

VIRTUS 03: ON MARKET ACQUISITIONS DURING A BID

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Legal Briefings - By **Rodd Levy and Mariia Artemenko**

The Australian Takeovers Panel in *Virtus 03* addressed the lack of clarity regarding the steps a bidder should take in relation to an on-market acquisition of shares at a price different from the bid price – should the precise price be disclosed to the market prior to making such acquisition, or not?

IN BRIEF

- The Takeovers Panel considered that neither the *ASIC Market Integrity Rules (Security Markets) 2017* nor the takeovers legislation required the bidder to disclose a specific price per share before making an on-market acquisition at a price higher than the offer price under the takeover bid.
- The Panel considered the market was properly informed of this possibility and a bidder should not be disadvantaged by having to telegraph its tactics where that is not expressly required by the legislation or the relevant ASX rules.
- Under the legislation, the bid is varied automatically so the higher price becomes the bid price. The bidder should, however, immediately announce the higher price once it has made an acquisition. This was upheld on review: *Virtus Health 04R*.

BACKGROUND

Once a takeover bid is announced, it may be important for the bidder to acquire shares on-market in order to soak up strategic parcels or to increase its grip on the target. Where the acquisitions will increase the bidder's stake beyond 20%, the law permits further acquisitions provided that the bid is unconditional or subject only to there being no prescribed occurrences.

In the battle between BGH and CapVest for Virtus Health, the steps that need to be taken to utilise this ability were examined for the first time in many years.

In order to compete with an earlier proposal from CapVest which had been accepted by the Virtus board, BGH Capital (which held 19.99% of shares) announced an off-market takeover bid at \$8.00 per share. The bid was subject to no conditions other than a no prescribed occurrences condition. The announcement stated that BGH reserved the right to buy shares on-market at prices different to the bid price (without specifying the varied price per share). That was said to comply with rule 5.13.1 of the *ASIC Market Integrity Rules*, which provides that:

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.

BGH stated in the announcement that, if a higher price was paid, it would be paid to any shareholder who had accepted the takeover offer (as required by the legislation).

CapVest challenged BGH's announcement and sought a declaration of unacceptable circumstances from the Takeovers Panel. It argued that rule 5.13.1 of the *ASIC Market Integrity Rules* prevented BGH from buying shares on-market at a price higher than the prevailing bid price without first announcing that price to the market. The consequence of such an announcement should be, in CapVest's submission, that trading in Virtus shares would be suspended for 60 minutes to give market participants (including CapVest) time to adjust before trading shares. In CapVest's submission, that was necessary to ensure the market was properly informed.

TAKEOVER PANEL'S DECISION

The Takeovers Panel examined rule 5.13.1 of the *ASIC Market Integrity Rules* and its history carefully and declined to make a declaration of unacceptable circumstances. The Panel stated that it was unclear what should be implied from the language in the rule. The Panel observed that, unlike a similar rule that applies only to an on market bidder, rule 5.13.1 did not spell out that the varied price had to be announced. The Panel felt that the interpretation of rule 5.13.1 is not a matter for it to determine.

Therefore, the Panel decided the matter based on ordinary Chapter 6 principles. The Panel concluded that the pre-disclosure of the higher price per share was not necessary to ensure an 'efficient, competitive and informed market' and accepted that BGH would be put at a disadvantage if it was required to disclose the price at which it was proposing to acquire shares above the bid price before making any such acquisition.

However, the Panel expressed concerns regarding the possibility of a potential delay in BGH's disclosure of the varied price to the market. At the Panel's request, BGH provided an undertaking to the effect that, after each on-market acquisition of shares at the price above the bid price, it would immediately announce the acquisition and follow the usual ASX market procedure. The Panel stated that BGH's undertaking satisfactorily addressed the potential unacceptable circumstances.

This was upheld on review: *Virtus Health Ltd 04R*.

A few weeks after the decision, just prior to the market closure on 24 May 2022, BGH, while its offer price was still \$8.00 per share, acquired 1,541,977 shares on-market for \$8.15 per share. BGH subsequently announced the higher price at 5:39 pm, though it does not appear that there were any trades in the time between BGH's acquisition and the announcement being made.

HISTORY OF RULE 5.13.1

Rule 5.13.1 of the *ASIC Market Integrity Rules* applies to both market and off-market takeover bids. Its history can be traced back to at least the 1980s (and it probably existed earlier). The rule then provided that a broker acting for a bidder may not buy securities at a price per share different from that specified in the offer until an announcement of 'the varied price' has been made.

