

Reference: 20110180



THE TREASURY

Kaitohutohu Kaupapa Rawa

18 July 2011

Keith Ng
keith@point.org.nz

Dear Keith Ng

Thank you for your Official Information Act request, received on 30 June 2011. You requested a copy of the British American Tobacco submission on the Regulatory Standards Bill. I note that this submission was in response to the discussion questions released by Hon Rodney Hide on 28 June 2010. It is not a submission to Parliament's Commerce Committee on the Regulatory Standards Bill, which that committee is currently considering.

Please find attached the requested document.

I have decided to release this document subject to information being withheld under section 9(2)(a) of the Official Information Act – to protect the privacy of natural persons, including deceased people.

In making my decision, I have considered the public interest considerations in section 9(1) of the Official Information Act.

This fully covers the information you requested.

You have the right to ask the Ombudsman to investigate and review my decision.

Yours sincerely

A handwritten signature in blue ink, appearing to be 'Kirsty Flannagan', with a long horizontal flourish extending to the right.

Kirsty Flannagan
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**BRITISH AMERICAN
TOBACCO**
NEW ZEALAND

British American Tobacco (NZ) Ltd

**Submission on the Regulatory
Responsibility Bill**

Contact:

[Withheld under s.9(2)(a)]

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OFFICIAL INFORMATION ACT

27 August 2010

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Introduction

- 1 British American Tobacco (New Zealand) Limited (**BATNZ**) congratulates the Taskforce for developing the draft Regulatory Responsibility Bill (the **Bill**) and welcomes this opportunity to comment on the questions posed by Hon Rodney Hide on 28 June 2010.
- 2 BATNZ has always taken a strong interest in issues of regulation and regulatory responsibility. We see the Bill as an important step towards an improvement of New Zealand's regulatory landscape.
- 3 BATNZ supports the adoption of the Bill, but submits it could be improved as noted below.

Part 1 - The need for a Regulatory Responsibility Bill

Question a - Do you agree that the quality of legislation (Acts, statutory regulations, tertiary legislation) in New Zealand is often not as good as it could or should be? If so, what do you see as the main problems with quality, and the main causes of those problems? If not, please explain the reasons for your view.

- 4 The quality of legislation in New Zealand is variable. There is room for improvement. We agree with the Taskforce that the volume and scope of legislation in New Zealand is an issue that needs to be addressed.
- 5 Good public policy should always be evidence-based as should legislation implementing that policy. Too often legislation in New Zealand is developed and implemented without a sufficient scientific and evidential basis to be justifiable and/or without adequate analysis and proper consideration of the available evidence as to its likely impact. In particular there is often inadequate analysis and consideration of the likely benefit of proposed legislation and/or its impact on the fundamental rights, liberties and freedoms articulated in the Bill.
- 6 This failing is a very serious one in a country where the legislature enjoys arguably the greatest degree of freedom to legislate of any legislature in the world. As the leading text on Constitutional and Administrative law puts it:¹

New Zealand is the acme of legislative supremacy. It has no fundamental laws, no entrenched Bill of Rights, and no federal division of powers. Its freedom of legislation transcends even that of Britain, where devolution and European Union membership obligations have effected a de facto surrender of United Kingdom legislative power. Parliamentary sovereignty is retained in principle only given Britain's supra-national obligations and devolved institutions. New Zealand's unique and insular status avoids any comparable limitations on legislative power.
- 7 Put simply, if Parliament does not 'get it right', New Zealand lacks the institutions to correct this or to protect individuals from the consequences of Parliament's failure in the meantime. This means it is vital that law-makers adequately consider both the evidence in support of any proposed law, and its likely impact on New Zealanders.
- 8 Adequate consideration of the evidence should always be informed by the overseas experience, if any, of similar legislation as suitably extrapolated and modified to suit

¹ Joseph, *Constitutional and Administrative Law in New Zealand*, 3rd ed, 2007, at page 498.

New Zealand conditions. This would involve a proper understanding of the experience overseas both in terms of the legislative detail and in terms of the institutional settings in which it is applied. It would also involve comparison of those institutional settings with those in New Zealand. To the extent there are subtle differences in either the relevant legislation or the institutional settings then prima facie similar legislation has the potential to produce very different outcomes when introduced here.

