



Australian Government

Takeovers Panel

MEDIA RELEASE

No: TP22/17

Friday, 4 March 2022

Virtus Health Limited 02 – 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) (**Virtus**). Virtus is the subject of competing control proposals made by BGH and CapVest Partners LLP (**CapVest**).

Details of the application, as submitted by the applicant, 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, Virtus received a non-binding, indicative proposal from BGH to acquire 100% of the outstanding share capital in Virtus by way of a scheme of arrangement at \$7.10 per Virtus share.

On 20 January 2022, Virtus announced that it had entered into a process deed with CapVest in relation to a non-binding, indicative proposal from CapVest to acquire all the issued shares in Virtus by way of a scheme of arrangement at \$7.60 cash per share or 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, at \$7.50 cash per share.

On 2 February 2022, BGH made an application to the Panel in relation to the affairs of Virtus (*Virtus Health Limited*) (see [TP22/10](#)). The application concerned the exclusivity arrangements in the process deed.

On 23 February 2022, the Panel made a declaration of unacceptable circumstances finding that certain aspects of the exclusivity arrangements had an anti-competitive effect (see [TP22/15](#)). The Panel made final orders (**Orders**) that included:

- a standstill preventing Virtus and CapVest from entering into (in effect) a scheme implementation agreement to acquire Virtus, and preventing CapVest

from making a takeover bid for Virtus (**standstill**) for approximately 10 business days and

- a requirement that Virtus and CapVest amend the process deed (**Amended Process Deed**) to ensure (among other things) that it is clear that the 'fiduciary out' is effective to create an exception to the no talk and no due diligence clauses "*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*".

On 28 February 2022, BGH provided a confidential revised proposal to Virtus to acquire 100% of the outstanding share capital in Virtus by way of a scheme of arrangement at \$7.65 per Virtus share (**Revised BGH Proposal**). Virtus announced the Revised BGH Proposal to ASX on the same day and noted that the Virtus Board was yet to evaluate the Revised BGH Proposal.

The next day, Virtus announced to ASX that it had received a revised proposal from CapVest to acquire control of Virtus via an acquisition of 100% of the share capital in Virtus by way of a scheme of arrangement at \$7.80 per Virtus share or an acquisition of at least 50.1% of the share capital in Virtus by way of an alternative transaction structure, such as an off-market takeover bid, at \$7.70 per Virtus share (**Revised CapVest Proposal**).

BGH submits that there was no material communication from Virtus to BGH following the submission of the Revised BGH Proposal before the Revised CapVest Proposal was announced.

The Virtus announcement stated that "*...the Virtus Board has determined that it will not be engaging with [BGH] in respect of [the Revised BGH Proposal], given the Revised CapVest Proposal is superior to the Revised BGH Proposal*" and noted that CapVest "*expects to be in a position to enter into an implementation agreement by 11 March 2022*", being the date the standstill in the Orders expires.

BGH submits that at no stage has Virtus taken any step to facilitate a genuine auction process involving both CapVest and BGH, despite having been given the opportunity to do so by the Orders.

It submits that the current circumstances continue to hinder the acquisition of control of Virtus taking place in an efficient, competitive and informed market, and deprive Virtus shareholders of the opportunity to participate in the benefits of a proposal, contrary to section 602 of the Corporations Act.

BGH submits that "*Virtus incorrectly considered it was unable to exercise, and otherwise failed to exercise, the fiduciary out available to it to engage with BGH, and instead chose to continue to engage only with CapVest*".

If, as Virtus has indicated Virtus and CapVest expect to enter into an implementation agreement as soon as the Panel's standstill period expires, BGH submits that *"what was an initial head start and timing advantage given to CapVest will become a comprehensive and permanent advantage"*.

BGH seeks an interim order to (in effect) extend the standstill until the determination of its application.

BGH seeks final orders to the effect that:

- the no talk and no due diligence restrictions have no further force or effect, and otherwise the 'fiduciary out' in the Amended Process Deed was and remains capable of being enlivened following the Revised BGH Proposal, such that in each case, Virtus must grant due diligence access to, and engage with, BGH in good faith in respect of the Revised BGH Proposal
- Virtus and CapVest be subject to a standstill until the expiry of 20 business days after the date on which Virtus grants BGH and its representatives access to the entire virtual data room made available to CapVest and its representatives and
- such other orders as the Panel considers appropriate.

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