SHORT PARTICULARS OF CASES
APPEALS

MARCH 2026

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AUSTRAL v NORTHERN TERRITORY OF AUSTRALIA (D9/2025); BINSARIS v NORTHERN TERRITORY OF AUSTRALIA (D10/2025); O'SHEA v NORTHERN TERRITORY OF AUSTRALIA (D11/2025); WEBSTER v NORTHERN TERRITORY OF AUSTRALIA (D12/2025)

Court appealed from: Court of Appeal of the Supreme Court of the Northern Territory
[2025] NTCA 3

Date of judgment: 28 March 2025

Special leave granted: 7 August 2025

Factual background

On 21 August 2014, the appellants were detainees at Don Dale Youth Detention Centre ('DDYD Centre') and placed in the Behaviour Management Unit ('BMU'). Another detainee, Jake Roper caused serious disturbance within the BMU. Corrections officers of DDYD deployed CS gas (a form of tear gas) at Roper, and consequently the appellants who were inside the BMU together with Roper were all exposed.

Each of the appellants commenced proceedings in 2015 against the respondent (NT) in the Supreme Court for claims including damages for assaults and batteries. Their claims were unsuccessful at first instance and dismissed on appeal as the primary judge and three judges of the Court of Appeal determined that the use of CS gas was lawful. Each of the appellants successfully applied for special leave to appeal to the High Court and in *Binsaris v Northern Territory of Australia (2020)* 270 CLR 549 ('2020 Binsaris'), a majority of the High Court found deployment of CS gas at DDYD Centre to be in contravention of the *Weapons Control Act 2001* (NT), *Prisons (Correctional Services) Act* (NT) and the *Youth Justice Act 2005* (NT). Consequently, the High Court set aside the orders of the Court of Appeal and remitted the assessment of damages to the Supreme Court.

These current appeals concern the issue of how the damages were assessed at those remittal hearings.

Procedural background

In assessing damages, the primary judge (Blokland J) found that the High Court's findings in 2020 Binsaris '*must inform the award of damages in a substantial way*'. Blokland J awarded damages totalling $250,000 each to Webster and O'Shea, $240,000 to Austral and $220,000 to Binsaris. Each of the amounts included $200,000 for exemplary damages, with additional amounts for aggravated damages (save for Binsaris, who had not given evidence at trial).

NT appealed seeking to set aside the awards for exemplary damages, or in the alternative, maintaining that each amount was manifestly excessive. Each appellant cross-appealed seeking that interest on general damages be awarded.

The Court of Appeal (Grant CJ, Reeves & Burns JJ) unanimously found that the primary judge erred in awarding exemplary damages, as there was no evidence revealing that the officers engaged in 'conscious wrongdoing', or that the officers acted 'in a high-handed fashion or with malice' (*Gray v Motor Accident Commission* (1998) 196 CLR 1*; State of New South Wales v Riley* (2003) 57 NSWLR 496; *Lamb v Cotogno* (1987) 164 CLR 1). Their Honours found that the deployment of CS gas was directed toward Roper and not the appellants and it was not a situation whereby an officer used direct force and was equipped with knowledge that the action was unlawful and excessive. Their Honours therefore held that the conduct and state of mind of the individual officers did not justify making an award of exemplary damages. Further, they held that exemplary damages could not be awarded against NT in respect of institutional responsibilities unless primary or direct liability can be found, which was not pleaded or addressed before the primary judge by each appellant. Their Honours further ordered that four per cent per annum interest be applied.

These appeals

The appellants each submit that the Court of Appeal erroneously decided that the High Court's judgment in 2020 Binsaris had no relevance in the assessment of exemplary damages and further erred in proceeding to apply the incorrect tests for that assessment. NT submits that there was no error in the Court of Appeal's decision and that the High Court in 2020 Binsaris was presented with a confined question as to whether the use of CS gas in DDYD was lawful, which is not the entire principle to apply in an assessment for exemplary damages. NT cross-appeals in relation to the amount of damages awarded and the applied rate of interest.

The grounds of appeal in each matter are:

1. The Court of Appeal erred by overturning the remitter judge's assessment of exemplary damages on a basis that was inconsistent with this Court's judgment in 2020 Binsaris, and thus failed to execute the judgment of this Court in accordance with section 37 of the *Judiciary Act 1903* (Cth).

2. The Court of Appeal erred by holding that the relevant state of mind inquiry for exemplary damages is whether the individuals who authorised the unlawful conduct that founded the battery claim knew that their conduct was unlawful.

