SUBMISSION BY THE
NEW ZEALAND BUSINESS ROUNDTABLE
TO THE GOVERNMENT ADMINISTRATION COMMITTEE
ON THE

PROTECTED DISCLOSURES BILL

APRIL 1997

Summary

1 The New Zealand Business Roundtable supports the underlying principles of the Bill, namely that it is in the public interest to detect and prevent serious wrongdoing wherever it occurs. However, the likely effects of fundamental changes of the kind proposed in the Bill must be carefully researched and their application considered in the widest possible context before such legislation is contemplated.

2 There are no obvious public policy grounds for the substantial interference with private rights that the measures proposed in the Bill would involve. The aim of whistleblowing legislation should be to prevent the misuse of public funds or public powers. Those aims are not relevant to the private sector which does not receive public funds or exercise public powers. The legislation is not only intrusive but would impose substantial compliance costs and undermine the employer/employee relationship.

3 Moreover, the Bill breaches the principles of natural justice. The procedural protections offered by the Bill are more apparent than real for private sector employers, who have little defence against any employee who sees fit to disclose information.

4 The common law public interest defence, which was successfully used in the *Pugmire* case, provides adequate protection for whistleblowers. A statutory interference with this evolving common law position risks impeding the further evolution of this defence for whistleblowers.

PROTECTED DISCLOSURES BILL

Introduction

1 This submission is made on behalf of the New Zealand Business Roundtable (NZBR), an organisation of chief executives of major New Zealand business firms. The purpose of the NZBR is to contribute to the development of sound public policies which reflect overall national interests.

2 There are no obvious public policy grounds for the substantial interference with private rights that the measures proposed in the Bill would involve in their application. Moreover, in terms of economic efficiency objectives - achieving the best use of economic resources and hence maximising community incomes - there is no justification for additional government intervention in this area.

3 The legislation is not only intrusive but would impose substantial compliance costs. It would also be unequal in its application to private sector entities. It would seriously undermine the employer/employee relationship. In our view, the procedural "safeguards" offered by the Bill are seriously flawed. The likely effects of fundamental changes of the kind proposed in the Bill should be carefully researched and their application considered in the widest possible context before such legislation is contemplated. Certainly, it should not be made in response to particular circumstances. At earlier stages of this exercise there were no proposals to apply such legislation to the private sector and the NZBR was assured by officials that such application was not intended. Neither the committee which reported on the issue nor subsequent official reports obtained under the Official Information Act offer any justification for applying such provisions to private firms. Although the NZBR made a submission to the review committee neither the committee nor officials have consulted it at any stage. We do not consider an adequate process of policy development has been followed on this issue.

Whistleblowing legislation is designed to protect public funds

4 The public interests claimed to be promoted by introducing whistleblowing legislation are to facilitate disclosure and investigation of serious wrongdoing, corruption, maladministration, or the mismanagement of public resources by those in public office.

The aim is to prevent misuse of public funds or public powers, and to promote accountability, by protecting the whistleblower.

5 The United States, South Australia, Queensland and New South Wales have recently enacted whistleblower legislation. In Australia that legislation was enacted to counter well publicised and widespread public sector corruption and public maladministration. While there have been isolated cases, generally involving individuals who have treated reimbursement of expenses as additional remuneration, no real problem of public sector corruption similarly exists in New Zealand. It would be wrong to impose the burden of legislation with such potentially far-reaching consequences in the absence of a proven need for it and without weighing up its potential benefits and costs.

6 If there is scant justification for imposing such legislation on the New Zealand public sector, there is none for extending its application to the private sector. The economic literature on information flows, and the value of information generally, emphasises that great care must be taken before any blanket mechanism is introduced that would override private rights and legitimate expectations. The blurring of private sector and public sector organisations, as contemplated by the legislation, undermines important constitutional distinctions between those entities which, generally in the name of the Crown, exercise public powers and expend public money to perform public functions, and those which do not. It also runs counter to the economic reforms which have involved taking those entities which should be operating under commercial incentives out of the public sector and away from public sector obligations in order to improve their accountability. This is to avoid the confusion that occurs when diffuse interests have to be accommodated in a political environment.

7 Where a private sector organisation does not receive public funds, or exercise public powers, no public interest is served by extending whistleblower legislation to it. If a firm's management wastes the firm's money, that will reduce the firm's profits and impact upon its shareholders, and not the taxpayer. If the firm, and its management or employees, break the law, it and they will be liable to the usual criminal and other sanctions. The fact that the firm is an "organisation" rather than a sole trader should not be a ground for imposing additional sanctions upon it. If this Bill is to be enacted, it must be confined to the public sector.

8 Clearly, the ability of enforcement authorities, parliament and the media to scrutinise closely the functioning and behaviour of public bodies, especially those exercising statutory powers or expending public money, is fundamental to the democratic system

of government. But that same disclosure requirement cannot, and should not, be compulsorily applied to the private sector, where firms exercise no more powers than natural persons and must operate under quite different disciplines.

