Conclusion
The decision establishes that a party which uses its bargaining power in commercial dealings to extract favourable concessions from other parties will not, by such conduct alone, have engaged in 'unconscionable' conduct under section 51AA of the TPA.
It should be noted that the case did not deal with sections 51AB or 51AC – the other provisions in the TPA concerning unconscionable conduct – which appear to have a wider application than section 51AA. The Court did not consider these provisions because section 51AC had not been enacted as at the time of proceedings and the ACCC accepted that section 51AB did not apply in the case.

GRANT OF PERMIT TO EXPORT HAZARDOUS WASTE – AUSTRALIA'S INTERNATIONAL OBLIGATIONS*

Australian Refined Alloys Pty Limited and The Minister for the Environment and Heritage ([2003] AATA 247 Administrative Appeals Tribunal, Sydney, No N2002/1279, 17 March 2003, Deputy President Handley)

Grant of permit to export hazardous waste – Australia's international obligations – Basel Convention on control of transboundary movements of such wastes – OECD decision authorising transfrontier movements

Background
This case involved an application by Australian Refined Alloys Pty Ltd (ARA) for review of a decision of the Minister for the Environment and Heritage (Minister) made on 7 August 2002 to grant a permit to Exide Australia Pty Ltd (Exide Australia), who was joined as a party, to export up to 15,000 tonnes of waste principally comprising used lead acid batteries (ULABs) to Exide Technologies Ltd (Exide NZ) for recycling. The decision was made under regulation 14 of the *Hazardous Waste (Regulation of Exports and Imports) (OECD Decision) Regulations* 1996 (OECD Regulations).

The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention) and entered into force on 5 May 1992. Australia and New Zealand are both members. The Basel Convention has a number of specific objects but its basic purpose is to provide a scheme for controlling the transboundary movement of hazardous waste between members.

In particular Article 11(1) of the Basel Convention permits members to enter into "bilateral, multilateral, or regional agreements or arrangements regarding transboundary movement of hazardous wastes … provided that such agreements or arrangements do not derogate from the environmentally sound management of hazardous wastes and other wastes as required by this Convention … [and] stipulate provisions which are not less environmentally sound than those provided for by this Convention".

On 30 March 1992 the Council of the Organisation for Economic Cooperation and Development (OECD) adopted a "Decision" to authorise and control transfrontier movements of wastes among OECD countries destined for recovery operations (OECD Decision). The OECD Decision is an Article 11 arrangement for the purposes of the Basel Convention. Australia and New Zealand, as members of the OECD, are bound by the OECD Decision. However, in the AAT proceedings, the

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applicant sought to have overriding effect to be given to Article 4(2)(d), of the Basel Convention which refers to transboundary movement of hazardous wastes being reduced.

The *Hazardous Waste (Regulation of Exports and Imports) Act* 1989 (the Act) commenced on 17 July 1990. The aim of the Act is to give effect to the Basel Convention and Article 11 arrangements made under that convention. The OECD Regulations made under the Act commenced on 12 December 1996. The object of those regulations is "to make regulations for section 13C of the Act giving effect to the OECD Decision".

Decision
The Tribunal affirmed the Minister's decision to grant Exide Australia a special export permit to have ULABs recycled in New Zealand.

Reasons
At the heart of the case is Australia's international obligations, particularly under a series of international conventions for the control of the transboundary movement of hazardous waste, as well as competition issues and the question of the desirability of using facilities in Australia for the disposal of hazardous waste.

The decision to grant or refuse a special export permit under regulation 14 of the OECD Regulations is made by reference to regulation 16. Subregulation 16(1) sets out a number of matters of which the Minister *must* be satisfied before granting a permit. Subregulations 16(2), (3) and (4) then give the Minister a discretion to refuse to grant a permit in certain circumstances, having regard to *inter alia* "the public interest", "Australia's international obligations" and "the desirability of using facilities in Australia for the disposal of hazardous waste".

The decision in this case turned on whether the Minister should exercise his discretion under any or all of subregulations 16(2), (3) and (4), to refuse to grant Exide Australia a permit.