9 The principles of responsible regulation in clause 7 of the Bill (the **principles**), especially the 'good-law making' requirements, will go some way to addressing the above concerns, in particular by requiring that legislation be consistent with fundamental rights, liberties and freedoms and that legislation:

9.1 should not be made unless there has been a careful evaluation of

9.1.1 the issue concerned;

9.1.2 the effectiveness of existing laws;

9.1.3 other options for addressing the issue;

9.1.4 who is likely to benefit and suffer from the legislation; and

9.1.5 all potential adverse consequences of the legislation.

9.2 should produce benefits that outweigh costs; and

9.3 should be the most effective, efficient and proportionate response available to the issue.

Question b - Do you agree that existing parliamentary and administrative processes are unlikely to be sufficient to encourage substantial improvements in the quality of legislation? Please explain the reasons for your view.

10 BATNZ agrees that existing processes are insufficient to encourage substantial improvements to the quality of legislation. Existing policies include those set out in or followed by:

10.1 the Legislation Advisory Committee Guidelines on Process and Content of Legislation (the **LAC Guidelines**);

10.2 the Regulations Review Committee;

10.3 the Cabinet Manual; and

10.4 Treasury in preparing a Regulatory Impact Analysis.

11 We agree with the Taskforce and with other commentators that these processes are not sufficient to encourage improvements to the quality of legislation, particularly due to:

11.1 the lack of any mandatory compliance processes within these mechanisms;

- 11.2 the lengthy and archaic nature of the LAC Guidelines, making them too complicated for policy-makers to commit to;²
- 11.3 the fact that, despite the substantial jurisprudence of the Regulations Review Committee, Parliament has not yet disallowed a regulation under the Regulations (Disallowance) Act 1989;³
- 11.4 the fact that the Regulations Review Committee assesses regulations post-enactment, rather than providing a pre-enactment safeguard;⁴
- 11.5 the fact that the Regulations Review Committee can currently only scrutinize regulations, not bills; and
- 11.6 the current Regulatory Impact Analysis procedure not being utilized to best advantage and in particular not addressing some of the key factors relating to legislative quality.

Part 2 - The nature and scope of the Bill

Question a - Do you agree that systematic testing of legislation against a set of established principles will help improve regulatory quality?

- 12 Yes, we agree that the proposed principles and benchmarking requirements under the Bill will help improve regulatory quality.

Question b - What is your view on the range and appropriateness of the principles identified by the Taskforce?

- 13 BATNZ supports the range and appropriateness of the principles in the Bill, however we note below a few improvements that we consider would further enhance the effectiveness of the principles.

Question c - If you would favour additions or changes to these principles, what would they be and why?

- 14 While BATNZ broadly supports the principles in the Bill, we consider they could be improved in the following ways:

- 14.1 The principles should include a reference to New Zealand's international obligations, which is an important feature of the LAC Guidelines.
- 14.2 The principles should specifically state that an *evidence-based assessment* is required of the issue and the necessity of legislation to address that issue.

² Tim Smith 'The Regulatory Responsibility Taskforce: A View From Inside the Room' *Policy Quarterly*, Volume 6, Issue 2, May 2010 at page 16.

³ Geoffrey Palmer 'A View of the Legal Debate' *Policy Quarterly*, Volume 6, Issue 2, May 2010 at page 33.

⁴ David Caygill, 'The Case for Better Parliamentary Scrutiny of Legislation' *Policy Quarterly*, Volume 6, Issue 2, May 2010 at page 55.

14.3 The 'Taking of property' principle contained in clause 7(1)(c) of the Bill should be amended to specifically state that 'property' includes both tangible and intangible property.

14.3.1 In their report, the Taskforce acknowledges that 'property' in clause 7(1)(c) 'refers to all types of real and personal property, including intangible property'. We strongly agree with the Taskforce's reasoning in this respect; it has been accepted, both in New Zealand and overseas, that 'takings' provisions of this nature cover intangible as well as tangible property.⁵

14.3.2 In order to avoid any uncertainty as to what is covered by clause 7(1)(c) we consider it would be of benefit to policy-makers, courts and the public in interpreting this clause to:

- (a) specifically state in clause 7(1)(c) that intangible property is included under the principle; and/or
- (b) include a definition of 'property' in clause 4 of the Bill, stating that property includes all types of real and personal property, including intangible property.

