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### Introduction

[1] New Zealand, South Korea and the Philippines are parties, along with 170 other states, to the Basel Convention.<sup>1</sup> The Basel Convention was adopted in 1992 to combat a growing practice among developed countries of exporting toxic or hazardous wastes to developing countries, largely in response to rising disposal costs forced by compliance with domestic environmental standards. The Basel Convention's specified purpose is to protect human health and the environment against the adverse effects of hazardous wastes. The mechanism adopted for this purpose is a requirement to minimise transboundary movements of such wastes.

[2] However, significantly for this appeal, the Basel Convention does not prohibit the transboundary movements of hazardous wastes. That is because the instrument's signatories recognised the existence and importance of an international market in recyclable materials, principally among developed states. The continuation of this economic activity is permitted but subject to a comprehensive regime for environmental management and disposal.

[3] Broadly speaking, the Basel Convention's obligations are incorporated into New Zealand's domestic legislation. The statutory vehicle is the Imports and

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<sup>1</sup> Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (opened for signature 22 March 1989, entered into force 5 May 1992).

Exports (Restrictions) Prohibition Order (No 2) 2004 (the 2004 Order), deriving from the Imports and Exports (Restrictions) Act 1998. At all relevant times the 2004 Order authorised the Minister of Commerce and with the Minister's delegated authority the Ministry of Economic Development (MED) to permit the exportation of hazardous wastes.

[4] Used lead acid batteries (ULABs or lead batteries) are among the wide range of hazardous wastes covered by the Basel Convention. Recycled lead is a valuable commodity; one of its commercial uses is in new lead acid batteries for motor vehicles. Exide Technologies Ltd is New Zealand's only lead battery recycler. Its smelter at Petone recycles lead-containing materials into pure lead and lead alloys.

[5] The capacity of Exide's smelter is greater than New Zealand's domestically generated supply of lead batteries. Since January 2008 MED has granted 24 permits to export lead batteries to South Korea and the Philippines. As at the date of judgment, at least 21 permits have expired and the remaining three are due to terminate by 12 February 2012. Exide objects to MED's policy of granting permits while New Zealand has unused domestic recycling capacity.

### **Judicial review**

[6] Exide applied to the High Court to judicially review MED's decision to grant permits. The company alleged that MED acted unlawfully in four separate respects and was also guilty of procedural unfairness. Miller J heard Exide's application under constraints of urgency on 5 and 6 September 2011. The Judge dismissed the application on 16 September.<sup>2</sup>

[7] Exide now appeals. Our judgment should be read in conjunction with Miller J's judgment which in particular contains a detailed and, we are satisfied,

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<sup>2</sup> *Exide Technologies Ltd v Attorney-General* HC Wellington CIV-2011-485-1549, 16 September 2011.

substantially correct narrative of the regulatory framework governing MED's decisions and of the Convention.<sup>3</sup>

[8] Like the High Court, we have given priority to hearing and determining Exide's appeal in view of its effects on third party rights. The company now maintains only one substantive ground of challenge to MED's decisions: it asserts that when granting export permits MED did not act in conformity with New Zealand's obligations under the Basel Convention. During oral argument the focus of Exide's appeal narrowed further, to a proposition that MED's breach arose from its policy of routinely allowing transboundary movements of lead batteries for recycling.

[9] Exide claims the remedies of, first, a declaration that MED has acted unlawfully since 2008 in issuing permits and, second, orders quashing or setting aside the existing permits. We should record, however, that Exide's claim for relief as pleaded faces three significant difficulties.

[10] First, Exide did not join as defendants permit holders whose rights would be affected by any formal remedy granted by the High Court and who would be entitled to be heard on an application for an order setting aside their permits. Second, as noted, the three remaining permits are progressively due to expire over the next two months. Third, on 1 July 2011 the Environmental Protection Authority (the EPA) assumed responsibility for administering the 2004 Order; MED is operating under transitional powers when considering the current permit applications. In this respect, MED has suspended processing those applications until Exide's claim is determined.

[11] Accordingly, even if Exide's appeal is substantively successful our power to grant relief, if any, is limited to a declaration of largely historical value about MED's previous policy. We do accept, however, that declaratory relief would be material to any review by the EPA of its policy legacy.

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<sup>3</sup> At [26]–[59].