Additional compliance costs on the private sector will result

9 It is a general assumption of modern scholarship that if a private sector organisation can see sufficient benefits in developing separate lines of reporting internally it will do so. Accordingly, many firms have internal reporting and accountability mechanisms which are appropriate to their particular size, range of activities and legislation or other risks to which they are especially exposed.

10 Such firm-specific internal reporting and accountability mechanisms are utilised to prevent mismanagement or the misuse of the company's resources as part of an overall risk management strategy. The compliance procedures are designed to deal efficiently, and transparently, with *all* allegations of wrongdoing whether within or by the organisation. Expressly to require an organisation to prescribe and publish a specific procedure for dealing with information about "serious wrongdoing" which, in the case of a private sector entity, can only involve a serious risk to public health, public safety, the environment or the maintenance of law - may well undermine and distort those mechanisms already in place.

11 Secondly, an additional tier of mandatory reporting and compliance requirements would compete for senior management time, and may impair the effectiveness of existing compliance programmes. Inevitably, there may be a number of unintended consequences. Firms may be obliged to establish different, and less appropriate, internal procedures at some cost, and another layer of expensive dispute resolution procedures may be created. This would run counter to the government's current policy initiative aimed at reducing business compliance costs.

12 Moreover, not all private sector "organisations" will be able to establish an appropriate internal procedure, which is the first line of defence against the Bill's more intrusive measures. Some "organisations" which are simply too small to have internal reporting procedures may nevertheless engage in activities which an employee may regard as constituting serious wrongdoing. An example might be a firm which comprises a tradesperson (say, an electrician) or retail shopkeeper and his or her sole employee. If that employee wants to report wrongdoing, the procedural first steps contemplated by clauses 6 and 7 of the Bill cannot apply, so initial reporting will be to an "appropriate

authority". In other words, the small firm simply does not have the opportunity of putting its own house in order first. It must be remembered that the vast majority of private sector organisations in fact are small businesses, which this legislation effectively would discriminate against.

13 If any private sector organisation does not have effective mechanisms to prevent misuse of its resources or wrongdoing, its earnings, share price, and proprietor's income or shareholders' dividends, will suffer. Ultimately, takeover or bankruptcy are likely to result. That is the market-based discipline on badly run organisations. If such mechanisms are in the interests of shareholders, they could be expected to be adopted voluntarily. On the other hand, overseas experience suggests that whistleblower legislation can be used by disgruntled employees to impose high costs on firms where no wrongdoing has occurred. The possibility that costs and benefits external to the firm may be involved is considered later.

What is the mischief at which the Bill is aimed?

14 The NZBR agrees that it is in the public interest to detect and prevent serious wrongdoing wherever it occurs.

15 However, special statutory mechanisms to prevent or detect corporate wrongdoing already exist in the Companies Act and Financial Reporting Act 1993 as well as in serious fraud and criminal legislation. In addition, all firms are subject to the legislation which sets the parameters of commercial behaviour, as well as the laws which control the behaviour of individuals. To extend the concept of serious wrongdoing beyond the scope of existing legislation (as this Bill does) to include any subjectively perceived risk of infringement will undermine the fabric of commercial decision-making.

16 That "serious risk" threshold in relation to maintenance of the law also undermines important constitutional safeguards. In the case of an individual the right to remain silent and the privilege against self-incrimination are not overridden by the public interest in the prevention, investigation and detection of offences. Various statutes, including the Summary Offences Act 1981, contain specific offences to deal with behaviour that constitutes actual wilful obstruction of enforcement authorities. Behaviour which might prejudice the right to a fair trial is dealt with by the crime of perverting the course of justice. Those constraints - and the safeguard that only behaviour which breaches those constraints gives rise to penalty - apply to the individual whether carrying on business or engaging in other activity. There is no obvious reason why additional

constraints, and fewer safeguards, should apply simply because a number of individuals are carrying on business together. The sole trader may constitute just as serious a risk to the maintenance of law as the large firm. The firm, in which a person, or persons, carries or carry on business should not give rise to additional obligations or liabilities.

17 We note that is generally inappropriate for third parties to make judgments in hindsight about the standard of commercial decision-making when they are isolated from and unfamiliar with the business context within which those commercial decisions were made.

18 Moreover, the Bill might not actually cover the mischief at which it is supposedly aimed, namely the type of disclosure that occurred in the *Pugmire* case.

19 That disclosure was more concerned with a clinical difference of opinion than any serious wrongdoing. (The fact that the former patient did subsequently reoffend could not be known conclusively in advance, and *always* to act on assumptions of this nature would inevitably lead to great injustice.) That being the case, it is difficult to see how the Bill could protect a person who made such disclosure because it would not have provided a basis for disclosure in the first place.

The common law public interest defence provides adequate protection for whistleblowers

20 In fact, the *Pugmire*-type situation is already covered by the common law public interest defence which can be relied upon in appropriate situations to mitigate obligations of confidence applying to the employment relationship.