Question d - The Taskforce considered that all levels of legislation (ie primary, secondary, and tertiary) should be tested against a set of principles. What levels of legislation do you think would benefit from such testing?

15 All legislation would benefit from being tested against the principles.

16 In addition, local government legislation is a very important feature of New Zealand's political landscape and BATNZ considers there is no good reason to exclude such legislation from the testing requirements. Therefore we support the inclusion of local government legislation under the Act as soon as possible, and encourage this inclusion to be recommended at least as part of the first five yearly review of the Bill.

Part 3 - The effectiveness and impact of the Bill

Question a - Do you agree that stronger benchmarking, transparency and monitoring mechanisms will improve the quality of New Zealand's legislation? Are there other mechanisms that you consider would be superior? Please explain the reasons for your view.

17 Yes, BATNZ agrees that the benchmarking, transparency and monitoring mechanisms in the Bill will contribute towards improving the quality of legislation in New Zealand.

⁵ For example, it has been accepted by the United States Supreme Court that the takings provision in the Fifth Amendment to the Constitution of the United States applies to the taking of trade secrets (*Ruckelshaus v Monsanto* 467 U.S 986 at 1004); by the Supreme Court of Canada that the taking of a business' goodwill constitutes a taking that must be compensated for (*Manitoba Fisheries Ltd v The Queen* [1979] 1 SCR 101 at 118); and in New Zealand that intellectual property rights are capable of being expropriated in the same way as other forms of property (*Glogau v Land Transport Safety Authority of New Zealand and New Zealand Taxi Proprietors' Federation Inc* [1997] 3 NZLR 353 at 363).

Question b - What are the likely effects of the principles/certification/declaration of incompatibility incentive structure?

- 18 We anticipate positive effects from the incentive structure. With regard to each element of the structure:
- 18.1 *The principles* - Having a short and well-defined list of principles will provide a clear benchmark for all legislation to meet.
- 18.2 *Declaration of incompatibility* - Declarations of incompatibility will not only provide the public with an important mechanism to address breaches of the principles, but will provide a strong incentive for policy-makers not to breach the principles in the first instance. We agree with the Taskforce that the threat of a declaration of incompatibility will provide significant political and institutional incentives for policy-makers to carefully consider the principles and create better quality legislation as a result. The threat of a judicial declaration will 'imprint on policy makers the importance of the principles and the need to take them seriously throughout the legislative process.'⁶
- 18.3 *Certification* - see 'Question c' below.

Question c - What are the likely effects of the requirement that Ministers and Chief Executives responsible for legislation certify as to its compliance with the principles of Responsible Regulation, including the likely effects on the relationship between Ministers and government officials?

- 19 Certification will add a key step into the policy-making process, forcing policy-makers to turn their minds to specifically consider the quality of the legislation they are proposing. The certification requirements will place political and moral pressures on policy-makers and will force them to take the question of compatibility with the principles seriously.⁷
- 20 We anticipate this requirement will be similar to the existing requirement under section 7 of the New Zealand Bill of Rights Act 1990 (**NZBORA**) which requires the Attorney-General to vet all legislation for compliance with the NZBORA and report to the Parliament on any inconsistency.
- 21 We note this process under the NZBORA has not resulted in any negative effects, and has in fact led to positive consequences.⁸

[A]s a consequence of the various procedures [in the NZBORA], policy analysts and legal advisers within government are now aware that to the extent that a s 7 report might imperil the passage of a legislative proposal dear to their minister, ministry or department, then it is best to formulate a policy, legislative proposals and draft legislation in such a way as to avoid BORA-inconsistency.

⁶ Richard Ekins 'The Regulatory Responsibility Bill and the Constitution' *Policy Quarterly*, Volume 6, Issue 2, May 2010 at page 12.

⁷ Tim Smith 'The Regulatory Responsibility Taskforce: A View From Inside the Room' *Policy Quarterly*, Volume 6, Issue 2, May 2010 at page 17.

