



Australian Government

Takeovers Panel

MEDIA RELEASE

No: TP22/15

23 February 2022

Virtus Health Limited – Declaration of Unacceptable Circumstances and Orders

The Panel has made a declaration of unacceptable circumstances (Annexure A) and final orders (Annexure B) in relation to an application dated 2 February 2022 by 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 the affairs of Virtus Health Limited (ASX: VRT) (**Virtus**) (see [TP22/10](#)).

Background

On 14 December 2021, Virtus announced that:

- it had received an unsolicited, non-binding indication of interest from BGH to acquire all the issued shares in Virtus by way of scheme of arrangement at \$7.10 cash per share and
- BGH had acquired a 9.99% interest in Virtus, held by Oceania Equity Investments Pty Ltd, a related entity of BGH, and had entered into a total return swap that was yet to settle, representing a further 10% interest in Virtus.

On 17 December 2021, representatives of BGH met with a representative of Virtus in order to present further detail in relation to BGH's proposal. A representative of Virtus subsequently informed BGH that Virtus would consider BGH's proposal and reconnect with BGH in mid-January 2022, however, this did not eventuate.

On 20 January 2022, Virtus announced that it had:

- received a non-binding, indicative proposal from CapVest Partners LLP (**CapVest**) to acquire all the issued shares in Virtus by way of a scheme of arrangement at \$7.60 cash per share. Virtus stated "*CapVest has also indicated it is willing to proceed with an alternative transaction structure which only requires acceptance by 50.1% of Virtus shareholders, such as an off-market takeover bid with a 50.1% minimum acceptance condition, offering \$7.50 cash per share*" and

- entered into a process deed with CapVest (**Process Deed**), attached to the announcement, various aspects of which are summarised below.

The Process Deed:

- provides for an exclusivity period, which applies from the date of the Process Deed “to the date that is 40 Business Days after the Data Room Open Date” (**Exclusivity Period**)
- contains a number of exclusivity arrangements that apply during the Exclusivity Period, including:
 - no shop, no talk and no due diligence provisions
 - a notification obligation on the part of Virtus to provide to CapVest (among other things) details of a person who makes any approach and all materials terms and conditions of the approach including as to value and price and
 - a matching right which applies to Virtus proposing to enter into an agreement to give effect to a competing proposal
- includes an obligation on the part of Virtus to provide to CapVest any non-public information about its business or affairs that is provided or made available to any person in connection with a competing proposal and which has not previously been provided to CapVest (**Non-Public Information Provision**)
- includes a fiduciary carve out (**Fiduciary Out**) which applies to the no talk and no due diligence restrictions from “the date which is 15 Business Days after the Data Room Open Date” and
- includes break fee arrangements for the benefit of CapVest in the amount of:
 - \$2 million in circumstances where before a specified date CapVest has given to Virtus (among other things) an implementation agreement which Virtus does not execute within a specified time period or
 - \$4 million in circumstances where (among other things) Virtus has received a competing proposal before a specified date and by a later specified date has entered into a binding agreement to give effect to it.

Virtus did not receive any competing proposal during the period when the no talk and no due diligence provisions were not subject to the Fiduciary Out (including any revised proposal from BGH).

Declaration

The Panel considered that (in summary) the following aspects of the exclusivity arrangements in the Process Deed, taken together, have an anti-competitive effect:

- the Fiduciary Out does not apply during a period of approximately 1 month
- the effectiveness of the Fiduciary Out is unclear in certain circumstances and is limited by the notification obligation
- the Non-Public Information Provision is not subject to any exception and
- the duration of the exclusivity arrangements and the fact that they were granted at the indicative proposal stage where there is no guarantee that Virtus shareholders would receive a binding bid.

The Panel considered that the exclusivity arrangements, considered as a whole, and having regard to the factual matrix of this matter, inhibit or are likely to inhibit the acquisition of control over voting shares in Virtus taking place in an efficient, competitive and informed market.

Accordingly, the Panel considered that the circumstances were unacceptable.

The Panel did not consider it against the public interest to make the declaration, and in making it had regard to the matters in s657A(3).

Orders

The Panel has made orders that (in summary):

- Virtus and CapVest are prohibited from entering into (in effect) a scheme implementation agreement to acquire Virtus, and CapVest is prohibited from making a takeover bid for Virtus, on and from the date of the Panel's orders until the expiry of 10 business days from the date Virtus makes the disclosure set out below
- certain of the exclusivity arrangements in the Process Deed, including the no-talk and no due diligence restrictions and the Non-Public Information Provision, will be of no force and effect (with effect from 8:00pm (Melbourne time) on the date that is 2 business days after the date of the Panel's orders) unless the Process Deed is amended to ensure it is clear that the Fiduciary Out is effective and that the Non-Public Information Provision contains an exception and
- Virtus must disclose the material terms of the Process Deed as affected by the Panel's orders and disclose the "Data Room Open Date".

