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Ethical Dilemmas during mergers, acquisitions, and takeovers

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Ethical Dilemmas during mergers, acquisitions, and takeovers:

ABSTRACT

The organisational world is still shaking from the impact of individual and organisational actions that are contrary to the open-ended community standards of ethics. Yet, ethical values have to fight continually for organisational space as the conflict between many differing corporate values problematises the workplace environment and decision-making for managers. This paper is based on a study that is investigating the relations between such values at times of significant organisational stress, when organisations merge, are acquired, or are taken-over, and the ethical dilemmas that arise from these events within the framework provided by Kidder (2009). The paper concludes by summarising the key issues of diversity and policy, which are emerging and the implications for managers and academics.

Keywords - Adapting to change, Flexibility, Managing change, Volatility

The purpose of this project and this paper is to consider what ethical dilemmas develop from a Merger, Acquisition, or Takeover (MAT). This is accomplished by dealing with the business processes of both predator and target organisations from an evaluation of their established and modified ethical models and practices, if any, used prior to, during, and after a MAT event, whether successful or not. Here we are dealing with ethical dilemmas which are not 'right against wrong' but the more difficult and interesting 'right against right' dilemmas whose directions and risks are only partially laid before the decision maker and whose proposed conclusion or conclusions may not be the actual result from the decision or decisions taken. This project is to examine deviations from an organization's established ethical practices at the time of the MAT and the reasons for doing so and whether or not the consequential results justified these deviations.

The use of a MAT situation has solid research value because of its time-framing ability, as a MAT has a beginning, a legal end, and then a set of after-effects, all of which are capable of examination to give these data resources solid research value. Whether a merger, acquisition, or takeover, the type of event is relatively unimportant, as what is studied is decision making under great stress. In other situations, I suggest, events are soon forgotten daily events, while a quite major event such as a MAT is documented, discussed during lunch, and elsewhere, a grand source of rumours, and is not easily forgotten whether successful or not.

This does not mean that a MAT high stress situation is unique; any other high stress business situation will have a similar set of dilemmas to consider.

The dilemma decision-making process is the key to this project, as the consequences can be sourced to the decision made, perhaps in haste or by having the wrong or insufficient information to make an important decision.

The intended and unintended set of MAT results is an upheaval that may destroy, on a personal level, careers, jobs, personal relationships that were cultivated internally and externally to each organisation, and on a business level, valuable links to other businesses, suppliers, communities, and other stakeholders. As well, the level of changes in business processes, decision making when presented with a dilemma, are at least as vital as these other events.

In effect, this project is extreme in its coverage even with the limitation of dealing only with MAT challenges. The apparent nebulosity of this topic is its weakness, in that to bind this project into a dense topic for investigation is the main required action, and the strength of this project is that few have been successful in defining what is actually studied. Whose ethics? Reality against theory, greed and self-interest against the common good, are all part of this study. From this, any worthwhile investigation leading to a series of conclusions will add to knowledge concerning practical ethics and decision making in business.

When considering philosophy, there seems to be an acceptable smudge-free angelic halo of purity of conclusion hovering above its assumed stable conclusions, particularly in the description of Ethics in Business area. This is in contrast with the reality of business, where the purity of its endeavours seems, in the public's view, to be dirty in comparison.

Reports from the front do not describe trends that favour the Moral Manager Model...The most admired corporate executives fit the conventional view of the hard-headed, business-savvy decision maker. Quote attributed to John R. Boatright(Brenkert and Beauchamp, 2010)

There are few, apparently, functional guidelines for managers to consider in their decision making particularly when confronted by an ethical dilemma. There seems to be no 'guidance' to follow or

consider beyond the financial cost to the organisation, or policy on how to evaluate dilemmas or to determine whether an actual dilemma exists in the first instance.

The gaps in the literature are broad and deep yet this paper considers only one situation, that of MATs and their highly volatile and uncertain times, supporting a stressful and emotional setting. Yet, it is apparent that other situations also raise the same dilemmas and perhaps the same approaches may be successful as well.

