



Australian Government

Takeovers Panel

Reasons for Decision

Healius Limited

[2023] ATP 6

Catchwords:

Decline to conduct proceedings – off-market takeover – bidder’s statement – disclosure – misleading statements – material omission – bid conditions – undertaking – dispatch – benefits of the bid/synergies – greenwashing – replacement bidder’s statement – withdrawal rights

Corporations Act 2001 (Cth), sections 602(a), 606(b)(iii), 636(1)(m) and 670A(1)

Australian Securities and Investments Commission Regulations 2001 (Cth), regulation 20

Takeovers Panel Procedural Rules 2020, Rule 20(1)

ASIC Class Order [CO 13/528]

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

INTRODUCTION

1. The Panel, Timothy Longstaff, Denise McComish (sitting President) and Rory Moriarty, declined to conduct proceedings on an application by Healius in relation to its affairs. The application concerned bidder’s statement disclosure in relation to an off-market takeover bid by ACL for Healius. The Panel considered that there was no reasonable prospect that it would declare the circumstances unacceptable after ACL issued a replacement bidder’s statement in a form the Panel did not object to.

2. In these reasons, the following definitions apply.

- ACL** Australian Clinical Labs Limited
- ACL announcements** has the meaning given to that term in paragraph 6
- Bidder’s Statement** ACL’s Bidder’s Statement dated 20 March 2023 in respect of its off-market takeover bid for Healius
- Expected Cost Synergies** certain cost savings that ACL expects would be generated following its acquisition of Healius shares under its off-market takeover bid as detailed in the Bidder’s Statement
- Healius** Healius Limited
- Perpetual** Perpetual Limited, a substantial shareholder of Healius with voting power of approximately 12.4%
- Tanarra** Tanarra Capital Australia Pty Ltd, a substantial shareholder of Healius with voting power of approximately 8.0%

FACTS

3. Healius is an ASX listed company (ASX code: HLS). It is Australia’s second largest pathology provider with market share of approximately 28%.
4. ACL is an ASX listed company (ASX code: ACL). It is Australia’s third largest pathology provider with market share of approximately 14%.
5. On 20 March 2023, ACL announced an off-market takeover bid for Healius offering 0.74 ACL shares for every 1 Healius share and lodged its Bidder’s Statement with ASIC and ASX. As set out in the Bidder’s Statement:
 - (a) the offer is subject to the satisfaction or waiver of 25 conditions, including (among others):
 - (i) ACCC clearance
 - (ii) 90% minimum acceptance
 - (iii) a condition restricting the ability of Healius to make certain acquisitions and disposals of any company, business or shares or other securities in any company, irrespective of materiality and
 - (iv) a condition restricting the ability of Healius to pay a bonus or incentive payment or retention payment or increase the remuneration of any employee that would result in the aggregate remuneration of that employee increasing by 7% or more in any financial year and
 - (b) the initial offer period expires on 29 September 2023, which is longer than a typical initial offer period because ACL expects the ACCC clearance process to take at least 6 months.
6. At the same time as releasing its Bidder’s Statement, ACL released on ASX an investor presentation titled “*Takeover Offer for Healius: Creating Australia’s largest pathology provider*” and an ASX announcement titled “*Takeover Offer for Healius Limited*” (together, the **ACL announcements**). The investor presentation directed Healius shareholders to read ACL’s ASX announcement and the Bidder’s Statement in their entirety in conjunction with the investor presentation and included certain other cross-references to the Bidder’s Statement.
7. Also on 20 March 2023, Healius issued an ASX announcement in which it advised shareholders to “*take no action*” in relation to the ACL takeover offer.
8. On 26 March 2023, Perpetual and Tanarra, two substantial shareholders of Healius holding in aggregate approximately 20.4% of its share capital, issued media statements to the effect that:
 - (a) in the case of Perpetual, the offer is unattractive in terms of its structure, certainty and terms, and in its view could likely result in an inappropriate transfer of value from Healius shareholders to ACL and
 - (b) in the case of Tanarra, both the exchange rate offered by ACL for Healius shares, and the offer conditions, are very unattractive and it has no intention to accept the offer.

