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Productivity Commission
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cc: Yvette Goss
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Dear Sir

**Productivity Commission Discussion Draft
Report into Executive Remuneration in Australia – September 2009**

I am the Chairman of Sirtex Medical Limited (**Sirtex**).

Sirtex is a public Company listed on the Australian Securities Exchange (the **ASX**). Sirtex's initial public offering and listing occurred in mid-2000. Its current market capitalisation is in the region of \$370 million. Sirtex is not part of the ASX300.

Sirtex has a Board comprising 3 independent non-executive Directors (including me) and 1 executive Director (the CEO). I am authorised to write this letter by the entire Sirtex Board.

1. The Commission Report

Let me start by commending the Commission on its Report. The issues which have been identified, and addressed, are important. And, the manner in which those issues have been addressed is balanced, and comprehensive.

There are many of the draft Recommendations which we support. However, we do not support draft Recommendation 15, and we wish to make brief submissions to the Commission to explain why.

Draft Recommendation 15

The Corporations Act should be amended to require that, where a Company's Remuneration Report receives a 'no' vote of 25% or higher, the Board [should] be required to report back to Shareholders in the subsequent Remuneration Report explaining how Shareholders' concerns were addressed and, if they have not been addressed, the reasons why.



If the Company's subsequent Remuneration Report receives a 'no' vote above a prescribed threshold, all elected Board Members [should] be required to submit for re-election (a 'two strikes' test) at either:

- *an Extraordinary General Meeting; or*
- *the next Annual General Meeting.*

We consider that there are a number of issues which have not been addressed in the Report around this draft Recommendation, as well as a number of unintended adverse consequences which may arise from the adoption of this draft Recommendation. Our submissions on these matters follow.

2. *Is a 25% Threshold Appropriate?*

The proposed 25% threshold is too low.

To permit a potentially small minority of Shareholders (see Sections 3 & 4 below) to oppose a single aspect of Board decision making, with the consequence that such minority opposition, in successive years, can lead to a wholesale purge of that Board, contrary to the views of a majority of Shareholders, and the overall performance of the Board, is anathema to democratic principles which lie at the heart of Australian corporate regulation, which otherwise require a majority, or in some cases a super-majority, in order to initiate significant corporate actions.

Consistent with those principles, any proposed 'two strikes' test, if it is to be implemented, should at least require a 'no' vote from a majority (ie. 50%), or a super-majority (eg. 50% excluding interested parties), in successive years to be triggered.

3. *What Method of Voting Applies to the Calculation of a 'No' Vote?*

It is implicit that the 25% is to be calculated by reference to votes cast at a General Meeting.

However, commonly in listed public Companies, particularly smaller ones, Resolutions are passed on a show of hands, rather than on a poll. Of course, on a show of hands, each person voting has only 1 vote. In contrast, on a poll, each person voting has a number of votes equal to the number of shares held.

Accordingly, a 'no' vote of 25% on a show of hands may be materially different to a 'no' vote of 25% on a poll.

4. *Is a 25% Threshold Statistically Representative?*

No listed public Company ever achieves a 100% attendance (in person, by proxy, etc.) at its General Meetings. Indeed, commonly in smaller listed public Companies, only Shareholders representing up to 30% or 40% of all votes which might be cast actually turn up to vote at General Meetings.

That being the case, a 25% 'no' vote on a Remuneration Report might, in fact, for some smaller Companies, in some instances, represent less than 10% of the total number of all shares on issue in that Company. That hardly seems representative as a basis for purging the entire Board of the Company, even if that happens 2 years in a row.

Further, irrespective of the percentage of 'no' votes cast on a Resolution to consider a Remuneration Report, that Resolution may not be supported by a vast majority in number of Shareholders in the Company. Accordingly, if it is to be implemented, the 25% threshold should be linked to a number of Shareholders, such that, for example, the 'two strikes' test is only failed by a Company where, in successive years, at least 25% in number of Shareholders voting on the relevant Resolution, representing at least 25% of the votes cast, actually vote 'no'.

