



Australian Government

Takeovers Panel

**Reasons for Decision
Virtus Health Limited 06R
[2022] ATP 17**

Catchwords:

Review - decline to conduct proceedings - bidder's statement - dispatch of documents - supplementary bidder's statement - disclosure - withdrawal rights

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

Eastern Field Developments Limited v Takeovers Panel [2019] FCA 311

Virtus Health Limited 05 [2022] ATP 15

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

INTRODUCTION

1. The review Panel, Rory Moriarty, John O'Sullivan (sitting President) and Karen Phin, declined to conduct proceedings on an application by Virtus Health Limited to review the decision of the initial Panel to decline to conduct proceedings in *Virtus Health Limited 05*.
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 which currently wholly owns the BGH Bidders
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

Takeovers Panel

Reasons – Virtus Health Limited 06R [2022] ATP 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 4
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 5
Virtus Letter to Shareholders	has the meaning given in paragraph 8

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. The Previous CapVest Proposal and the Revised CapVest Proposal involved a scheme of arrangement and a simultaneous takeover bid.
4. On 6 April 2022, BGH Bidders, which then held 19.99% of Virtus shares, lodged the BGH BS. The BGH BS contained a table that compared the BGH Bidders' offer with the takeover bid under the Previous CapVest Proposal, including in relation to consideration (**Key elements table**).
5. On 11 April 2022, Virtus announced the Revised CapVest Proposal. On the same day, 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 to the Virtus Letter to BGH Bidders.
6. On 20 April 2022, BGH Bidders announced the dispatch of the BGH BS. No amendments were made to the BGH BS prior to dispatch.

Takeovers Panel

Reasons – Virtus Health Limited 06R [2022] ATP 17

7. On 21 April 2022, BGH Bidders lodged with ASIC the BGH Supplementary BS, which (among other things):
 - (a) noted the Revised CapVest Proposal, describing the increase from the Previous CapVest Proposal to be \$0.02 per share, in the case of the scheme, and \$0.12 per share, in the case of the simultaneous takeover bid (but not the total value of consideration in either case) and
 - (b) stated that other “*than in respect of the [Key elements table], the commentary set out in Item 5 of the 'Why You Should Accept the Offer' section of the Bidders' Statement, including the illustrative example, is no longer relevant in light of the terms of the Revised CapVest Takeover Offer*”.
8. On 22 April 2022, Virtus released to ASX a letter to update shareholders, disclosing its concerns regarding the BGH BS and BGH Supplementary BS (**Virtus Letter to Shareholders**).
9. On 27 April 2022, Virtus received an email from a shareholder who had accepted the BGH Bid before they had received the Virtus board’s recommendation in respect of the Revised CapVest Proposal, and querying the options available to them. The shareholder did not allege that they were misled by the BGH Bidders Statement, or by the specific portions of that Bidders Statement alleged by Virtus to be misleading.
10. On 29 April 2022 the Panel received an application from Virtus in relation to its affairs. Virtus submitted (in summary) that the BGH BS contained no reference to the Revised CapVest Proposal and contained misleading statements. Virtus also submitted that BGH Bidders did not amend the BGH BS prior to dispatch despite these issues and the BGH Supplementary BS also contained misleading statements.
11. On 6 May 2022 the Panel decided not to conduct proceedings in relation to *Virtus Health Limited 05*.¹ The Panel stated the following in its decision media release²:

“The Panel was concerned that BGH Bidders had dispatched the BGH BS without first lodging and sending with it a supplementary bidder’s statement to clearly disclose the implications of the Revised CapVest Proposal on the section of the BGH BS that compared the BGH bid favourably to the previous proposal from CapVest.

However, the Panel considered that:

 - *On 22 April 2022, Virtus released a letter to the ASX that was despatched to shareholders making it clear that the Virtus board considered the Revised CapVest Proposal to be superior to the BGH bid, addressing the principal disclosure deficiency. If Virtus considered shareholders required it, Virtus could have engaged with them in other ways, both before and after dispatch of the BGH BS.*
 - *Virtus did not apply to the Panel until 9 days after dispatch of the BGH BS and some of the concerns in Virtus’s application, in particular, the comparison of the BGH bid with*

¹ See *Virtus Health Limited 05* [2022] ATP 15

² See TP22/38

Takeovers Panel

Reasons – Virtus Health Limited 06R [2022] ATP 17

the Revised CapVest Proposal in the BGH BS, were not previously raised in the Virtus Letter or other correspondence.

The Panel noted that BGH Bidders had, at least, lodged the BGH Supplementary BS before shareholders would have received the BGH BS. It was not clear to the Panel 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).

The Panel considered that many of Virtus’s concerns with BGH Bidders’ disclosure could sufficiently be addressed by Virtus in its Target’s Statement. The Panel noted that, since making the application, Virtus had issued its Target’s Statement, with ASIC relief from the requirement to post. Given that, the Panel considered 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.”

