



**In the matter of Axiom Properties Limited 01
2006 ATP 1**

Catchwords:

appointment of directors; Black-Scholes; coercive; conflict of interest; control of board; convertible notes; dilution of interests; disclosure; declaration of unacceptable circumstances; expert's report; fiduciary exception; final orders to amend Notice of Meeting and Explanatory Memorandum; funding; issue of shares; joint venture; "No Talk"; option valuation; options; shareholder approval; order to vary or void contract; undertaking; unfair prejudice

Corporations Act 2001 (Cth): sections 602(b)(iii); 606; 611 item 7; 657A, 657C, 657D, 657E
ASIC Act; section 201A
ASIC Regulations; Regulation 16
ASX Listing Rule 7.1
Guidance Note 7 – Lock-up Devices

Axiom Properties Limited; HLB Mann Judd; Macquarie Bank; MacSea Nominees Pty Ltd; Pivot Group Pty Ltd; Port Geographe; Saramac Nominees Pty Ltd; Seaport Pty Ltd; Tallwood Nominees Pty Ltd

These are the Panel's reasons for making a declaration of unacceptable circumstances and final orders in relation to the affairs of Axiom Properties Limited following applications to the Takeovers Panel by Pivot Group Pty Ltd and Saramac Nominees Pty Ltd. The Panel required Axiom Properties Limited to make additional disclosure to its shareholders of the potential for conflicts of interest which may arise if they approved a proposal by Saramac to provide additional funds to the company by way of subscription, convertible note and options. The Panel required Pivot to amend the agreement it had entered with Axiom, to delete a "No Talk" provision from the agreement, in order to allow Axiom to discuss the rival Saramac Proposal.

SUMMARY

1. Axiom Properties Limited (**Axiom**) is a listed property company with one major project, Port Geographe, in Busselton W.A. Axiom required funds to progress the Port Geographe project and was initially approached by Pivot Group Pty Ltd (**Pivot**).
2. Pivot entered a heads of agreement with Axiom (**Pivot Agreement**) to subscribe for shares and convertible notes and be issued options. The total amount of money which Axiom might receive under the Pivot Agreement was \$5,300,000. The Pivot Agreement was subject to Axiom shareholder approval. The Pivot Agreement included a "No Talk" provision, which did not include a "fiduciary exception" as described in the Panel's Guidance Note 07 on Lock-up Devices.
3. After the announcement of the Pivot Agreement, Saramac Nominees Pty Ltd (**Saramac**) approached Axiom to provide funds for the Port Geographe project as an alternative to the Pivot proposal. The terms of the proposal that Saramac put to Axiom (**Saramac Proposal**) were very similar to those in the Pivot Agreement, except Saramac offered to pay twice the amount per share which Pivot offered under the Pivot Agreement, and Saramac sought to have four directors appointed to the Axiom Board as opposed to three under the Pivot Agreement.

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4. Saramac is a company ultimately owned and controlled by Macquarie Bank Ltd (**Macquarie**) and Mr Luke Saraceni, who also control Axiom's joint venture partner in the Port Geographe project.
5. The Panel found that the potential conflicts of interest which would exist if Saramac were the major shareholder of Axiom (given the interests of Saramac's ultimate owners as the ultimate owners of Axiom's joint venture partner and the provisions of the joint venture agreement) had not been adequately explained to Axiom shareholders in the draft notice of meeting.
6. The Panel found that the "No Talk" provision in the Pivot Agreement was likely to have a coercive effect on Axiom shareholders when considering the two rival proposals.
7. The Panel made a declaration of unacceptable circumstances and orders to remedy the two issues of concern which it found. The declaration and orders are annexed to these reasons.

THE PROCEEDINGS

8. These reasons relate to two applications to the Takeovers Panel made on 20 December 2005 and 3 January 2006 in relation to the affairs of Axiom. The applications (the **Applications**) were:
 - (a) **Pivot Application:** an application made by Pivot under section 657C of the *Corporations Act 2001 (Cth)*¹ dated 20 December 2005 and amendments to the original application dated 22 December 2005. Pivot applied for a declaration of unacceptable circumstances and interim and final orders in relation to the affairs of Axiom;
 - (b) **Saramac Application:** an application made by Saramac under section 657C dated 3 January 2006. Saramac applied for a declaration of unacceptable circumstances and final orders in relation to the affairs of Axiom.

THE PANEL & PROCESS

9. The President of the Panel appointed Carol Buys (sitting President), John Fast and Irene Lee (sitting Deputy President) as the sitting Panel (the **Panel**) for the proceedings (the **Proceedings**) arising from the Applications.
10. On 23 December 2005 the Panel decided to conduct proceedings in relation to the Pivot Application. On 3 January 2006 the Panel decided to conduct proceedings in relation to the Saramac Application. The Panel considered that it was appropriate to consider the Pivot Application and the Saramac Application together since they related to the same facts and overlapping remedies, and therefore pursuant to regulation 16 of the *Australian Securities and Investment Commission Regulations 2001 (Cth)* (the **Regulations**) directed that the Applications be considered together.

¹ Statutory references in these reasons are to the *Corporations Act 2001 (Cth)*, unless otherwise expressly stated.

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11. The Panel adopted the Panel's published procedural rules for the purposes of the Proceedings.
12. The Panel consented to the parties being legally represented by their commercial lawyers in the Proceedings.

BACKGROUND

13. The following is a description of the facts leading up to the Applications.
14. Axiom is a property development company based in Perth, Western Australia. It has one major development project, at Busselton, called the Port Geographe project.
15. As at 20 December 2005, Axiom had 165,757,532 ordinary shares on issue.