## Basel Convention

[12] We are principally concerned with two of the Basel Convention's provisions. First, art 4.2 materially provides that:

Each Party shall take the appropriate measures to:

- (a) Ensure that the generation of hazardous wastes and other wastes within it is reduced to a minimum, taking into account social, technological and economic aspects;
- (b) Ensure the availability of adequate disposal facilities, for the environmentally sound management of hazardous wastes and other wastes, that shall be located, to the extent possible, within it, whatever the place of their disposal;
- ...
- (d) Ensure that the transboundary movement of hazardous wastes and other wastes is reduced to the minimum consistent with the environmentally sound and efficient management of such wastes, and is conducted in a manner which will protect human health and the environment against the adverse effects which may result from such movement.

[13] Second, art 4.9 provides:

Parties shall take the appropriate measures to ensure that the transboundary movement of hazardous wastes and other wastes only be allowed if:

- (a) The State of export does not have the technical capacity and the necessary facilities, capacity or suitable disposal sites in order to dispose of the wastes in question in an environmentally sound and efficient manner; or
- (b) The wastes in question are required as a raw material for recycling or recovery industries in the State of import ...

[14] The Basel Convention defines the “environmentally sound management of hazardous wastes or other wastes” as:<sup>4</sup>

... taking all practicable steps to ensure that hazardous wastes or other wastes are managed in a manner which will protect human health and the environment against the adverse effects which may result from such wastes.

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<sup>4</sup> Article 2.8.

“Management” is defined as “the collection, transport and disposal of hazardous wastes or other wastes, including after-care of disposal sites”.<sup>5</sup>

[15] Article 4 is the substantive provision. The remaining articles are more of a machinery or procedural nature. Article 6 is relevant because it contains a prescriptive regime designed to govern all aspects of transboundary movements from departure to receipt of recyclable material.

[16] We adopt this part of Miller J’s narrative of the domestic regulatory framework governing MED’s decisions:

*The Imports and Exports (Restrictions) Act 1988*

[26] In 2003 the Import Control Act 1988 was amended and renamed the Imports and Exports (Restrictions) Act 1988. The purpose of the amending legislation was to enable New Zealand “to give better effect to its international obligations to restrict the exportation of certain goods”. The Act provides that the Governor-General, if satisfied that it is necessary to give effect to an international obligation, may by Order in Council prohibit the exportation of goods of a specified class from New Zealand. The international obligations of which the legislation speaks are defined to include those assumed under the Basel and Waigani Conventions.<sup>6</sup> A prohibition may be general or limited in various ways or conditional. The Act creates an offence of exporting goods from New Zealand in breach of such an Order in Council.

[27] The 2004 Order was made under the Act, and all of the decisions in issue here were made under the 2004 Order.

*The Imports and Exports (Restrictions) Prohibition Order (No 2) 2004*

[28] The 2004 Order generally prohibits the shipping of any hazardous waste to a place outside New Zealand. ULABs are hazardous wastes as defined, for they contain lead and lead compounds and acidic solutions. The plastic casings are also considered hazardous until they have been cleaned during the recycling process because they are contaminated with the hazardous constituents of the battery.

[29] However, cl 11 permits hazardous waste exports where the Minister has authorised them, and the Minister enjoys a discretion to authorise exports if certain conditions are met. ...

(Footnotes omitted.)

[17] Clause 11 of the 2004 Order, as it was to 1 July 2011, materially provided:

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<sup>5</sup> Article 2.2.

<sup>6</sup> The Waigani Convention is specific to the South Pacific region but generally reflects the Basel Convention’s philosophy and language: see the High Court judgment at [61].

## 11 When waste may be exported

- (1) A hazardous waste or household waste may be exported if the Minister has consented to the exportation.
- (2) Subject to subclause (3) [which deals with Stockholm Convention chemicals], the Minister may consent to the exportation of any hazardous waste or household waste if—
  - (a) the waste will be exported to a qualifying destination; and
  - (b) any of the following applies:
    - (i) New Zealand does not have the technical capacity and the necessary facilities, capacity, or suitable disposal sites to dispose of the waste in an environmentally sound and efficient manner; or
    - (ii) the waste is required as a raw material for any recycling or recovery industry in the importing State; or
    - (iii) the exportation of the waste is in accordance with any criteria decided by the Basel Parties; and
  - (c) the waste can be disposed of or managed in an environmentally sound and efficient manner in the importing State; and
  - (d) *exportation of the waste is otherwise in conformity with New Zealand's obligations under the Basel Convention and, if relevant, the Waigani Convention.*

...