When announced, a MAT can be for a number of valid commercial reasons, but the main reason should be for a MAT to add value to the predator organisation, and this is, in general, considered the MAT's primary purpose, yet this may not be the actual case (Goedhart et al., July 2010). However, the initiation of a MAT upon an organisation tends to be one of upheaval, uncertainty, and doubt for both predator and target until the takeover is either successful or not, as 70% of takeovers are considered failures.

It is proposed that a series of case studies dealing with MATs and ethics in business be assembled looking for commonalities and uniqueness in decision making under stress. This to determine where and when the pathways to management success or failure of the MAT began and ended and what changes, if any, were undertaken in the new combined organisation or, in the case of failure, in the resulting two or more organisations. This study is currently in the first phase of development and is restricted to reporting on the key themes and issues emerging from the initial stages of the study.

LITERATURE

Definition of Ethics

Kidder (2009) gives a source of a good definition of Ethics, and believe it is one of the better ones, and is sourced from The Atlantic Magazine of July 1924 and quotes a verbatim recording of an impromptu speech given by Lord Moulton entitled "Law and Manners" (Moulton, 1924).

Lord Moulton describes two extremes of freedom, that of Absolute choice and Positive Law.

Absolute Choice is where there is no applicable legislation or regulation against an action. This includes what colour is your car, the furniture that you choose and buy.

Positive Law are the legislation and regulation that have punishments for their transgression, things such as speeding, theft, fraud.

In the middle, is *Obedience to the Unenforceable* and Kidder and this paper defines this as Ethics. As Lord Moulton states ‘[Obedience to the Unenforceable] covers all cases of right doing where there is no one to make you do it but yourself.’ He also regards the words “Duty” and “Morals” are too narrow to describe this middle part of freedom.

PEOPLE

It is up to the decision maker concerned, as to whether they would accept the risks of deviating from the established business procedures and practices of their organization, ethical or not, to attempt to resolve an ethical dilemma, provided that decision-maker recognises that they are dealing with a dilemma in the first instance.

The speed of the decision may lead to Cognitive Bias (Kahneman, 2011), if too slow, the lack of a decision may result in a minor or major disaster. Kahneman uses the term Type 1 Thinking for the ‘off the cuff’ responses as opposed to the Type 2 Thinking, which is slower but is a more considered, evaluated and perhaps logical response. However, either it may not be the decision maker’s cognitive bias that determines the decision, but the biases of other powerful internal and external forces, individually or in concert that may determine the decision, irrespective of the evaluation of the defined decision maker.

Yet, in a MAT environment, speed with effective and positive outcomes allows a ‘combatant’ to out manoeuvre and ‘get inside’ his or her opponent. This is John Boyd’s OODA loop (Moran, 2008), a feedback mechanism developed by the American Air Force during the Korean War.) Observation, Orientation, Decision, and Action is the OODA Loop, where Orientation includes the personal traits (cultural traditions, genetic heritage, and previous experiences) of the person using this method as well as the information flow and its analysis and syntheses.

So here, we have an interesting conundrum: management learning to “spot and manage problems is of high importance,” (Brenkert and Beauchamp, 2010) yet managers may not be given the time to consider their options to seek a one best solution, denying the utility of the OODA Loop and relying on Type 1 thinking.

From all this, this project does not seek philosophical comprehension, it is to seek what skills management uses and develops during times of high stress, a philosophical particularity, while trying to remove the dust and dirt that hides the ‘geniality’ of the philosophy of Ethics in Business.

DEFINITION OF A MERGER, ACQUISITION AND TAKEOVER

While the terms are often used interchangeably, there are some subtle differences. Acquisition refers to any transfer of ownership in which one organisation is absorbed by another, merger is a combination in which two or more previously autonomous companies form a wholly new firm, and takeover refers to those situations where a company or an investment group gains enough shares of stock in a publicly traded company that it can control its governance via a plurality of votes for the board of directors. Merger typically reflects a sense of equality between the two organisations, whereas acquisition and takeover reflect the dominance of the acquiring organisation over the target firm (Buono, 2008).

