



Submission in response to the Free Range Egg Labelling Consultation Paper

The Animal Law Institute is a not for profit community legal centre that is dedicated to protecting animals and advocating for their interests through the Australian legal system.

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Manager

Consumer Policy Unit

Small Business, Competition and Consumer Policy Division

The Treasury

Langton Crescent

PARKES ACT 2600

By online application

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The Animal Law Institute

1. The Animal Law Institute (**ALI**) welcomes the opportunity to make this submission to the Australian Treasury on behalf of Consumer Affairs Australia New Zealand (**CAANZ**) in response to the Free Range Egg Labelling Consultation Regulation Impact Statement (**Consultation Paper**).
2. ALI is a registered charity and a not for profit community legal centre that is dedicated to protecting animals and advocating for their interests through the Australian legal system. ALI is a member of the Victorian Federation of Community Legal Centres and the National Association of Community Legal Centres.

Summary of recommendations

3. After considering the proposed options in the Consultation Paper, ALI recommends that the Commonwealth introduce an information standard pursuant to section 134 of the Australian Consumer Law¹ which requires producers to label their eggs as either free range, 'barn' or 'cage' (Option 3). However, ALI recommends that the proposal in Option 3 be amended as follows.
4. First, the application of the information standard should be extended to the supply of all eggs, rather than just shell eggs sold in the retail market.

¹ *Competition and Consumer Act 2010* (Cth), Schedule 2.

5. Second, we recommend that as part of the consultation process the Treasury, on behalf of CAANZ, undertakes a separate comprehensive independent market survey and engages more directly with consumers to understand what the term free range means to a broad cross section of consumers who purchase free range eggs.
6. Third, following direct engagement with consumers to gauge what consumers understand the free range label to mean, we recommend amending the definition of free range to better reflect the minimum husbandry practices that a majority of consumers expect a producer of free range eggs to adhere to. Subject to further direct engagement and survey data, ALI would expect the definition of free range to include, as a minimum, the husbandry practices listed in the proposed 'premium free range' category.
7. Fourth, ALI does not support the proposal to introduce a new 'premium free range' category or a new 'access to range' category because doing so is unnecessary and could also increase consumer confusion.
8. In ALI's view, Option 3 is the most desirable approach to address the fact that currently:
 - a. the absence of a national mandatory standard with clearly identifiable mandatory standards that producers must adhere to creates consumer uncertainty; and
 - b. there is evidence which indicates that consumers do associate the free range label with not only low stocking density levels, but also production systems that adhere to higher animal welfare standards.
9. As requested by the Consultation Paper, ALI responds directly to particular Focus Questions.

Focus Question 48 – What benefits would Option 3 provide to consumers? How would they differ from Option 2?

10. One option proposed by the Consultation Paper (Option 3) is to develop a national information standard pursuant to section 134 of the Australian Consumer Law which prescribes the minimum requirements of a production system a person, in trade or commerce (i.e a producer) *must* adhere to in order to supply eggs for sale in the grocery retail market.² In other words, a producer must label its eggs as free range, barn or cage before these eggs are supplied for sale.
11. The proposed prescribed definitions of these production systems are as follows:

“1. *Free range*

² The Treasury, *Free Range Egg Labelling Consultation Paper* (2015) (**Consultation Paper**), pp 27 – 28.

Free range eggs are produced by hens that can, and do, move about freely on an open range on most ordinary days.

An 'ordinary day' is every day other than a day when on the open ranges weather conditions endanger the safety or health of the laying hens or predators are present or the laying hens are being medicated.

2. *Barn*

Barn eggs are produced by hens that are continually housed within a barn in which they are free to roam. The barn may have more than one level. The floor may be based on litter or other material such as slats or wire mesh.