The Port Geographe Joint Venture

16. Axiom is party to a joint venture (the **PGJV**) to complete the development of the Port Geographe Canal Project in Busselton, Western Australia.
17. The ownership and particular details of the PGJV are set out in an undated development agreement between:
 - (a) Axiom;
 - (b) Tallwood Nominees Pty Ltd (**Tallwood**) (a wholly owned subsidiary of Axiom); and
 - (c) MacSea Nominees Pty Ltd (**MacSea**),
(the **Development Agreement**).
18. There are two participants in the PGJV, MacSea and Tallwood. MacSea has a 60% interest in the PGJV and Tallwood has a 40% interest. Tallwood's 40% interest in the PGJV is Axiom's major asset.
19. MacSea is a company formed to represent the interests of Macquarie and Luke Saraceni and is held 50% by Gatesun Pty Limited (**Gatesun**) (100% owned by Macquarie) and 50% by Seaport Pty Ltd (**Seaport**) (100% owned by Luke Saraceni). Carl Peter Lancaster and Luke Saraceni are directors of MacSea.
20. Saramac is owned 50% by Gatesun and 50% by Seaport (i.e. the same ownership as MacSea).
21. Under the Development Agreement (among other things):
 - (a) the occurrence of certain "Trigger Events" may result in dilution of Tallwood's interest in the PGJV;
 - (b) if Tallwood fails to meet a required contribution to the costs of the PGJV imposed on each participant in the PGJV (a **Called Sum**), then the Called Sum of Tallwood may be contributed by MacSea. If this occurs MacSea is entitled to charge interest on that sum plus the amount of its own Called Sum that has been paid and Tallwood is not entitled to repay MacSea until the expiry of a period of 12 months; and

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(c) if Tallwood commits an “Irremediable Default”², compensation is payable and MacSea has options which enable it to acquire Tallwood’s land (i.e. Lot 9001 on Deposited Plan 40540) or both Tallwood’s interest in the PGJV (at a discount to the market value of this interest) and Tallwood’s land,

(together the **Tallwood Default Provisions**).

22. Under the Development Agreement, the management committee decides whether additional funding by the participants is required. MacSea holds 60% of the voting rights on the management committee.
23. The financing arrangements for the PGJV are set out in an undated security trust and inter creditor deed (**Security Deed**).
24. The manager for the PGJV is Seaport, a company in which Luke Saraceni is the sole shareholder and director, as set out in an undated Project Management Agreement between Tallwood, MacSea and Seaport.
25. There are other agreements with respect to the PGJV between different parties.
26. In 2005, the board of Axiom decided that it required additional funds to comply with its obligations under the PGJV for development of the Port Geographe project.

Pivot Proposal

27. On 3 October 2005, Pivot entered into the Pivot Agreement under which Axiom agreed to:
 - (a) issue to Pivot 25 million shares at 2 cents per share to raise \$500,000;
 - (b) issue to Pivot convertible notes to the value of \$2 million convertible into 100 million shares at 2 cents per share; and
 - (c) grant to Pivot 140 million options exercisable between 13 months from completion of the heads of agreement (which is to be no later than 3 business days after shareholder approval of the transactions) and 15 January 2008 at 2 cents per option.
28. The Pivot Agreement was subject to, and conditional on, approval by the Axiom shareholders.
29. If the Pivot Agreement was approved and implemented, Pivot would be entitled to nominate three directors to the Axiom Board, which at that time comprised three directors.
30. Clause 6 of the Pivot Agreement, in summary, sought to restrict Axiom from negotiating or entering into discussions with third parties in relation to (amongst other things) proposals similar to the proposal put by Pivot in the Pivot Agreement (the **Pivot Proposal**) for the period from entry into the Pivot Agreement until the

² Under the Development Agreement, an “Irremediable Default” may be committed by either of Tallwood or MacSea. The consequences that flow from an “Irremediable Default” may be different depending on which party has committed the “Irremediable Default”. This paragraph describes the consequences that flow or may flow (as the case may be) from an “Irremediable Default” committed by Tallwood.

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resolutions to be put to the Axiom shareholders regarding approval of the Pivot Proposal were not passed.

31. Clause 6 of the Pivot Agreement was not subject to any 'fiduciary exception' condition as described in the Panel's Guidance Note 7 on [Lock-up Devices](#), namely: *allowing directors to respond positively to any better proposal if they form the view that to do so would be in the best interests of target shareholders.*³
32. Under clause 11.2 of the Pivot Agreement, Axiom and Pivot agreed that they would each do all things and execute all further documents necessary to give full effect to the Pivot Agreement.
33. Clause 2.2 of the Pivot Agreement required Axiom to procure that the shareholders' meeting regarding consideration of the resolutions required to be approved in order to enable Axiom to complete the Pivot Agreement was held by no later than 30 November 2005. This date was then extended by the parties to 31 December 2005 on 27 October 2005, and then to 28 February 2006 on 2 December 2005.
34. Pivot had no tangible voting power in Axiom when it entered the Pivot Agreement⁴. If Axiom proceeded with the transactions contemplated in the Pivot Agreement, and Pivot converted all of the convertible notes and exercised all of the options it acquired under the Pivot Agreement (and Axiom issued no other shares or options and Pivot and its associates acquired no other shares in Axiom), Pivot's voting power in Axiom shares would equate to 61.5%.

Saramac Proposal

35. On 10 November 2005, Axiom announced to Australian Stock Exchange Limited (ASX) that it had received the Saramac Proposal under which Axiom would:
 - (a) issue to Saramac 25 million shares at 4 cents per share to raise \$1,000,000;
 - (b) issue to Saramac convertible notes to the value of \$4 million convertible into 100 million shares at 4 cents per share; and
 - (c) grant to Saramac 140 million options exercisable between 13 months from shareholder approval and 15 January 2008 at 4 cents per option,on terms which were initially contained in an implementation agreement which was signed by Saramac only (the **Initial Implementation Agreement**).
36. The Saramac Proposal was subject to, and conditional on, approval by the Axiom shareholders.
37. If the Saramac Proposal was approved and implemented, Saramac would be entitled to nominate 4 directors to the Axiom Board. At that time, that would be a majority.