3. The Court of Appeal erred by holding that exemplary damages cannot be awarded against a state defendant for the unlawful conduct of its senior officers unless the state's liability is direct and not vicarious.

The grounds of cross-appeal in each matter are:

1. The award of $200,000 in exemplary damages to the appellant (for a total of $800,000 to the four appellants whose claims were heard together) is manifestly excessive.

2. Because of the very substantial award of exemplary damages made by the assessing judge, it was within the judicial discretion to decline to award interest because to do so was unnecessary to restore the appellant to the position in which he would have been but for the respondent's tortious act.

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION v WEB3 VENTURES PTY LTD ACN 655 090 869 (S136/2025)

Court appealed from: Full Court of the Federal Court of Australia [2025] FCAFC 58

Date of judgment: 22 April 2025

Special leave granted: 4 September 2025

Background

In 2022, the appellant commenced proceedings in the Federal Court against the respondent under the *Corporations Act 2001* (Cth) ('the Act'), alleging that the respondent, under the trading name Block Earner, had carried on a financial services business without holding an Australian Financial Services Licence, in contravention of section 911A of the Act. An essential part of the appellant's claim was that a facility known as 'Earner' constituted a 'financial product' within the meaning of the Act.

Pursuant to terms of use between the respondent and each user ('the Terms'), the user would invest in the Earner product by 'lending' cryptocurrency to the respondent in return for interest at a fixed rate. The 'loan' began when the user's cryptocurrency was received by the respondent and ended when the user elected to terminate. Upon termination, the user's cryptocurrency and accrued interest was converted to an equivalent value in Australian dollars ('AUD') and placed in the user's account. The user could then choose to withdraw the funds, either in AUD or in cryptocurrency, or invest in another Block Earner product. The respondent generated revenue by lending users' cryptocurrency, mingled with its own cryptocurrency, to third parties at higher interest rates than it agreed to pay the users.

The appellant contended that Earner was a 'financial product' within the meaning of the Act because it was a managed investment scheme (as defined in s 9 of the Act), a facility by which a person made a financial investment (s 763B of the Act), or a derivative (s 761D).

Primary judgment and appeal below

In a judgment on liability, Jackman J, held that the respondent had contravened s 911A of the Act. His Honour found that Earner was a managed investment scheme and declared that the respondent had contravened s 601ED(5) and (8) of the Act by operating such a scheme that was not registered (under s 601EB). Jackman J also found that Earner was a financial investment facility. In a subsequent judgment on penalty, his Honour ordered, under s 1317S(2) of the Act, that the respondent be relieved from liability to pay a pecuniary penalty for its contraventions. This was upon finding that the respondent had acted honestly, had obtained legal advice about Earner, had made only a modest profit and had suffered adverse publicity, and that no user had suffered loss or damage.

The appellant appealed from the penalty judgment, and the respondent cross-appealed in respect of liability based on Earner's having been a financial product.

The Full Court of the Federal Court (O'Callaghan, Abraham and Button JJ) unanimously allowed the respondent's cross-appeal and set aside the primary judge's declarations of contravention, and consequently dismissed the appellant's appeal. Their Honours found that the Terms did not represent any intention for the Earner product to generate a financial benefit for the user, in circumstances where the Terms made clear that the user's entitlement to the fixed yield return was irrespective of the amount that the respondent earned from dealing with third parties. That is, the user was not affected by the respondent's success or failure in trading cryptocurrencies. The Earner product therefore was found not to be a facility by which a person made a financial investment.

The Full Court also held that the Earner product was not a derivative, as the process of converting cryptocurrency to AUD for the user did not form a single arrangement to use the Earner product, and that it was not an inherent feature of the Earner product that the user's cryptocurrency would be converted into AUD. Conversion to AUD at the end of the loan was one of three options that was available to users.

This appeal

The grounds of appeal are:

1. The Full Court erred in holding that the Earner product as issued by the respondent was not a facility through which a person makes a financial investment as defined by s 763B(a)(i) or (iii) of the Act.

2. The Full Court erred in holding that the Earner product as issued by the respondent was not a 'derivative' as defined by s 761D of the Act:

    a. on the proper construction of the Terms; or

    b. applying s 761B of the Act.

