



**Australian Government**  
**Takeovers Panel**  
**Reasons for Decision**  
**Virtus Health Limited 03**  
**[2022] ATP 10**

**Catchwords:**

*Undertaking – decline to make a declaration - on-market acquisitions – efficient, competitive and informed market – prescribed occurrences - ASIC Market Integrity Rules*

*Corporations Act 2001 (Cth), sections 602, item 2 of s611, 623, 651A, 652C*

*Corporations Amendment (Financial Market Supervision) Act 2010 (Cth), ASIC Market Integrity Rules (Securities Markets) 2017, rule 5.13.1*

*Renard and Santamaria, Takeovers and Reconstructions in Australia, at [921], A Lumsden and S Huber Australian Corporation Law Principles & Practice, 2020 at [6.4.0110], R P Austin and A J Black, Austin & Black's Annotations to the Corporations Act, last updated, October 2017 at [6.650A], R Levy "Takeovers Law & Strategy" 5th edition, Lawbook Co, at 249 (fn 29)*

*Midwest Corporation Limited 02 [2008] ATP 15, Citec Corporation Limited [2006] ATP 6, Taipan Resources NL 07 [2000] ATP 18*

Interim order	IO undertaking	Conduct	Declaration	Final order	Undertaking
YES	NO	YES	NO	NO	YES

## INTRODUCTION

1. The Panel, Teresa Dyson, Richard Hunt (sitting President) and James Stewart, declined to make a declaration of unacceptable circumstances in relation to the affairs of Virtus Health Limited after accepting undertakings. The application concerned (among other things) the operation of ASIC Market Integrity Rule 5.13.1 and whether the acquisition of control of Virtus would take place in an efficient, competitive and informed market if BGH Bidders carried out their intention (as stated in their bidders' statement) to acquire Virtus shares on market during their bid period, which may be at prices above the bid price, and to then follow with an announcement. The Panel accepted undertakings from BGH Bidders which, in effect, required them to make such an announcement immediately.
2. In these reasons, the following definitions apply.

**ASIC Market Integrity Rules**      *ASIC Market Integrity Rules (Securities Markets) 2017*

**BGH Bidders**      Oceania Equity Investments Pty Ltd (ACN 655 692 738) as trustee for the Oceania Trust and A.C.N. 658 293 166 Pty Ltd (ACN 658 293 166)

**bid price**      the offer price under the terms of the off-market takeover bid by the BGH Bidders for all of the fully paid ordinary shares in Virtus as may be varied from time to time

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<b>CapVest</b>	CapVest Partners LLP by its bid vehicle, Evergreen Bidco Pty Ltd
<b>Virtus</b>	Virtus Health Limited

## FACTS

3. Virtus is an ASX listed company (ASX code: VRT), which provides assisted reproductive technology. Virtus is the subject of competing control proposals for all the fully paid ordinary shares in Virtus from BGH Bidders and CapVest.
4. BGH Bidders has made an off-market takeover. The current bid price is \$8.00 per Virtus share.
5. CapVest is proposing a scheme of arrangement and simultaneous off-market takeover (that is conditional on the scheme failing). The proposed scheme price is \$8.15 per Virtus share, and the takeover bid price is \$8.10 per Virtus share.<sup>1</sup>
6. BGH Bidders has voting power of 19.99% in Virtus.
7. On 6 April 2022, BGH Bidders released on ASX their bidders' statement containing offers conditional only on the matters listed in section 652C.<sup>2</sup>
8. BGH Bidders bidders' statement included the following disclosure under the heading "**ASIC Market Integrity Rule 5.13.1 Disclosure**" (emphasis in the original):  
*"In accordance with rule 5.13.1 of the ASIC Market Integrity Rules, BGH Bidders note they have appointed UBS ... as broker to acquire Shares on market during normal trading hours on the ASX during the Bid Period ... at prices equal to, below, or higher than, the Offer Price (On Market Purchases).*

*Pursuant to section 651A of the Corporations Act, if the price per Share paid to acquire Shares in an On Market Purchase is higher than the Offer Price, the consideration payable per Share under the Offer will be automatically increased to that higher price (and Shareholders who have previously received consideration for Accepted Shares shall be entitled to receive the increase in consideration immediately).*

