



Australian Government

Takeovers Panel

**Reasons for Decision
Virtus Health Limited 05
[2022] ATP 15**

Catchwords:

Decline to conduct proceedings - bidder's statement - dispatch of documents - supplementary bidder's statement - supplementary target's statement

Corporations Act 2001 (Cth), sections 9 (definition of "bidder's statement"), 602, 633(1), 636, 643, 650E

ASIC Regulatory Guide 9, ASIC CO 13/528

Guidance Note 5: Specific Remedies – Information Deficiencies

Virtus Health Limited 03 [2022] ATP 10, Virtus Health Limited 02 [2022] ATP 7, Virtus Health Limited [2022] ATP 5

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

INTRODUCTION

1. The Panel, Teresa Dyson, Richard Hunt (sitting President) and James Stewart, declined to conduct proceedings on an application by Virtus Health Limited in relation to its affairs. The application concerned disclosure in a bidder's statement given by BGH Bidders for their off-market takeover bid for Virtus and the adequacy of their supplementary bidder's statement in response to a subsequent increase in CapVest's proposal.
2. In these reasons, the following definitions apply.

BGH Bid	the takeover bid described in the BGH BS
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)
BGH BS	the bidders' statement BGH Bidders lodged with ASIC on 6 April 2022 and sent to Virtus shareholders on 20 April 2022
BGH	BGH Capital Pty Ltd in its capacity as the investment manager or adviser to the constituent entities of BGH Capital Fund I
BGH Supplementary BS	the supplementary bidder's statement BGH Bidders lodged with ASIC on 21 April 2022

CapVest	CapVest Partners LLP and its bid vehicle, Evergreen Bidco Pty Ltd
Disclosure Deficiencies	has the meaning given in paragraph 17
Interim dividend	the \$0.12 per share dividend declared by Virtus on 22 February 2022
Key elements table	has the meaning given in paragraph 9(b)
Previous CapVest Proposal	the proposal announced by Virtus on 14 March 2022 under which CapVest agreed to acquire up to 100% of Virtus by way of a scheme of arrangement at \$8.13 per Virtus share, or by simultaneous off-market takeover bid at \$7.98 per Virtus share (in each case less certain distributions or dividends, not including the Interim dividend)
Revised CapVest Proposal	the revised proposal announced by Virtus on 11 April 2022 under which the prices under the Previous CapVest Proposal were increased to \$8.15 per share, in the case of the scheme, and \$8.10 per share, in the case of the simultaneous takeover bid (in each case less the value of any distributions or dividends other than the Interim dividend)
Virtus	Virtus Health Limited
Virtus Letter to BGH Bidders	has the meaning given in paragraph 7
Virtus Letter to Shareholders	has the meaning given in paragraph 10

FACTS

3. Virtus is an ASX listed company (ASX code: VRT). Virtus is the subject of competing control proposals for all its fully paid ordinary shares from BGH Bidders and CapVest which have been the subject of several Panel applications.¹
4. BGH Bidders are currently wholly-owned by BGH Capital Fund I. BGH is the investment manager or adviser to the constituent entities of BGH Capital Fund I.
5. On 6 April 2022, BGH Bidders, which then held 19.99% of Virtus shares, lodged the BGH BS.
6. On 11 April 2022, Virtus announced the Revised CapVest Proposal, which among other things increased the price under CapVest's concurrent scheme and bid proposals to:
 - (a) \$8.15 per share under CapVest's scheme of arrangement (an increase of \$0.02 per share) and
 - (b) \$8.10 per share under CapVest's takeover bid (an increase of \$0.12 per share), less the value of any distributions or dividends other than the Interim dividend.
7. Also on 11 April 2022, Virtus sent a letter to BGH Bidders, expressing concerns with various deficiencies in the BGH BS (**Virtus Letter to BGH Bidders**). On 14 April 2022, BGH Bidders responded indicating that in its view the disclosures made in the BGH BS complied with s636² and ASIC and Panel policy.
8. On 20 April 2022, BGH Bidders announced the dispatch of the BGH BS, which had not been amended.
9. On 21 April 2022, BGH Bidders lodged with ASIC the BGH Supplementary BS, which referred briefly to the Revised CapVest Proposal, including by:
 - (a) noting that it increased the prices under the Previous CapVest Proposal by \$0.02 per share, in the case of the scheme, and \$0.12 per share, in the case of the simultaneous takeover bid, but without stating the amount or value of the increased consideration, and
 - (b) stating that the commentary in BGH BS Item 5 of "Why You Should Accept the Offer" was no longer relevant "[o]ther than in respect of the 'Key elements' comparison table" (**Key elements table**). The first row of the Key elements table compared BGH Bidders' offer with the lower consideration offered by the takeover bid under the Previous CapVest Proposal.
10. On 22 April 2022, Virtus released to ASX a letter to update shareholders, reflecting its concerns regarding the BGH BS and BGH Supplementary BS (**Virtus Letter to Shareholders**).