By notice of contention, the respondent seeks to raise the following grounds:

1. The Full Court's decision that the Earner product was not a 'derivative' within the meaning of s 764A(1)(c) and 761D(1) of the Act should be affirmed on the grounds, not decided by the Full Court, that even if any exchange of the capital into AUD was a part of the arrangement for the purposes of s 761D(1)(c), then:

    a. Earner was a 'contract for the future provision of services' within the meaning of s 761D(3) and thereby exempted from characterisation as a 'derivative' and 'financial product' for the purposes of s 764A(1)(c);

    b. further or alternatively, Earner did not satisfy the condition in s 761D(1)(c) because:

        i. the amount of consideration or value of the arrangement was not ultimately determined, derived from or varied by reference to the 'value or amount of something else'; and/or

        ii. the Exchange service did not have a determinative effect on the amount of the consideration or value of the arrangement.

2. The Full Court's decision should be affirmed on the further ground, not decided by the Full Court, that Earner is a 'credit facility' as defined in regulation 7.1.06 of the *Corporations Regulations 2001* (Cth), and is thereby excluded from the definition of 'financial product' by reason of s 765A(1)(h)(i) of the Act.

THE KING v KO (S172/2025)

Court appealed from: Court of Appeal of the Supreme Court of New South Wales
[2025] NSWCCA 129

Date of judgment: 25 August 2025

Special leave granted: 4 December 2025

Factual background

On 16 July 2024, the respondent was found guilty by a jury of one count of attempting to import a commercial quantity of two border-controlled substances contrary to sections 11.1(1), 307(1) and 311.1(1)(f) of the *Criminal Code* (Cth), and was sentenced to six years and six months imprisonment, including a non-parole period of three years and ten months. The charge related to a commercial dough mixer that was shipped on consignment from Toronto via Brisbane to Sydney. The commercial dough mixer was intercepted by Canadian authorities, who identified the presence of illegal substances secreted in the dough mixer.

Procedural background

Section 307.1(1) of the *Criminal Code* (Cth) has five elements to the offence. The trial was focused on two of the statutory elements: 'the accused intended to import a substance' ('the Second Element'), and 'the accused was reckless as to whether the substance attempted to be imported was a border-controlled drug' ('the Fourth Element'). The Crown case was that Mr Yang, the 'boss' of the operation, instructed the respondent to import the substances into Australia, and the respondent used his position as a freight forwarder to ensure that the consignment containing the dough mixer would successfully clear customs and complete the delivery. The evidence said to establish the offence included communications between the respondent and Mr Yang via an encrypted application and seven key facts of the offence. The respondent denied the offending and gave evidence that he helped Mr Yang as a friend by filling out documentation and communicating with stakeholders involved with the consignment. The respondent denied knowledge of the content of the object.

The trial judge (Smith DCJ) directed that for the Second Element, the jury could infer the intent of the respondent if they were 'satisfied beyond reasonable doubt' that the respondent 'perceived that there was a real or substantive chance of a substance being present in the consignment' that was attempted to be imported. As to the Fourth Element, the trial judge directed that the jury must be satisfied that the respondent was aware that there was a risk that the substance inside the consignment was a border-controlled drug and it was unjustifiable, in the jury's view, for the respondent to take that risk.

The respondent sought leave to appeal against his conviction. One of the grounds of appeal was that the trial judge erred in his summing up by conflating the direction as to the mental element of intention with a direction as to inferential reasoning, which confused the distinct elements of intention and recklessness. The Court of Appeal (Ward P, Yehia and Weinstein JJ) unanimously allowed that ground of appeal, quashed the conviction and ordered a re-trial. Their Honours found that the

directions provided by the trial judge were insufficient, and should have directed the jury that it must be proved beyond reasonable doubt that the respondent 'nevertheless persisted with that conduct' notwithstanding that awareness or belief that the consignment contained the substance (as required in *Smith v The Queen; The Queen v Afford* (2017) 259 CLR 291; [2017] HCA 19 ('*Smith and Afford*'); *Kural v The Queen* (1987) 162 CLR 502; [1987] HCA 16).

Their Honours found that *Smith and Afford* required two steps for a jury to draw an inference of intent: one, the jury must be satisfied that the respondent had the state of mind that there was a significant or real chance that the consignment contained the substance, and two, the jury must then go on to consider whether that was sufficient to satisfy beyond reasonable doubt that the respondent meant to import the consignment – notwithstanding the significant or real chance. Their Honours held that the trial judge fell short of stating those directions in accordance with *Smith and Afford*.

This appeal

The appellant submits that the Court of Appeal misapplied the principles in *Smith and Afford*, and that the majority of the High Court in 2017 did not intend for the language in *Smith and Afford* to be a mandatory direction or instruction to be read by a trial judge. The appellant submits that the trial judge had given sufficient directions to the jury to satisfy the Second and Fourth Element of the offence. The respondent submits that the conclusion of the Court of Appeal was correct and correctly applied *Smith and Afford*.