9. On 27 March 2023, Healius issued a further ASX announcement in which (among other things) it:
- (a) reiterated its “*take no action*” advice
 - (b) alerted its shareholders to the media statements of Perpetual and Tanarra
 - (c) noted that it had written to ACL pointing out a number of deficiencies it considered existed in the Bidder’s Statement and, having not been able to resolve those issues with ACL, intended to raise the matters with the Panel and
 - (d) noted that a number of the conditions of the ACL takeover offer were overly restrictive to the extent that running the Healius business in the ordinary course could lead to certain conditions being triggered.

APPLICATION

Declaration sought

10. By application dated 28 March 2023, Healius sought a declaration of unacceptable circumstances. Healius submitted that ACL’s Bidder’s Statement was misleading (including by omission) and inadequate because it:
- (a) failed to adequately disclose the impact on the realisation of the Expected Cost Synergies if it acquired less than 90% of the Healius shares
 - (b) failed to adequately address that ACCC may impose conditions on any clearance which may include divestments that impact the realisation of the Expected Cost Synergies
 - (c) misrepresented that the offer represents a “nil premium” based on a single comparative 10-day volume weighted average price metric when other common comparative metrics reflect a “negative premium”
 - (d) failed to adequately disclose the risk to Healius shareholders of accepting the bid early
 - (e) made misleading representations regarding expected improvements to safety standards without reasonable grounds and
 - (f) made misleading representations regarding expected reduced carbon footprint without reasonable grounds.
11. Healius also submitted that certain conditions of the bid were “*unusually extensive, overreaching and unnecessarily restrictive*”, including the conditions described in paragraphs 5(a)(iii) and (iv) above, as they limit what Healius can do during a significant period of time to maintain its attractiveness as a standalone entity or as an acquisition target for other entities.
12. Healius submitted that as a result of these issues:
- (a) the acquisition of control over voting shares in Healius was not taking place in an efficient, competitive and informed market, contrary to section 602(a)¹

¹ Unless otherwise specified, all statutory references are to the *Corporations Act 2001* (Cth) (as modified by ASIC) and all terms used in Chapter 6 or 6C have the meaning given in the relevant Chapter

- (b) Healius shareholders were not being given enough information to enable them to properly assess the merits of ACL’s bid, contrary to section 602(b)(iii) and
- (c) the Bidder’s Statement contravenes sections 636(1)(m) and 670A(1).

Interim order sought

13. Healius sought an interim order, pending the final determination of the application, that ACL be restrained from:
 - (a) dispatching the Bidder’s Statement
 - (b) lodging a supplementary or replacement bidder’s statement in relation to the matters raised in the application and
 - (c) sending or making any communications with Healius shareholders in relation to the matters raised in the application.
14. In response to our request for submissions on the requested interim orders, ACL undertook that it would provide at least 48 hours’ notice of its intention to lodge a replacement bidder’s statement or despatch its Bidder’s Statement (including any replacement bidder’s statement) to Healius shareholders pending determination of the application.
15. On the basis of this undertaking, we decided not to make the interim orders sought by Healius.

Final orders sought

16. Healius sought final orders that:
 - (a) ACL provide corrective disclosure in the form of a replacement bidder’s statement to address the matters raised in the application
 - (b) ACL issue ASX announcements correcting any misleading disclosures made in the ACL announcements and
 - (c) all further disclosures and any communications with Healius shareholders do not include the statements and conduct raised in the application.

Preliminary submissions

17. ACL made preliminary submissions responding to each of the issues raised in the application and attaching a draft replacement bidder’s statement seeking to address certain of those issues. Among other things, ACL submitted that it was willing to issue the replacement bidder’s statement subject to:
 - (a) Healius undertaking to consent to early dispatch of the replacement bidder’s statement for the purpose of *ASIC Class Order [CO 13/528]* to permit ACL to dispatch the replacement bidder’s statement 7 days after being lodged with ASIC and sent to Healius shareholders and
 - (b) the Panel deciding not to conduct proceedings.
18. Healius made rebuttal submissions responding to the ACL preliminary submissions in which it submitted (among other things) that the draft replacement bidder’s statement:

- (a) fails to adequately disclose the risks and consequences of not fully realising the Expected Cost Synergies where ACL acquires a relevant interest of more than 50% and less than 90% of Healius shares
 - (b) does not disclose any risks and consequences of not fully realising the Expected Cost Synergies where ACL acquires a relevant interest of less than 50% of Healius shares and
 - (c) is unduly optimistic regarding the prospects of unconditional ACCC clearance and fails to disclose the basis for ACL's view that any possible divestments would not materially impact the realisation of the Expected Cost Synergies or the valuation of the combined group.
19. While a party is not ordinarily entitled to make rebuttal submissions to a preliminary submission, having regard to the nature and extent of ACL's preliminary submissions and its draft replacement bidder's statement, and the prospect that consideration of the rebuttal submission may assist in promptly dealing with Healius' application, we agreed to accept Healius' rebuttal submission under rule 20(1) of the Panel's Procedural Rules.

DISCUSSION

20. Having considered the application, ACL's preliminary submissions, ACL's draft replacement bidder's statement and Healius' rebuttal submissions, we had concerns in relation to ACL's disclosure of the impact of it acquiring less than 90% of Healius shares on the Expected Cost Synergies. We were minded to conduct proceedings in relation to this issue but considered that our concerns could be dealt with through additions to ACL's draft replacement bidder's statement regarding the anticipated:
- (a) breakdown of the Expected Cost Synergies
 - (b) timing to realise the Expected Cost Synergies and
 - (c) value of the combined group,
- in the event ACL acquired more than 50% but less than 90% of Healius shares.
21. We informed ACL that we expected that the further disclosures we requested would be accompanied by relevant context, assumptions and other supporting disclosures.
22. We considered it was not necessary for the undertaking offered by ACL to issue the replacement bidder's statement to be subject to any undertaking from Healius as suggested in ACL's preliminary submission (see paragraph 17(a)), noting that ACL also had the option to seek ASIC's consent for early dispatch of its replacement bidder's statement under *ASIC Class Order [CO 13/528]*.
23. We were minded to consider that the other issues identified in Healius' application had been adequately addressed in ACL's draft replacement bidder's statement but invited the parties to make further submissions on this point. In particular we sought ASIC's views in relation to whether the draft replacement bidder's statement adequately dealt with Healius' greenwashing concerns.
24. In relation to ACL's disclosure regarding the prospect of unconditional ACCC clearance and the potential impact of any divestment conditions on the Expected

Cost Synergies and value of the combined group, we informed ACL that we would expect it to disclose promptly in a supplementary bidder's statement if it accepted divestment conditions from the ACCC and offer withdrawal rights to accepting Healius shareholders. ACL submitted that withdrawal rights may only be necessary if the assets the subject of those divestments are material in the context of the combined group or those divestments would otherwise be reasonably likely to have a material adverse impact on the realisation of the Expected Cost Synergies. We acknowledge that materiality may be a factor if this scenario were to arise.

25. ACL confirmed that it intended to prepare an updated draft replacement bidder's statement addressing our concerns and that it was prepared to give an undertaking that it would issue the replacement bidder's statement in a form we did not object to, subject to the Panel continuing to consider that this would adequately address the relevant issues.
26. Healius submitted, in effect, that:
 - (a) ACL should also be required to make corrective disclosure in relation to the misleading and inadequate disclosure in the ACL announcements given these documents would still be accessible by Healius shareholders, particularly given the large number of retail Healius shareholders and
 - (b) the replacement bidder's statement should also be updated to address the anticipated impact on Expected Cost Synergies in the event ACL acquired less than 50% of Healius shares as there is a real possibility this outcome could eventuate if ACL elected to waive the 90% minimum acceptance condition to motivate acceptances of more than 50% of Healius shares.
27. ASIC submitted that it had no concerns with the draft replacement bidder's statement, except that it would prefer ACL to remove, or otherwise include further disclosure to explain, headline claim references to the merged group being expected to deliver "*ESG benefit*". ASIC submitted that while the benefits disclosed in the draft replacement bidder's statement appeared to be environmentally focussed (relating to a reduced carbon footprint), they did not substantively canvass any "*social*" and "*governance*" aspects.
28. ACL submitted an updated draft replacement bidder's statement incorporating changes to address (among other things):
 - (a) our request for further disclosure in relation to the anticipated breakdown and timing of the Expected Cost Synergies and impact on value of the combined group where ACL acquired more than 50% but less than 90% of Healius shares and
 - (b) ASIC's comments regarding the "*ESG benefits*" claim.
29. In relation to Healius' submission that ACL should make corrective disclosure in relation to the ACL announcements, ACL submitted that this was not required as Healius shareholders (and the market generally) would be fully informed about the updated and revised disclosures through the replacement bidder's statement which would be published on the ASX in mark-up against the earlier lodged replacement bidder's statement.