This concern is particularly apposite in a Company such as Sirtex, where there is a single Shareholder who holds in excess of 25% of the Company's shares. Of course, there are many listed public Companies (particularly smaller ones) in that situation. However, in Sirtex's case, the concern is even more acute, given that that Shareholder (who holds approximately 33%) is disaffected and, although he seeks no Board representation himself, consistently seeks to destabilise the incumbent independent Board for reasons quite unrelated to any issues around Executive remuneration. The draft Recommendation will, if it is to be implemented, afford such Shareholders an inappropriate and unintended vehicle for continuing such de-stabilising tactics, in direct conflict with, and abuse of, the best interests of all other Shareholders in the Company.

5. *How Does the Board Know What Shareholders' Concerns Actually Are?*

It is implicit in the draft Recommendation that, in the context of any 'no' vote, the concerns of Shareholders will be apparent to the Board. However, the 25% 'no' vote is a blunt instrument when it comes to identifying to a Board what Shareholders' concerns actually are.

While some Shareholders present at a General Meeting might voice their views in a discussion of the relevant Resolution, most will not do so. That includes, of course, those who have lodged proxies in favour of the Chairman directing a 'no' vote, who are not even personally present to express their views.

In the case of some smaller listed public Companies, less than 10 non-associated Shareholders may attend the Annual General Meeting, and there is little or no discussion on the particular Resolution. Of course, Shareholders cannot be compelled to articulate their objections, and many mums-and-dads Shareholders are unwilling to do so even if they attend the relevant Meeting.

Accordingly, it may be difficult, or in some cases impossible, for a Board to actually know, from the 'no' vote itself, what the grievances of the Shareholders voting in that way may be. For example, is it the remuneration policy to which objection is being taken? Or, is it the implementation of the policy? Is the CEO's remuneration considered to be too high? Or, is the remuneration of the Board too high? Rather than the amount of the remuneration, is it the mix in the Executives' remuneration which is problematic (ie. the mix of fixed pay v short-term incentives v long-term incentives)?

Or, is it something altogether unrelated to the Remuneration Report which has led to a particular 'no' vote (see Section 6 below)? For example, in a start-up Company, is it that profits have not been achieved quickly enough? Or, in a more established Company, has there been an unexpected downturn in profits in the past year? Or, is there some other reason why a body of Shareholders may want to voice their frustrations, whether specifically with the Company, or with the Board, or more generally with the broader prevailing circumstances? Presumably, negative sentiment arising out of the global financial crisis as a whole is having some effect on increasing the 'no' vote on Remuneration Reports, particularly in the case of those Companies which have been worst affected by the downturn, even where the relevant Company's remuneration policy is not objectively unreasonable.

For different Shareholders, is it different reasons, including some or all of the above?

In the absence of an appropriate medium through which Shareholders' concerns which lead to a 'no' vote on a Remuneration Report can be made known to the Boards of listed public Companies, calling on Boards to report in the following year on how Shareholders' concerns were addressed and, if they have not been addressed, the reasons for that seems potentially misguided and, in any event, not particularly helpful. This is particularly the case with smaller listed public Companies which do not have the same financial and other resources as their larger ASX300 counterparts (eg. investor relations support) to make meaningful enquiries of their dissenting Shareholders about such matters.

6. *Could the 'Two Strikes' Test Become a Stalking Horse for other Issues in the Company?*

There does not appear to be any empirical evidence as to why Shareholders have voted 'no' (apparently in increasing numbers) since the introduction of the advisory Remuneration Report Resolution in mid-2004. It cannot safely be assumed that all, or even a majority of, Shareholders have voted 'no' on that Resolution solely because of a view that the Executives' remuneration in a particular Company is excessive, or inappropriate.

More likely, there are a broad range of reasons why Shareholders might vote 'no'. These reasons may in some cases be specific to the remuneration policies and practices of the relevant Company, or they may not.

For example, there may be a particular, quite unrelated, reason why a body of Shareholders may, on 1 or even 2 or more occasions, want to voice their frustrations, whether specifically with the Company, or with the Board, or more generally with the broader prevailing circumstances, and the Resolution concerning the Remuneration Report may simply be a vehicle to express those frustrations.

7. *What is the Prescribed Threshold for the Second 'No' Vote?*

The prescribed threshold for the second 'no' vote cannot sensibly be less than 25%.

Nor, in our view, should it be less than a majority (ie. 50%), or a super-majority (eg. 50% excluding interested parties), for the reasons set out in Section 2 above.

Further, if it is only 25%, it will suffer the same problems as set out in Sections 3 & 4 above.