¹ See *Virtus Health Limited* [2022] ATP 5, *Virtus Health Limited* 02 [2022] ATP 7, *Virtus Health Limited* 03 [2022] ATP 10, TP22/036 *Virtus Health Limited* 04R - Panel Declines to Conduct Proceedings

² Unless otherwise indicated, 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)

APPLICATION

Declaration sought

11. By application dated 29 April 2022, Virtus sought a declaration of unacceptable circumstances, submitting (among other things) that:
 - (a) The BGH BS contained no reference to the Revised CapVest Proposal, omitted other material information, and contained misleading statements – including misleading and inaccurate descriptions of the tax rulings sought by Virtus in relation to the CapVest proposals.
 - (b) BGH Bidders did not amend the BGH BS prior to dispatch despite the issues above being brought to their attention by Virtus.
 - (c) The BGH Supplementary BS contained misleading statements and omitted material information, including that it did not state the price offered under the Revised CapVest Proposal, did not adequately update and correct previous disclosure, and incorrectly stated that *“the after-tax returns under the BGH Bidders’ Offer may be more attractive to such Shareholders than the after-tax returns available under the Revised CapVest Takeover Offer”*.
12. Virtus also submitted (among other things) that:
 - (a) It was unacceptable for BGH Bidders not to have issued a supplementary bidder’s statement promptly after they became aware of the issues raised in the Virtus Letter to BGH Bidders and the Revised CapVest Proposal.
 - (b) BGH Bidders’ failure to dispatch a replacement bidder’s statement, rather than the defective BGH BS followed by the BGH Supplementary BS (which did not appear to have been sent to shareholders), was contrary to ASIC guidance³ and exacerbated the unacceptable circumstances.
 - (c) The BGH Supplementary BS was itself misleading and did not effectively correct the defects in the BGH BS, which further contributed to the unacceptable circumstances.
 - (d) By avoiding the issue of a replacement bidder’s statement, the BGH Bid was able to open earlier creating additional leverage for BGH relative to the Revised CapVest Proposal timetable.
13. Virtus submitted that it was concerned that *“its shareholders have been, and continue to be, misled by the BGH BS and the BGH Supplementary BS and may be induced into accepting into its offer without understanding that it is not supported by the Virtus board”*.
14. Virtus submitted that these unacceptable circumstances were amplified by the fact that BGH Bidders only required a small number of acceptances to block⁴ Virtus shareholders’ access to the higher price offered under the CapVest scheme.

³ ASIC Regulatory Guide 9 at [9.440] and [9.444]

⁴ BGH Capital has made a truth in takeovers statement that *“BGH will vote all Virtus shares that it owns or controls at the relevant time against any CapVest proposal to acquire Virtus by way of scheme of arrangement, and BGH will not accept into any takeover offer from CapVest with respect to all Virtus shares that it owns or controls at the relevant time”*

Interim orders sought

15. Virtus sought interim orders that BGH Bidders be restrained from processing acceptances under their bid or closing their bid until the conclusion of the Panel proceedings.

Final orders sought

16. Virtus sought final orders that BGH Bidders:
 - (a) provide corrective disclosure via a supplementary bidders' statement, in a form that ASIC and the Panel do not object to, that is dispatched to Virtus shareholders
 - (b) provide withdrawal rights to Virtus shareholders for a period of not less than 10 trading days and
 - (c) *"must extend the offer period of the BGH Bid so that it remains open until the earliest date it could have closed if BGH Bidders had sent a replacement bidder's statement, instead of dispatching the BGH BS, without the consent of Virtus under item 6 of section 633(1) of the Corporations Act"*.

DISCUSSION

17. We did not consider that the disclosure complained of by Virtus raised any significant concerns, except for disclosure regarding the Revised CapVest Proposal (**Disclosure Deficiencies**). In particular, we were concerned that BGH Bidders had dispatched the BGH BS without first lodging and sending, with the BGH BS, a supplementary bidder's statement to clearly disclose the implications of the Revised CapVest Proposal. BGH submitted that there was no requirement to dispatch a supplementary bidder's statement *"particularly where there has been extensive surrounding disclosure"*.⁵ We consider that the BGH Bidders should have done so. Furthermore, the BGH Supplementary BS that was issued shortly after dispatch of the BGH BS did not clearly update, *but instead confirmed*, the favourable comparison in the first row of the Key elements table of the BGH Bid with the Previous CapVest Proposal.
18. However, in the context of all the circumstances, we do not consider that our intervention is appropriate here.
19. We consider that Virtus addressed the principal disclosure deficiency by promptly sending the Virtus Letter to Shareholders making it clear that the Virtus board considered the Revised CapVest Proposal to be superior to the BGH Bid. That letter specifically stated that the BGH BS had not been updated for recent developments *"most notably in its reference to a previous version of CapVest's proposal that was improved by CapVest on 11 April 2022"*. If Virtus considered shareholders required it, Virtus could also have engaged with them in other ways, both before and after dispatch of the BGH BS.