3. *Cage*

*Cage eggs are produced by hens that are continually housed in a cage within a barn.*³

12. In contrast, the proposed Option 2 only imposes obligations on producers who choose to label their eggs as free range.⁴ That is, the proposed information standard would not apply to producers who use a descriptor *other* than free range to label their eggs.
13. ALI is of the view that the proposal to include only three clearly defined production systems in the information standard (being 'free range', 'barn' and 'cage') would provide consumers with greater certainty when purchasing eggs.
14. This was recognised by the SCARM Working Group back in 2000 when it explained that the "*accurate definition of egg production systems operating in Australia (i.e for conventional caged system, barn laid system, free range system) is one of the essential prerequisites for any system of uniform, Australia-wide labelling standards*".⁵
15. This position is also consistent with the Independent Panel for the Review of Food Labelling Law and Policy's recommendation that in order to increase consumer clarity over identification of poultry products, standardised terms should be developed, and provided the terms 'free range', 'barn laid' and 'caged' as examples of the standardised terms to be adopted.⁶
16. Also by introducing mandatory labelling requirements for all three production systems, it would prohibit producers from using similar labels which are unclear to consumers and in some circumstances have been found to be misleading by the Courts. As the Consultation

³ Consultation Paper, p 28.

⁴ Ibid, p 17.

⁵ SCARM Working Group, *Synopsis Report on the Review of Layer Hen Housing and Labelling of Eggs in Australia*, (2000), p 8, <<http://www.australiananimalwelfare.com.au/app/webroot/files/upload/files/synopsis.pdf>>.

⁶ Independent Panel for the Review of Food Labelling Law and Policy, *Labelling Logic* (28 January 2011), 6.26.

Paper notes, in the current market space for egg products there are multiple terms being used to label eggs supplied for sale, such as ‘happy hens’, ‘free to roam’ and ‘farm fresh’.⁷ Accordingly, it would also likely provide producers with greater certainty. The case of *ACCC v C.I & Co Pty Ltd*⁸ is an example where the producers re-labelled their eggs in a way which the producers considered to be in compliance with the law, but the Court considered the label to be misleading and deceptive. In this decision Justice North of the Federal Court found that the producers engaged in misleading and deceptive conduct by (among other things) supplying eggs re-labelled as ‘Fresh-Range Omega 3’. The Federal Court accepted that the producer adopted this label after being notified that the ACCC was investigating its use of the label free range which was "*although misleading to the consumer, an attempt, albeit misguided, to avoid the use of the word “free range” and, thereby, comply with the law as perceived by the second respondent.*"⁹

17. Given the certainty that the information standard can generate for consumers and producers alike, ALI encourages CAANZ to extend the application of this information standard to the sale of *all* eggs. Retail eggs sales constitute just over a half of egg production, with approximately 42% going into processed foods, hospitality and catering.¹⁰ Accordingly, in the absence of evidence which indicates that consumers are *only* concerned with the production system under which their eggs are produced when purchasing those eggs in the supermarket, ALI considers that for the information standard to achieve the desired purpose of providing greater certainty in the market, it should apply to the sale of all eggs.

Recap of recommendations

- Introduce an information standard which requires producers to label their eggs as either ‘free range’, ‘barn’ or ‘cage’ in order to supply eggs for sale.
- Extend the application of the information to the supply of all eggs, rather than just shell eggs sold in the retail market.

⁷ Consultation Paper, p.5.

⁸ [2010] FCA 1511.

⁹ *Ibid*, 35.

¹⁰ K Outlaw, ‘Eggs farming in Australia: Market research report’ (2012), A0142, IBISWorld.

Focus Question 32 - Would the proposed definitions in Option 3 clearly define and capture the three broad methods of egg production?

Free range label

18. ALI agrees that the proposed definition of free range in Option 3 is a good starting position as it is consistent with the test enunciated by Justice Flick of the Federal Court in the decision of *Australian Competition and Consumer Commission v Pirovic Enterprises Pty Ltd (No 2)* (**Pirovic case**).¹¹ ALI is of the view that it is inappropriate for the information standard to adopt a definition of free range that does not, as a minimum, reflect the test in the Pirovic case, which requires that "*most hens are able to, and actually do, move about freely on an open range on most ordinary days*".¹²
19. However, ALI recommends that the definition of free range be expanded so that it better reflects the minimum husbandry practices that a majority of consumers expect to be followed in the production of eggs labelled as free range.