It remained in this form until 13 March 2000, when the CLERP reforms were introduced. At that point, the rule was streamlined and simplified. The express requirement for 'the varied price' to be included was omitted and the rule essentially took on its current form. It is unclear why the change was made or if any thought was given to the effect of the change. A contemporary publication said that this was part of a series of 'minor amendments to adopt the CLERP terminology for consistency purposes and did not involve policy issues'. It reminds us of the old saying that, given a choice between a conspiracy and a stuff up, always assume a stuff up!

There is potentially some evidence that the market may have assumed that the old requirement to specify an actual price continued after 2000. BNP Paribas was fined \$5,500 in 2001 by the National Adjudicatory Tribunal for acquiring shares at the price higher than the bid price prior to making an announcement to ASX that the takeover bid had been varied. The Tribunal also recommended that BNP put in place an appropriate training program to avoid future breaches of the rule. However, this example is not conclusive as it is unclear if there was any announcement made in that case (BGH submitted in *Virtus 03* there was no announcement), not simply one which did not specify the higher bid price. (In those days, generic reservations to buy at different prices were very unusual, presumably because the general assumption was that the pre-CLERP requirement to specify a price continued.)

The old formulation of the rule sits more comfortably with the ASX rule that suspends trading for 60 minutes once a varied bid price has been announced. This is contained in Appendix 4013 Part 3 of the *ASX Operating Rules Procedures Appendices*. If rule 5.13.1 can be satisfied simply by making a generic statement that does not specify the revised price, how and when is this rule supposed to operate? Presumably, this would be when the price variation was finally announced post share purchase, even though that seems to defeat the intent of that procedure, which is to allow the market to pause and factor in the revised bid price before there is any further share trading.

COMMENTARY

First, we think the Panel came to the right decision in *Virtus 03* and *Virtus 04R*. Rule 5.13.1 does not require the varied price to be announced before executing trades at that price. Even though the reasons for the change from the 1980s' form of the rule are very unclear (assuming the drafting change was considered in detail at all), we think that an announcement from a bidder like the one made by BGH effectively warning shareholders who sell on market that they may be selling prematurely is sufficient to create an efficient, competitive and informed market. That has to be the unstated purpose of rule 5.13.1. We do not think that an efficient, competitive and informed market requires that the bidder must telegraph everything it proposes to do in the course of a bid. That approach slants the playing field against the bidder unfairly.

Second, the decision highlights that a generic reservation of rights to buy shares at a different price from the bid price satisfies the strict working of rule 5.13.1. That sort of reservation has appeared in various bidder's statements for a number of years. The decisions in *Virtus 03* and *Virtus 04R* will make this standard. It will become part of the usual boilerplate in a bidder's statement. That will neuter any meaningful role for rule 5.13.1. ASIC and ASX will need to consider whether to revise (or remove) the rule, though we think it still has a role to play to ensure that shareholders are reminded of the scope for bidders to buy shares at higher prices.

Third, the Panel decision is an interesting example of the Panel dealing with a situation where the possibility of particular circumstances arising in the future was the basis for the application. The Panel did not wait until BGH had actually purchased shares at a price higher than the bid price before it considered the matter. This aspect of the decision was not addressed in the Panel's reasons, but it may show a greater willingness by the Panel to consider issues that may be arguably hypothetical.

Fourth, we have been in contact with ASIC about rule 5.13.1 and whether ASIC has any reaction to the Panel's decision. ASIC is presently formulating public guidance for a Market Integrity Update. So, we will have to wait to see what they make of it.

As a final comment, we cannot help referring to the Takeovers Panel's decision in *Allegiance Mining NL* in 2008 as it raises similar issues. In that case, shareholders accepted an unconditional off-market offer unaware that the bidder had extended the offer period by giving the target a notice of extension minutes before the scheduled closing time of 7pm. The shareholders alleged this was unacceptable. We advised the bidder. The Panel decided that, by withholding information about the extension, the bidder had created unacceptable circumstances. This was the case even though there was no requirement for any immediate announcement, there was a specific rule for on-market bidders to announce an extension 7 days beforehand and the bidder had reserved the right to vary the offer, including by extending the offer, in the bidder's statement. The Panel said that shareholders were 'deprived of the opportunity to obtain sufficient information in which to consider the merits of the extension and were not given reasonable time to consider it'. The Panel granted withdrawal rights to the shareholders who had accepted.

Our view at the time was that the shareholders in *Allegiance* had had plenty of time to consider the offer and the risks of accepting when they did (which were arguably less than the risks for the Virtus shareholders who sold on market unaware that it was BGH who was buying at a higher price). Just like in the *Virtus* matter, an efficient, competitive and informed market should not require the bidder to take extra steps to announce an extension the offer period. The policy settings of the rules should support takeover activity - ultimately, that benefits all shareholders and the market generally.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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