⁸ Butler and Butler, *The New Zealand Bill of Rights Act: A Commentary*, 2005, at page 1105.

Question d - Are the courts the best external body to assess the consistency of legislation with the principles set out in the Taskforce's Bill? If not, what other bodies might fulfil this role?

- 22 The courts are the best and the most appropriate body to assess the consistency of legislation with the principles. There is no other body that would be appropriate for this role. Indeed we consider that it is essential that the courts carry out this role given their independence and experience. This is particularly true given the courts' experience in making assessments of consistency with the NZBORA, as well as their ability to apply jurisprudence, both domestic and international, to the issues of consistency that arise.

Question e - What are the likely effects of giving the courts, or your preferred alternative agency if you have one, a role in assessing whether legislation is compatible with a set of legislative principles?

- 23 We do not consider there would be any significant negative effects of giving the courts the power to assess legislation. We agree with the Taskforce that providing the courts with this power is justified and necessary to encourage and ensure compliance by policy-makers with the principles.
- 24 It may be the case that courts will be disinclined to exercise this power. We note that the approach taken by the judiciary in relation to section 6 of the NZBORA⁹ is that the courts will always give legislation a meaning in accordance with ordinary legislative principles of statutory interpretation and will only diverge from that approach in the exceptional case where:

24.1 that meaning is incompatible with the NZBORA; and

24.2 an alternative meaning is in fact available.¹⁰

It is therefore likely that courts will only intervene in cases of clear incompatibility with the principles of responsible regulation, i.e. in cases where something has gone wrong with the process of enactment of legislation.¹¹ This will significantly reduce the risk of any negative effects.

Question f - Under the Bill, a court's exercise of the declaration of incompatibility procedure does not affect the validity of the legislation at issue. Nevertheless, some commentators suggest that the Bill will alter the relationship between Parliament and the courts, particularly given that the courts must take into account whether any breach of the principles is "justified in a free and democratic society" when deciding whether to make a declaration of incompatibility.

Do you think that such suggestions are accurate?

⁹ As confirmed by the Supreme Court in *R v Hansen* [2007] 3 NZLR 1 at [237].

¹⁰ Tim Smith 'The Regulatory Responsibility Taskforce: A View From Inside the Room' *Policy Quarterly*, Volume 6, Issue 2, May 2010 at page 17.

¹¹ *Ibid*, page 19.

- 25 No, BATNZ does not consider there will be any undesirable alteration of the relationship between Parliament and the courts as a result of the declaration of incompatibility procedure.
- 26 The courts already have to consider, in relation to inconsistency with the NZBORA, whether breaches of the rights therein are 'justified in a free and democratic society'. The courts already have the power to issue declarations of inconsistency with the NZBORA¹² and the United Kingdom courts have made declarations about incompatibility with the Bill of Rights Act there. In addition compensatory damages for breaches of the NZBORA are now available.¹³ These developments have not caused any fundamental alteration of the relationship of comity that existed, and continues to exist, between Parliament and the courts. We therefore consider that the courts will continue to exercise their discretionary powers with due respect to the power of Parliament. The New Zealand judiciary is 'well aware of its institutional limits'¹⁴ and we do not consider this will change as a result of the Bill.
- 27 We also note that in the years since the Supreme Court's finding in *R v Hansen* that aspects of the Misuse of Drugs Act 1975 were inconsistent the NZBORA, the legislature has not amended that Act. This indicates that Parliament is well able to withstand this type of finding and will be committed to maintaining the current relationship between itself and the courts.

If so, do you think that the potential benefits of improving the quality of legislation in New Zealand are such that such alterations to the relationship between Parliament and the courts are justified?

- 28 As indicated, BATNZ does not anticipate there will be any adverse alterations to the relationship.

Could the Bill be improved in this respect?

- 29 In order to improve this aspect of the Bill, BATNZ considers that all of the principles of responsible regulation ought to be subject to the courts' power to issue a declaration of incompatibility. The Taskforce states in their Report that the issues in clause 7(1)(i) to (k) are particularly unsuitable for judicial consideration, given the institutional limits of the adversarial process. We respectfully disagree with the Taskforce's reasoning in this respect for the following reasons:

- 29.1 We cannot discern any reason to differentiate between the principles in clause 7(1)(a) to (h) and those in (i) to (k). If the former are considered suitable for a declaration then there is no reason why the latter ought not to be also. If any limits of the adversarial process existed, they would apply to all of the principles in clause 7 rather than to a select number of them, if at all. BATNZ does not consider there are any such limits that would prevent the courts from appropriately using their declaratory power.

