [75] – [76] (**CAB 164 – 165**). The appellants do not challenge this conclusion.

15. The appellants say that exemplary damages may be justified because the Territory did not lead evidence in mitigation and continues to justify its conduct: **Reply, [7]**. That would involve illegitimately drawing an inference, never sought before, about the actions taken by the Territory in response to *Binsaris.*

Cross appeal

16. The assessing judge erred in principle by failing to consider whether the cumulative effect of the four separate awards of $200,000 exceeded the necessary deterrent effect: **RS [63]**. In any event, the total award of $800,000 was manifestly excessive: **RS [65]**.

17. The assessing judge did not award the appellants interest on general damages, because of the "windfall" exemplary damages. In the Court of Appeal, the Territory conceded that if the exemplary damages were set aside, interest on general damages should be awarded. If the appellants' exemplary damages are restored, so should the assessing judge's discretionary approach to interest: **RS [66]**.

Dated: 11 March 2026

David McLure **Trevor Moses** **Henry Cooper**