Evidence that consumers associate the free range label with higher animal welfare standards

20. ALI is of the view that based on the current literature available there is evidence to suggest that consumers associate the free range label with higher animal welfare standards.
21. For instance, a CHOICE report indicates that of the 900 CHOICE members who completed a survey in 2012, 85% of those members indicated that they choose free range products due to animal welfare reasons.¹³ Also, a more recent CHOICE survey in 2014 shows that amongst the 1,696 participants across Australia, 68% of them bought free range eggs for animal welfare reasons.¹⁴
22. This does not appear to be in contention, as the Consultation Paper recognises that "*research indicates that consumers who purchase free range eggs do so for a number of reasons, including ethical and animal welfare considerations*"¹⁵ and that "*some consumers equate free range with overall issues of humane egg production*".¹⁶

¹¹ *Australian Competition and Consumer Commission v Pirovic Enterprises Pty Ltd (No 2)* [2014] FCA 1028.

¹² *Ibid.*

¹³ CHOICE, *Survey on Consumer Expectations of Free Range Egg Labelling – Key Findings Report*, (May 2012), p.1.

¹⁴ Rachel Clemons and Katinka Day, *Do You Shell Out for Free-Range Eggs?* (7 August 2014) CHOICE <<https://www.choice.com.au/food-and-drink/meat-fish-and-eggs/eggs/articles/free-range-eggs>>.

¹⁵ Julie Dang & Associates Pty Ltd, *Production methods understanding & QA evaluation: A market research report*, Prepared for Australian Egg Corporation Ltd (May 2012) <www.aecl.org/dmsdocument/465> in Consultation Paper, p 6.

¹⁶ Consultation Paper, p 60.

23. The Consultation Paper explains that its "*objective is to increase consumer certainty, not to prescribe a particular set of production practices or regulate animal welfare.*"¹⁷ ALI recognises that it would be inappropriate for CAANZ to do the latter in isolation. However, ALI is of the view that in order to meet its stated objective of increasing consumer certainty and ensure that free range labelling requirements are consistent with the consumer law protections, the definition of free range should accord with what consumers expect the free range label to mean. That is, if a majority of consumers indicate that they expect the free range label to equate with compliance of certain husbandry practices, the free range definition in the information standard should reflect this.
24. ALI submits that this is not inconsistent with common law developments of the meaning of free range in the context of understanding what representations and conduct is prohibited under the Australian Consumer Law. For instance, in *ACCC v C.I & Co Pty Ltd*¹⁸ Justice North accepted that "*... the free range representation is a representation as to quality. The representation suggests that the eggs are produced by a more humane environment for laying hens and that consumers might regard free range eggs as having a different quality, that is to say, a different circumstance of production.*"¹⁹
25. In any event, this position is also consistent with the Consultation Paper's proposal to include a 'premium free range' label.

Minimum husbandry practices

26. ALI notes that there is literature which also indicates what minimum husbandry practices consumers of free range eggs expect producers to adhere to. In particular, ALI refers to the public submissions received by the ACCC as part of the Certification Trade Mark Application (CTM1390450) filed by Australian Egg Corporation Limited in 2012 (**AECL CTM Assessment**). While the submissions were made in a different context, the AECL CTM Assessment provides an insight into consumer expectations of free range egg labelling at that time.
27. In the AECL CTM Assessment, the ACCC noted that broadly the submissions "*raised concerns that a number of aspects of the CTM Rules would conflict with consumer expectations and perceptions of what constitutes 'free range' eggs, namely that under the proposed CTM:*
- a. *Outdoor stocking density can be up to 20,000 birds per hectare.*

¹⁷ Ibid, p 9.

¹⁸ [2010] FCA 1511.

¹⁹ *Australian Competition and Consumer Commission v C I & Co Pty Ltd* [2010] FCA 1511, 16.