¹² See Tipping J in the Supreme Court in *R v Hansen* at [107].

¹³ *Simpson v Attorney-General (Baigent's case)* [1994] 3 NZLR 667.

¹⁴ Tim Smith 'The Regulatory Responsibility Taskforce: A View From Inside the Room' *Policy Quarterly*, Volume 6, Issue 2, May 2010 at page 20.

- 29.2 We consider the principles in clause 7(1)(i) to (k) are of crucial importance in achieving the Bill's goal of improved regulatory quality. To deny the courts the power to issue declarations on breaches of those principles will severely limit the effectiveness of the Bill in reaching that goal.
- 29.3 To segregate certain principles for judicial declarations will create confusion and inconsistency, and also poses the risk of elevating the importance of certain principles over others. In terms of creating a sound set of principles of responsible regulation, this would not be a desirable outcome.
- 30 In order to further improve the Bill in this respect, BATNZ also considers that the Courts should be empowered to award compensation for breaches of the principles.
- 30.1 In its report the Taskforce states that the purpose of clause 13 is to avoid the possibility of a decision similar to that in *Baigent's case*¹⁵ where the Court of Appeal held the courts have the power to award damages for a breach of the NZBORA. We note that the Taskforce does not provide any reasons as to why they wish to avoid a decision similar to that in *Baigent's case*.
- 30.2 In reaching this conclusion, the Taskforce footnotes a report of the New Zealand Law Commission following the decision in *Baigent's case*.¹⁶ However, BATNZ submits with respect that the Law Commission's report in fact supports allowing compensation under the Bill. In the report, in recommending the *Baigent's case* remedy ought not to be repealed through legislation, the Law Commission gave three key reasons:
- 30.2.1 There is a need for an effective remedy for breaches of the NZBORA in order to reinforce the Act as an overarching set of principles by which New Zealanders, including decision-makers, are guided and protected.¹⁷
- 30.2.2 If remedies are not provided for breaches of the NZBORA, remedies would inevitably develop at common law for rights similar to those under the NZBORA, with similar remedies to those available for breaches of the NZBORA. Therefore allowing remedies for breaches of the NZBORA now achieves the same result that would inevitably arise, but does so in a more efficient manner.¹⁸
- 30.2.3 *Baigent's case* compensation is supported by the central principle that where there is a right there should be a remedy. This is a

¹⁵ *Simpson v Attorney-General (Baigent's case)* [1994] 3 NZLR 667.

¹⁶ New Zealand Law Commission, 'Crown Liability and Judicial Immunity: A Response to *Baigent's Case* and *Harvey v Derrick*', 1997.

¹⁷ *Ibid*, at page 27.

¹⁸ *Ibid*.

long standing principle and one that is affirmed in the International Covenant on Civil and Political Rights.¹⁹

- 30.3 There is no good reason to deny compensation for breaches of the principles in the Bill if compensation for breaches of the rights in the NZBORA exists. The reasoning of the Law Commission in approving remedies under the NZBORA applies equally to the Bill; the Bill is closely modelled on the NZBORA and has been described as being functionally equivalent to a bill of rights.²⁰
- 30.4 Not only should the Bill not deny compensation, BATNZ considers it would be prudent for the Bill to be amended to explicitly allow damages for breaches, rather than leaving development of remedies to the 'slow and sporadic' common law.²¹
- 30.5 The compensation available under the Bill ought to be similar to *Baigent's case* compensation. We note that *Baigent's case* compensation is not automatically awarded for breaches of the NZBORA, and that courts will take into account a range of factors in determining whether compensation is appropriate, including the value of the rights protected and the consequences of the breach.²² We consider that the application of the same approach, along with the fact that the validity of the relevant legislation will not be affected, would remove any concern that the Bill or remedies under the Bill may impinge Parliamentary sovereignty.

