



Australian Government

Takeovers Panel

MEDIA RELEASE

No: TP22/22

Thursday, 10 March 2022

Virtus Health Limited 02 – Panel Declines to Conduct Proceedings

The Panel has declined to conduct proceedings on an application dated 3 March 2022 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 the affairs of Virtus Health Limited (ASX: VRT) (**Virtus**).

Virtus is the subject of competing control proposals made by BGH and CapVest Partners LLP (**CapVest**) (see [TP22/17](#)).

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

On 1 March 2022, 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**).

The Virtus announcement stated (among other things) 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”.

BGH submitted that, notwithstanding the clear intent of the Orders, the circumstances were continuing to unacceptably frustrate a proper auction process or competitive bidding environment. It submitted that this was evidenced by Virtus disclosing the Revised BGH Proposal to CapVest (either via ASX announcement or privately), CapVest matching or improving its existing proposal and the Virtus board then dismissing the Revised BGH Proposal in preference to continuing to deal exclusively with CapVest, despite having the legal ability, as a result of the Orders, to engage with both parties in parallel.

The Panel considered that the Amended Process Deed enabled Virtus to engage with BGH in relation to the Revised BGH Proposal, but the Virtus board decided not to do so on the basis that that decision was in the best interests of Virtus and its shareholders. If it conducted proceedings, the Panel considered it unlikely that it would second guess the Virtus board’s decision.

The Panel made no comment on the merits of the decision.

The Panel concluded 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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