



**In the matter of Axiom Properties Limited 02  
[2006] ATP 5**

**Catchwords:**

*declined to commence proceedings; misleading and deceptive statements; media statements; notice of meeting; rival funding proposals; corrective statements; last and final; options; commitment to exercise all of options issued; future intentions*

*Saramac Nominees Pty Ltd; Pivot Group Pty Ltd; Axiom Properties Limited*

*Corporations Act 2001 (Cth), sections 602(a), 657A, 657C, 657D and 657E*

*The Australian Securities and Investments Commission Act 2001 (Cth)*

**These are the Panel's reasons for not commencing proceedings following the application by Saramac Nominees Pty Ltd for a declaration of unacceptable circumstances in relation to statements made by Pivot Group Pty Ltd regarding its funding proposal for Axiom Properties Limited.**

**SUMMARY**

1. These are the Panel's reasons for declining to commence proceedings in relation to an application (the **Application**) to the Panel from Saramac Nominees Pty Ltd (**Saramac**) on 17 February 2006 in relation to the affairs of Axiom Properties Limited (**Axiom**). Saramac sought a declaration of unacceptable circumstances, interim orders and final orders.
2. Saramac complained about a number of statements which had been reported in the media or were contained in a media release published by Pivot Group Pty Ltd (**Pivot**) on 10 February 2006 when Pivot announced variations in the funding proposal to be put to Axiom shareholders along with a rival proposal by Saramac. Saramac contended that the statements gave a misleading impression of the Pivot funding proposal, the rival proposal and other related topics.
3. The Panel noted that, in aggregate, the submissions of Saramac were not entirely without merit. However, the Panel considered that there was no reasonable prospect that the risk of being misled by the statements was sufficient to give rise to unacceptable circumstances.
4. The Panel considered that while it was disappointed that some spokespersons of Pivot had chosen words in some of the statements that were capable of being misconstrued, on balance, and when taken in context of the full text of each of the statements, and the forthcoming notice of meeting, Axiom shareholders were unlikely to be misled or materially confused.

## THE PROCEEDINGS

### The Panel & Process

5. The President of the Panel appointed Carol Buys (sitting President), Irene Lee (sitting Deputy President) and Andrew Lumsden as the sitting Panel (the **Panel**) for the proceedings (the **Proceedings**) arising from the Application.
6. The Panel adopted the Panel's published procedural rules for the purposes of the Proceedings.

### Background

#### *Pivot Proposal*

7. On 3 October 2005, Pivot entered into a heads of agreement with Axiom in which Axiom agreed, subject to shareholder approval, to issue to Pivot shares, convertible notes and options (the **Pivot Agreement**). The Pivot Agreement was varied by the parties on 2 December 2005, 19 January 2006 and 15 February 2006.
8. Accordingly under the current Pivot Agreement, Pivot agreed to subscribe for:
  - (a) 25,000,000 Axiom shares at 4 cents per share (to raise \$1,000,000 for Axiom);
  - (b) 100,000,000 partly-paid Axiom shares at 4 cents per partly paid share payable in installments to raise \$4,000,000; and
  - (c) 140,000,000 options exercisable at 20 cents per option (**Pivot Options**) (potentially to raise up to \$28,000,000),(the **Pivot Proposal**).
9. The obligations of Pivot and Axiom are conditional on, (among other matters) the approval of various resolutions by Axiom shareholders.
10. Full implementation of the Pivot Proposal would raise a total of \$33,000,000 (this assumes the full exercise of the Pivot Options).

