Mark Weldon and incentive payments to the MediaWorks directors

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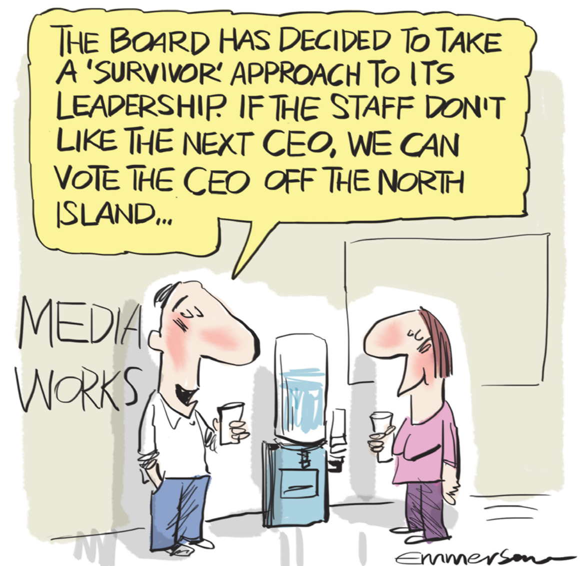
Speed Read

We don't agree with comments, reported in the Herald [on 7 May], by governance expert, Bill Kirkley, that the MediaWorks board directors have a conflict of interest because they have sizeable bonus incentives from the sole shareholder, Oak Tree Capital if MediaWorks is favourably sold off, which in turn impacts how they dealt with the Weldon situation.

If anything, those incentives align the board more strongly with their duties That doesn't ultimately change the correctness of Dr Kirkley's views as to the MediaWorks board failing in its governance role around Mark Weldon, assuming the facts as reported in the media are correct.



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The Detail

Dr Kirkley is reported as saying that the board incentives create "*a difficulty for the board, which is obliged to act in the best interests of the company while also meeting the needs of a shareholder seeking a return on investment. "Who are the board there to represent? And is it in the best interests of the company?""*

The key point is made by answering those last two questions in this way: the directors must act in the interests of shareholders, to enhance shareholder value (and not to enhance other interests such as employees and viewers, unless that also enhances shareholder value).

The bonuses for directors if there is a sale of Mediaworks does the opposite of creating a conflict of interest: it is fully aligned with the directors' legal duties. In fact, if the directors start doing what Dr Kirkley says and make decisions based on interests other than the shareholders, they breach their legal duties and could be sued.

The Companies Act, legal cases and New Zealand's leading text on legal duties of directors are clear enough that, so long as directors are watching out closely enough to see that creditors are not at undue risk of not being repaid, the duties of directors are to act in the best interests of the shareholders as a whole. The Companies Act even specifically directs directors to do this (at s131): "*a director of a company, when exercising powers or performing duties, must act in good faith and in what the director believes to be the best interests of the company.*" In this context, "*the company"* clearly equates with the body of shareholders, as the courts have decided, assuming creditors' interests are adequately managed.

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As MediaWorks has only one shareholder – Oaktree Capital - to consider the directors don't have to worry about looking out for the interests of minority shareholders.

The position is clear enough that it is not even necessary to look at whether s 131(2) applies: where a company is a wholly owned subsidiary, and the constitution so permits, a director can "*act in a manner which he or she believes is in the best interests of that company's holding company even though it may not be in the best interests of the [subsidiary] company*".

Therefore, if, as Dr Kirkley says, the directors do something other than in the interests of shareholders – for example, to look after employees, viewers and so on - they breach their legal duties, unless that in turn enhances shareholder value. Everything in the end must come back to promoting shareholder value.

The board taking incentives from the shareholder to optimise the sale of MediaWorks is fully aligned with their legal duties as directors, assuming the motherhood-and-apple-pie duties to manage solvency are met.

So, from a legal point of view, given that required focus on shareholder value, how do Dr Kirkley's concerns about inadequate MediaWorks board performance play out?

If the directors make decisions that mean the company is more likely to underperform financially, and shareholder value is eroded, they act contrary to their legal duties. For example, while there is no direct duty on directors to keep staff and viewers happy or to look out for them in any way, having a well performing staff generally leads to enhanced shareholder value (the more so in media companies with the strong emphasis on intellectual capital). Similarly as tolisteners and viewers, advertisers and so on.

Being a CEO is no beauty parade, particularly as the board drives change. Dr Kirkley's conclusions can be approached from a different, and legally correct, angle: is appointment and retention of Mark Weldon as CEO ultimately going to lead to shareholder value being enhanced/retained? By this path, Dr Kirkley might come to the same conclusions, assuming the facts are as reported in the media. Legally, and from a governance perspective, the choice and functioning of the CEO is of course a critical role for the board.

Legally, only Oaktree, the shareholder, can hold the board to account.

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