*If the price per Share paid to acquire Shares in an On Market Purchase is higher than the Offer Price, BGH Bidders will continue to trade at volume at or above that higher price until notification of the increased consideration payable per Share under the Offer is disclosed by BGH Bidders to the ASX (noting that at the time BGH Bidders execute at a higher price than the Offer Price, BGH Bidders' order may execute with any existing offers in the market at a price between the Offer Price and that higher price).*

*Any On Market Purchases will be disclosed to the ASX in substantial shareholder notices which BGH Bidders are required to lodge under the Corporations Act.*

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<sup>1</sup> Both proposals account for the payment of a \$0.12 Virtus dividend. Accordingly, Virtus has disclosed that the value of the CapVest scheme proposal is equivalent to \$8.27 per Virtus share and the value of the CapVest bid proposal is equivalent to \$8.22 per Virtus share

<sup>2</sup> Generally known as "prescribed occurrences". All statutory references are to the *Corporations Act 2001* (Cth), and all terms used in Chapter 6 or 6C have the meaning given in the relevant chapter (as modified by ASIC)

*Shareholders who sell their Shares on the ASX will receive payment on a T+2 basis (being two Business Days after the date of the relevant transaction).*

*Shareholders who sell Shares on the ASX cannot subsequently accept the Offer in respect of their Shares sold on the ASX. In addition, Shareholders who sell Shares on the ASX may incur brokerage charges and GST on brokerage charges which they may not incur if they accept the Offer.”<sup>3</sup>*

9. Rule 5.13.1 of the ASIC Market Integrity Rules provides that:

**“5.13.1 Acquisition of Cash Market Products by Bidder**

- (1) *This rule applies to both Takeover Market Bids and Takeover Off-Market Bids.*
- (2) *A Market Participant acting on behalf of a Bidder must not offer to buy on behalf of the Bidder Cash Market Products in the Bid Class On-Market during the Bid Period for a price that varies from the consideration offered under the Takeover Bid unless and until an announcement has been made to the Market where Cash Market Products in the Bid Class have been granted Official Quotation.*
- (3) *For the purposes of subrule (2), the announcement must be made in writing, by facsimile or electronic delivery to the operator of the Market where Cash Market Products in the Bid Class have been granted Official Quotation.”*

## **APPLICATION**

### **Declaration sought**

10. By application dated 7 April 2022, CapVest sought a declaration of unacceptable circumstances. CapVest submitted (among other things) that:
  - (a) ASIC Market Integrity Rule 5.13.1 required that there be an announcement informing the market that the bid price was to be increased, stating the amount, before Virtus shares could be purchased on behalf of BGH Bidders on market above the bid price and
  - (b) if “*ASX receives information in relation to an Off-Market Bid (ASX Operating Rules Procedures, R 4013), in particular, "announcement of variation of the consideration offered under an Off-Market Bid", then Securities will be placed in a Pre\_NR Session State for a minimum period of 60 minutes (ASX Operating Rules Procedures Appendices – Appendix 4013)*”.
11. CapVest further submitted that BGH Bidders’ view seemed to be that the announcement required under ASIC Market Integrity Rule 5.13.1 had already been provided in their announcement on the morning of 6 April 2022 and in their bidders’ statement, and that the announcement that would move Virtus shares into Pre-NR phase was their subsequent substantial holder notice.
12. CapVest submitted that therefore BGH Bidders’ interpretation “*circumvents the purpose of Rule 5.13.1*” and so the trading of Virtus shares (and for Chapter 6 purposes

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<sup>3</sup> BGH Bidders’ announcement of their off-market takeover offer dated 6 April 2022 (released prior to their bidders’ statement) contained the first four paragraphs of this disclosure under the heading “**ASIC Market Integrity Rule 5.13.1 Disclosure**”

the acquisition of control of Virtus) will be taking place in a market that is not efficient, competitive and informed.

**Interim order sought**

13. CapVest sought an interim order that BGH Bidders' broker be restrained from acquiring Virtus shares on behalf of BGH Bidders at a price higher than the bid price until further order.

**Final orders sought**

14. CapVest sought final orders that BGH Bidders' broker not be permitted to acquire Virtus Shares on behalf of BGH Bidders at a price higher than the bid price until:
  - (a) "*it has announced to ASX the price it proposes to acquire Virtus Shares at and ASX Operating Procedures Rule R4013 has been complied with in relation to that higher specified price*" and
  - (b) "*after 9 am London time following the announcement of a higher price under ASX Operating Procedures Rule R4013.*"
15. CapVest submitted that the order sought in paragraph 14(b) would negate "*the impact of these actions from preventing CapVest from competing on price in circumstances where BGH has effectively done so. CapVest is London based with no Australian office or Australian based employees and is unable to react to any announcement under ASX Operating Procedures Rule R4103 to protect its interests during the Australian trading day*".

