

17 July 2015

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The Treasury

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GrainCorp welcomes the opportunity to comment on the Exposure Drafts of the *Foreign Acquisitions and Takeovers Legislation Amendment Bill 2015* and the *Foreign Acquisitions and Takeovers Regulation 2015*.

GrainCorp welcomes two clarifications included in the Exposure Draft, namely:

1. The \$55 million screening threshold must also be greater than a 10% interest in the relevant agribusiness, to avoid needlessly capturing passive investments; and
2. Reinvestment by foreign owned companies would not require FIRB approval.

However, we remain concerned about the unintended consequences that would arise from the proposed definitions of 'direct interest' and 'agribusiness'. These have the potential to substantially increase the regulatory burden on desirable (and relatively common) investments. An increase in regulatory burden on such investment risks reducing liquidity in ASX listed agribusinesses and raising their cost of capital, weakening the international competitiveness of Australian agribusinesses.

These outcomes are clearly contradictory to the government's stated objective of attracting foreign investment into five priority areas including agribusiness and food. The government's commitment was most recently demonstrated in the Federal Budget, which allocated \$30 million to target foreign investment in agribusiness, food and other areas.

## **DEFINITION OF 'DIRECT INTEREST'**

GrainCorp is concerned about the interaction of Section 11 (a) and 11 (c) (i)-(iii) of the Regulation. Inconsistencies between these sections risk reducing liquidity in listed agribusinesses, by causing substantial additional barriers to relatively minor and inconsequential investments.

Section 11 (a) allows a foreign investor to acquire up to 10% in an agribusiness in one transaction without the requirement for FIRB approval, recognising that an investment of 10% does not give an investor control of a company.

However, section 11 (c) requires FIRB approval if an investor holding an interest of 5% or more wishes to increase their stake by 1% within a 12 month period. GrainCorp makes the following comments in response to this requirement:

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- Changes of interest between 5-10% are inconsequential and do not give an investor control over a company (as implied by the limit of 10% for an initial stake).
- This proposed element within the draft regulation appears to be mirrored on the requirement to lodge a Substantial Shareholder Notice under the Corporations Act. GrainCorp notes that the 5% threshold in this instance is a requirement to notify for information purposes only. It is not an appropriate level to be the trigger for where an approval is required – it would add an unnecessary level of complexity to insignificant transactions.
- It is unclear why an investor who already holds 5% should be forced through a more stringent regulatory process than a new investor seeking 10% in one transaction. Such an additional requirement appears arbitrary and would act as a potential barrier to those major investors already supporting Australian agribusiness, who wish to extend that support.
- GrainCorp agrees that investors should not be able to use “creeping” transactions to assume control by stealth over a target company. However, substantial protections against such an outcome already exist in the Corporations Act. Seeking to duplicate these protections through the foreign investment framework would be a poor regulatory outcome and would lead to unnecessary complexity.

To illustrate the frequent (and benign) nature of transactions between the 5-10% and the potential complexity involved, GrainCorp has provided an analysis attached as **Appendix A**.

Appendix A shows all Substantial Shareholder Notices relating to GrainCorp since January 2014. Each of these notices has been publicly lodged on the ASX announcements platform in accordance with existing regulation. These notices include 12 instances where a substantial holder has increased their interest by 1% or more during this period (5 notices of a stake reduction of >1% have been excluded).

It is not clear which of these would require FIRB approval under the proposed regulation, as there is uncertainty as to:

- Whether the investors lodging the actual notices would be considered “a foreign person”;
- How many and which of any entities sitting beneath the lodging entity may be foreign;
- The definition of ‘direct investment’ where shares are held by an entity (Australian or foreign) on behalf of a beneficial foreign holder;
- Whether some beneficial holders may have passive investments held on their behalf and – at the same time – hold investments in their own name.

The possible unintended consequences of this uncertainty include:

1. Some investors may have to direct their fund managers not to invest in GrainCorp (or other agribusinesses) above a certain level, so as not to trigger a threshold requiring FIRB approval;
2. Some fund managers may be restricted from investing in GrainCorp (or other agribusinesses) where a certain percentage of their clients are foreign, even though passive;

3. Some fund managers may no longer have the necessary flexibility within their holding to maintain GrainCorp (or other agribusinesses) within their approved investments.