³ Paragraph 7.31 of Guidance Note 7 – Lock-up Devices.

⁴ Pivot had voting power of 0.0012% in Axiom due to 200,000 shares in Axiom held by the company secretary of Pivot.

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38. The Saramac Proposal was later amended, and on 30 November 2005 Axiom announced that Saramac irrevocably undertook to execute a revised implementation agreement (**Revised Implementation Agreement**) following:
- (i) *“review and approval of the final form of Axiom's proposed notice of meeting in relation to the Saramac Transaction prior to circulation to Axiom shareholders;*
 - (ii) *all necessary Axiom shareholder approvals being obtained for the Saramac Transaction; and*
 - (iii) *execution by Axiom of the revised Implementation Agreement.”*

The proposal to subscribe capital and to appoint directors remained the same.

39. Neither Axiom nor Saramac had signed the Revised Implementation Agreement at the time the Panel made its decision in the Proceedings.
40. Saramac had no pre-existing voting power in Axiom. If Axiom proceeded with the Saramac Proposal and Saramac converted all of the convertible notes and exercised all of the options it acquired under the Saramac Proposal (and Axiom issued no other shares or options and Saramac and its associates acquired no other shares in Axiom), Saramac's voting power in Axiom shares would equate to 61.5%.

Notice of Meeting and Explanatory Memorandum

41. The acquisition of 61.5% of the shares in Axiom by Pivot or Saramac would contravene the general prohibition set out in section 606, but item 7 of section 611 would permit the acquisition if Axiom shareholders had approved the issue of shares, convertible notes and options⁵ by resolution passed at a general meeting .
42. Accordingly, Axiom prepared a draft Notice of Meeting and Explanatory Memorandum containing resolutions to be considered by the Axiom shareholders which, if passed, would enable Axiom to proceed with one or other or neither of the Pivot and the Saramac Proposals. The draft Notice of Meeting and Explanatory Memorandum prepared by Axiom was revised a number of times in response to comments by Pivot, Saramac and the Australian Securities and Investments Commission (**ASIC**). The draft Notice of Meeting and Explanatory Memorandum that the Panel considered was the version lodged with ASIC and ASX on 21 December 2005 for their review and approval prior to dispatch to Axiom shareholders (**draft Meeting Documents**).
43. Axiom lodged the draft Meeting Documents with ASIC as they contained:
- (a) a related party transaction resolution; and
 - (b) resolutions pursuant to item 7 of section 611.
44. Axiom lodged the draft Meeting Documents with ASX as they contained resolutions seeking shareholder approval pursuant to Listing Rule 7.1.

⁵ The resolutions also approved the acquisition of voting shares as a result of conversion or exercise of the convertible notes or options.

APPLICATIONS

Pivot Application

Background

45. In summary, the Pivot Application alleged the following in relation to the draft Meeting Documents (**Disclosure Deficiencies**):
- (a) inadequate explanation of the fact that as the Axiom Board comprised only three directors, the appointment of four new Saramac-nominated directors would constitute a majority of the enlarged Axiom Board if the Saramac Proposal was approved⁶;
 - (b) inadequate explanation of the fact that Saramac's entitlement to appoint a majority of the directors to the Axiom Board would enable Saramac to obtain control of the Axiom Board without having to acquire (or subscribe for) a majority shareholding position in Axiom (which would not occur until the conversion of the notes and/or exercise of the options referred to in the Saramac Proposal);
 - (c) the expert's reports prepared by HLB Mann Judd (**Expert's Reports**), did not adequately take into account the effect or the implications of Saramac obtaining control of the Axiom Board referred to above and specifically the consequent operational or strategic influence of Saramac and its associated entities on Tallwood's performance (and non-performance) of its obligations under the Development Agreement;
 - (d) insufficient disclosure relating to the conflicts of interest which the directors of each of:
 - (i) Saramac and/or MacSea; and
 - (ii) Axiom and Tallwood,may have in relation to the PGJV if the Saramac Proposal was approved, or how these conflicts would be managed;
 - (e) inadequate explanation of the existence and implications of the Tallwood Default Provisions;
 - (f) inadequate explanation of the differences between Pivot and Saramac;
 - (g) inadequate explanation of:
 - (i) the fact that Saramac was not required to convert the notes or exercise the options referred to in the Saramac Proposal to obtain control of Axiom;
 - (ii) the fact that in certain situations the money subscribed (for shares or convertible notes) by Pivot under the Pivot Agreement could exceed that subscribed by Saramac under the Saramac Proposal;

⁶ Pivot contrasted this with its proposal under which only three new directors would be appointed, which Pivot submitted would not control the Axiom board.

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- (h) inadequate explanation of the legal implications of a contravention of clause 11.2 of the Pivot Agreement (clause 11.2 required Axiom to do all things necessary to give full effect to the Pivot Agreement, when linked with the No Talk provision in clause 6, Pivot asserted that Axiom was in default of either or both of those provisions in the Pivot Agreement);
- (i) a number of circumstances in the Expert's Reports where inadequate information was provided. These included:
 - (i) the matter of control of the Axiom Board; and
 - (ii) the potential risk to Axiom flowing from the possible divergence of interests of Saramac as a shareholder and a joint venturer if the Saramac Proposal was approved;
- (j) the options referred to in the Saramac Proposal had been undervalued by using an inappropriate share price for the Axiom shares in the Black-Scholes option pricing model;
- (k) inadequate information on the fact that, notwithstanding the "irrevocable" nature of the Saramac Proposal, it was still possible for the Saramac Proposal to fail, thereby leaving Axiom without funds, particularly in circumstances where the resolutions relating to the Pivot Proposal had not been approved by the Axiom shareholders,

and therefore the draft Meeting Documents:

- (l) offended the "Eggleston Principle" reflected in section 602(b)(iii) because Axiom's shareholders had not been given enough information to enable them to assess the merits of the Pivot Proposal and the Saramac Proposal, either of which, if approved by shareholders and implemented, could lead to acquisition of control over Axiom; and
- (m) did not provide the Axiom shareholders with all information known to Saramac, Pivot and Axiom, that was material to the decision on how to vote on the Pivot Agreement and Saramac Proposal and thereby contravened item 7 of section 611.