**DISCUSSION**

16. We have considered all the material, but address specifically only that part of the material we consider necessary to explain our reasoning.

**Decision to conduct proceedings and interim orders**

17. BGH Bidders made a preliminary submission, submitting among other things that:
  - (a) CapVest's interpretation was an attempt to give it a matching right
  - (b) there is no legal or policy basis for not interpreting the words of ASIC Market Integrity Rule 5.13.1 according to their plain meaning and
  - (c) CapVest had not identified any unacceptable circumstances and we should decline to conduct proceedings.
18. BGH Bidders indicated that the order they would place would be 'at volume' meaning that they would be standing in the market to receive any shares offered. Accordingly, it submitted, "*no subsequent on-market trade for Virtus Shares would occur at any price lower than the price previously paid by the BGH Bidders with respect to their most recent on-market acquisition.*"
19. Virtus made a preliminary submission supporting CapVest's application for the reasons set out in the application.
20. We considered that an interim order would be necessary to maintain the status quo if we decided to conduct proceedings.

21. We were also of the preliminary view that CapVest's application was not clear as to how BGH Bidders' broker acquiring Virtus shares on behalf of BGH Bidders, at a price higher than the bid price, was contrary to the principles of s602 or otherwise unacceptable given BGH Bidders' disclosure in their bidders' statement.
22. Accordingly, we sought urgent submissions over the weekend on these issues.
23. We also asked the parties, ASIC and ASX whether they had any background material that explains the policy underlying ASIC Market Integrity Rule 5.13.1.
24. ASIC provided a number of regulatory guides and consultation papers that discussed the ASIC Market Integrity Rules but not Rule 5.13.1 in particular. ASX submitted that it could not locate any background material in relation to the antecedents to ASIC Market Integrity Rule 5.13.1 in the time available.
25. CapVest provided a worked example showing how it believed BGH Bidders' interpretation of the Market Rule would work. In the example, assuming BGH Bidders offered \$8.20 on market, they would acquire all the shares asking \$8.05 and \$8.10 and \$8.15 already in the market until they reached the asking price of \$8.20.
26. CapVest submitted, assuming BGH Bidders' interpretation of ASIC Market Integrity Rule 5.13.1, that (among other things):
  - (a) It would clearly be an inefficient market if shareholders did not know that the bid price had been increased or the details of the increase and were not given prior notice of this increase and time to consider (s602(a)).
  - (b) By securing shares from uninformed shareholders, BGH Bidders would be able to secure a clear "blocking stake" to block any auction for 100% of Virtus by way of scheme of arrangement, which would be anti-competitive (s602(a)).
  - (c) Clearly shareholders would not be informed if they were selling on-market at a price of less than the revised bid price or even if they were selling at the revised bid price, given the potential for further upside beyond this level in a competitive environment (s602(a)).
  - (d) Shareholders would not know the identity of the person buying the shares or the likelihood that they were selling to BGH Bidders if selling at the revised bid price (s602(b)(i)).
  - (e) Clearly shareholders would not have had time to have considered the revised bid price if they were not even aware of it when they sell (s602(b)(ii)).
  - (f) Clearly shareholders would not know the revised bid price, or the fact that there was a revised bid price if they sell to BGH Bidders prior to notice of that revised bid price (s602(b)(iii)).
  - (g) Clearly shareholders that sell to BGH Bidders prior to notice of the revised bid price would be treated in an unreasonable and unfair way compared to any shareholders that have the benefit of the notice of the revised bid price prior to selling. BGH Bidders would have acquired their shares benefiting from an information asymmetry of their own making (s602(c)).

