



Australian Government

Takeovers Panel

MEDIA RELEASE

No: TP22/10

Wednesday, 2 February 2022

Virtus Health Limited – Panel Receives Application

The Panel has received an application from BGH Capital Pty Ltd in its capacity as manager or adviser to each of the constituent entities of the BGH Capital Fund I (**BGH**) in relation to Virtus Health Limited (ASX: **VRT**). VRT is the subject of competing control proposals made by BGH and CapVest Partners LLP (**CapVest**).

Details of the application, as submitted by BGH and from public announcements, are below.

A sitting Panel has not been appointed at this stage and no decision has been made whether to conduct proceedings. The Panel makes no comment on the merits of the application.

Details

On 13 December 2021, VRT received a non-binding, indicative proposal from BGH to acquire 100% of the outstanding share capital in VRT by way of a scheme of arrangement at \$7.10 per VRT share (**BGH Proposal**).

On 14 December 2021, VRT announced the BGH Proposal, advising that the VRT Board had commenced assessment of the BGH Proposal and that shareholders did not need to take any action at that time.

On 20 January 2022, VRT announced that:

- it had received a non-binding, indicative proposal from CapVest to acquire control of VRT via an acquisition of 100% of the share capital in VRT by way of a scheme of arrangement at \$7.60 per VRT share or an acquisition of at least 50.1% of the share capital in VRT by way of an alternative transaction structure, (such as an off-market takeover bid) at \$7.50 per VRT share (together, the **CapVest Proposal**)
- it had entered into (and attached a copy of) a process deed with CapVest (**Process Deed**) as the basis on which to progress the CapVest Proposal. The Process Deed was described to include (among other things) “*standard deal*”

protection mechanisms (including break fee consistent with Takeovers Panel guidance, no-shop, no-talk, no-due diligence, notification and matching right provisions)” and

- the VRT Board had “*determined that the CapVest Proposal is attractive for shareholders in the context of a change of control transaction and superior to the BGH Proposal*” and that, subject to agreeing an implementation deed with CapVest, the Board intended to unanimously recommend the CapVest Proposal, subject to the view of an independent expert and in the absence of a superior proposal.

BGH submits, among other things, that entry into the Process Deed “*constitutes unacceptable circumstances on the basis that it undermines the operation of, and VRT and CapVest have failed to meet the minimum standard of conduct required of participants to preserve, an efficient, competitive and informed market for the acquisition of control of VRT.*”

In particular, BGH submits that the following matters have had a “*significant adverse impact on competition for control of VRT*”:

- “*the premature entry into the Process Deed, after VRT had indicated that it would revert to BGH following the BGH Proposal and without VRT attempting to meaningfully engage with BGH or otherwise facilitating an effective auction process for VRT*”
- the Process Deed provides CapVest with “*an effective 10-11 week exclusivity period*”, including a period of “*absolute exclusivity*” as the ‘no talk’ and ‘no due diligence’ restrictions do not contain a fiduciary out for VRT to respond to any competing or superior proposal until 15 business days after CapVest is given access to a virtual data room
- the inclusion of other lock up arrangements in the Process Deed (which require VRT to provide CapVest with any non-public information that it has provided to another bidder and a “*recurring right*” given to CapVest to match any superior control proposal made for VRT for the duration of the exclusivity period) and
- the payment of a \$4 million break fee to CapVest “*where VRT enters into an agreement to give effect to a superior proposal, or recommends a takeover bid made for VRT, during a period of approximately 6 months after the date of the Process Deed*”, which is payable “*regardless of whether CapVest ultimately delivers a binding proposal and regardless of the quantum of actual costs incurred by CapVest in pursuing the CapVest Proposal*” (**Competing Proposal Break Fee**). This is separate to a \$2 million break fee which is payable to CapVest if it delivers a binding proposal to VRT but VRT elects not to proceed (**Binding Proposal Break Fee**).¹

¹ The Process Deed provides, in effect, that if both the Competing Proposal Break Fee and the Binding Proposal Break Fee are triggered, the total amount payable by VRT to CapVest is \$4 million

BGH does not seek any interim orders. BGH seeks final orders, including that the Process Deed be amended to the effect that:

- the 'absolute exclusivity provisions' be removed, such that the 'no-talk' and 'no due diligence' provisions are subject to a customary fiduciary out throughout their duration
- certain other lock up arrangements (as described above) be removed and
- the Competing Proposal Break Fee be removed, or failing that, amended such that it would operate as a cost recovery provision reflective of the actual and reasonable third party adviser costs incurred by CapVest, up to a cap of \$2 million.

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