Declaration and orders sought in the Application

46. Pivot sought interim orders pursuant to 657E:

- (a) to prevent Axiom from releasing the draft Meeting Documents to Axiom shareholders; or
- (b) to prevent Axiom from calling an Extraordinary General Meeting for the purpose of approving either the Pivot Agreement or the Saramac Proposal until the final orders as contemplated below had been effected.

47. Pivot sought a declaration pursuant to section 657A that the following circumstances (or one or more of the following circumstances) gave rise to unacceptable circumstances in relation to the affairs of Axiom:

- (a) failure by Axiom to disclose in the draft Meeting Documents some or all of the Disclosure Deficiencies; and

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- (b) failure by HLB Mann Judd to prepare expert reports adequately taking into account some or all of the Disclosure Deficiencies.
48. Pivot sought the following final orders under section 657D:
- (a) an order to compel Axiom to amend the draft Meeting Documents to satisfy Pivot's concerns with the Disclosure Deficiencies; and
 - (b) an order to compel HLB Mann Judd to prepare revised expert's reports and, in doing so, to:
 - (i) adequately take into account the Disclosure Deficiencies; and
 - (ii) recalculate the value of the Saramac options.

Saramac Application

Background

49. In summary, the Saramac Application alleged that the following in relation to the Pivot Agreement gave rise to unacceptable circumstances:
- (a) the terms of the Pivot Agreement;
 - (b) the conduct of Pivot in attempting to enforce the terms of the Pivot Agreement; and
 - (c) the assertion by Pivot, which Axiom reflected in the draft Meeting Documents, that Axiom's recommendations to its shareholders of the Saramac Proposal constituted a breach of the Pivot Agreement.

Declaration and orders sought in the Application

50. Saramac sought a declaration under section 657A that, in effect, the failure of Pivot and Axiom to include a "fiduciary exception", qualifying clause 6 of the Pivot Agreement, gave rise to unacceptable circumstances in relation to the affairs of Axiom.
51. Saramac sought a final order under section 657D that:
- (a) Pivot and Axiom amend the Pivot Agreement to remove clause 6 of the Pivot Agreement; and
 - (b) Pivot not seek or threaten, to enforce proceedings or to take action in relation to, any alleged breach of the provisions the Pivot Agreement arising from the Axiom Board's recommendation in relation to the Saramac Proposal; or
 - (c) the Pivot Agreement be cancelled or declared void.

DISCUSSION

Disclosure of potential conflict of interest for Saramac nominee directors of Axiom

52. As discussed above Pivot, alleged (inter alia) the following in relation to the draft Meeting Documents:
- (a) there was insufficient disclosure in the draft Meeting Documents relating to the potential conflicts of interest which the directors of each of:

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- (i) Saramac and/or MacSea; and
- (ii) Axiom and Tallwood,

may have in relation to the PGJV if the Saramac Proposal was approved, or how these conflicts would be managed;

- (b) the Expert's Reports did not adequately (or at all) take into account the effect or the implications of Saramac obtaining control of the Axiom Board referred to above and specifically the consequent operational or strategic influence of Saramac and its associated entities on Tallwood's performance (and non-performance) of its obligations under the Development Agreement;
- (c) a number of circumstances in the Expert's Reports where inadequate or no information was provided. These included:
 - (i) control of the Axiom Board;
 - (ii) the potential risk to Axiom flowing from the possible divergence of interests of Saramac as a shareholder and a joint venturer if the Saramac Proposal is approved.

53. The Panel agreed that a possible material issue relating to a potential conflict of interest of Saramac nominee directors of Axiom was inadequately explained in the draft Meeting Documents.
54. As a consequence, Axiom shareholders would not be adequately informed of a material issue before them when considering the two different proposals which relate to the control of, and the acquisition of a substantial interest in, Axiom.
55. The Panel considered that in its experience this fact of inadequate disclosure would likely have had an effect on the control, or potential control of Axiom, or the acquisition, or proposed acquisition, by Saramac of a substantial interest in Axiom. In the Panel's experience, if Axiom shareholders were not adequately informed as to the potential conflicts which could arise if the Saramac Proposal were approved (such conflicts would be a detriment to the interests of Axiom shareholders), it was likely that more Axiom shareholders would approve the Saramac Proposal (enabling Saramac to acquire control over Axiom) in circumstances where, had there been proper disclosure in the draft Meeting Documents, the Saramac Proposal may not have been approved.
56. The Panel considered that, on this basis, the draft Meeting Documents gave rise to unacceptable circumstances.
57. The Panel considered, in light of the purposes set out in section 602, and other public interest issues, that it was not against the public interest to make a declaration of unacceptable circumstances.⁷
58. The Panel considered that before dispatch to Axiom shareholders, the draft Meeting Documents should be amended to disclose properly, the potential conflict of interests

⁷ The declaration of unacceptable circumstances that the Panel made is set out in Annexure A.

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which the Saramac nominee directors on the Axiom Board may face with respect to the material issue identified by the Panel.