Given the relatively frequent nature of such transactions and the high risk that the additional regulation risks delaying or hindering desirable and relatively minor additional investments, GrainCorp recommends changes to the draft regulation.

#### **RECOMMENDATION**

**To reduce complexity, GrainCorp recommends that the threshold referred to in 8 (c) (ii) should be amended to 10%, to align with the requirement on new investors. Alternatively, Section 8 (c) (i)-(iii) could be removed to align the regulation with the creeping acquisition requirements in the Corporations Act, so long as it does not result in a change of control.**

#### **DEFINITION OF AGRIBUSINESS**

The proposed definition of 'agribusiness' causes substantial complexity for diversified businesses and, as they are currently structured, are likely to have significant impacts on sectors of the economy beyond agriculture.

GrainCorp recommends that the percentage prescribed by Section 14 (2) of the Draft Regulation should be increased from 25% to 50%. This is consistent with the principle that agribusiness operations should form a significant portion of the business.

Further, the regulation does not give consideration to changes in ownership of diversified businesses as a result of equity injections (such as joint ventures) to fund investments in non-agribusiness related activities. Any investment in non-agribusiness activities should be quarantined from this regulation.

#### **CONTACT DETAILS**

GrainCorp appreciates the opportunity to provide comment on the exposure drafts. To discuss the issues raised in this document further please contact:


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## APPENDIX A

 <span style="float: right;">Markets</span>								
Announcements by GNC.ASX								
Period: Custom (01 Jan 2010 - 10 Jul 2015)								
Category: SECURITY HOLDER DETAILS								
Date	Time	Code	Company Name	\$Sen	Substantial Shareholder Notice	Increase / Decrease	Title	Investor
23/06/2015	08:26 AM	GNC	GrainCorp Limited		Change	Increase	Change in substantial holding	Elerston
28/05/2015	04:03 PM	GNC	GrainCorp Limited		Becoming	Becoming	Becoming a substantial holder from AMP	AMP
25/02/2015	10:04 AM	GNC	GrainCorp Limited		Change	Increase	Change in substantial holding	Elerston
31/12/2014	08:27 AM	GNC	GrainCorp Limited		Becoming	Becoming	Becoming a substantial holder	Norges
29/12/2014	08:37 AM	GNC	GrainCorp Limited		Becoming	Becoming	Becoming a substantial holder	Norges
8/12/2014	08:26 AM	GNC	GrainCorp Limited		Becoming	Becoming	Becoming a substantial holder	Norges
5/12/2014	08:56 AM	GNC	GrainCorp Limited		Change	Increase	Change in substantial holding from PPT	Perpetual
21/11/2014	05:37 PM	GNC	GrainCorp Limited		Change	Increase	Change in substantial holding - PPT	Perpetual
30/10/2014	09:35 AM	GNC	GrainCorp Limited		Change	Increase	Change in substantial holding	Elerston
3/10/2014	05:07 PM	GNC	GrainCorp Limited		Becoming	Becoming	Becoming a substantial holder from PPT	Perpetual
8/08/2014	08:27 AM	GNC	GrainCorp Limited		Becoming	Becoming	Becoming a substantial holder	Norges
7/08/2014	09:35 AM	GNC	GrainCorp Limited		Change	Increase	Change in substantial holding	Elerston
19/06/2014	09:45 AM	GNC	GrainCorp Limited		Change	Increase	Change in substantial holding	Elerston
14/05/2014	09:17 AM	GNC	GrainCorp Limited		Change	Increase	Change in substantial holding	Elerston
30/04/2014	09:05 AM	GNC	GrainCorp Limited		Change	Increase	Change in substantial holding	Elerston
15/04/2014	08:25 AM	GNC	GrainCorp Limited		Change	Increase	Change in substantial holding	Goldman Sachs
15/04/2014	06:41 PM	GNC	GrainCorp Limited		Becoming	Becoming	Becoming a substantial holder	Elerston
20/03/2014	08:27 AM	GNC	GrainCorp Limited		Change	Increase	Change in substantial holding	Goldman Sachs
10/03/2014	08:26 AM	GNC	GrainCorp Limited		Change	Increase	Change in substantial holding	Goldman Sachs
20/01/2014	08:24 PM	GNC	GrainCorp Limited		Becoming	Becoming	Becoming a substantial holder	UBS

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