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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Australian Government

Takeovers Panel

ANNEXURE A

CORPORATIONS ACT SECTION 657A

DECLARATION OF UNACCEPTABLE CIRCUMSTANCES

VIRTUS HEALTH LIMITED

CIRCUMSTANCES

1. On 14 December 2021, Virtus Health Limited (**Virtus**) announced that:
 - (a) it had received an unsolicited, non-binding indication of interest from BGH Capital Pty Ltd (**BGH**) to acquire all the issued shares in Virtus by way of scheme of arrangement at \$7.10 cash per share and
 - (b) BGH had acquired a 9.99% interest in Virtus, held by Oceania Equity Investments Pty Ltd, a related entity of BGH, and had entered into a total return swap with UBS that was yet to settle, representing a further 10% interest in Virtus.
2. On 17 December 2021, representatives of BGH met with a representative of Virtus in order to present further detail in relation to BGH's proposal. On 22 December 2021, a representative of Virtus informed BGH that Virtus would consider BGH's proposal and reconnect with BGH in mid-January 2022. However, Virtus did not revert to BGH with any further material communications in relation to BGH's proposal.
3. On 20 January 2022, Virtus announced that it had:
 - (a) received a non-binding, indicative proposal from CapVest Partners LLP (**CapVest**) to acquire all the issued shares in Virtus by way of a scheme of arrangement at \$7.60 cash per share. Virtus stated "*CapVest has also indicated it is willing to proceed with an alternative transaction structure which only requires acceptance by 50.1% of Virtus shareholders, such as an off-market takeover bid with a 50.1% minimum acceptance condition, offering \$7.50 cash per share*" and
 - (b) entered into a process deed with CapVest (**Process Deed**), attached to the announcement, various aspects of which are summarised below.

4. The Process Deed provides for an exclusivity period, which applies from the date of the Process Deed “to the date that is 40 Business Days after the Data Room Open Date” (**Exclusivity Period**). The Data Room Open Date is defined in the Process Deed to mean “the first Business Day after the date on which Virtus gives notice to CapVest in accordance with clause 2.4(a) and such data room is open and made available to CapVest” (**Data Room Open Date**).
5. The Process Deed contains a number of exclusivity arrangements that apply during the Exclusivity Period, including:
 - (a) no shop, no talk and no due diligence provisions
 - (b) a notification obligation, with the obligation on Virtus to provide to CapVest (among other things) details of the person making the approach and “all material terms and conditions of, and the nature of, the Competing Proposal, including as to value and price” and
 - (c) a matching right, which applies to Virtus proposing to enter into an agreement to give effect to a Competing Proposal during the Exclusivity Period.
6. A fiduciary carve out (**Fiduciary Out**) applies to the no talk and no due diligence restrictions from “the date which is 15 Business Days after the Data Room Open Date”.
7. A break fee of \$2 million applies if before the end of a period defined as from the date of the Process Deed to a date that is 10 business days after the date on which the Exclusivity Period ends (**Diligence Period**), CapVest gives to Virtus (among other things) an implementation agreement and “Virtus does not, within 4 Business Days of receiving the executed agreement, execute and return the agreement to CapVest”.
8. A break fee of \$4 million applies if (among other things) Virtus has received a competing proposal during the Diligence Period and on or before the date that is four months after the last day of the Diligence Period (**End Date**) has entered into “any legally binding agreement to give effect to a Superior Proposal” or “a person (either alone or with other persons) has made, or has publicly announced their proposal to make, a takeover bid under Chapter 6 of the Corporations Act for ordinary shares in” Virtus and such a takeover bid has been recommended by the Virtus board.
9. Under the Process Deed, Virtus must promptly provide to CapVest any non-public information about the business or affairs of the Virtus Group that is provided or made available to any person in connection with an actual, proposed or potential Competing Proposal and which has not previously been provided to CapVest (**Non-Public Information Provision**).
10. The date on which the Data Room Open Date occurred, being 31 January 2022 (and accordingly the date on which the Fiduciary Out came into effect, being 21

February 2022), was unclear as it was not publicly disclosed by Virtus to the market.

11. The Panel considers that the following aspects of the exclusivity arrangements in the Process Deed, taken together, have an anti-competitive effect:
 - (a) the Fiduciary Out does not apply during the period from 20 January 2022 (being the date the Process Deed was entered into) to 20 February 2022
 - (b) the effectiveness of the Fiduciary Out is unclear in circumstances where CapVest matches any genuine Competing Proposal
 - (c) the notification obligation may increase the anti-competitive effect of the no-talk restriction and limit the effectiveness of the Fiduciary Out
 - (d) the Non-Public Information Provision was not subject to any exception which would allow for the protection of bidder sensitive information from CapVest in exceptional circumstances
 - (e) the Exclusivity Period, the Diligence Period and the End Date mean some of the exclusivity arrangements are in place for a number of months and
 - (f) the exclusivity arrangements are granted in respect of an indicative proposal and there is no guarantee that Virtus shareholders would receive a binding bid at the indicative price under CapVest's proposal or at all.

EFFECT

12. The Panel considers that the exclusivity arrangements, considered as a whole, and having regard to the factual matrix of this matter, inhibit or are likely to inhibit the acquisition of control over voting shares in Virtus taking place in an efficient, competitive and informed market.