27. BGH Bidders submitted that, following any on-market acquisition of Virtus shares by them above the bid price, s651A would operate to automatically increase the bid price to the higher price under the on-market acquisition.
28. We considered that we needed more submissions from the parties on whether the principles in s602 required BGH Bidders to disclose any on-market acquisitions before (or immediately after) any such acquisitions were made and the relevance of ASIC Market Integrity Rule 5.13.1 to this question.
29. Accordingly, we conducted proceedings.
30. We accepted a submission from BGH Bidders that the interim order sought by CapVest was broader than the final order CapVest sought and made a narrower interim order that prohibited BGH Bidders (without our consent) from acquiring on market any Virtus shares above the bid price, unless and until they had made an announcement to ASX that informed the market that the bid price was to be increased and the amount of that increase (**Annexure A**).

**ASIC Market Integrity Rule 5.13.1**

31. ASIC Market Integrity Rule 5.13.1 requires a market announcement prior to a bidder (through its broker) offering to buy bid class securities on-market during the bid period for a price that varies from the consideration offered under the bid. It does not specify the content of the market announcement. It is reasonable to infer at least that it should state the bidder's intention that it will acquire bid class securities at a price that differs from its bid price.
32. The parties had different views as to what else should be implied from the language in ASIC Market Integrity Rule 5.13.1.
33. BGH Bidders submitted that:

*"In the c. 25 years since the equivalent of Rule 5.13.1 was first introduced in the ASX Business Rules, no iteration of the rule imposed by ASX or ASIC has ever required notification of the varied bid price ahead of a purchase on-market at that price. If that is what ASX or ASIC required, that is what the rules would (and in other contexts, do) say."*
34. CapVest submitted that commentators supported its reading of ASIC Market Integrity Rule 5.13.1. For example, Renard and Santamaria states that:

*"Pursuant to the ASIC Market Integrity Rules (Securities Markets) 2017, acquisitions of bid class securities by the bidder cannot be made on the ASX during the bid period for a price that varies from the bid consideration unless and until an announcement has been made to the ASX: Rule 5.13.1 of the ASIC Market Integrity Rules (Securities Markets) 2017. This is the case for both market and off-market bids. Following this announcement, the securities will be placed in "Pre-NR Session State" (bids and offers for securities may be entered, amended or*

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*cancelled but no bids or offers will be matched) for a minimum period of 60 minutes: ASX Operating Rules Procedures Appendix 4013, Pt 3.”<sup>4</sup>*

35. As we read it, the commentary does little more than explain what the rule and the ASX procedure say. It provides no direct answer to the issue at hand, namely whether the announcement as made by BGH is sufficient, although perhaps that can be inferred from the conjunction of the rule and the procedure. The same can be said of the other commentary we were directed to. None of the commentary addresses specifically what the market announcement needs to be. Thus, the question remains whether BGH Bidders’ announcement satisfies the rule.
36. CapVest referred to an ASX Determination in 2001 regarding Business Rule 2.20.3(1) as follows:

*“The circumstances of this matter are that on 10 January 2001, BNPPE, acting on behalf of a bidder who had made a takeover offer for Taipan Resources NL (“TAI”), increased the price of an existing bid in SEATS (made on behalf of the bidder) to a price (8.2 cents per fully paid share) that was greater than the amount offered under the takeover bid (7.6 cents per fully paid share), prior to an announcement being made to ASX by the bidder that the takeover bid had been varied. Four trades for a total volume of 133,776 TAI (this was 0.06% of the total fully paid TAI shares on issue) at 8.2 cents each were executed as a result of the increase in the price of the bid by BNPPE.”*

37. CapVest also submitted that the Panel’s decision in Citect Corporation Limited<sup>5</sup> supported its interpretation of ASIC Market Integrity Rule 5.13.1. In that case, the Panel observed that on-market transactions were exempt from the collateral benefits prohibition by way of s623(3)(b). The Panel also observed in the context of the on-market acquisitions not offending the policy behind the collateral benefits prohibition. The Panel said (at [79]):

*“...In addition, on-market transactions are anonymous and conducted on a “first come first served” basis and therefore no individual shareholder has an advantage over another to dispose of their shares to a bidder. Making the offers on-market would also have allowed all Citect shareholders the possibility to sell their shares at the higher price to TCEP LLC, and would have allowed the market to assess its position in the circumstances of TCEP LLC’s offer. This was especially significant in the context of TCEP increasing its offer price, which under ASX market rules would have required Citect shares to be placed into a trading halt for one hour for the market to digest the price increase prior to TCEP completing the order. This would have also given SEAH the opportunity to increase its offer price for Citect shares.”*