The sole ground of appeal is:

1. The Court of Criminal Appeal erred at [125] in concluding that the trial judge misdirected the jury by not directing them that the prosecution had to prove beyond reasonable doubt not only that the respondent was aware of a real and significant chance that his conduct involved the importation of substance, but that the respondent 'nevertheless persisted' with that conduct.

COMMISSIONER OF TAXATION v MERCHANT & ANOR (S157/2025); MERCHANT & ANOR v COMMISSIONER OF TAXATION (S158/2025)

Court appealed from: Full Court of the Federal Court of Australia
[2025] FCAFC 56;
[2025] FCAFC 81

Dates of judgments: 22 April 2025;
18 June 2025

Special leave granted: 9 October 2025

Factual background

In July 2020, the Commissioner of Taxation ('the Commissioner') issued amended notices of assessment and penalties to Mr Gordon Merchant, a founder of the Billabong surfwear brand, and to certain companies in the Merchant Group, including GSM Pty Ltd ('GSM'), in relation to the 2015 income year. This followed determinations by the Commissioner under Part IVA of the *Income Tax Assessment Act 1936* (Cth) ('ITAA 1936') to cancel tax benefits from certain schemes identified by the Commissioner.

In September 2014, Gordon Merchant (No 2) Pty Ltd ('GM2') as trustee of the Merchant Family Trust ('the MFT') sold approximately 10 million shares held in Billabong International Ltd ('BBG') to GSM Superannuation Pty Ltd as trustee of the Gordon Merchant Superannuation Fund ('GMSF') for $5.8 million ('the BBG Share Sale'). Mr Merchant had always sought to hold a substantial parcel of BBG shares and would not have sold BBG shares to unrelated entities. The sale was off-market but the shares were priced at market value. The Commissioner determined that s 177D(1) of the ITAA 1936 applied, because the sale was carried out for the dominant purpose of obtaining a tax benefit, being the crystallisation of a capital loss of $56 million that could be applied by GM2 against a capital gain from an anticipated sale of a company it wholly owned, Plantic Technologies Ltd ('Plantic'). The Commissioner cancelled that benefit by determining under s 177F(1)(c) that the capital loss was not incurred. This resulted in an increase of the MFT's taxable income and the issuance of an amended assessment to GSM as the beneficiary having a 100 per cent present entitlement to the income of the MFT.

By May 2014, Mr Merchant had become frustrated that Plantic was unprofitable, it having for years required monthly injections of funds from other entities in the Merchant Group. In April 2015, GM2 sold all shares in Plantic to Kuraray Co Ltd, an unrelated Japanese company, resulting in a capital gain of $85 million. On the day of the sale, to meet a requirement of Kuraray Co that Plantic have no liabilities to any Merchant Group entity, loan debts including the following were forgiven by Plantic: $50 million by GSM ('the GSM Debt Forgiveness Scheme'), and $4 million by another Merchant Group company, Tironui Pty Ltd ('the Tironui Debt Forgiveness Scheme'). The Commissioner determined that those measures, which effected reductions in the undistributed profits of GSM and Tironui and an increase in the sale value of Plantic's shares, substantially had the effect of schemes in the nature of dividend stripping under s 177E(1)(a)(ii) of the ITAA 1936, and determined under s 177F(1)(a) that the sums be included in the assessable

income of Mr Merchant who, as the sole shareholder of GSM and Tironui, could otherwise have received them as distributed dividends.

Procedural background

After objections to the amended notices of assessment by Mr Merchant and GSM (together, 'the taxpayers') were disallowed by the Commissioner, the taxpayers appealed to the Federal Court under s 14ZZ of the *Taxation Administration Act 1953* (Cth) in respect of the amended assessments.

Thawley J dismissed Mr Merchant's appeals and allowed in part GSM's appeal (due to an incorrect calculation) and remitted to the Commissioner a reconsideration of GSM's amended notice of assessment. His Honour had regard to the eight matters prescribed in s 177D(2) of the ITAA 1936, finding that each matter weighed in favour of a reasonable conclusion that the dominant purpose of Mr Merchant, the MFT and GMSF in carrying out the BBG Share Sale was to obtain a tax benefit for the MFT, in anticipation of a sale of Plantic, rather than to free up cash for the MFT. Thawley J also held that s 177E was satisfied, finding that the forgiveness of loan debts owed by Plantic were schemes having substantially the effect of dividend stripping for the purposes of s 177E(1)(a)(ii). This was after finding that there was no economic reason for GSM and Tironui to bear a loss on their loans to Plantic, as Plantic was solvent and the loan debts were recoverable. His Honour considered that the apparent unfairness in ss 177D and 177E both being applicable could be ameliorated by assessment adjustments under s 177F(3), in view of the interrelationship of the BBG Share Sale with the debt forgiveness schemes.