59. The Panel considered that there were readily conceivable circumstances where the interests of Axiom and of MacSea, as the two joint venture partners in the PGJV, will conflict (rather than merely *diverge* as stated in the draft Meeting Documents concerning conflicts of interest). In those circumstances, Saramac nominee directors would be faced with a conflict of interest when sitting on the Axiom Board or sitting on the PGJV management committee. An example where such a material conflict could arise is where the PGJV management committee considered the source of funding for costs of the PGJV and, at the time, debt funding would be more desirable for Axiom but equity funding would be more desirable for MacSea. The Panel was mindful that there had been no suggestion that the Saramac nominee directors of Axiom would not fulfil their fiduciary obligations to Axiom shareholders - simply that the potential for conflict of interest clearly existed and had been inadequately disclosed and described.
60. On that basis, the Panel considered it appropriate to make an order⁸ requiring Axiom to amend the draft Meeting Documents to reflect properly the existence of the potential conflicts of interests described above, which may face the Saramac nominee directors on the Axiom Board, if Axiom shareholders approve the Saramac Proposal.
61. Axiom was to provide a marked up copy of the draft Meeting Documents to the Panel for its approval, prior to the dispatch of the draft Meeting Documents to Axiom shareholders.
62. The Panel considered the adverse effects which the order would have, primarily on Axiom and Saramac, and the harm to Axiom shareholders which the order sought to remedy. The Panel considered that, on balance, the order was not unfairly prejudicial to any person and that it was a proportionate and effective response to the unacceptable circumstances identified and their effects on Axiom shareholders.
63. The order protected the interests of Axiom shareholders, in that it required them to be given the information which under the unacceptable circumstances they had not been given and which the Panel considered they required to make an informed decision on the merits of the proposed acquisition of a substantial interest in Axiom by Saramac and which would have an effect on the control of Axiom. The Panel considered that the provisions and the purposes of Chapter 6 gave Axiom shareholders a right to expect to be properly informed. Under the unacceptable circumstances that right or interest had not been met.
64. The Panel considered that the costs to Axiom and Saramac of its orders were small compared to the adverse effects of the unacceptable circumstances on Axiom shareholders. The costs to Axiom were some delay in the date of the meeting to consider the Pivot Agreement and Saramac Proposal, and some additional printing costs. In particular, the Panel considered that Axiom, being advised by professional advisers in respect of the Meeting Documents, should have recognised the clear potential for the conflicts identified in the Pivot Application and by the Panel, and

⁸ The orders the Panel made are set out in Annexure B.

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should have recognised the need for clear and careful disclosure of such conflict. The costs to Saramac were some reduced prospect of having the Saramac Proposal approved by Axiom shareholders, and some adverse effect from the delay to the Axiom meeting

65. The Panel considered that the orders sought by Pivot in the Pivot Application adequately canvassed the possibility of the Panel making such an order and, accordingly, the parties, and any person likely to be adversely affected by the order, had had a proper opportunity to make submissions on the order prior to the Panel making it.

“Fiduciary exception” in the Pivot Agreement

66. As discussed above, Saramac alleged that the following in relation to the Pivot Agreement gave rise to unacceptable circumstances:
- (a) the terms of the Pivot Agreement (clauses 6 and 11.2);
 - (b) the conduct of Pivot in attempting to enforce the terms of the Pivot Agreement; and
 - (c) Pivot’s assertion, which Axiom reported in the draft Meeting Documents, that Axiom’s recommendations to its shareholders of the Saramac Proposal constituted a breach of the Pivot Agreement.
67. The Panel considered that clause 6 of the Pivot Agreement, without a “fiduciary exception” as described in the Panel’s Guidance Note 7 on Lock-Up Devices, gave rise to unacceptable circumstances.
68. The Panel considered that clause 6 of the Pivot Agreement should be subject to a “fiduciary exception” to avoid adversely affecting the efficiency and competitiveness of the market for control of shares in Axiom. The Panel considered that the assertions by Pivot of a breach of the Pivot Agreement by Axiom recommending the Saramac Proposal to its shareholders were unsustainable. However, in the absence of authoritative determination the assertions themselves had the potential to affect the decision of Axiom shareholders in considering whether to choose either of the Pivot Proposal or Saramac Proposal.
69. The Panel considered that the threat of litigation that was described in the draft Meeting Documents was likely to have a coercive effect on Axiom shareholders by making them concerned at the risk that Axiom would be involved in costly litigation if they approved the Saramac Proposal. Given that the Pivot Agreement and Saramac Proposal both contemplated the acquisition of substantial interests in Axiom, and potentially acquisition of control of Axiom, under the Pivot Agreement or the Saramac Proposal, the Panel considered that the circumstances referred to above were likely to affect control of, or the acquisition of a substantial interest in, Axiom.
70. The Panel considered that in its experience, this threat of litigation over the alleged breach of the Pivot Agreement would likely have had an effect on the control or potential control of Axiom. If Axiom shareholders considered that there was a material potential for costly and delaying litigation if the Saramac Proposal were approved in the face of Pivot’s assertions that Axiom had breached the Pivot

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Agreement, it was likely that fewer Axiom shareholders would approve the Saramac Proposal (potentially denying Saramac control over Axiom) in circumstances where, had the Pivot assertions as to breach of the Pivot Agreement not been disclosed in the draft Meeting Documents, the Saramac Proposal may have been approved. The reverse is likely to have happened in relation to approval of the Pivot Agreement.