#### *Saramac Proposal*

11. On 10 November 2005, Axiom announced to Australian Stock Exchange Limited (**ASX**) that it had received a proposal from Saramac in which Axiom was to, subject to shareholder approval, issue to Saramac shares, convertible notes and options. Following a number of revisions and the entry into an agreement between Saramac and Axiom on 7 February 2006 Saramac has agreed to subscribe for:
  - (a) 25,000,000 Axiom shares at 6 cents per share (to raise \$1,500,000 for Axiom);
  - (b) 85,000,000 partly-paid Axiom shares at 6 cents per partly paid share payable in installments to raise \$5,100,000; and
  - (c) 50,000,000 options exercisable at 10 cents per option (**Saramac Options**) (potentially to raise up to \$5,000,000),(the **Saramac Proposal**).
12. The obligations of Saramac and Axiom are conditional on, (among other matters) the approval of various resolutions by Axiom shareholders.

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13. Full implementation of the Saramac Proposal would raise \$11,600,000 (this assumes the full exercise of the Saramac Options).

#### *Notice of Meeting and Explanatory Memorandum*

14. Item 7 of section 611 permits acquisitions of interests such as those that Pivot or Saramac might acquire if Axiom shareholders approve the allotment of shares. Axiom has prepared a draft Notice of Meeting and Explanatory Memorandum (**draft Meeting Documents**) which were lodged with ASX and ASIC on 16 February 2006.

#### **Application**

15. The Application alleged that Pivot had made a number of statements in the media concerning the Pivot Proposal and Saramac Proposal which were misleading and deceptive and in breach of the Corporations Act (*Cth*) 2001 (the **Corporations Act**)<sup>1</sup> (including section 602(a)) and the Australian Securities and Investments Commission Act 2001 (*Cth*). Among other things, Saramac sought orders for the issue of corrective statements.

## **DISCUSSION**

16. The Panel considered the statements complained of by Saramac in the context of:
  - (a) the full text of the relevant material;
  - (b) the information which had been provided; and
  - (c) the information about to be provided to Axiom shareholders (the Panel noted that it expected that the directors of Axiom would present all relevant information clearly and completely).
17. The Panel also noted that the statements were part of ongoing media commentary from parties in relation to both the Saramac Proposal and the Pivot Proposal. Saramac had opportunities to comment on any statements it had concerns about in that forum.

#### **Future intentions and agreement statements**

18. Saramac submitted that the following statement made on 8 February:

*“Peter Laurance’s Pivot Group said yesterday it was reluctant to revise its bid for Port Geographe developer Axiom Properties because it was concerned it would further delay the rival offers for the company being put to shareholders”*

was misleading and deceptive because it was inconsistent with a further statement made by Pivot in a media release published on 10 February 2006 in which Pivot announced a variation to its proposal.

19. Saramac further submitted that the announcement made by Pivot in the 10 February media release that *“Pivot Group today varied its re-financing agreement with Axiom Properties Limited”* was false at the time because agreement was not reached until Pivot and Axiom executed a variation to the Pivot Agreement on 15 February.

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<sup>1</sup> Statutory references in these reasons, unless otherwise noted, are to provisions of the Corporations Act.

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20. The Panel did not consider, on balance, that the statements were misleading and likely to confuse Axiom shareholders. The Panel considered that it was clear from the 10 February media release that Pivot had at that time only made an offer to Axiom and that an agreement had not yet been executed. In relation to the statement made on 8 February, the Panel did not consider that Mr Laurance had been quoted as making a definitive or “last and final” statement. Rather the statements had some reasonable words of caution and possibility of change.

#### **\$33 million commitment statements**

21. Saramac submitted that the following quote of Pivot executive director Ben Laurance:

*“...the deal represented a \$33 million commitment by Pivot in the listed company, including an offer to increase the strike price of 140 million options exercisable at between January 2007 and January 2009 to 20 cents each or \$28 million in total”*

was misleading because it implied that Pivot had bound itself to exercise the options at some time during their exercise period. Saramac further submitted that a description by Pivot in the 10 February media release of the option component of its proposal also implied that the Pivot Options would be exercised.