SECULAR AND NON-SECULAR CONSIDERATIONS

The current state of the literature, which has exploded in size since the Global Financial Crises and with few exceptions, and seems sourced from one of the ancient religions –Zoroastrianism, as the followers of Zoroaster had a very strict ethical code concerning good and bad actions.

The same Zoroastrian attitude seems to prevail when considering the industrial waste from the ‘manufacturing’ processes and its apparent degradation of the three elements. This policy is what Drucker calls *primum non nocere*, or do no harm, while Friedman (Friedman, 1970) denies that any organisation can possess morals in any instance, as an organisation is composed of people who must make the moral decisions. The question is ‘right against right’ in dealing with true ethical dilemmas. Kidder (2009), presents a discussion in dealing with ethical dilemmas, and states that there are only four true ethical dilemmas:

1. Truth against loyalty.
2. Justice against mercy.
3. Short term against long term.
4. Individual against community.

From this Kidder provides some guidance as to how to reduce the actual presented ethical dilemma to simpler problems of manageable size, and possible approaches to their satisfactory resolution. To accomplish this outcome, is to recognise the situation and match it to one or more of the four Kidder

dilemmas and determining which 'end' is to yield a best result. The danger here is oversimplification of the situation.

The core aim of this study is to provide a set of approaches to ethics in business as a defensible, logical, and workable approach that yields a best solution given the circumstances. The circumstances include the given situation, personal morality, the influences of internal and external forces (Mann, 1988), the legal situation, and so on.

METHOD

This study is taking the interpretivist paradigm and using deep multiple embedded case studies (Yin, 2004) to gather data through multiple instruments using an oral history approach.

To complete this research, three imbedded case studies are necessary to examine common research themes to allow the three possible separate but linked data collections. This in order to pursue a comparison of under severe stress from the volatility and uncertainty of the situation.

The research actions are to review a MAT no longer than three years ago; this is to allow a better reminiscence of events, emotions, and decision-making during the MAT process.

Prior to the MAT there may be established ethical procedures and policies or not. This in itself does not mean that the organisation is ethical in any sense; it only means that policies have or have not, been put in place with the aim of being 'ethical.' During the MAT, ethics for the participants, predator and target, may be ignored, revised, or continue as usual. If the MAT is successful, the now controlling organisation may 'invade' its new possession with a very new set of ethical standards, or it may let the target's old ones continue or it may only revise certain parts of the target organisations ethics based policies and procedures. The controlling organisation also, at this time may institute a new set of standards for its entire new organisation or not or, again, just revise certain parts.

RESEARCH QUESTION

The research question is then: *What affects Organisational Ethics prior to, during, and afterwards of a Merger, Acquisition, or Takeover (MAT)?* What this research does is to seek knowledge about the personal attributes of a decision-maker that gives the decision-maker 'an edge' for a successful

conclusion to the presentation of an ethical dilemma, expected, planned for, or not. If the result is a failure, what is the next step to find a resolution to the original dilemma and any further dilemmas sourced from the failed original solution? Does this mean that the manager has to have both a tough 'hide' and a flexible outlook, and if not, what advantageous directions are available? Is success an advantage?

The four dilemmas of Kidder also play a significant part in the normal operations of an organisation, but I suggest that they are even more relevant and important during a MAT for both parties. Each party has its own methods of carrying on business, and depending upon the type of MAT, the ethical changes may be none, minimal, or extreme on either or both parties. What determines the extent of ethical changes may be a combination of internal and external forces that may 'suggest' or demand changes in the ethical operations of the new and combined organisation, and if the MAT is unsuccessful, these forces may demand changes to both 'old' firms in the aftermath of this failed event, as these forces may be irresistible. The selection of the cases will be by acquiring data from various resources, government, and private, covering the period of the past three years. The mix has yet to be established, whether all successful, all failures, or a mixture. Case study implies inbuilt reliability in all four areas of validity: Construct, Internal, External and reliability, and from the above discussion provides an amount of evidence supporting this statement (Yin, 2009).

FINDINGS

This study is currently in the first phase of operation and this restricts both the quantity of data available for analysis and discussion and limits the confidence and certainty of the researcher in terms of identifying key themes and issues emerging from the study. However, initial discussion with field practitioners and the piloting and testing of the method and associated instruments have already indicated three important issues emerging from the study even at this early stage.

