



Australian Government

Takeovers Panel

MEDIA RELEASE

No: TP22/38

Monday, 9 May 2022

Virtus Health Limited 05 – Panel Declines to Conduct Proceedings

The Panel has declined to conduct proceedings on an application dated 29 April 2022 from Virtus Health Limited (**Virtus**) in relation to its affairs.

Virtus is the subject of competing control proposals for all its fully paid ordinary shares from both BGH Capital Pty Ltd¹ (**BGH Bidders**) and CapVest Partners LLP (**CapVest**) which have been the subject of several Panel applications.²

This application (see [TP22/35](#)) concerned BGH Bidders' disclosure in its bidder's statement lodged with ASIC on 6 April 2022 (**BGH BS**) and the adequacy of their supplementary bidder's statement (**BGH Supplementary BS**) in response to a subsequent increase in CapVest's proposal announced on 11 April 2022 (**Revised CapVest Proposal**).

Among other things, the Revised CapVest Proposal increased the price under CapVest's concurrent scheme and bid proposals to:

- \$8.15 per share under CapVest's scheme of arrangement (an increase of \$0.02 per share) and
- \$8.10 per share under CapVest's takeover bid (an increase of \$0.12 per share),

less the value of any distributions or dividends other than the \$0.12 interim dividend declared by Virtus on 22 February 2022.

¹ in its capacity as investment manager or adviser to the constituent entities of BGH Capital Fund I. The Bid is being made by Oceania Equity Investments Pty Ltd (as trustee for the Oceania Trust) and A.C.N. 658 293 166 Pty Ltd, each currently wholly-owned by BGH Capital Fund I

² See [TP22/15 Virtus Health Limited – Declaration of Unacceptable Circumstances and Orders](#), [TP22/22 Virtus Health Limited 02 – Panel Declines to Conduct Proceedings](#), [TP22/30 Virtus Health Limited 03 – Panel Accepts Undertaking](#), [TP22/036 – Virtus Health Limited 04R - Panel Declines to Conduct Proceedings](#)

Also on 11 April 2022, Virtus sent a letter to BGH Bidders expressing concerns with various deficiencies in the BGH BS (**Virtus Letter**), to which BGH Bidders responded on 14 April 2022.³

On 20 April 2022, BGH Bidders announced the dispatch to shareholders of the BGH BS, which was unamended from the version lodged on 6 April 2022 and did not address any deficiencies asserted in the Virtus Letter or refer to the Revised CapVest Proposal.

The following day, BGH Bidders lodged the BGH Supplementary BS, which referred to the Revised CapVest Proposal but, in Virtus's opinion, did not appropriately address the concerns in the Virtus Letter and further omitted information material to the decision of Virtus shareholders whether to accept the bid.

On 27 April 2022, Virtus learned that BGH Bidders had received some acceptances of their bid.

Virtus submitted (among other things) that:

- It was unacceptable for BGH Bidders not to have issued a supplementary bidder's statement promptly after they became aware of the issues raised in the Virtus Letter and the Revised CapVest Proposal.
- BGH Bidders' failure to dispatch a replacement bidder's statement, rather than the defective BGH BS followed by the BGH Supplementary BS (which did not appear to have been sent to shareholders), was contrary to ASIC guidance and exacerbated the unacceptable circumstances.
- The BGH Supplementary BS was itself misleading and did not effectively correct the defects in the BGH BS, which further contributed to the unacceptable circumstances.

The Panel was concerned that BGH Bidders had dispatched the BGH BS without first lodging and sending with it a supplementary bidder's statement to clearly disclose the implications of the Revised CapVest Proposal on the section of the BGH BS that compared the BGH bid favourably to the previous proposal from CapVest.

However, the Panel considered that:

- On 22 April 2022, Virtus released a letter to the ASX that was despatched to shareholders making it clear that the Virtus board considered the Revised CapVest Proposal to be superior to the BGH bid, addressing the principal disclosure deficiency. If Virtus considered shareholders required it, Virtus

³ On 13 April 2022, BGH Bidders sent an email to Virtus stating (among other things) it would respond to Virtus's concerns at some stage the next day. Also on 13 April 2022, Virtus provided BGH Bidders with a copy of an amended and restated Transaction Implementation Deed between Virtus and CapVest (signed that day)

could have engaged with them in other ways, both before and after dispatch of the BGH BS.

- Virtus did not apply to the Panel until 9 days after dispatch of the BGH BS and some of the concerns in Virtus's application, in particular, the comparison of the BGH bid with the Revised CapVest Proposal in the BGH BS, were not previously raised in the Virtus Letter or other correspondence.

The Panel noted that BGH Bidders had, at least, lodged the BGH Supplementary BS before shareholders would have received the BGH BS. It was not clear to the Panel that earlier despatch with the BGH BS would have made any difference (given the information on the Revised CapVest Proposal provided to shareholders, albeit not by post).

The Panel considered that many of Virtus's concerns with BGH Bidders' disclosure could sufficiently be addressed by Virtus in its Target's Statement. The Panel noted that, since making the application, Virtus had issued its Target's Statement, with ASIC relief from the requirement to post. Given that, the Panel considered it would be anomalous to require BGH Bidders to post a supplementary or replacement bidder's statement that would likely contain less information regarding the relative benefits of the Revised CapVest Proposal and the BGH bid than the Target's Statement.

In view of the matters above, and despite its concerns, the Panel concluded that there was no reasonable prospect that it would make a declaration of unacceptable circumstances. Accordingly, the Panel declined to conduct proceedings.

The sitting Panel was Teresa Dyson, Richard Hunt (sitting President) and James Stewart.

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

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