



Tuesday, 10 January 2006

Axiom Properties Limited - Decision

The Takeovers Panel (**Panel**) advises that it has considered the application by Pivot Group Pty Ltd (**Pivot**), and the application by Saramac Nominees Pty Ltd (**Saramac**) in relation to the affairs of Axiom Properties Limited (**Axiom**) (see [TP05/89](#) and [TP06/01](#)).

The applications

The Pivot application related to a draft Notice of Meeting and Explanatory Memorandum relating to resolutions seeking shareholder approval in respect of two alternative proposals to provide funds to Axiom for its Port Geographe project. One proposal has been put forward by Pivot (the **Pivot Proposal**) and the other by Saramac (the **Saramac Proposal**). Pivot alleged the draft Notice of Meeting and Explanatory Memorandum gives rise to unacceptable circumstances because it does not provide Axiom shareholders with:

- (a) sufficient information to enable them to assess the merits of the Pivot Proposal 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.

The Saramac application related to an agreement between Axiom and Pivot (the **Pivot Agreement**) regarding the Pivot Proposal which Saramac alleged:

- (a) contains a “no shop and no talk” provision that constitutes unacceptable circumstances because the Pivot Agreement 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; and
- (b) Pivot’s actions in relation to the Pivot Agreement (ie enforcing or threatening to enforce the “no shop and no talk” provision) constitute unacceptable circumstances.

The “no shop and no talk” provision in the Pivot Agreement, in summary, seeks to restrict Axiom from negotiating or entering into discussions with third parties in relation to (amongst other things) proposals similar to the Pivot Proposal for the

period from entry into the Pivot Agreement until the resolutions to be put to the Axiom shareholders regarding approval of the Pivot Proposal are not passed.

Background

Saramac Proposal

Pursuant to the Saramac Proposal, Saramac would be entitled to nominate 4 directors to the Axiom Board. We note that currently that would be a majority.

Pivot Proposal

Pursuant to the Pivot Agreement, Pivot would be entitled to nominate 3 directors to the Axiom Board.

The Port Geographe Joint Venture

Axiom is party to a joint venture (the **PGJV**) to complete the development of the Port Geographe Canal Project in Busselton, Western Australia.

There are two participants in the PGJV, MacSea Nominees Pty Ltd (**MacSea**) and Tallwood Nominees Pty Ltd (**Tallwood**) (a wholly owned subsidiary of Axiom). 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.

MacSea and Saramac are both owned in equal shares by interests associated with Macquarie Bank Limited and Mr Luke Saraceni.

There are various agreements which constitute and relate to the PGJV between different parties.

Decision

The Panel considered that the following give rise to unacceptable circumstances:

- (a) the failure of the draft Notice of Meeting and Explanatory Memorandum to disclose adequately the nature and substance of a potentially material conflict of interest which may arise for the directors of Axiom nominated by Saramac; and
- (b) the absence of a "fiduciary exception" as described in the Panel's [Guidance Note 7 - Lock-up Devices](#), from the Pivot Agreement. Such a "fiduciary exception" would allow:
 - (i) Axiom shareholders to choose between the Pivot and Saramac proposals 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 is as similarly binding on all parties as is the Pivot Agreement.

When making its declaration of unacceptable circumstances in relation to adequacy of disclosure in the draft Notice of Meeting and Explanatory Memorandum, 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 exists and had been inadequately disclosed and described.

Orders

The Panel made orders requiring Axiom to provide to the Panel a revised draft Notice of Meeting and Explanatory Memorandum addressing those matters the Panel was concerned with for the Panel's approval and restraining Axiom from dispatching the draft Notice of Meeting and Explanatory Memorandum to shareholders until receipt of the Panel's approval.

The Panel also made orders that have the effect of cancelling the "no shop and no talk" provision in the Pivot Agreement and restraining Pivot from seeking, or threatening, to enforce the provisions of, or seeking any damages as a consequence of any alleged breach of, certain provisions of the Pivot Agreement (including the "no shop and no talk" provision) as a consequence of the Axiom directors carrying out their fiduciary duties in making a recommendation between the Pivot and Saramac proposals.

The Panel will publish its reasons for this decision in due course on its website www.takeovers.gov.au.

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