⁵ We note that BGH Bidders would have been required to post with the BGH BS any supplementary lodged before its dispatch under item 6 (a) of the table in section 633(1) (given section 9 defines "bidder's statement" to mean "as supplemented") or post a replacement bidder's statement under item 6(b)(as modified by ASIC CO 13/528)

20. The Disclosure Deficiencies were not clearly raised by Virtus in the Virtus Letter to BGH Bidders⁶ or otherwise prior to making its application. Although BGH Bidders would have been made aware of Virtus' concerns regarding the comparison of the BGH Bid with the Revised CapVest Proposal in the BGH BS based on statements made in the Virtus Letter to Shareholders, Virtus did not clearly raise this directly with BGH. It is the Panel's preference that information deficiencies are identified promptly to the party responsible and this is relevant to whether the Panel will conduct proceedings.⁷
21. Virtus did not apply to the Panel until nine days after dispatch of the BGH BS. We consider this delay long in the context of the one month offer period⁸ for the BGH Bid. We also accept, as submitted by BGH, that it could assume that Virtus was comfortable with BGH's response on 14 April 2022 to the Virtus Letter to BGH Bidders since there was no further communication from Virtus. We had difficulties reconciling the delay in bringing the application with the orders sought by Virtus given the period of time the offer had then been open, the fact that Virtus had not previously raised the Disclosure Deficiencies with the BGH Bidders and note that the delay limited the actions we could potentially take. If Virtus wanted the Panel to be able to address the disclosure deficiency in a timely and effective manner, noting the highly contested battle for Virtus and Virtus' concern that BGH only required a small number of acceptances to block CapVest's scheme, it needed to apply more quickly.
22. Although it does not excuse their delay, BGH Bidders did lodge the BGH Supplementary BS before shareholders would have received the BGH BS. It is not clear to us that earlier despatch with the BGH BS would have made any difference (given the information on the Revised CapVest Proposal provided to shareholders, albeit not by post).
23. In our view, many of Virtus' concerns with BGH Bidders' disclosure could sufficiently be addressed by Virtus in its Target's Statement. We note that, since making the application, Virtus had issued its Target's Statement, with ASIC relief from the requirement to post.⁹ Given that, we consider it would be anomalous to require BGH Bidders to post a supplementary or replacement bidder's statement that would likely contain less information regarding the relative benefits of the Revised CapVest Proposal and the BGH Bid than the Target's Statement.
24. Virtus submitted that it had received an unsolicited email from a shareholder on 27 April 2022. The email stated that the shareholder had accepted the BGH Bid before "*the recommendation to take the CapVest offer over the BGH offer was received*" and asked Virtus to explain the shareholder's position now. Virtus submitted that this

⁶ Other than by suggesting, in the context of issues raised in relation to the disclosure of the uncertainty of the tax implications of the Previous CapVest Proposal, that given the Revised CapVest Proposal, the entire section containing the Key elements table be removed or otherwise "*amended substantially to present the matters fairly to Virtus shareholders and in a way that is not misleading*"

⁷ Noting Guidance Note 5: Specific Remedies – Information Deficiencies at [23] to [26]

⁸ This period was subsequently extended

⁹ Also, on 6 May 2022, BGH lodged a Second Supplementary Bidders' Statement that appears to address some issues raised by Virtus in this matter. We have not considered it and make no comment as to its adequacy

demonstrated that the BGH BS and BGH Supplementary BS had caused, and was likely to cause, Virtus shareholders to accept the BGH Bid on the basis of misleading and incomplete information.

25. In its preliminary submission, BGH submitted that none of the acceptances it had received to date appeared to be from the Virtus shareholder identified in the email provided by Virtus. BGH also noted that Virtus had directed shareholders not to take action in respect of the BGH Bid on 6 April 2022 and recommended the Revised CapVest Proposal to shareholders on 11 April 2022, well in advance of the BGH Bid opening.
26. We do not consider the email provided by Virtus sufficiently persuasive for us to conduct proceedings given our view of all the circumstances. We note that there may be any number of reasons for a shareholder to accept the BGH Bid and subsequently wish to withdraw their acceptance, but in any event there had not been a material amount of acceptances at the time of the application.
27. In view of the matters above, and despite our concerns above regarding BGH Bidders' approach, we decided not to conduct proceedings.

DECISION

28. For the reasons above, we do not consider that there is any reasonable prospect that we would make a declaration of unacceptable circumstances. Accordingly, we have decided not to conduct proceedings in relation to the application under regulation 20 of the *Australian Securities and Investments Commission Regulations 2001* (Cth).

Orders

29. Given that we made no declaration of unacceptable circumstances, we make no final orders, including as to costs.

Richard Hunt

President of the sitting Panel

Decision dated 6 May 2022

Reasons given to parties 30 May 2022

Reasons published 2 June 2022

Advisers

Party	Advisers
BGH	Allens
Virtus	Gilbert + Tobin
CapVest	Ashurst