38. BGH Bidders submitted that we should not place any weight on the above commentary, because:

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<sup>4</sup> Renard and Santamaria, Takeovers and Reconstructions in Australia, at [921]. See also A Lumsden and S Huber Australian Corporation Law Principles & Practice, 2020 at [6.4.0110], R P Austin and A J Black, Austin & Black's Annotations to the Corporations Act, last updated, October 2017 at [6.650A] and R Levy "Takeovers Law & Strategy" 5th edition, Lawbook Co, at 249 (fn 29)

<sup>5</sup> [2006] ATP 6

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*“...that purports to interpret a rule without reference to any relevant extrinsic materials. This ‘body of material’ is nothing more than unsubstantiated opinion by market commentators. Indeed, if neither ASX nor ASIC have presented the policy rationale for the rule they were required to administer at different times and neither points to that commentary as being of any relevance, it would be wholly inappropriate for the Panel to place any weight on it.”*

39. BGH Bidders submitted that the ASX Determination in 2001 referred to in paragraph 36 was made in circumstances where no announcement had been made to the ASX and the predecessor to ASIC Market Integrity Rule 5.13.1 had clearly been breached.

40. Virtus submitted the acquisition on market of Virtus shares above the bid price on the basis of the 6 April announcement would mean a period of time during which trading on the market would be uninformed. It submitted that:

*“Virtus shareholders trading their shares without the benefit of understanding that the Bid Price has been since changed is inconsistent with the acquisition of control over voting shares taking place in an efficient, competitive, and informed market.”*

41. Virtus further submitted that there was a difference between market participants speculating about a higher bid price and the certainty of a higher bid price.

42. ASIC made some useful submissions in relation to the background of ASIC Market Integrity Rule 5.13.1 and how it should be interpreted, including the following:

- (a) On 24 August 2009, the Australian Government announced the transfer of the supervisory function for Australia's domestic licensed financial markets from market operators to ASIC, which was implemented by the *Corporations Amendment (Financial Market Supervision) Act 2010* (Cth).

- (b) In effect ASIC Market Integrity Rule 5.13.1 is identical to Rule 2.20.3 of the ASX Business Rules, which commenced operation on 13 October 1998 and has operated in the same form since without controversy.

- (c) *“Having regard to the history of Rule 5.13.1 and the present lack of extrinsic explanatory material surrounding its historical operation, ASIC submits that while reasonable minds may differ on its construction on this point, ASIC considers that the Rule may be read with a view to furthering the policy position of ensuring that the market is fully informed in the course of a takeover bid.”*

*“For this reason, ASIC’s preferred policy position is that Rule 5.13.1 is read as requiring an announcement of, at a minimum, whether the bidder may seek to acquire securities on-market at, above or below the offer price. In circumstances where the bidder has made a decision as to the prices at which it would be prepared to acquire securities, the maximum number of securities that it would be prepared to acquire, or that it has formed an intention to do either of those things, ASIC submits that the announcement made in accordance with Rule 5.13.1 would, as a matter of best practice, set out those matters. However, it is important to note that this does not mean that target holders are automatically guaranteed that a bidder will, in fact, purchase securities on-market at any price. It is still a matter of the bidder’s discretion as to*

*whether it actually makes any purchases at all, or at what price it makes them (within the parameters it has announced)."*

43. ASIC also submitted that:

- (a) from its observations the position detailed in paragraph 42(c) above has "*been the established market practice for over 15 years*"
- (b) there have been numerous announcements by bidders in which a bidder has announced that it may seek to acquire target securities on-market at or below the offer price and
- (c) it has located "*fewer examples of bidders making an announcement that it may seek to acquire securities on-market above the offer price*":
  - (i) in some cases, a bidder has announced a formal variation increasing its offer price and announced that it may seek to acquire securities on-market at or below the newly increased offer price<sup>6</sup> and
  - (ii) it had found two examples "*where a bidder had announced that it may seek to acquire at or above the offer price and stated that doing so would trigger an automatic variation of the offer price under its bid*".<sup>7</sup> In those examples, the bidder concerned "*provided additional information by specifying the maximum price at which it intended to acquire securities on-market*" which ASIC submitted was consistent with its view that "*where the bidder is aware of such information, it is best practice to provide the information to the market in the announcement*".