- (4) In subclause (2), **qualifying destination** means a Basel Party that—
  - (a) has not prohibited the importation of the waste; and
  - (b) has consented in writing to the specific import in question.

(Italicised emphasis ours, emboldened emphasis original.)

[18] As we discuss below, the emphasised words of cl 11(2)(d) provided the focus of Exide's argument in this Court.

## Decision

(a) *Summary of Exide's case*

[19] Exide filed a number of affidavits in support of its application, much of which were in the nature of submission or argument and thus inadmissible. A large amount of correspondence passing between the parties was also produced but was not of assistance. The apparent purpose of these documents was to mount a challenge to the substantive merits of MED's decisions. It is appropriate to record that our powers on review are limited to an examination of the lawfulness of MED's decisions. The scope of that inquiry is necessarily confined, and is to be undertaken against the benchmark of the Basel Convention and the 2004 Order.

[20] Exide did not suggest in this Court that MED is licensing other parties to commit the primary mischief against which the Basel Convention is directed – that is, of dumping toxic wastes on undeveloped states with inadequate sites for efficient disposal. Moreover, Exide now accepts, contrary to its position in the High Court, that three of the four statutory criteria were satisfied when each permit was issued. That is, in all cases:

- (a) the lead batteries were to be exported to a qualifying destination – that is, a signatory to the Basel Convention (cl 11(2)(a) of the 2004 Order);
- (b) the lead from the batteries was required as a raw material in a recycling or recovery industry in the qualifying destination (cl 11(2)(b)); and
- (c) the waste could be disposed of in an environmentally safe manner at that destination (cl 11(2)(c)).

[21] Exide's remaining ground of challenge to the legality of MED's decision is based on cl 11(2)(d) and is pleaded as being that:

*By granting consent to export ULABs in circumstances where they could be disposed of in an environmentally sound and efficient manner in New Zealand [MED] failed to comply with:*

...

- (ii) ... the provisions of ... [the 2004 Order] including without limitation the requirement in clause 11(2)(d) that the exportation of the waste is “otherwise in conformity with” New Zealand’s obligations under the Basel Convention ...; and/or
- (iii) the obligation to take appropriate measures to ensure the availability of adequate disposal facilities ... within New Zealand, as required by article 4(2)(b) of the Basel Convention; and/or
- (iv) the obligation to take appropriate measures to ensure that the transboundary movement of hazardous wastes is reduced to the minimum consistent with the environmentally sound and efficient management of such wastes, as required by article 4(2)(d) of the Basel Convention ...

(Our emphasis.)

*(b) Exide’s operation*

[22] The factual platform for Exide’s case is that its smelter is the only remaining lead battery recycling facility in New Zealand. Exide has a current resource consent for that purpose. Exide’s plant is able to process about 28,000 tonnes of lead batteries annually but can remain economically viable with feedstock levels as low as 16,000 tonnes.

[23] Exide’s smelter was able to recycle to its capacity until 2009 because Exide sourced lead batteries from Australia and, to a lesser extent, the Pacific Islands as well as New Zealand. Australia then had one domestic ULAB recycler which did not have the capacity to process all of Australia’s domestically generated supply. However, Australia now has three domestic ULAB recyclers with sufficient combined capacity to deal with all its domestic supply. Australia now refuses to allow the lead batteries to be exported to New Zealand.

[24] Thus, since October 2010 Exide has relied solely on ULABs sourced within New Zealand plus a continuing small quantity from the Pacific Islands (644 tonnes in 2010). Domestic supply is about 16,000 tonnes annually, the minimum necessary to keep Exide’s smelter operational. The 20 permits approved for export

of lead batteries to Korea since 1 January 2008 comprise 75,020 tonnes; the four applications approved for the Philippines for the same period comprise 18,800 tonnes. In total, consents granted by MED have permitted the export of up to 93,820 tonnes of batteries in just under four years.