22. The Panel considered that the information that would be provided to shareholders would be adequate to ensure that Axiom shareholders did not mistakenly believe that Pivot had bound itself to exercise all of the Pivot Options and subscribe the full \$33 million regardless of circumstances.
23. The Panel considered that the relevant statements reflected a certain lack of care in Mr Laurance’s use of language and that in isolation, the words could be construed the way that Saramac submitted.

The Panel considered that Pivot could have expressed itself more clearly.

However, in light of the whole article, and other relevant material, the Panel considered that Axiom shareholders were unlikely to have been misled or confused by the statements in the manner submitted by Saramac.

24. The Panel noted that in general directors should exercise particular care when describing technical matters such as the Pivot Options.

#### **Delay statements**

25. Saramac submitted that the following statement in the 10 February media statement:

*“Pivot Group is concerned that if the Pivot/Macquarie stoush over Axiom continues, Axiom shareholders may not get a timely opportunity to vote for the future of their company”*

was misleading and deceptive because it implied that Saramac had delayed the proposed Axiom shareholders meeting.

26. The Panel did not consider that the Axiom shareholders would be misled or confused by this statement in the manner submitted by Saramac.

#### **Vision statements**

27. Mr Peter Laurance was quoted in the 10 February media release as saying:

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*“Pivot has a much grander vision for the company’s future, based on the development opportunities it intends to offer Axiom on favourable terms...”*

28. Saramac submitted that the “development opportunities” should be disclosed and the references to “on favourable terms” were vague and ambiguous and were likely to mislead or deceive.
29. The Panel did not consider that the Axiom shareholders would be misled or confused by this statement.

#### Financing statements

30. Saramac submitted that the following statement made by Pivot in the 10 February media release:

*“I am sure shareholders will take account of the fact that Pivot Group is putting its own money into Axiom, whereas Macquarie are conducting a banking exercise to improve their existing income stream from the Port Geographe project, of which they already own 60%...”*

and a statement in which Ben Laurance was quoted as saying that:

*“This is our money not OPM, other people’s money”*

was misleading and deceptive as it implied that, for example, Peter Laurance and Ben Laurance were personally providing the funding for the Pivot Proposal and Macquarie Bank Ltd (not Saramac) was providing a “traditional debt funding package”.

31. The Panel did not consider that the Axiom shareholders would be misled by these statements. The draft Meeting Documents adequately set out that Pivot (not the Laurance’s as individuals) was responsible for providing funds under the Pivot Proposal and that Saramac (a company 50% owned by Gatesun Pty Limited (100% owned by Macquarie Bank Ltd) and 50% by Seaport Pty Ltd (100% owned by Luke Saraceni)) was responsible for providing funds under the Saramac Proposal.

#### General misinformation

32. Saramac submitted that the following statement made by Pivot in the 10 February media release:

*“We think some interested parties have thus far been single-minded about whether the share price is 2.6 cents as it was when Pivot first made its offer, or 4 cents which was Macquarie’s opening bid which Pivot matched, or 6 cents partly-paid, or 10 cents in the case of Macquarie’s options”*

was misleading and deceptive as it inaccurately compared the terms of the competing offers and that the statement implied that the Pivot Proposal is more favourable than the Saramac Proposal.

33. The Panel considered that, in the context of the information to be provided to Axiom shareholders, it would be unlikely that the Axiom shareholders would be misled in the manner submitted by Saramac.

## **DECISION**

### **Decline to commence proceedings**

34. For the reasons set out above, the Panel considered that there was no reasonable prospect the statements would give rise to unacceptable circumstances and therefore, under Regulation 20 of the Australian Securities and Investments Commission Regulations 2001, declined to commence proceedings in response to the Application.

### **Orders**

35. As the Panel did not commence proceedings, it made no orders as to costs or otherwise.
36. As the Panel did not commence proceedings it did not make interim orders.

**Carol Buys**

**President of the Sitting Panel**

**Decision dated 22 February 2006**

**Reasons published 27 February 2006**