- b. *Indoor stocking density can be the same as for that in a barn laid system – 30 kg/m² (or approximately 15 birds per square metre).*
 - c. *The rotation of birds on to fresh pasture is only strongly recommended but is not a requirement. It is also only recommended that environmental management is practiced.*
 - d. *Certain management practices inconsistent with the concept of free range such as beak trimming, forced moulting and toe trimming are not dealt with.*²⁰
28. In the AECL CTM Assessment, the ACCC also explained that it "*considers that consumers expect that free range birds would access a genuine range environment where they can frequently perform most, if not all, of their natural behaviours. Consumers would also expect higher animal welfare practices in free range systems relating to the management of flock size and density as well as preventative management practices (for example, providing opportunities for dust bathing and perching) to alleviate the need for routine beak trimming. Consequently, the ACCC considers that routine beak trimming, which may impact on a bird's ability to engage in natural behaviours (particularly foraging), is not an animal welfare outcome that consumers would typically associate with free range egg production.*"²¹
29. Also, survey data collated by Humane Society International in October 2015 from 1356 consumers (**HSI Survey**)²² indicates that (among other things):
- a. 98% think that a national standard should specify an outdoor stocking density of no more than 1,500 hens per hectare in line with the current Model Code of Practice for the Welfare of Animals: Domestic Poultry (4th Edition);
 - b. 99.5% indicated that there should be maximum limit set regarding the number of hens being kept inside in each shed;
 - c. 98.5% thought that a stocking density of 10,000 hens per hectare did not represent their expectations of free range; and
 - d. 89% thought that a mandatory national standard for free range egg labelling should not allow beak trimming and 90% thought that the egg cartons should display whether or not the hens have been de-beaked.
30. This information, and the HSI Survey in particular, indicates that consumers expect the definition of free range to incorporate, as a minimum, a stocking density requirement which

²⁰ Australian Competition and Consumer Commission, *Initial Assessment of Certification Trade Mark Application CTM1390450 filed by the Australian Egg Corporation Limited* (2 November 2012) <<https://www.accc.gov.au/system/files/Initial%20assessment%20of%20Certification%20Trade%20Mark%20application%20-%20Australian%20Egg%20Corporation%20Limited.pdf>> (**AECL CTM Assessment**), 46.

²¹ *Ibid*, 107.

²² Humane Society International, *HSI Free Range Egg Labelling Consumer Survey* (October 2015).

equates to at least 1,500 hens per hectare and husbandry practices the Consultation Paper suggests to include in a new 'premium free range' definition.

31. As noted by the Consultation Paper, the Model Code of Practice for the Welfare of Animals: Domestic Poultry (4th Edition) is currently under review and the review is expected to be completed in 2017. This review is well overdue, given that the Model Code was last updated in 2002. The Consultation Paper has asked whether it would be preferable to delay the introduction of the information standard following the release of the revised Model Code. ALI is of the view that the information standard can be adopted before the revised Model Code is released to provide consumers greater clarity as soon as possible. However, ALI recommends that the definitions of the three production systems be reviewed following the release of the revised Model Code to ensure that the definitions in the information standard are consistent with those in the revised Model Code.
32. In saying this, ALI notes that it is over-simplistic to say that the best animal welfare occurs in free range systems. Despite this view, detailed comment has not been made about this point in the submission due to the Consultation Paper's refusal stated objective (as outlined in paragraph 23 of this submission).

Further direct engagement with consumers

~~34-33.~~ While research indicates that consumers expect the free range label to adhere to higher animal welfare standards which are aligned with the premium free range label, ALI still considers that current publicly available research is insufficient to determine exactly *what* minimum husbandry practices producers must follow in order to produce eggs using the free range label which are consistent with consumer expectations.

~~35-34.~~ While ALI recognises that consumers are encouraged to make submissions throughout this consultation process, ALI notes that some consumers may be deterred to do so due to the length and complexity of the Consultation Paper.