21 A statutory interference with this evolving common law position actually risks impeding rather than enhancing the further evolution of this defence for whistleblowers. It will also create considerable uncertainty within the employment relationship.

22 The further point must be made that the personal grievance provisions of the Employment Contracts Act 1991 are entirely adequate to protect any employee who takes action in respect to serious organisational wrongdoing.

The Bill breaches the principles of natural justice

23 The procedural "protections" provided by clauses 6 to 10 of the Bill are more apparent than real. First, clause 6 is ambiguous in its use of the phrase "must disclose" in contrast to the phrase "may disclose" in clause 5. While the drafting intention may be to impose an obligation on the whistleblower to use the organisation's internal procedures (where applicable), clause 6 may alternatively be read as simply imposing an obligation to disclose.

24 While that drafting ambiguity may be easily clarified, the concept of progression underlying clauses 7 to 10 is more fundamentally flawed. First, as explained above, the smallness of the "organisation" will preclude many private sector entities from having an "internal procedure". Thus, paragraph (a) of clause 7 will apply as a matter of course - by reason of size, not system failure. But, for the same reason, the head of the organisation is almost inevitably going to be implicated in the alleged wrongdoing. So, paragraph (a) of clause 8 will apply, too - again, by reason of size, not system failure. Thus, the whistleblower has direct recourse to clause 9 - which, in the case of a private sector organisation, must mean disclosure to a Minister of the Crown, not to the Chief Ombudsman.

25 As to what the Minister to whom disclosure is made may or must do with the information, the Bill is silent. With the exception of the Attorney-General, Ministers of the Crown are not "law officers". But they are politicians. The temptation to use the information for political ends under the protection of parliamentary privilege may be irresistible.

26 Employers appear to have little, if any, defence against an employee who sees fit to disclose information, however unjustified that disclosure may be.

27 The *audi alteram partem* rule, or right to hear the other side - in the sense of an employee having the right to speak in his or her own defence - has certainly been read by the Court of Appeal into the conduct of any inquiry which might lead to an employee's dismissal. It is of particular concern that the Protected Disclosures Bill promulgates a disclosure regime which guarantees employers no corresponding right to speak in *their* own defence.

28 The Bill should, at the very least, make provision for the disclosure of the identity of any employee who has made a false, frivolous, or vexatious complaint. It should also

discourage the making of such complaints by including penal provisions, which would allow the employer to take disciplinary action against an offending employee, including action for the recovery of any business loss sustained.

29 Moreover, it is difficult to see how any investigation can be effectively undertaken without allowing the person against whom the allegation has been made to speak in his or her own defence, or to know who has made the disclosure.

30 On the above point, section 27(1) of the New Zealand Bill of Rights Act has some relevance:

Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.

Does the Bill affect private sector professional advisers' obligations of confidentiality?

31 It is unclear whether the whistleblower protections afforded by the Bill are intended to override private sector professional advisers' obligations of confidentiality regarding their clients. This is clearly a very significant issue which has not been addressed in the Bill. Similarly, it is unclear whether, once confidential private sector information has been disclosed, confidentiality protections will be lost. For example, would legal or other professional privilege be deemed to have been waived?

Public health and safety and environmental risks are covered by existing legislation

32 Whether an activity poses a significant risk to public health and safety or the environment is a matter which requires an objective and informed assessment of the role of any commercial activity. The framework for appropriate objective assessment of the risks associated with such activities already exists in the context of public health and safety and the environment by virtue respectively of the Health and Safety in Employment Act 1992 (HSE), and the Resource Management Act 1991 (RMA). Particularly given the emotive nature of health and safety and environmental issues, it is inappropriate for one person's subjective and isolated assessment of risk to be used as a justification for breaching duties of confidentiality.

Retrospectivity is inappropriate

33 It is a general legal principle that the retrospective creation of offences without clear policy justifications should be avoided. The public interest is best served by the prevention and detection of current misuse of public resources or public powers. The investigation of alleged past offences may well divert resources and distract from the primary aim.

34 The retrospective definition of serious wrongdoing could create new offences from past conduct that was a legitimate activity at the time it occurred. Conversely, we question whether the public interest would be served by historical offences, which, through passage of time, are now statute barred, being effectively resurrected via this Bill.

Conclusion

35 We are doubtful about the case for applying whistleblower legislation to the public sector on the basis of arguments put forward to date. However, no analysis whatever has been presented to justify the extension of such legislation to the private sector. We submit that such provisions are unnecessary and would not yield benefits commensurate with the costs involved. They would add to the cummulative burden imposed by other legislation on the business sector in recent years on social policy grounds. This is adding to the costs and risks of doing business in New Zealand and deterring investment. As a result, economic growth and job creation are being hampered. Accordingly, if the Bill is to proceed, we recommend that provisions applying to the private sector be deleted.