71. The Panel considered, under section 657A(3), that the existence of clause 6 of the Pivot Agreement, without a “fiduciary exception” was also likely to have adversely affected the efficient market for control of shares in Axiom because it could deter rival proposals to the Pivot Proposal for the control of, or acquisition of substantial interests in, Axiom.
72. The Panel also considered that the absence of a “fiduciary exception” was likely to have adversely affected the efficient market for control of Axiom because it had the tendency to inhibit (although it had not prevented the Saramac Proposal from being recommended and put to the Axiom shareholders) the Axiom Board in considering, or recommending, a rival proposal to the Pivot Agreement.
73. The Panel considered, in light of the above, that the circumstances set out in paragraph 66 above gave rise to unacceptable circumstances, and that in light of the purposes set out in section 602, and other public interest issues, it was not against the public interest to make a declaration of unacceptable circumstances in relation to those circumstances.
74. The Panel considered that clause 6 of the Pivot Agreement should be cancelled. The Panel also considered that Pivot should be restrained from:
 - (a) seeking, or threatening, to enforce the provisions of; or
 - (b) seek any damages as a consequence of any alleged breach of,either clause 6 or clause 11.2 of the Pivot Agreement as a consequence of the Axiom directors carrying out their fiduciary duties in making a recommendation between the Pivot Proposal and Saramac Proposal.
75. On that basis, the Panel considered it appropriate to make an order:
 - (a) declaring clause 11.2 of the Pivot Agreement to be of no effect to the extent that it inhibits the Axiom directors carrying out their fiduciary duties in making a recommendation between the Pivot Proposal and Saramac Proposal; and
 - (b) declaring clause 6 of the Pivot Agreement to be void and of no effect ; and
 - (c) restraining Pivot from:
 - (i) seeking, or threatening, to enforce the provisions of, or
 - (ii) seeking any damages as a consequence of any alleged breach of, those clauses.
76. The order protected the interests of Axiom shareholders, in that it removed those parts of the Pivot Agreement which the Panel considered inhibited the ability of:

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- (a) the Axiom shareholders to make a decision between the two rival proposals for control of Axiom (and acquisition of substantial interest in Axiom); and
 - (b) the Axiom directors to follow their fiduciary duties and give information to Axiom shareholders as to the merits of the two rival proposals for control of Axiom (and the acquisition of a substantial interest in Axiom).
77. The Panel considered that the provisions and the purposes of Chapter 6 gave Axiom shareholders a right to expect to be properly informed as to the merits of the two rival proposals and for the acquisition of control over a substantial interest in Axiom shares to be conducted in an efficient, competitive and informed market. Under the unacceptable circumstances identified by the Panel in relation to the Pivot Agreement, that right or interest had not been met.
78. The Panel considered that the cost to Pivot of its orders was small compared to the potential adverse effects of the unacceptable circumstances on Axiom shareholders. The cost to Pivot was the loss of the exclusivity it had sought under clause 6 of the Pivot Agreement. However, the Panel considered that Pivot, being advised by professional advisers, and the clear statement of policy of the Panel in its Guidance Note, should have recognised the clear potential for the harm identified in the Saramac Application and by the Panel and should have recognised the need for a fiduciary exception to clause 6 or 11.2.
79. The Panel considered the adverse effects which the order would have, primarily on Pivot, and the harm to Axiom shareholders which the order sought to remedy. The Panel considered that, on balance, the order was not unfairly prejudicial to any person and that it was a proportionate response to the unacceptable circumstances identified.
80. The Panel considered that the orders sought by Saramac in the Saramac Application adequately canvassed the possibility of the Panel making such an order and, accordingly, the parties, and any person likely to be adversely affected by the order, had had a proper opportunity to make submissions on the order prior to the Panel making it.

Disclosure regarding composition and control of the board

81. Pivot submitted that the draft Meeting Documents provided inadequate or no explanation of the fact that as the composition of the Axiom Board comprised three directors, the four additional Saramac-nominated directors would constitute a majority of the Axiom Board if the Saramac Proposal was approved.
82. The Panel considered that the draft Meeting Documents adequately described the potential effect on the composition of the Axiom Board of the two proposals.
83. Pivot further submitted that the draft Meeting Documents provided inadequate explanation of the fact that Saramac's entitlement to appoint a majority of the directors to the Axiom Board would enable Saramac to obtain control of the Axiom Board without having to acquire (or subscribe for) a majority shareholding position in Axiom (which would not occur until the conversion of the Saramac notes and/or exercise of the Saramac options referred to in the Saramac Proposal).

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84. The Panel considered that the draft Meeting Documents adequately described the potential effect on the composition of the Axiom Board of the two proposals. The Panel noted that neither proposal would give Pivot or Saramac majority voting power in Axiom until it had converted notes or exercised options to be issued under the proposal. Therefore, the nominees of either could be voted off the board at a general meeting unless and until Pivot or Saramac subscribed for under the proposal agreed by Axiom shareholders, or otherwise acquired, sufficient Axiom shares to carry a majority at a meeting.

Disclosure in the Expert's Reports regarding the board

85. Pivot submitted that the Expert's Reports did not adequately take into account the effect or the implications of Saramac obtaining control of the Axiom Board referred to above and specifically the consequent operational or strategic influence of Saramac and its associated entities on Tallwood's performance (and non-performance) of its obligations under the Development Agreement.
86. The Panel considered that the Expert's Reports contained adequate information concerning the composition of the board of Axiom in the event of either proposal being approved. The Panel considered that its orders concerning disclosure would remedy any valid concerns about disclosure of conflicts of interests of any Saramac nominee directors of Axiom.

Disclosure regarding the Tallwood Default Provisions

87. Pivot submitted that the draft Meeting Documents provided inadequate explanation of the existence and implications of the Tallwood Default Provisions in the Development Agreement.
88. The Panel considered that the draft Meeting Documents would contain an adequate description of those provisions once the conflict of interests issue had been addressed.