Firstly, while the configuration of most research is to determine answers from the field of practice, it is almost inevitable that what confronts the researcher is unexpected diversity due to their limited

understanding of the complexity of organisational relations in relation to a specific issue. This study appears to be no exception.

Secondly, organisational attitudes toward ethics and ethical dilemmas appear to be very diverse. They range from companies who have well developed policies and codes of practice to those that would struggle to define the terms. However, there is no sure link of cultural practice to policy intent, particularly in international or even national organisations.

‘This is Sydney, they’re in London, we’re Aussies and they’re Poms, they do it their way, we do it ours, results count more than a piece of paper!’ (Conversation between manager and new employee concerning divergence from stated corporate policy.)

Thirdly, depending upon the circumstances, managers in higher management environments may be indifferent to policy and apply their personal ethics, assuming the personal risks of failure confident of their ability to weather any potential critical storm. While in other cases, managers appear to benefit from an organisational climate that encourages reflective practice on decision-making and enacts the social and ethical values, walking them off the page of policy documents and into real ethical dilemmas in the workplace.

‘...it was new thing for us...taking time to talk about issues rather than just passing information...it made it easier when we really did hit some problem later on.’ (Manager at Expo.)

There are other issues as well.

Some MATs are almost doomed to fail before they are finished. An interesting on-line article, refers to nine steps to prevent merger failure (Adolph et al., 2006), where it refers to the reasons why MATs fail most of the time and where, and how failure may be prevented at the most dangerous stage – execution.

Another problem may also be the limits to diversification, as expressed by a McKinsey article (Cyriac et al., 2012), which more or less repeats the idea that a MAT is for the purpose of adding value to the acquiring firm. The problem here is in the acquisition of a different line of business in order to become a conglomerate, regardless of the business skills they now possess.

We expect that people in business know what ethics in business represents, but the scarcity of business ethics training is apparent. This paper deals with the Kidder quartet of ethical dilemmas, there may be more, but as Kidder's research points out, no others in his years of *teaching about* ethics in business suggested to be new additions to his four.

This being the case, another question arises "How many people in business recognise an ethical dilemma and how many business people have received training concerning their resolution?"

This observation is probably why there is a lack of open discussion of organisational ethical dilemmas in Australian businesses, yet enthusiasm to discuss ethical issues at a personal level.

That sale means that you are now over quota, so why the long face?

Ok, I'm a hero, but the getting the order wasn't very ethical, was it? We named a past employee and insinuated that as he is an ex-employee of ours he is inadequate to do the technical work of his current employer as well as for the customer.

Let the company worry about ethics; it has a whole department full of people guarding the sacredness of our business methods. All is fair in sales and war!

Exactly! Maybe that is why a salesperson here lasts a maximum of 5 years!

I would keep personal attitudes or 'ethics' to yourself; the company position is reflected in its successes, not the person who contributed to that success. (Overheard in an informal post-sales meeting.)

INTERPRETATION

Drawing any conclusions at this early time of this project would be hasty, however, at this stage, offered are certain generalities.

Three main themes arise in this study.

Firstly, most businesspersons act legally and with due diligence, as they are trained to do, however, to act ethically is typically defined as 'if it is legal, it is ethical' and philosophically speaking, this is a misleading argument. Some use this attitude as a convenient excuse for the actions and decisions taken

using a narrow consideration of what is meant by ethics, as ethics using this apparently legal argument, is no longer considered 'relative, situational, negotiable, and wholly subjective' (Kidder, 2008).

Secondly, shrewd business activities are not by themselves necessarily unethical. Better planning, better sources of funding, and advice does not predicate a lack of ethics. However, on the predator side, an almost seamless amalgamation is the best result for both parties while asset stripping and other destructive actions upon the target may be unethical as it denies the remaining target's shareholders accumulated value and profits. On the target side, 'Golden Parachutes' and other defensive actions that reduce shareholder value almost certainly contradict the fiduciary responsibilities of the Board and management. In these two cases, however, we have 'wrong against wrong' forms of defensive vengeance.