CONCLUSION

13. It appears to the Panel that the circumstances are unacceptable circumstances:
 - (a) having regard to the effect that the Panel is satisfied they have had, are having, will have or are likely to have on:
 - (i) the control, or potential control, of Virtus or
 - (ii) the acquisition, or proposed acquisition, by a person of a substantial interest in Virtus
 - (b) further or in the alternative, having regard to the purposes of Chapter 6 set out in section 602 of the *Corporations Act 2001* (Cth) (**Act**).

14. The Panel considers that it is not against the public interest to make a declaration of unacceptable circumstances. It has had regard to the matters in section 657A(3) of the Act.

DECLARATION

The Panel declares that the circumstances constitute unacceptable circumstances in relation to the affairs of Virtus.

Tania Mattei
General Counsel
with authority of Richard Hunt
President of the sitting Panel
Dated 23 February 2022



Australian Government

Takeovers Panel

ANNEXURE B

CORPORATIONS ACT SECTION 657D ORDERS

VIRTUS HEALTH LIMITED

The Panel made a declaration of unacceptable circumstances on 23 February 2022.

THE PANEL ORDERS

1. Virtus and CapVest (and its Associates) are prohibited from entering into any legally binding agreement to give effect to a Relevant Transaction, and CapVest is prohibited from announcing an intention to make, or making, a takeover bid for Virtus, on and from the date of these orders until the expiry of 10 Business Days after the date that the ASX announcement is made under Order 3.
2. Each of clauses 4.4 (No talk), 4.5 (No due diligence), 4.6 (Fiduciary carve out to the no talk and no diligence requirements), 4.7 (Non-public information) and 4.11 (Notification obligation) of the Process Deed between CapVest and Virtus announced by Virtus on 20 January 2022 (**Process Deed**) are of no force and effect as of 8:00pm (Melbourne time) on the date that is 2 Business Days after the date of these orders unless:
 - (a) the Process Deed is amended in a form acceptable to the Panel and including any necessary consequential amendments (**Amended Process Deed**) to ensure that:
 - (i) it is clear that the 'fiduciary out' in clause 4.6 is effective to create an exception to each of clauses 4.4 and 4.5 (in the context of the board of Virtus determining that it is in the best interests of Virtus shareholders for the board of Virtus to facilitate, or continue to facilitate, a Competing Proposal notwithstanding that the relevant Competing Proposal may not be more favourable to Virtus shareholders than any counter proposal made by CapVest), including but not limited to deleting or amending clause 4.11 so that it does not oblige Virtus to notify CapVest of a Competing Proposal until after the board of Virtus has determined whether the 'fiduciary out' in clause 4.6 applies and

- (ii) the requirement for Virtus to provide information to CapVest under clause 4.7 is subject to an exception which allows for the protection of bidder sensitive information from CapVest in exceptional circumstances and
 - (b) Virtus provides a copy of the fully executed version of the Amended Process Deed to the Panel.
3. Virtus must, as soon as practicable after the date of these orders, and in any event within 3 Business Days after the date of these orders:
- (a) in the event that an Amended Process Deed is approved and provided to the Panel under Order 2, release an ASX announcement (in a form approved by the Panel) which discloses details of all material terms of the Amended Process Deed and discloses that the Data Room Open Date occurred on 31 January 2022 or
 - (b) in the event that clauses 4.4, 4.5, 4.6, 4.7 and 4.11 of the Process Deed become of no force and effect under Order 2, release an ASX announcement (in a form approved by the Panel) which explains that clauses 4.4, 4.5, 4.6, 4.7 and 4.11 of the Process Deed have become of no force and effect and discloses that the Data Room Open Date occurred on 31 January 2022.
4. In these orders, the following definitions apply and capitalised terms used but not defined in these orders have the meaning given to them in the Process Deed:

Amended Process Deed	has the meaning given in Order 2(a)
CapVest	means CapVest Partners LLP
Process Deed	has the meaning given in Order 2
Relevant Transaction	means a transaction under which CapVest or its Affiliates (either alone or with any Associate) would: <ul style="list-style-type: none"> a) directly or indirectly acquire Voting Power in, or have a right to acquire a legal, beneficial or economic interest in, or control of, more than 20% of the securities in any member of the Virtus Group b) acquire Control of any member of the Virtus Group

- c) directly or indirectly acquire or become the holder of, or otherwise acquire or have a right to acquire a legal, beneficial or economic interest in, or control of, all or substantially all or a material part of the Business or assets of any member of the Virtus Group or
- d) otherwise directly or indirectly acquire, be stapled with or merge with Virtus,

whether by way of a takeover bid, scheme of arrangement, shareholder approved acquisition, capital reduction, buy back, sale, lease or purchase of shares, other securities or assets, assignment of assets or liabilities, joint venture, dual listed company (or other synthetic merger), deed of company arrangements, any debt for equity arrangement or other transaction or arrangement

Virtus

means Virtus Health Limited.

Tania Mattei
General Counsel
with authority of Richard Hunt
President of the sitting Panel
Dated 23 February 2022