30. In relation to Healius' submission that ACL should disclose the impact on Expected Cost Synergies of achieving less than a 50% relevant interest in Healius, ACL submitted that this was not raised in the application, it did not make any preliminary submissions in relation to it and had not been sought by the Panel.
31. In the updated draft replacement bidder's statement, ACL stated that it believed it could reasonably expect *"to reach agreement with Healius in relation to the operation of their respective businesses in a way which allows them to realise the Expected Cost Synergies"* in circumstances where ACL declares the offer free of the 90% minimum acceptance condition and acquires a relevant interest in more than 50%, but less than 90%, of Healius shares.
32. Healius submitted that the updated draft replacement bidder's statement did not provide the relevant context, assumptions and other supporting disclosures as requested by the Panel and was otherwise inadequate to enable Healius shareholders to assess the merits of the offer, including because it failed to disclose:
- (a) sufficient details as to the nature and extent of the agreements that would need to be reached between Healius and ACL for it to realise the Expected Cost Synergies
 - (b) the anticipated timing for reaching those agreements
 - (c) the potential complexities in reaching those agreements, including that they would need to be negotiated between ACL and the independent directors of Healius (not ACL's nominee directors)
 - (d) the approvals required to reach those agreements (including any related party shareholder approvals)
 - (e) the risk of failing to reach those arrangements for Healius shareholders and
 - (f) how much of the Expected Cost Synergies are contingent on an agreement being reached.
33. Having considered ACL's updated draft replacement bidder's statement and Healius' response, and recognising the potential divergence in outcomes for Healius shareholders that accept ACL's bid (who will acquire ACL shares) and those that do not (who may continue to hold Healius shares if ACL is unable to effect compulsory acquisition), we informed the parties that we were minded not to object to the updated draft replacement bidder's statement if ACL included the following additional disclosure:
- (a) a clear statement that the benefits that may flow from the potential ACL consolidated equity value if ACL acquires 50.1% of Healius shares may not flow equally between ACL shareholders and Healius shareholders who do not accept the bid
 - (b) qualitative disclosure of the possible value creation (synergies) that may accrue to Healius shareholders who do not accept the bid if ACL acquires 50.1% of Healius shares and how it may differ from the possible value creation (synergies) that may accrue to ACL shareholders (including those Healius shareholders who accept the bid) and

- (c) the risk that any agreement between ACL and Healius required to realise the Expected Cost Synergies may involve detailed negotiations between ACL and the independent directors of Healius and may be subject to approval (including under the ASX Listing Rules) of non-associated Healius shareholders.
34. ACL submitted a further revised draft replacement bidder’s statement which (among other things) incorporated our further requested disclosure in a form we did not object to and, on 14 April 2023, lodged that replacement bidder’s statement with ASIC and ASX.

DECISION

35. We consider that ACL’s replacement bidder’s statement sufficiently deals with the issues raised in Healius’ application. We are not satisfied that the circumstances require the corrective disclosure sought by Healius in relation to the ACL announcements noting that it is open to Healius to include disclosure in this regard in its Target’s Statement.
36. 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 decided not to conduct proceedings in relation to the application under regulation 20 of the *Australian Securities and Investments Commission Regulations 2001* (Cth).

Orders

37. Given that we have decided not to conduct proceedings, we do not (and do not need to) consider whether to make any final orders.

Denise McComish

President of the sitting Panel

Decision dated 14 April 2023

Reasons given to parties 22 May 2023

Reasons published 24 May 2023

Takeovers Panel

Reasons - Healius Limited
[2023] ATP 6

Advisers

Party	Advisers
ACL	Gilbert + Tobin
Healius	King & Wood Mallesons