44. On the question of how we should approach ASIC Market Integrity Rule 5.13.1, ASIC submitted that:

*"Given this doctrinal uncertainty, ASIC submits that the Panel should take care in whether and how it considers Rule 5.13.1 for the purposes of s657A(3)(b). ASIC notes that the Markets Disciplinary Panel is generally the appropriate body for determining whether a breach of the Market Integrity Rules has occurred. Instead, ASIC submits that it is open to the Panel to address any issues of announcement and disclosure broadly as a matter of s602(a) of the Act in ensuring any acquisitions made by BGH Bidders take place in an efficient, competitive and informed market."*

45. If the application of ASIC Market Integrity Rule 5.13.1 was clear and supported CapVest's interpretation, we consider that BGH Bidders acting against that interpretation is a relevant consideration in determining whether unacceptable circumstances occurred.<sup>8</sup>

46. The secondary sources referred to by CapVest, and the observations by the Panel in *Citect Corporation Limited*, are consistent with CapVest's interpretation of ASIC

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<sup>6</sup> ASIC referred to IGIC Pte Ltd's announcement dated 28 October 2019 and Drillsearch Energy Limited's announcement dated 26 October 2012

<sup>7</sup> ASIC referred to ARA Asset Management Ltd's announcement dated 7 August 2020 and Oceania Capital Partners Ltd's announcement dated 7 February 2014

<sup>8</sup> See *Midwest Corporation Limited 02 [2008] ATP 15* at [71]

Market Integrity Rule 5.13.1. However these secondary sources are not determinative. Accordingly, we are left with ASIC's submission, as the market regulator, that there is some doubt about the application of the rule.

47. We also agree with ASIC's submission that the focus of our enquiry should be on whether BGH's disclosure (and proposed actions) offends any of the principles underpinning Chapter 6 (including s602). The Panel's primary role is to ensure that the principles underpinning Chapter 6 are met.

### **Chapter 6 principles**

48. BGH Bidders submitted that requiring them to disclose an increase in their bid price prior to acquiring on market at above the bid price was inconsistent with the policy underlying item 2 of s611. They referred to the following discussion of that exception in the Corporations Bill Explanatory Memorandum 1988 (at [1943]):

*"The basis for this exception to the prohibition in cl. 615 is that failure to provide access to stock exchange trading during the takeover period would place the proposing [bidder] at an unfair disadvantage to any competitors (who have access to the market during that period) and might enable successful counter-measures, thereby defeating the bid and depriving shareholders of the benefits of the bid".*

49. BGH Bidders further submitted that CapVest's interpretation of ASIC Market Integrity Rule 5.13.1:

*"...achieves the exact opposite of this policy intent [as quoted in paragraph 48 above] and effectively denies BGH this fundamental right. It creates a structural disadvantage for BGH in that it must first flag its intended purchase price and then give CapVest (and other third parties) an opportunity to frustrate the purchase through counter measures. It is a misguided attempt to contort an interpretation of Rule 5.13.1 to deliver CapVest an effective matching right prior to BGH executing on-market purchases."*

50. BGH Bidders submitted that as they had disclosed a possible intention to acquire Virtus shares higher than the bid price:

*"... any Virtus shareholder considering selling on-market should know that BGH's broker may purchase at a price higher than the offer price. In these circumstances, any Virtus shareholder who places a sell order on-market has made a clear choice to do so and forgo the opportunity to sell at a higher price (to BGH, CapVest or any other party)."*

51. CapVest submitted that if BGH Bidders' broker placed an order above the bid price, it would automatically acquire all sell orders on the market at a lower price first.
52. We consider, however, that any Virtus shareholder who places a sell order on market accepts the risk that a higher price might be paid by BGH Bidders, CapVest or another buyer.<sup>9</sup> Sellers on market are indifferent to the purchaser, and indeed cannot

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<sup>9</sup> A similar sentiment was expressed by the Panel in *Taipan Resources NL 07* [2000] ATP 18. In that matter the target submitted that the bidder should not be allowed to acquire target shares on market because target shareholders were not sufficiently informed about the bid and the status of a previous bid by the bidder. The Panel stated (at [46]) that "*In general, it is accepted that those shareholders who sell on-market before the bidder's statement and target's statement are sent to them are accepting the risks inherent in doing so*".

control who will buy. We agree with BGH Bidders that sellers should know about BGH Bidders' plans. We do not agree with CapVest that adopting this view sets aside the principles in section 602.