[25] Ms Chen drew our attention to some informative statistics provided by Exide, showing that:

- (a) The amounts approved by MED for export of lead batteries was much higher in 2008 and 2009 (28,500 and 29,820 tonnes respectively) than in 2010 (18,500 tonnes). Final figures are unavailable for 2011.
- (b) The estimated amounts of lead batteries actually exported – that is not recycled in Exide’s smelter – has similarly declined, from ranges of 10,125 tonnes to 15,791 tonnes for 2008, 5,215 to 14,201 tonnes for 2009, to 2,983 to 4,358 tonnes for 2010.
- (c) Exide’s domestic collections have increased from 6,204 in 2008 to 13,000 tonnes in 2010.

[26] In summary, these figures are consistent with a statement made by John Cowpe, Exide’s Australasian managing director, that the company offers and pays a price for ULABs which is internationally competitive. The fact that a relatively small proportion of the amounts approved are actually exported bears out Mr Cowpe’s assertion. On these figures, despite the existence of approvals to export large volumes of lead batteries, less than 25 per cent of New Zealand’s domestically generated supply was exported in 2010. By inference, Exide must have purchased the balance.

[27] In reliance on this raw data Ms Chen submits that cl 11(2)(d) of the 2004 Order obliges MED to refuse to issue export permits if New Zealand has domestic capacity to recycle the batteries; and that MED is only allowed to consider applications for external recycling where insufficient domestic capacity exists, at

which point it can grant export permits and run the risk inherent in transboundary movements. That is the legal basis upon which Exide's claim is pleaded (see at [21] above).

(c) *MED's policy*

[28] Ms Robyn Washbourne, a senior analyst employed by MED, explained its approach when considering Exide's objections to its policy of granting export permits for ULABs.

[29] In summary Ms Washbourne advised that:

- (a) Since as early as 2005 Exide has requested MED to use the permit approval process to prohibit or limit the export of lead batteries to protect Exide's domestic supplies of that product. Until recently, the company's view was that it was not able to compete with overseas recyclers and its viability would be threatened without such protection.
- (b) However, MED's view is that the environmentally sound management of ULABs in the New Zealand context is not best served by using the export permit process to protect the sole domestic recycler from competition. In principle MED does not consider that granting Exide monopsony status, thereby preventing or limiting the ability for collectors to sell to other recyclers, is a desirable way to encourage the collection of ULABs in New Zealand. Therefore it does not decline otherwise acceptable applications for export permits on that ground.
- (c) The main policy issue taken into account by MED when deciding this way is the nature and extent to which Government, having created a monopsony buyer, could exercise control about how that buyer exercises its market power.

(d) *High Court*

[30] Miller J dismissed an argument advanced by Ms Chen in the High Court similar to her submission before us based on cl 11(2)(d) in these terms:

[71] Further, the 2004 Order contains no prohibition on export whenever New Zealand is capable of recycling ULABs domestically in an environmentally appropriate manner. On the contrary, cl 11 plainly authorises export when waste is to be exported to a qualifying destination where it can be disposed of or managed in an environmentally sound and efficient manner, and the waste is required as a raw material for recycling or recovery in the importing State, and export otherwise conforms with New Zealand's obligations under the Basel Convention. In other words, export is authorised for recycling purposes where the waste can be disposed of in an environmentally appropriate manner, notwithstanding that the Convention generally seeks to reduce transboundary movements. It is for these reasons that, as noted earlier, Ms Chen ultimately conceded that ULAB exports are permitted under the 2004 Order notwithstanding that they can be processed appropriately in New Zealand.

[31] Ms Chen did not make the same concession in this Court. In any event, we agree with Miller J's reasons and add that the words of cl 11(2) contradict Ms Chen's construction. The provision prohibits MED from issuing permits unless all four qualifying criteria are satisfied. But, if they are satisfied, MED is empowered to exercise its discretion without giving priority to or ranking of any particular factor. The statutory discretion is broad, subject always to ensuring that it is exercised in conformity with New Zealand's obligations under the Basel Convention.

[32] The question then is whether Exide is able to justify its proposition that MED's decisions are not "otherwise in conformity with" New Zealand's obligations under the Basel Convention on another ground.

(e) *The nature of parties' obligations under the Basel Convention*

[33] We preface our analysis of Ms Chen's argument with a short observation about the nature of parties' obligations under the Basel Convention. As noted (see at [15] above), art 4 imposes substantive general obligations, whereas the remaining duties are more of a machinery or procedural nature. Within and across those broad classifications, it is also possible to distinguish two types of obligations: those

leaving considerable room for discretion in implementation and those imposing discrete affirmative duties or prohibitions. By way of two examples of the latter type, art 4.5 prohibits parties from permitting exports to or imports from non-parties; and art 6.1 requires notification of exports including specified declarations and information.