ARA made several submissions in relation to the proper interpretation of subregulations 16(2), (3) and (4) that were rejected by the Tribunal. ARA submitted that the expression "public interest" should be interpreted to mean "the best interests of Australia". The Tribunal found that "public interest" should be interpreted in the broader context of the Act, which expressly aims to give effect to international conventions intended to protect human beings and the environment, and therefore permits interests outside Australia to be taken into account.

ARA submitted that the words "having regard to" in subregulations 16(3)(c) and 16(4)(c) require the Minister "to take the matter referred to into account and to give weight to it as a fundamental element in making the determination". In other words, "Australia's international obligations" (s 16(3)(c)) and "the desirability of using facilities in Australia for the disposal of hazardous waste" (s 16(4)(c)) should be given fundamental importance in the decision-making process. The Tribunal held, given the discretionary nature of the relevant provisions, that there is no reason to give these matters greater weight than is accorded by their ordinary, plain meaning.

In regard to the meaning of "Australia's international obligations", ARA (as indicated above) placed heavy emphasis on Article 4(2)(d) of the Basel Convention, which states that members are obliged to ensure that the transboundary movement of hazardous waste is "reduced to the minimum consistent with the environmentally sound and efficient management of such wastes". ARA said that the decision to grant Exide Australia the permit was inconsistent with this obligation and should be set aside on that basis.

Although the Tribunal held that it was strictly unnecessary to refer to extrinsic material to reach a conclusion, it found that "the overwhelming weight of extrinsic material supports the view that the

words 'Australia's international obligations' should be given their ordinary meaning, with the consequence that the Minister (and the Tribunal) is not limited to a consideration of obligations arising only under the Basel Convention or pursuant to Article 11 arrangements". Therefore, not only did the Tribunal reject ARA's attempt to place special emphasis on one particular obligation under the Basel Convention, it rejected completely the idea that consideration of "Australia's international obligations" should be confined to Australia's international obligations in relation to the transboundary movement of hazardous waste.

As well as dealing with the proper interpretation of the legislative scheme, Exide Australia's submissions focused on the potential negative consequences of refusing to grant a permit. Exide Australia pointed out that a regular and safe trade in ULABs between Australia and New Zealand had been established and Exide Australia had been granted permits to export ULABs to New Zealand since 1994.

Exide Australia also submitted that if a permit was refused, the recycling plant at Exide NZ would most likely close leading to a significant decrease in competition in the market for ULABs and less incentive for people to recycle ULABs. Moreover, if the NZ recycling plant closed there would effectively be no decrease in the transboundary movement of hazardous waste because ULABs would then have to be exported from New Zealand to Australia for recycling. Importantly, ARA claimed that, regardless of whether the NZ recycling plant closed, ARA's recycling facilities in Australia had the capacity to process all ULABs arising in Australia.

The Tribunal made three key findings. First, the Tribunal held that ARA currently has the capacity in Australia to process 63,000 tonnes of ULABs and 3,000 tonnes of other lead scrap annually, which is insufficient to deal with the total of 69,000 tonnes of ULABs and 6,000 tonnes of other lead scrap arising in Australia.

Second, the Tribunal found that "if a permit is not granted, the [NZ] recycling plant may close [and] if this occurs, ARA will have a recycling monopoly in Australia and New Zealand, and there is likely to be a less effective and efficient system for the collection of ULABs and scrap because of the lack of competition for ULABs and lead scrap in the market".

Third, the Tribunal held that if the NZ recycling plant is closed, ULABs arising in New Zealand would have to be exported to Australia for recycling at ARA's plants and this could lead to "an increase in the transboundary movement of this waste, in addition to potentially less effective and efficient collection systems in Australia and New Zealand …[and] these consequences are not consistent with the environmentally sound management of hazardous waste".

Based on these findings, the Tribunal concluded that the discretion to refuse to grant a permit on the grounds of "public interest", "Australia's international obligations" or "the desirability of using facilities in Australia for the disposal of hazardous waste" should not be exercised. Accordingly, the decision to grant Exide Australia a special export permit under regulation 14 of the OECD Regulations was affirmed.