APPLICATION

12. On 10 May 2022, Virtus requested the President’s consent for leave to review the initial Panel’s decision to decline to conduct proceedings in *Virtus Health Limited 05* pursuant to section 657EA and made a review application.
13. In its request for the President’s consent and review application, Virtus submitted (among other things) that:
 - (a) BGH Bidders dispatched the BGH BS 9 days after it became aware of the terms of the Revised CapVest Proposal, without making any changes to the disclosure in the BGH BS and which represented the BGH Bid as the superior proposal.
 - (b) Its delay in making the initial application was explicable. While Virtus was concerned about BGH Bidders’ “*defective and insufficient disclosure*”, it “*did not see that there was any point in making an application to the Panel in respect of the misleading information*” after it made sure its shareholders were properly informed as quickly as possible by releasing the Virtus Letter to Shareholders two days after the BGH BS had been dispatched. However, Virtus made the initial application after discovering that a Virtus shareholder “*had mistakenly accepted the BGH Bid not realising that it was not the superior offer that was recommended by the Virtus Board*” and was subsequently informed that another Virtus shareholder had done the same thing.
 - (c) The issues the subject of the review application have important ramifications for market practice.
 - (d) “*In the context of this transaction, providing shareholders who have been misled with withdrawal rights is important not just for those shareholders and the interests of market integrity – it may also determine whether all Virtus shareholders have the opportunity to receive the benefits of the superior proposal which is currently recommended by the Virtus board*”.
14. The President considered that granting consent to the review was warranted on the basis that the initial Panel had concerns about the conduct and disclosures made by

Takeovers Panel

Reasons – Virtus Health Limited 06R [2022] ATP 17

BGH Bidders and that new evidence had been provided by Virtus in connection with its request for consent that had not been considered by the initial Panel.

Interim orders sought

15. Virtus sought interim orders that BGH Bidders be:
 - (a) restrained from processing acceptances under their bid pending resolution of the review and
 - (b) required to keep the BGH Bid open for acceptances until the conclusion of the review Panel proceedings.

Final orders sought

16. Virtus sought final orders that BGH Bidders:
 - (a) provide withdrawal rights to Virtus shareholders who accepted the BGH Bid prior to dispatch of Virtus' target's statement for a period of not less than 10 trading days with that period starting from the date on which the supplementary bidders' statement is dispatched to Virtus shareholders
 - (b) provide a supplementary bidders' statement advising Virtus shareholders of the Panel's decision, including details of the right to withdraw 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 have considered all the material, including the material before the initial Panel in *Virtus Health Limited 05* and preliminary submissions in response to the review application from CapVest and BGH, but address specifically only that part of the material we consider necessary to explain our reasoning.
18. The powers of a review Panel are set out in section 657EA. As our role is to conduct a de novo review,³ we did not consider it was necessary to delay considering this application before seeing the reasons of the initial Panel.
19. BGH Bidders dispatching their bidders' statement without first lodging and sending with it a supplementary bidders' statement that clearly disclosed the revised CapVest proposal was not an example of good disclosure. However, in the circumstances including in light of all the information available to Virtus shareholders (including the Virtus Letter to Shareholders), we do not consider it to be unacceptable.
20. BGH submitted that there *"was an unreasonable delay by Virtus in bringing the Initial Application (i.e. 23 days after lodgement of the BGH BS on 6 April 2022), particularly given that BGH promptly and comprehensively responded to concerns raised in the Virtus Letter of 11 April 2022 in the BGH Letter of 14 April 2022"*. We agree.

³ *Eastern Field Developments Limited v Takeovers Panel* [2019] FCA 311 at [181]

Takeovers Panel

Reasons – Virtus Health Limited 06R [2022] ATP 17

21. Virtus submitted that *“seeking corrective disclosure was not the primary reason for Virtus making the Initial Application”*. It submitted that it made the application *“[w]hen it became apparent that Virtus Shareholders had been confused or misled by the failure of the BGH BS to refer to the current Revised CapVest Proposal”*, referring to an email it had received from a shareholder on 27 April 2022 who had accepted the BGH Bid before receiving the Virtus board’s recommendation to accept the Revised CapVest Proposal.⁴ Since the initial application, Virtus submitted that it had received a communication from a second shareholder *“who has mistakenly accepted the BGH Bid”*. Virtus submitted that *“[i]f the Panel had concerns about the disclosure by BGH, and it appears that some retail shareholders have been misled by this disclosure, the only real avenue of redress for those shareholders is for the Panel to commence proceedings”*.
22. It was not clear from the material, including the new evidence, that any Virtus shareholder was misled by any misleading or deficient disclosure on the part of BGH Bidders. In relation to the communication from the second shareholder, Virtus submitted that its CFO had received an unsolicited phone call from the shareholder on 3 May 2022 and provided a contemporaneous email from its CFO summarising the exchange with the shareholder. The email stated that the shareholder had accepted the BGH Bid *“...but has now seen the Takeover Statement [target’s statement] and recommendation from Virtus and wants the shares back and has asked what options are available?”*. Virtus submitted that this demonstrated that the BGH BS and BGH Supplementary BS had caused, and may cause, Virtus shareholders to accept the BGH Bid on the basis of misleading and incomplete information.
23. We do not consider that the email from the Virtus CFO describing the phone call from the shareholder on 3 May 2022 demonstrated that the shareholder had actually been misled, or if he had been misled that he had been misled by the alleged disclosure deficiencies made by BGH Bidders. In addition, the Virtus board had made clear to shareholders that they should take no action in relation to the BGH Bid in earlier public statements.
24. We are also concerned that review proceedings to investigate these circumstances, following the delay by Virtus in bringing the initial application, may unfairly prejudice the BGH Bid.⁵

⁴ See [9]

⁵ which, at the time, was due to close on 27 May 2022, ahead of the CapVest scheme meeting

Takeovers Panel

Reasons – Virtus Health Limited 06R
[2022] ATP 17

DECISION

25. For the reasons above, and despite our concerns regarding BGH Bidders' approach, 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

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

John O'Sullivan

President of the sitting Panel

Decision dated 17 May 2022

Reasons given to parties 10 June 2022

Reasons published 20 June 2022

Advisers

Party	Advisers
BGH	Allens
Virtus	Gilbert + Tobin
CapVest	Ashurst