



Australian Government

Takeovers Panel

Reasons for Decision
Virtus Health Limited 04R
[2022] ATP 13

Catchwords:

Review – decline to conduct proceedings – on-market acquisitions – efficient, competitive and informed market – prescribed occurrences – ASIC Market Integrity Rules

Corporations Act 2001 (Cth), sections 611 (item 2), 652C, 657EA

Australian Investments and Securities Commission Act 2001 (Cth), section 127

ASIC Market Integrity Rules (Securities Markets) 2017, rule 5.13.1

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Takeovers Panel Procedural Rules 2020, rule 18(5)

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

INTRODUCTION

1. The Panel, Rory Moriarty, John O’Sullivan (sitting President) and Karen Phin, declined to conduct proceedings on an application by CapVest Partners LLP for review of the decision of the initial Panel to decline to conduct proceedings in *Virtus Health Limited 03*.¹
2. In these reasons, the following definitions apply.

ASIC Market Integrity Rules

ASIC Market Integrity Rules (Securities Markets) 2017

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 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

CapVest

CapVest Partners LLP by its bid vehicle, Evergreen Bidco Pty Ltd

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initial Panel means the sitting Panel in *Virtus Health Limited 03*
Virtus Virtus Health Limited

FACTS

3. Virtus is an ASX listed company (ASX code: VRT).
4. On 13 March 2022, CapVest entered into a transaction implementation deed with Virtus proposing to undertake a scheme of arrangement at \$8.25 per share and a simultaneous off-market takeover offer at \$8.10 per share (in each case, less the value of any dividends or distributions declared or paid after the date of the deed, including a \$0.12 per share dividend to be paid by Virtus on 14 April 2022).
5. On 6 April 2022, BGH announced its intention to make an off-market takeover offer at \$8.00 per share to acquire all of the fully paid ordinary shares in Virtus it did not already own or control and the BGH Bidders released their bidders' statement containing offers conditional only on the matters listed in section 652C.²
6. The 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.

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

² 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)

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ASX may incur brokerage charges and GST on brokerage charges which they may not incur if they accept the Offer.”³

7. 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.”*

8. On 7 April 2022, CapVest made an application submitting (among other things) that 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 the BGH Bidders on market above the bid price. It submitted that reliance on BGH’s announcement and the bidders’ statement as providing the announcement required by Rule 5.13.1 circumvented the purpose of that rule and would result in the trading of Virtus shares (and for Chapter 6 purposes the acquisition of control of Virtus) not taking place in a market that is efficient, competitive and informed.
9. On 11 April 2022, CapVest improved its proposal increasing the price payable under the scheme to \$8.15 per share and under the takeover to \$8.10 per share (in each case, less the value of any dividends or distributions declared or paid after 11 April 2022, but excluding the \$0.12 per share dividend previously declared by Virtus).
10. On 22 April 2022, the initial Panel declined to make a declaration of unacceptable circumstances and accepted an undertaking from the BGH Bidders that, in effect, they would notify the market immediately when an order they have placed on market is matched at a higher price than the bid price (and otherwise to follow the usual ASX market procedures) before they can make any further on market purchases (except they may complete the unfilled balance under the order that resulted in the higher price).

APPLICATION

11. On 22 April 2022, CapVest requested the President’s consent for leave under section 657EA to review the initial Panel’s decision to accept the undertaking and not to make a declaration in *Virtus Health Limited 03* and made a review application.

³ BGH’s 6 April 2022 announcement also contained the first four paragraphs of this disclosure under the heading “ASIC Market Integrity Rule 5.13.1 Disclosure”

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President's consent

12. After considering the request for consent and a preliminary submission from BGH, the President granted consent to the application for review given the novel issue presented by the circumstances and the potential impact of the initial Panel's decision on market practice.

Interim orders

13. On 25 April 2022, at the request of CapVest, the President decided to make an interim order (**Annexure A**) in the same form as the initial Panel to permit time for the review Panel to consider the matter. The interim order in effect prohibited the BGH Bidders (without the consent of the President or, once appointed, the review Panel) 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.
14. BGH submitted that, in order to preserve the status quo genuinely for both BGH and CapVest, CapVest should be prevented from obtaining any timing advantage arising from the review proceedings and requested an interim order preventing CapVest from despatching its bidder's statement (or preventing Virtus from consenting to early despatch). BGH noted that the first court hearing for CapVest's scheme was scheduled for 28 April 2022 and it expected that CapVest and Virtus would propose a shareholder booklet that unified the scheme booklet, the bidder's statement and target's statement (with Virtus consenting to early despatch of the bidder's statement for this purpose "*subverting the exposure period that the market would otherwise have with the draft bidder's statement available for a 14 day period on ASX before it is despatched and takeover offers open*").
15. Virtus submitted (among other things) that the BGH requested interim order would have a material impact on Virtus shareholders receiving the transaction booklet in accordance with the agreed timetable previously disclosed to the market and the opportunity to consider the CapVest scheme and the CapVest takeover and receive the benefits of the recommended transaction (that was superior to the BGH takeover) in accordance with that timetable.
16. After considering submissions on BGH's request, the President declined to make a further interim order. While noting the timing advantage raised by BGH, the President did not consider that preventing despatch was necessary to maintain the status quo given that CapVest's takeover was conditional on the scheme not proceeding.