53. BGH Bidders also submitted, in effect, that Virtus shareholders were protected through:
  - (a) The operation of s651A which would operate to increase the bid price to the highest price paid by BGH Bidders on-market. We note that this is a protection only for shareholders who accept BGH Bidders' takeover bid.
  - (b) BGH Bidders' disclosure in their bid announcement and bidders' statement that "*BGH Bidders will continue to trade at volume at or above that higher price until notification of the increased consideration payable per Share under the Offer is disclosed by the BGH Bidders to the ASX*". We agree that this information is available to all Virtus shareholders, including those with sell orders on market.
54. We also noted that but for any application of the principles in section 602 to the contrary:
  - (a) Chapter 6 permits the on-market acquisition of shares during the bid period by a bidder under an off market takeover bid that is conditional only on prescribed occurrences at a price above the bid price, without any prior disclosure of the price at which it intended to acquire the shares
  - (b) there is no requirement in Chapter 6 for a bidder to announce that it may increase the offer price under a takeover bid prior to the increase being made and
  - (c) section 651A(1)(c)(i) specifically contemplates that an on-market acquisition may be made by a bidder at a price above the offer price under its off market takeover bid.
55. On balance, weighing up the exception in item 2 of section 611 and the ASIC Market Rule 5.13.1, we are prepared to accept that BGH Bidders would be put at a disadvantage if they were required to disclose the price at which they propose to acquire shares above the bid price before making any such acquisition. In this respect we note that an off-market purchase may be made above the existing bid price (which results in an automatic increase) without any prior notice.
56. A key principle underpinning Chapter 6 is that the market for corporate control is informed. BGH Bidders' intentions were clearly disclosed in their bidders' statement and announcement.
57. Moreover, the interpretation of Market Rule 5.13.1 is not a matter for us to determine.
58. Accordingly, we consider that such pre-disclosure as CapVest submitted is required is not necessary to ensure an efficient, competitive and informed market.
59. We are however, concerned about the potential delay in BGH Bidders disclosing to the market that it has acquired Virtus shares on-market at above the bid price.

60. BGH Bidders submitted that following any acquisition they make above the bid price “*consistent with the disclosures in the BGH BS and Bid Announcement, the BGH Bidders will promptly release an ASX announcement confirming that the Offer Price has been automatically increased*”. However, they also submitted that, before such an announcement was made, they would “*continue to acquire all available Virtus Shares at or above the highest price already paid by them on-market*”.
61. We asked BGH Bidders whether they would be prepared to provide an undertaking to ensure that the market was informed immediately when BGH Bidders made an on-market acquisition above the bid price. BGH Bidders provided an undertaking in response (see **Annexure B**). The effect of the undertaking is to allow BGH Bidders to place an order on market and, if the order results in ASX matching sellers to it at a higher price than the bid price, then BGH Bidders must immediately make an announcement and follow the usual ASX market procedure. The undertaking requires BGH Bidders to do this any time there is a subsequent increase.
62. We accept the undertaking. We consider the undertaking satisfactorily addresses the potential unacceptable circumstances.

## **DECISION**

63. Given the undertakings offered by BGH Bidders, we declined to make a declaration and are satisfied that it is not against the public interest to do so. We had regard to the matters in s657A(3).
64. Given that we made no declaration of unacceptable circumstances, we make no final orders.

## **Other matters**

65. As stated in paragraph 14(b), CapVest sought a final order that BGH Bidders’ broker not be permitted to acquire Virtus Shares on behalf of BGH Bidders at a price higher than the bid price until “*after 9 am London time following the announcement of a higher price under ASX Operating Procedures Rule R4013*”.
66. Even if we had been minded to make a declaration on the basis that BGH Bidders should disclose the price at which they propose to acquire shares above the bid price before attempting to make any such acquisition, we consider that it is unlikely we would have made an order that took into account the location of CapVest’s operations in London. Given the nature of the transaction, it is not unreasonable for market participants to expect that developments may occur during Australian business hours.

**Richard Hunt**  
**President of the sitting Panel**  
**Decision dated 22 April 2022**  
**Reasons given to parties 30 April 2022**  
**Reasons published 3 May 2022**

## Takeovers Panel

**Reasons - Virtus Health Limited 03  
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### Advisers

Party	Advisers
BGH Bidders	Allens
Virtus	Gilbert + Tobin
CapVest	Ashurst



**Australian Government**

**Takeovers Panel**

**Annexure A**

**CORPORATIONS ACT  
SECTION 657E  
INTERIM ORDERS**

**VIRTUS HEALTH LIMITED 03**

CapVest made an application to the Panel dated 7 April 2022 in relation to the affairs of Virtus.