[34] By contrast, as we shall explain, we are satisfied that the provisions of the Basel Convention primarily relied upon by Ms Chen are of the former or general type. In those circumstances the question is whether MED's decisions satisfy the statutory purpose,<sup>7</sup> which with a degree of circularity is described as to "give better effect to its international obligations to restrict the exportation of certain goods".<sup>8</sup> Nevertheless, we shall analyse whether those general obligations are capable of giving rise to the absolute duties propounded by Ms Chen.

(f) *Article 4.2(b) of the Basel Convention*

[35] Ms Chen justifies her submission on two alternative grounds. Both derive from cl 11(2)(d). First, Ms Chen submits that, unless MED exercises its discretion to refuse consents to exports of lead batteries when they could be disposed of in an environmentally sound and efficient manner in New Zealand, the economic viability of New Zealand's sole domestic recycler will be put at risk. She raises the spectre of Exide going out of business. In that event, she says, New Zealand will be in breach of art 4.2(b) of the Basel Convention. Ms Chen submits that MED will not have taken appropriate measures to:

Ensure the availability of adequate disposal facilities, for the environmentally sound management of hazardous wastes and other wastes that shall be located, to the extent possible, within [New Zealand], whatever the place of their disposal.

[36] In answer, Ms Casey points out that the Basel Convention does not compel parties to develop or maintain domestic facilities. However, we note that art 4.2(b)

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<sup>7</sup> *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 (HL); *Unison Networks Ltd v Commerce Commission* [2007] NZSC 74, [2008] 1 NZLR 42.

<sup>8</sup> Imports and Exports (Restrictions) Amendment Act 2003, s 3.

requires states to take “appropriate measures” to ensure their availability. In other words, states have responsibilities to act affirmatively in this respect.

[37] Ms Chen’s argument proceeds on the premise that the inevitable result of MED’s policy to grant export permits will be the closure of Exide’s recycling smelter. Thus, she submits, when that contingency occurs, MED will have failed to take appropriate measures in this regard.

[38] However, Ms Chen is inviting us to draw a factual inference which is without a sufficient evidential foundation: the possibility of closure of Exide’s smelter at some indefinite time in the future does not of itself prove any breach by MED of its obligation to take appropriate measures. It is, however, relevant when considering whether MED has discharged that duty that in 2007 Exide raised a concern with MED about the viability of its smelter due to the competitive threat from overseas recyclers. The company requested MED to impose limits on exports. As Ms Casey emphasises, MED responded by offering to consider provision of support under the Government’s industry and regional development programmes. However, Exide has declined MED’s invitation to provide information to support a business case for assistance.

[39] In this respect, as Ms Chen herself points out, Exide’s smelter has a current resource consent which has expired or is about to expire. The company has applied for a renewal. It is common ground that the smelter’s recycling facility is able to dispose of the lead batteries in an environmentally sound and efficient manner.

[40] Exide may decide in the future that it is no longer economic to run the smelter. In the event that Exide is unable to sell the plant and it is forced to close, the EPA (as MED’s successor with responsibility for administering the 2004 Order) may have to take measures to ensure that that facility or an alternative adequate disposal facility remains domestically available. But that is not the present issue. We are not satisfied that MED has breached art 4.2(b) of the Basel Convention when granting permits.

(g) *Articles 4.2(d) and 4.9*

[41] Second or alternatively, Ms Chen submits that by granting export permits whenever domestic capacity to recycle lead batteries exceeds supply MED is in breach of art 4.2(d) of the Basel Convention. She submits that it is not taking appropriate measures to:

Ensure that the transboundary movement of hazardous wastes ... is reduced to the minimum consistent with the environmentally sound and efficient management of such waste, and is conducted in a manner which will protect human health and the environment against the adverse effects which may result from such movement.

[42] We note that a State's obligation to take appropriate measures to reduce transboundary movements of hazardous wastes is not absolute. The word "minimum" is qualified by the requirement that it be consistent with the environmentally sound and efficient management of such waste. The definition of the phrase "environmentally sound management of hazardous wastes" refers to its management "in a manner which will protect human health and the environment against the adverse effects which may result from such wastes". And management is defined as the "collection, transport and disposal of hazardous wastes ...".