Question g - The Bill directs the courts to prefer interpretations of legislation that are consistent with the principles (initially only in respect of new legislation, but applying to all legislation after 10 years). The New Zealand Bill of Rights Act contains a similar provision. What do you think the likely effects of this provision would be on the body of New Zealand law?

- 31 BATNZ considers this provision will improve the body of New Zealand law, in a similar way to the improvements that have been seen as a result of the similar provision in the NZBORA. The courts' power to prefer interpretations of legislation that are consistent with the NZBORA has led to a number of improvements to criminal procedure rights in court, to the protection of other rights and to the availability of remedies for breaches of fundamental rights.²³ These improvements have ultimately had a positive impact on the body of New Zealand law, and we consider the impact of the courts' power under the Bill will be equally positive.

¹⁹ Ibid.

²⁰ Paul Rishworth 'A Second Bill of Rights for New Zealand?' *Policy Quarterly*, Volume 6, Issue 2, May 2010 at page 6.

²¹ New Zealand Law Commission, 'Crown Liability and Judicial Immunity: A Response to *Baigent's Case* and *Harvey v Derrick*', 1997, at page 26.

²² The full considerations for the court in awarding *Baigent's case* compensation are listed by the Ministry of Justice in 'The Guidelines on the New Zealand Bill of Rights Act 1990: A Guide to the Rights and Freedoms in the Bill of Rights Act for the Public Sector', 2004.

²³ Butler and Butler, *The New Zealand Bill of Rights Act: A Commentary*, 2005, at pages 1105 to 1112.

- 32 However, we consider the delay of 10 years for the application of this provision to existing legislation is too long. This provision, as well as the declaration of incompatibility provision, should take effect for all legislation, new and old, from the five year anniversary of the Bill. This would be consistent with the proposed extension of the application of the Bill to local government legislation, and would mean that the Bill reaches full application in all respects after a uniform period of five years. This uniformity would remove doubt and would lead to a quicker, more orderly and more consistent adoption of the principles. A five year period would be sufficient to provide legislators and their advisors with an appropriate transition period in which to review legislation and make appropriate modifications.

Clarifications on the Regulatory Responsibility Bill and potential alternative mechanisms

Question a - Are there are any other aspects of the Regulatory Responsibility Bill that you consider could be clarified or improved?

- 33 Clause 7(2) of the Bill allows for incompatibility with the principles where the incompatibility is both reasonable and justified in a free and democratic society. This is based on section 5 of the NZBORA which provides:

5 Justified limitations

Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

- 34 It would be more consistent with section 5 if section 7(2) also imported the concept that inconsistency or incompatibility must be limited. We suggest that section 7(2) is amended to read:

(2) Any incompatibility with the principles is justified to the extent that it is limited, reasonable and can be demonstrably justified in a free and democratic society.

Question b - The Taskforce's Regulatory Responsibility Bill suggests one set of measures for improving regulatory quality in New Zealand. Given your answers to the questions outlined above, can you think of any possible measures not suggested by the Taskforce that might help improve regulatory quality? These measures may be supplementary to the Taskforce's suggestions or in place of some or all of them. Please explain the reasons for your views.

- 35 We are not aware of any other measures not suggested by the Taskforce that might help improve regulatory quality.

- 36 However, we note that the Taskforce has made a number of suggestions in their Report that are not implemented in the Bill. We support the implementation of these further suggestions in the necessary manner, in particular we agree that:

- 36.1 consistency of legislation with the principles ought to be a key consideration during the select committee process, particularly because it will provide members of the public with the opportunity to present submissions on consistency with the principles;
- 36.2 the Regulations Review Committee's power should be extended to cover draft bills as well as regulations and to consider complaints from aggrieved persons or organisations;

- 36.3 guidelines ought to be prepared in order to assist the executive branch in complying with their responsibilities under the Bill; and
- 36.4 a permanent group should be established to be responsible for reviewing legislation against the principles and consulting where appropriate.

Question c - Are there any other points that you wish to raise that have not already been discussed in your submission?

- 37 No. BATNZ is grateful for this opportunity to comment on the Bill and looks forward to witnessing the improvement and progress of the Bill in the near future.

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