AFR 8 May 2007 p. 63

Playing for time's a dangerous game

Robert Marks

As a shareholder of Qantas, you have the opportunity to sell your shares to the Macquarie Bank-led Airline Partners Australia consortium, which needs a 50 per cent acceptance rate by the 7pm deadline to allow its takeover process to progress. The offered price of $5.45 looks attractive (and is about a quarter higher than last November's pre-bid price) but this year's prospects for the airline look very good, with three recent profit forecast upgrades.

So much so that the best outcome for you would be to hold onto your shares while the takeover goes ahead: as a minority shareholder, you would either gain from the airline's rosy future and from the "new broom" of cost cutting and capital disbursement, or would be offered a higher price to sell out later. Even if the takeover fails, you are better off holding onto your shares, since the airline is now in play. So you decide to hold.

No matter what others do and no matter whether the consortium reaches the 50 per cent target by the deadline, you're better off holding your shares rather than selling them to the consortium, especially if enough other shareholders do sell by the deadline so that the takeover proceeds.

But most shareholders think as you do, which means that the bid may not succeed since it has less than 50 per cent of shares offered by the deadline. All would like to free-ride on the sales of others' shares to the consortium: it's not often that humble shareholders can share in the rich pickings afforded to private equity takeover owners.

Ideally, if you had a crystal ball, you could see by how much the acceptance rate of the deadline was deficient, and sell the consortium just the number of shares needed to exceed the 50 per cent requirement, assuming that you held enough shares to make the difference.

Well, the US hedge fund Heyman Investment Associates held 10 per cent of Qantas, and the deficit after 7pm last Friday was about 4 per cent. Oops! Well why not offer 4-plus per cent of the shares after the deadline? Neither the Takeovers Panel nor the Australian Securities and Investments Commission would object, would they?

Yes, they would! The deficit was not a consequence of confusion or miscommunication. In today's wired world? No, it was the result of a strategic play gone wrong: waiting for others to sell their shares into the consortium while hoping to go along for the post-takeover ride. The Takeovers Panel should resist any pressure to change the rules ex post, not least because the Australian regulator's reputation matters now and into the future.

"The outcome was the result of a strategic play gone wrong."

There are rumours that private equity is sniffing around the two largest mining houses in Australia. It is possible that deadlines similar to last Friday's will occur in the future. If the Takeovers Panel has acquired a reputation as being weak – saying no at first, but accommodating later – then not only will future contentious takeovers be even more bloody (and corporate lawyers don't come cheap), but Australian investors' confidence in a level playing field for all shareholders will be shattered, with adverse consequences for any company trying to raise equity capital here.

And the consortium should not be allowed to revisit its current offer, perhaps with a higher price and revised conditions, since such a concession would just encourage future takeover consortiums to acquire shares cheaply from naïve shareholders first, before rewarding the more cautious shareholders, who were holding out for more, with higher prices.

The game last Friday was essentially a simultaneous move, since no one but Airline Partners knew the offers to sell as the clock ticked. But even if it had announced, say, the percentage already offered, minute-by-minute, hold-out shareholders would have experienced the same incentive to hold back and let someone else be the seller who pushed the acceptances over 50 per cent. Very similar behaviour would have resulted.

■ *Robert Marks is from the School of Economics at the University of NSW's Faculty of Business (incorporating AGSM).*