[43] The existence and terms of this qualification to art 4.2(d) are consistent with the permissive nature of art 4.9 (see at [13] above). It allows for the transboundary movement of hazardous wastes if either (a) the exporting State does not have the technical capacity and the necessary facilities for adequate disposal or (b) the wastes are required as a raw material for recycling or recovery industries in the importing State. Cl 11.2(a) and (b) of the 2004 Order incorporate both options into New Zealand law.

[44] It follows from Exide's abandonment of its original argument that MED breached cl 11.2(a), (b) and (c) that it accepts the lead batteries can be disposed of or managed in an environmentally sound and efficient manner in both South Korea and the Philippines. That is an important concession. A significant objective of the Basel Convention would be frustrated if export was permitted to a country which did not have environmentally sound and efficient disposal facilities. Here,

however, there can be no issue about whether the toxic waste will be disposed of adequately at its destination State.

[45] The inquiry then narrows further: the only question is whether the fact of MED's permission to export the ULABs – that is, to allow their transboundary movements – constitutes a breach of art 4.2(d). Ms Chen focuses on the shipping risk inherent in all movements of sea cargo, from the point of containerisation in one country to unloading in another. She says that, properly construed, the Basel Convention requires that any movement of recyclable materials, if they are of a hazardous nature, should only be allowed once domestic supply exceeds capacity.

[46] Without doubt, all transport movements of lead batteries whether domestic or external, are attended by risks, principally from electrolyte spillages. Technical guidelines for dealing with ULAB recycling provide recommendations for their storage and transport.<sup>9</sup> We accept that the nature and extent of these risks increase with transboundary movements. Shipping has its inherent dangers. But the implementation of the provisions of art 6, designed to ensure the environmentally safe movement of hazardous wastes from one country to another, mitigates those risks.

[47] Against this background, we do not read art 4.2(d) in conjunction with art 4.9 as having the prohibitive effect submitted by Ms Chen. We agree with Ms Casey that the Basel Convention strikes a compromise or balance between two potentially conflicting objectives: one is to prohibit dumping of the toxic wastes in countries which do not have adequate facilities for disposal; the other is the desirability of maintaining an international trade in recyclable materials which is in itself an environmentally and economically beneficial aim.

[48] It is notable that art 4 is not directed at the dangers inherent in transboundary movements of toxic wastes as such, a point reinforced by the recognition within art 4.2(b) that disposal may occur outside the country of origin. Rather, the requirement to limit transboundary movements is the mechanism by

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<sup>9</sup> Technical Guidelines for the Environmentally Sound Management of Waste Lead-Acid Batteries (Secretariat of the Basel Convention, 2003).

which the underlying mischief of dumping of toxic wastes can be minimised or eliminated. Accordingly, art 4.2(d) specifically allows for the conduct of transboundary movements of hazardous waste in a protected manner. We do not accept that MED has breached that provision when granting export permits; to the contrary, we accept that in doing so MED was exercising its discretion in a manner consistent with the statutory purpose.

## **Result**

[49] We are not satisfied that MED has acted unlawfully when granting permits to export ULABs. Exide's appeal is dismissed.

[50] The parties filed a joint memorandum dated 22 November 2011 seeking confidentiality for certain commercially sensitive information in the case on appeal. The order that was sought largely replicated the confidentiality order made in the High Court. We made the order sought by the parties preserving the confidentiality of the information set out in the joint memorandum in Court on 24 November 2011 and we now confirm that order.

[51] Ms Chen submits that, if Exide's appeal is unsuccessful, the Court should exercise its discretion to make no award of costs. While the proceeding substantially affects Exide's private interests, it is being brought as a last resort and raises issues of considerable public interest. Ms Chen also submits that if Exide succeeds costs should be fixed as on a complex appeal.

[52] Ms Casey submits that costs should follow the event. She observes that Exide's pursuit of what she called a "scattergun" approach in the High Court, which was abandoned on appeal, significantly increased MED's costs.

[53] We agree with Ms Casey that costs should follow the event. However, they should be fixed on a standard, not complex, basis. This appeal did not raise any particularly complex or significant issues.

[54] Accordingly, Exide must pay MED costs as on a standard appeal on a band A basis together with usual disbursements. We certify for second counsel.

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Crown Law, Wellington for Respondent