The Institute for Global Ethics, founded by Kidder, has a short article concerning 'wrong against wrong' which gives five tests concerning such actions and concentrates on the destructive results of discovery of unethical actions, by whatever ethical measure. One is the 'Legal Test,' if the action is illegal, you will pay a severe penalty. There is one called 'The Stench Test,' which deals with 'gut-feel' that if one feels uncomfortable about the situation, think again. The next is "The Front Page Test' or as I would call it, the 'Six o'clock News Test' and how will the neighbourhood and community react? The remaining two 'The Mom Test' and 'The Regulation Test' are for your trusted, respected, and admired persons and their possible reactions as well as your professional colleagues and their actions or reactions (Kidder).

Thirdly, the favourable rewards of good business judgement make it necessary to support this personal characteristic using, anticipating, and evaluating both offensive and defensive policies when dealing with MAT possibilities. The formulation of these policies is part of this project as well.

The links to theory can be as old as philosophy and Kidder mentions three, Utilitarianism or as he puts it "Ends based thinking,'- the greatest good for the greatest number. Kantian philosophy or 'Rule based thinking,' where an established rule is as a universal law or the ideal is to 'follow the principle that you want everyone else to follow.' The third is the Christian based 'Golden Rule – do unto others what you would like them to do to you' (Kidder, 2009).

CONCLUSIONS

It is a reasonable assumption that in a capitalist system, the managers hired and assigned to run an effective, imaginative, and efficient business, act within the constraints of their given and stated responsibilities, and the current legal and defensible ethical situations as well. If the management of an organisation cannot maintain a reality of ethical behaviour, then historical actions considered unethical in the focus of a future day can only be hidden for so long then within the management chain of responsibilities and power, 'leaks' appear and soon the 'house' is in trouble.

For the predator and the target to use whatever means possible to pursue their stated goals are the arguments to be examined, and care is to be used in delving into emotional and factual arguments describing the actions of their own advisors and the advisors of their adversaries. This is capitalism at its best and worst, and it is a most fascinating area of study.

I suggest that most managers are aware of risk, courage, and rewards, I also suggest, from an empirical viewpoint, that most managers are unaware of the four management dilemmas of Kidder, and if put to them in a stressful situation, they would demand that they are irrelevant to that situation, as if they hold no value for them or anyone else. The choices are for management to plan, manage, and not dictate spontaneous directions.

The demands for loyalty over truth are quite common and disagreements with authority can lead to limited career prospects, or it can lead to additional empowerment.

The argument for justice over mercy eliminates explanatory circumstances, and tests both the manager and his subordinate concerning the options of recovery.

The individual over the community is either the most important or the least important of the Kidder dilemmas, depending on the circumstances. One instance brought to mind is the case of an American biochemist that after discovering the birth defects caused by a new drug in laboratory animals, that treated a minor ailment during a human pregnancy, denied release of this drug. Later this drug released in Australia caused much human misery.

Individualism is a positive trait, yet it can be disruptive as can the 'group think' of a community.

Short term over long term is perhaps the most important dilemma, as short term may be the requirement of lower levels of management, yet the long term is the ultimate consideration as it determines the ultimate survival of the organisation. However, it is generally considered that the lowest levels of management deal only with the short term, and the term apparently gets longer, while including the shortest term, the higher the level of management.

The conclusions in this case are what is the reality that managers will openly consider any of these four Kidder dilemmas in part or in whole if, they have no avenues of solid advice? If assumed that power is easily given and difficult to regain, is it a surrender of power to seek advice and a gain of power to give good advice? Are the non-ethical events more powerful than ethical events, is politics the determiner of ethical actions?

There is also the consideration that of the four Kidder dilemmas, are they mutually exclusive in the decision making process? What weights does management give to the various influences upon decision making under severe stress? Is there a hierarchy of influences that determine a decision related to an ethical dilemma?

It is issues like these that the study will explore further and produce more evidence that can be used to extend our understanding of managing ethical dilemmas within organisations in volatile and uncertain times.

These conclusions are currently on hold until this project is completed.

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