An appeal by the taxpayers was allowed in part by the Full Court of the Federal Court (Logan, McElwaine and Hespe JJ). McElwaine and Hespe JJ held that Thawley J had correctly reached a conclusion as to the *objective* purpose of the participants in the BBG Share Sale; his Honour had not erred by having undertaken in substance an analysis of subjective purposes. In respect of s 177E of the ITAA 1936, McElwaine and Hespe JJ held that Thawley J had erred by considering that the Commissioner's s 177D determination to cancel the capital loss arising on the BBG Share Sale was to be disregarded when determining the effect (as distinct from the purpose) of the debt forgiveness schemes. The s 177D determination retrospectively deemed the capital loss not to have occurred. In respect of the GSM Debt Forgiveness Scheme, that gave rise to taxation of the capital gain from the sale of Plantic in the hands of GSM at a higher rate than would have been payable by Mr Merchant on fully franked dividends paid out of accumulated profits. The GSM Debt Forgiveness Scheme therefore did not have the substantial effect of a scheme in the nature of dividend stripping. The Tironui Debt Forgiveness Scheme did have such substantial effect, however, as the amount of the debt forgiveness represented substantially all of Tironui's retained profits, enabling the MFT to receive a capital sum free from income tax as a result of available net capital losses.

Logan J would have allowed the appeal in all respects. His Honour held that Thawley J had erred when applying the factors prescribed in s 177D(2) by directing the enquiry to actual purpose rather than reaching an objective conclusion, and that the correct conclusion was that the obtaining of the posited tax benefit was not a dominant purpose of the BBG Share Sale. In respect of the potential application of s 177E, Logan J considered that s 177D was inapplicable, but that Thawley J had erred by undertaking an 'actual purpose' analysis. Logan J held that the forgiving

by GSM and Tironui of Plantic's loan debts gave rise to potential income tax obligations rather than rendering the capital gain made on the sale of Plantic tax free, and that s 177E therefore was inapplicable.

The appeals in this Court

Both the Commissioner and the taxpayers have been granted special leave to appeal to this Court. The appeals are being heard together. In the Commissioner's appeal, the grounds of appeal are:

1. The Full Court erred in holding that the existence of a scheme satisfying s 177E(1)(a)(ii) (and inferentially s 177E(1)(a)(i)) of Part IVA of the ITAA 1936 requires a 'substantial liability' to tax to have been avoided on a 'substantial proportion' of the 'accumulated profits' of a target company. The Full Court ought to have held that the provision is engaged if tax is avoided by the taxpayer referred to in s 177E(1)(c) on the profits that are the subject of s 177E(1)(b) of the ITAA 1936.

2. The Full Court erred in holding that whether a scheme is within s 177E(1)(a)(ii) (and inferentially s 177E(1)(a)(i)) of Part IVA of the ITAA 1936 is determined having regard to the operation of s 177D to another taxpayer. The Full Court ought to have treated the application of s 177D to the other taxpayer as irrelevant to whether a scheme has the effect required to engage s 177E(1)(a)(ii) (and inferentially 177E(1)(a)(i)).

By notice of contention in that appeal, the taxpayers seek to raise a ground that the majority of the Full Court erred in finding that the GSM Debit Forgiveness Scheme had the requisite purpose of tax avoidance. The taxpayers also seek special leave to cross-appeal, on grounds that the majority of the Full Court erred in finding that the Tironui Debit Forgiveness Scheme had the requisite purpose of tax avoidance and had the substantial effect of a scheme in the nature of dividend stripping.

In the taxpayers' appeal, the grounds of appeal are:

1. The majority of the Full Court erred in concluding that Part IVA of the ITAA 1936 applied to the BBG Share Sale because their Honours:

    a. failed to consider the different legal, commercial and tax considerations that governed the entities involved in the scheme; and

    b. failed to conduct the correct counterfactual inquiry required by s 177D.

The Commissioner seeks special leave to cross-appeal on a ground that, even if the Full Court had erred in concluding that Part IVA of the ITAA 1936 applied to the BBG Share Sale, the Full Court ought to have dismissed the appeal by Mr Merchant in relation to the applicability of s 177E because it ought to have found that the GSM Debt Forgiveness Scheme had substantially the effect of a scheme in the nature of dividend stripping.