The Panel ORDERS:

1. Without the consent of the sitting Panel,
  - (a) UBS Securities must not acquire on market any Virtus shares above the Bid Price on behalf of BGH Bidders and
  - (b) BGH Bidders must not appoint any broker other than UBS Securities to acquire on market any Virtus shares above the Bid Price on behalf of BGH Bidders,unless and until the BGH Bidders have made an announcement to ASX that informs the market that the Bid Price is to be increased and the amount of that increase.
2. In these orders the following terms have their corresponding meaning:

**BGH Bidders**      BGH Capital Pty Ltd 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

**Bid Price**      the offer price under the terms of the off-market takeover bid by the BGH Bidders for all of the fully paid ordinary shares in Virtus as set out in the Bidders' Statement lodged with the ASX on 6 April 2022 as may be varied from time to time in accordance with section 650B of the *Corporations Act 2001* (Cth)

**CapVest**      CapVest Partners LLP

**UBS Securities**      UBS Securities Australia Limited

**Virtus**      Virtus Health Limited

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3. These interim orders have effect until the earliest of:
  - (i) further order of the Panel
  - (ii) the determination of the proceedings and
  - (iii) 2 months from the date of these interim orders.

**Allan Bulman  
Chief Executive  
with authority of Richard Hunt  
President of the sitting Panel  
Dated 11 April 2022**



## Australian Government

### Takeovers Panel

#### Annexure B

### AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION ACT 2001 (CTH) SECTION 201A UNDERTAKING

#### VIRTUS HEALTH LIMITED 03

BGH Bidders undertakes to the Panel that in respect of their Takeover Bid and during the Bid Period:

1. if they instruct their broker to make on market acquisitions of Virtus shares on their behalf above the then Bid Price, they will instruct their broker that upon the order on market First Executing on ASX Trade (such that it results in any acquisition above the then Bid Price), the broker is to remove any other orders on their behalf from the market (if any have been entered) at that time; and
2. on the happening of the order First Executing on ASX Trade, immediately:
  - (a) make an announcement on ASX:
    - (i) of the purchase or purchases, and the price (or highest price) paid and
    - (ii) that the Takeover Bid is automatically increased accordingly; and
  - (b) inform ASX and comply with any pre-open or other phase as required by ASX, before BGH Bidders (through their broker) make any further on-market acquisitions other than as ASX Trade automatically matches any unfilled balance under the order; and
  - (c) as soon as practicable after (b), lodge and serve a supplementary bidder's statement as required by law.
3. on each occasion that the order referred to in paragraph 1 results in a subsequent acquisition at a price above that announced under paragraph 2, the requirements of paragraph 2 will be fulfilled again.

For avoidance of doubt, in this undertaking:

- (a) First Executing on ASX Trade means the automatic matching of the buy order with such sell orders as at that time exist on market and
- (b) any unfilled balance of the first order may remain on ASX Trade.

BGH Bidders agrees to confirm in writing to the Panel when it has satisfied its obligations under this undertaking.

#### Definitions

The following definitions apply to this undertaking:

**ASX** means ASX Limited (ABN 98 008 624 691) or, as the context requires, the financial market operated by it.

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**ASX Trade** means the automatic securities trading system of ASX.

**BGH Bidders** means Oceania Equity Investments Pty Ltd (ACN 655 692 738) as trustee for the Oceania Trust and A.C.N. 658 293 166 Pty Ltd (ACN 658 293 166)

**Bid Period** has the meaning given to it in the *Corporations Act 2001* (Cth).

**Bid Price** means the consideration offered for each ordinary share in Virtus under the Takeover Bid.

**Takeover Bid** means the joint off-market takeover offer by the BGH Bidders to acquire all of the fully paid ordinary shares in Virtus that they do not own or control, as announced to ASX on 6 April 2022 and as may be varied in accordance with the *Corporations Act 2001* (Cth).

**Virtus** means Virtus Health Limited (ACN 129 643 492).

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**Signed by Benjamin Gray of BGH Capital Pty Ltd  
with the authority, and on behalf, of BGH Bidders  
Dated 21 April 2022**