Disclosure regarding specific matters relating to Pivot and Saramac and their proposals

89. Pivot submitted that the draft Meeting Documents provided inadequate explanation of:
- (a) the differences between Pivot and Saramac;
 - (b) the fact that Saramac would not be required to convert the Saramac notes or exercise the Saramac options to obtain control of Axiom; and
 - (c) the fact that in certain situations the monies subscribed (for shares or convertible notes) by Pivot under the Pivot Agreement could exceed that subscribed by Saramac under the Saramac Proposal.
90. The Panel considered that the draft Meeting Documents contained adequate notification to Axiom shareholders that they should consider the differences between Pivot and Saramac and that Axiom could not reasonably be asked to provide greater information concerning the two rivals in the draft Meeting Documents. The Panel noted that it was open to either or both of Pivot and Saramac to write to the Axiom

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shareholders setting out the reasons why Axiom shareholders should prefer them to be the major shareholder in Axiom.

91. In relation to the notes and options, the Panel considered that the draft Meeting Documents contained adequate description of the optional nature of conversion of convertible notes and exercise of options under both proposals.
92. In relation to the subscription amounts, the Panel considered that the draft Meeting Documents contained adequate description of the potential money flows to Axiom under both proposals.

Disclosure regarding clause 11.2 of the Pivot Agreement

93. Pivot submitted that the draft Meeting Documents provided inadequate explanation of the legal implications of a contravention of clause 11.2 of the Pivot Agreement.
94. The Panel considered that its orders would make this issue redundant (except to the extent of Axiom amending the draft Meeting Documents to reflect the Panel's orders and their consequences).

Disclosure in the Expert's Reports generally

95. Pivot submitted that the Expert's Reports provided an inadequate explanation of or no information on the following:
 - (a) the matter of control of the Axiom Board;
 - (b) the potential risk to Axiom flowing from the possible divergence of interests of Saramac as a shareholder and a joint venturer if the Saramac Proposal is approved; and
 - (c) the fairness and reasonableness approach used.
96. As discussed above, the Panel considered that the draft Meeting Documents (including the Expert's Reports) contained adequate description of the control of the Axiom board and the relevant potential effects and consequences of the two proposals.
97. In relation to the potential risks that may flow from the possible divergence of interests of Saramac as a shareholder and a joint venturer, the Panel considered that its orders concerning disclosure would remedy this issue.
98. In relation to the fairness and reasonableness approach adopted by the HLB Mann Judd, the Panel did not consider that the Pivot Application raised issues with which the Panel had material concerns.

The Black-Scholes option pricing model

99. Pivot submitted that the Saramac options were undervalued by using an inappropriate share price for the Axiom shares in the Black-Scholes option pricing model.
100. The Panel did not consider that this raised issues with which the Panel had material concerns. The Panel considered it appropriate for the expert to use the same market price for Axiom shares in valuing each of the option proposals. However, the Panel considered that it would likely assist Axiom shareholders, and their advisers, if the

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expert commissioned by Axiom provided a discussion as to the appropriateness and a better explanation of the methodology, assumptions and values, it used in the calculation of the value of options proposed to be issued to Pivot and Saramac under their relevant proposals.

Disclosure of potential risk regarding failure of Saramac proposal

101. Pivot submitted that the draft Meeting Documents provided inadequate information on the fact that, notwithstanding the “irrevocable” nature of the Saramac Proposal, it was still possible for the Saramac Proposal to fail, thereby leaving Axiom without funds, particularly in circumstances where the resolutions relating to the Pivot Agreement have not been approved by the Axiom shareholders.
102. The Panel considered that its orders would make this issue redundant by removing the inhibition on Axiom responding to the Saramac Proposal. Saramac advised the Panel that it would seek to enter an agreement, of the same binding nature as the Pivot Agreement, with Axiom as soon as Axiom no longer felt constrained by Pivot’s assertions concerning clauses 6 and 11.2 of the Pivot Agreement.

DECISION

Declaration

103. The Panel considered that the following gave rise to unacceptable circumstances:
 - (a) the failure of the draft Meeting Documents to disclose adequately the nature and substance of a potentially material conflict of interest that may arise for Saramac nominees on the Axiom Board, for example, in the event that the PGJV management committee came to consider whether or not to make a call for an additional equity contribution from the PGJV participants; and
 - (b) the absence of a “fiduciary exception” as described in the Panel’s Guidance Note 7 on [Lock-up Devices](#), from the Pivot Agreement. Such a “fiduciary exception” would have allowed:
 - (i) Axiom shareholders to choose between the Pivot Proposal and Saramac Proposal without the threat of litigation over breach of the Pivot Agreement;
 - (ii) the Axiom directors freely to advise their shareholders as to the two proposals before them; and
 - (iii) Axiom and Saramac to enter an agreement which was as similarly binding on all parties as was the Pivot Agreement.
104. Accordingly, the Panel made a declaration of unacceptable circumstances, the form of which is attached as Annexure A.

Orders

105. The Panel made the orders set out in Annexure B.
106. The Panel declined to make an order in relation to costs.
107. The Panel declined to make the interim orders requested by Pivot.

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Undertakings

108. The Panel accepted an undertaking from Axiom not to distribute:

- (a) the draft Meeting Documents; or
- (b) any notice of meeting containing resolutions regarding the approval of either the Saramac Proposal or the Pivot Proposal.

prior to the conclusion of the Proceedings.