~~36-35.~~ Accordingly ALI recommends that as part of the consultation process the Treasury, on behalf of CAANZ, undertakes a separate comprehensive independent market survey and engages more directly with consumers to understand what the term free range means to a broad cross section of consumers who purchase free range eggs.

Recap of recommendations

- As part of the consultation process the Treasury, on behalf of CAANZ, undertakes a separate comprehensive independent market survey and engages more directly with consumers to understand what the term free range means to a broad cross section of consumers who purchase free range eggs.
- The definition of free range be amended to include as a minimum, the husbandry practices listed in the proposed 'premium free range' category.

Focus Questions 36 and 39 – Is there value in a ‘premium free range’ category to regulate the use of superior animal welfare claims? Would this benefit consumers, noting existing certified trademarks and industry standards? How would it impact on producers?

Would an ‘access to range’ category potentially increase consumer confusion about what is and what is not free range?

~~37-36.~~ Additionally, we think that subject to the findings of the comprehensive consumer survey, consumers would expect that the husbandry practices proposed in the definition of ‘premium free range’ would instead be prescribed in the definition of free range. The HSI Survey also suggests this as 89.6% of consumers surveyed noted that they have chosen not to purchase free range eggs because they did not trust that they were truly free range. Accordingly, the introduction of new 'premium free range' category is unnecessary.

~~38-37.~~ Also, if the additional classifications of ‘premium free range’ and ‘access to range’ prescribed in the information standard, it could lead to confusion. A behavioural economics study indicates that when individuals are provided with a new option in a choice situation, they are more likely to choose one of the initial options they had prior to the introduction.²³ This suggests that the introduction of such terms would add little value to achieving the objective of ensuring consumer certainty given that consumers are already familiar with the 'free range', 'barn' and 'cage' labels.

~~39-38.~~ Accordingly, we submit that a simple taxonomy of production method labels of ‘free range’, 'barn' and 'cage' should be implemented, without the additional terms such as ‘premium free range’ and ‘access to range’.

²³ Jon D. Hanson and Douglas A. Kysar ‘Taking Behavioralism Seriously: The Problem of Market Manipulation’ (1999) 74 *NYU Law Review* 630, p.676.

Focus Question 18 - Would guidance material provide consumers with more certainty that free range egg products are produced in a manner consistent with their labelling?

~~40-39.~~ In ALI's view, the current system has created consumer confusion as the label of free range is used inconsistently across egg products which are sold from a variety of different production methods.

~~41-40.~~ Although the ACCC has the ability to pursue legal action against non-compliant producers who use the free range label to mislead and deceive consumers, this legal action is limited by ACCC resources and relies on the common law system to develop the law surrounding the definition of free range in the context of egg production and sale.

~~42-41.~~ Consumers can rely on the numerous independent accreditation schemes. However schemes are inconsistent in terms of the required standards of production for the product to be labelled with the particular certification mark. For example, the stocking densities for both inside and outside vary between each scheme, with a variation of 15 birds/m² to 5 birds/m² for inside stocking densities, and no maximum to 750 birds/ha for outside stocking densities.²⁴ Accordingly, while consumers do have information available to assist with making more informed decisions about how the product they are purchasing accords with certain husbandry standards, there is no universal framework which provides that.

~~43-42.~~ Above all, the HSI Survey identifies that under the status quo, 99.5% of consumers surveyed believe that Australia needs mandatory national standards for eggs labelled as free

~~44-43~~ range. Accordingly, while guidance material would go some way in assisting consumers, ALI submits that a national legally binding framework is required in order for the key objectives of this process to be best achieved.

We thank CAANZ for considering our submission.

Should the Treasury or CAANZ have any questions regarding this submission, please do not hesitate to contact ALI via email at policy@ali.org.au.

Yours sincerely

The Animal Law Institute Inc.

²⁴ Christine Parker, 'Voting with your fork? Industrial free-range eggs and the regulatory construction of consumer choice' in *Organisational Challenges to Regulatory Enforcement and Compliance* (Susan Silbey ed, Sage, 2013) 60.