DISCUSSION

17. We reviewed all the material before the initial Panel, the review application, a preliminary submission from BGH in response to the review application and the reasons for the initial Panel's decision, but address specifically only that part of the material we consider necessary to explain our reasoning.

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18. CapVest’s review application repeated the submissions made in its initial application and further submitted that:
 - (a) the undertaking accepted by the initial Panel did not achieve an outcome of proper disclosure of BGH’s intentions because it explicitly permitted BGH to undertake trades at prices higher than the bid price by placing a single order of any size *“that is able to be executed **before** an announcement is made to ASX and the appropriate trading states are imposed”* (emphasis included) and
 - (b) the Chapter 6 principles were not being satisfied because, while sellers may be willing sellers at the prices displayed before any announcement of an improved BGH offer, they are doing so on an uninformed basis, noting that a statement by BGH that it may buy below, at or above the improved bid price *“hardly creates a market informed by knowledge of what the improved bid price is”*.
19. In its preliminary submission, BGH submitted (among other things) that it made an off-market takeover bid which is conditional only on no prescribed occurrences *“taking on substantive commercial risk ... in volatile equity markets”* on the basis that it would have the benefit of item 2 of section 611. However, it submitted that it had been denied that benefit by successive interim orders since 11 April 2022 *“without any suggestion of wrongdoing or concern from the initial Panel, ASIC or ASX”* and queried CapVest’s objectives for bringing the review application.
20. Having considered all the material, we agree with the reasons and conclusions of the initial Panel and note that while this is a *de novo* hearing, no new material was provided that would result in us coming to different conclusions. There was also nothing to warrant us making additional further enquiries that would further delay the transactions proceeding as proposed.
21. We also note that sellers on-market during a takeover bid always give up the opportunity to accept an improved off-market bid price. Here is no different, except potential sellers know that the BGH Bidders may be willing buyers at a price higher than the bid price.
22. As noted at paragraph 54 of the initial Panel’s reasons, Chapter 6 permits on-market purchases during an off-market takeover bid that is conditional only on prescribed occurrences at a price above the bid price without prior disclosure of the increased price. The BGH Bidders have clearly disclosed their intention to acquire Virtus shares on market including at above the bid price. In our view the market is operating on an informed basis. Whether Rule 5.13.1 requires more than this is not a matter for us, although we note that if it required a prior announcement of the increased price, presumably it would expressly say so, as it does in Rule 5.12.1.
23. Accordingly, we do not consider that BGH’s proposal undermines the existence of an efficient, competitive and informed market, noting also the undertaking provided by BGH which removes any potential delay in the BGH Bidders disclosing to the market that they have acquired Virtus shares on-market above the bid price.

DECISION

24. 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).
25. Given that we have decided not to conduct proceedings, we do not (and do not need to) consider whether to make any final orders. As the proceedings are determined, the President’s interim order ceases to have effect, however the undertaking given to the initial Panel remains in place.

Request for use of confidential information

26. In conjunction with its review application, CapVest wrote to ASIC asking ASIC to request that the Markets Disciplinary Panel (a separate peer review panel that makes decisions about alleged breaches of the market integrity rules) express a view as to the correct interpretation of Rule 5.13.1. CapVest asked for our confirmation that the provision by ASIC to the Markets Disciplinary Panel of confidential information provided to the Panel in these proceedings be permitted in accordance with Rule 18(5) of the Takeovers Panel Procedural Rules 2020.
27. As to the confidential information provided to the initial Panel, we directed this matter to the initial Panel. In respect of these proceedings, we note that ASIC is not subject to Rule 18, but is subject to its own confidentiality requirements in section 127 of the *Australia Securities and Investments Commission Act 2001* (Cth) and it is therefore a matter for ASIC to decide whether to provide material from the proceedings to its Markets Disciplinary Panel.

John O’Sullivan

President of the sitting Panel

Decision dated 3 May 2022

Reasons given to parties 6 July 2022

Reasons published 8 July 2022

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Advisers

Party	Advisers
BGH	Allens
Virtus	Gilbert + Tobin
CapVest	Ashurst



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ANNEXURE A

**CORPORATIONS ACT
SECTION 657E
INTERIM ORDERS**

VIRTUS HEALTH LIMITED 04R

CapVest made an application to the Panel dated 22 April 2022 seeking a review of the Panel's decision in *Virtus Health Limited 03* and requesting interim orders pending the review.

The President ORDERS:

1. Without the consent of the President or, once appointed, the review 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 <i>Corporations Act 2001</i> (Cth)
CapVest	CapVest Partners LLP

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UBS Securities	UBS Securities Australia Limited
Virtus	Virtus Health Limited

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

**Tania Mattei
General Counsel
with authority of Alex Cartel
President
Dated 25 April 2022**