8. *What Happens if there is a Third or Subsequent 'No' Vote?*

It is not clear from the Report what will happen if there is a third or subsequent successive 'no' vote above the prescribed threshold.

For example, will a third successive 'no' vote be treated as another trigger for a purge of the relevant Company's Board in the next year, potentially leading to annual Board purges thereafter? Or, does the 'two strikes' count start again after the year in which the proposed 'two strikes' Board renewal Resolutions occur?

9. What Consequences Could there be of Requiring a Board Purge Following a Second 'No' Vote?

There are a number of possible unintended consequences of requiring a Board purge following a second successive 'no' vote on the Remuneration Report Resolution.

Possible unintended adverse consequences insofar as the relevant Board is concerned include, without limitation:

- (a) all Directors will be required to submit themselves for re-election including, for example, those Directors who may have voted against particular remuneration packages which might be considered as objectionable – this seems unfair on those Directors;
- (b) certain Board members may choose not to submit themselves for re-election, simply because of a perceived stigma attaching to the consequence of a Board failing the 'two strikes' test – this may cause Board instability, and a reduction in non-executive Board numbers, particularly in smaller listed public Companies where appropriately qualified Directors are often hard to find, a problem which may be exacerbated if there are 'two strikes' Resolutions hanging over the relevant Board's head;
- (c) the 'two strikes' test seems to assume a static Board: it is not clear from the Report what the position will be of new additions to the Board who join the Board after the first, or after the second, 'no' vote above the prescribed percentage (ie. if a new addition to the Board only joined the Board after the first, or the second, 'no' vote, does that Board member have to submit himself/herself for re-election too) (see also Sections 10 & 11 below) – this seems potentially unfair on new Directors; and
- (d) the 'two strikes' test appears to expose listed public Companies to greater opportunities for greenmail (for example, the antics of David Tweed in his attempt to oust the Board of Clime Capital Limited in 2005-2006, as part of a manoeuvre to take control of that Company at an undervalue) – this hardly seems sensible.

Possible unintended adverse consequences insofar as Shareholders of the relevant Company are concerned include, without limitation:

- (e) it may be that Shareholders feel safe in voting 'no' with respect to the Remuneration Report Resolution because that Resolution is advisory only: if that is the case, introducing the 'two strikes' test may lead to reduced Shareholder engagement over remuneration issues (ie. fewer Shareholders casting a 'no' vote), because of the adverse consequences of successive 'no' votes above the prescribed threshold – this seems to be contrary to the stated objectives of the draft Recommendation.

10. How Does the 'Two Strikes' Test Sit with the Practice of Rolling Board Renewals?

Listing Rule 14.5 of the ASX Listing Rules requires a listed public Company to hold an election of Directors each year. Listing Rule 14.4 of the ASX Listing Rules requires Directors appointed to fill a casual vacancy on, or as an addition to, the Board of a listed public Company to submit themselves for re-election at the Annual General Meeting next following their appointment. Listing Rule 14.4 of the ASX Listing Rules separately requires all other Directors of a listed public Company (other than the Managing Director) to submit themselves for re-election at a General Meeting at least every 3 years.

The practical effect of these Listing Rules is that, in substance, all Directors (other than the Managing Director) come before Shareholders for re-election at least every 3 years. What the further 'two strikes' Resolutions (which may lead, in addition to this, to a complete Board purge every 3 years) will add to that existing process (other than for possible additional disclosure around the Remuneration Report) is unclear. It seems unnecessary.

11. *Is a Change Necessary in Light of Existing Corporations Act Rights?*

Finally, it should not be forgotten that Shareholders holding 5% of more of a Company's voting shares have rights to procure that any Director, or indeed the entire Board, of a listed public Company is called to account by facing re-election at an Annual General Meeting for any reason.

Subject only to Section 203D of the Corporations Act, such Shareholders can either require the Board to convene a General Meeting for that purpose under Section 249D of the Act, or can themselves convene such a General Meeting under Section 249F of the Act. Why additional mandatory 'two strikes' Resolutions for the entire Board of a Company are considered as necessary in the face of that existing process is unclear. Again, it seems unnecessary.

As will be obvious from our above submissions, we are strongly of the view that the implementation of the draft Recommendation would be difficult and could have serious, non-intended consequences, particularly for smaller listed public Companies. We believe that the proposed approach should be revised and other ways to achieve the Commission's aim be explored.

Yours faithfully



Richard Hill
Chairman