109. The Panel released Axiom from this undertaking when it made its orders.

Carol Buys

President of the Sitting Panel

Decision dated 10 January 2006

Reasons published 8 May 2006

Takeovers Panel

Reasons for Decision - Axiom Properties Limited

Annexure A - Declaration of unacceptable circumstances

In the matter of Axiom Properties Limited

WHEREAS

- A. The Takeovers Panel (**Panel**) received an application from Pivot Group Pty Ltd (**Pivot**), in relation to a draft Notice of Meeting and Explanatory Memorandum (**draft Meeting Documents**) prepared by Axiom Properties Limited (**Axiom**) for a meeting proposed to be held in February 2006.
- B. The draft Meeting Documents relate to resolutions seeking shareholder approval in accordance with item 7, section 611 and chapter 2E of the Corporations Act and Listing Rule 7.1 of the ASX Listing Rules in respect of two alternative proposals to provide funds to Axiom for its Port Geographe project. One proposal has been put forward by Pivot and the other by Saramac Nominees Pty Ltd (**Saramac**).
- C. The draft Meeting Documents give rise to unacceptable circumstances because they do not provide Axiom shareholders with:
 - (a) sufficient information to enable them to assess the merits of the Pivot or the Saramac proposal;
 - (b) all information known to Saramac, Pivot and Axiom that is material to the decision on how to vote on the resolutions.
- D. In particular, the draft Meeting Documents fail to provide adequate disclosure on the potentially material conflicts of interest that may arise for the Saramac nominees on the board of Axiom due to the fact that:
 - (a) Saramac and MacSea Nominees Pty Ltd (**MacSea**) have common ownership (i.e. 50% owned by Gatesun Pty Ltd and 50% owned by Seaport Pty Ltd (**Seaport**));
 - (b) MacSea has a 60% interest in the joint venture to complete the development of the Port Geographe Canal Project (**PGJV**) with Tallwood Nominees Pty Ltd (a wholly owned subsidiary of Axiom) and Seaport is the manager of the PGJV; and
 - (c) under the PGJV transaction documents circumstances may arise which trigger the dilution of Tallwood's interest in the PGJV or require the sale of the land owned by Tallwood (as the case may be) and those circumstances may be triggered by the directors of Axiom nominated by Saramac acting or failing to act at all times in a manner that preserves or enhances Tallwood's investment in the PGJV.
- E. The Panel also received an application from Saramac which the Panel determined it would hear in the same proceedings dealing with the application from Pivot.
- F. The application concerned an agreement between Axiom and Pivot (the **Pivot Agreement**) for the proposal by Pivot described in Recital B.

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- G. A provision in the Pivot Agreement restraining Axiom from negotiating with proponents of competing transactions does not contain an appropriate fiduciary exception allowing Axiom's directors to respond positively to an alternative proposal if the directors consider to do so would be in the best interests of Axiom shareholders, contrary to the policy set out in section 602(a) of the Corporations Act 2001 (Cth) and the Panel's [Guidance Note 7 - Lock-up Devices](#).

Under section 657A of the Corporations Act, the Panel declares that the circumstances relating to:

- (a) the failure of the draft Meeting Documents to disclose adequately the nature and substance of a potentially material conflict of interest which may arise for Saramac nominees on the board of Axiom; and
- (b) the absence from the Pivot Agreement of an express fiduciary exception as described in the Panel's Guidance Note 7 on Lock-up Devices,

constitute unacceptable circumstances in relation to the affairs of Axiom.

Carol Buys

President of the Sitting Panel

Dated 9 January 2006

Takeovers Panel

Reasons for Decision - Axiom Properties Limited

Annexure B - Orders

In the matter of Axiom Properties Limited

Pursuant to:

1. section 657D of the *Corporations Act 2001* (Cth); and
2. a declaration of unacceptable circumstances in relation to the affairs of Axiom Properties Limited (**Axiom**) made by the Takeovers Panel (**Panel**) on 9 January 2006,

the Panel HEREBY ORDERS:

1. that Axiom:
 - (a) provide to the Panel a mark up of the draft Notice of Meeting and Explanatory Memorandum lodged with the Australian Securities & Investments Commission and the Australian Stock Exchange Limited on 21 December 2005 by Axiom (**draft Meeting Documents**) within two business days from receipt of this order that:
 - (i) contains disclosure properly reflecting the existence of the potential conflicts of interests which may face the nominee directors of Saramac Nominees Pty Ltd (Saramac) on the board of Axiom if the Axiom shareholders approve the proposal put forward by Saramac to provide funding to Axiom by way of subscriptions for shares, options and notes (Saramac Proposal); and
 - (ii) omits sections which describe or relate to clauses 6 and 11.2 of the agreement entered into between Pivot Group Pty Ltd (**Pivot**) and Axiom on 3 October 2005 (which was extended by the parties on 27 October 2005 and on 2 December 2005) (**Pivot Agreement**) except to the extent that they describe the orders and the effect of the orders of the Panel in paragraphs 2, 3 and 4 below; and
 - (b) not dispatch the draft Meeting Documents or call an Extraordinary General Meeting for the purpose of approving either the Saramac Proposal or the alternative proposal put by Pivot until Axiom has received written confirmation from the Panel that the mark up provided to the panel under paragraph (a) has been approved by the Panel;
2. the following clause of the Pivot Agreement be void and of no effect as of the date of this order:

6. NO FURTHER DEALINGS

From the execution of this Agreement unless the Resolutions are not passed and Completion, therefore, cannot occur the Company will not negotiate or enter into discussions with any other party with respect to any proposal in respect of the Company

Takeovers Panel

Reasons for Decision - Axiom Properties Limited

which is either similar in nature to the subject matter of this Agreement or otherwise relates to the sale of an interest in Port Geographe or the issue of securities by the Company.

3. the following clause of the Pivot Agreement be of no effect to the extent that it inhibits the Axiom directors carrying out their fiduciary duties in making a recommendation to the Axiom shareholders between the Saramac Proposal and Pivot proposal:

11.2 Each party will do all things and execute all further documents necessary to give full effect to this Agreement.

4. Pivot not to:

- (a) seek to or threaten to enforce any of the rights which but for these orders it might otherwise have had under; or
- (b) seek any damages as a consequence of any potential breach of,

the following clauses:

clause 11.2 of the Pivot Agreement to the extent that any such action relates to or is connected with the Axiom directors carrying out their fiduciary duties in making a recommendation to the Axiom shareholders between the Saramac Proposal and Pivot proposal; and

clause 6 of the Pivot Agreement.

Carol Buys

President of the Sitting Panel

Dated 9 January 2006