

Barristers Animal Welfare Panel

Level 2, 525 Lonsdale Street, Melbourne 3000 • www.bawp.org.au



Free Range Egg Labelling Consultation Paper
Small Business, Competition and Consumer Policy Division
The Treasury Langton Crescent PARKES ACT 2600

SUBMISSION TO FREE RANGE EGG LABELLING CONSULTATION PAPER

The Barristers Animal Welfare Panel is a national unitary body comprising over 100 barristers, including some 20 silks. It has an adjunct panel of law firms, which includes large national top tier firms. More information about the Panel is available at www.bawp.org.au.

Introduction

There is a clear consumer interest in the creation of a nationally consistent and enforceable standard requiring prominent disclosure of the production methods for all hen eggs including the definition of the terms "Free Range" and "Barn-laid".¹

"Free range" egg producers employ an array of different practices, of which consumers are largely unaware. The huge variation in stocking density coupled with evidence of high stocking densities by producers who claim their products are "free range" emphasises the problem.²

Production system claims for eggs such as 'free range' are apt to mislead consumers.

The existence of a multitude of different farming practices at egg production facilities in all jurisdictions combined with differing legislative or voluntary requirements in each jurisdiction deprives the term 'free range' (and other descriptors relating to production methods) of any consistent and universal meaning for consumers.

It is likely that few consumers understand the distinction between voluntary codes and legislative requirements in the context of the animal welfare requirements applicable to the individual production facility and the consequences of non-compliance.

Further, the establishment by the peak industry body of labelling guides and quality assurance programs under which egg producers are permitted to label their eggs 'free range' has not

¹ Appendix E – Complaints to ACL Regulators; Choice Consumer Association's surveys and publications.

² Choice's 2014 Free Range Egg Survey demonstrated that only 2 per cent of free range egg buyers believe that 10,000 hens per hectare is an acceptable stocking density while 46 per cent believe that 1,500 is a reasonable stocking density for free range eggs; see also Timoshanko, A "Limitations of the Market Base Approach to Farm Animal Welfare" (2015) 38(2) University of New South Wales Law Journal 514

prevented the Court from making findings that such claims are misleading and deceptive. This is precisely what happened in the *Pirovic* decision.³

The ACCC prosecutions and the limitations of the Federal Court decisions: Why Option 1 should be rejected.

The misleading use of the term “free range” on labelling of eggs has been successfully prosecuted in four cases against egg producers since 2011 by the Australian Competition and Consumer Commission (“ACCC”) under the *Trade Practices Act* or the *Australian Consumer Law* (“ACL”), with decisions in two more cases pending.⁴ There have also been various prosecutions of producers of chicken and duck meat also claiming “free range” credentials⁵.

In each case, the ACCC alleged that the producers in question had engaged in misleading and deceptive conduct by making false claims that eggs were “free range” and that certain production methods were being used, when this was not, in fact, the case.

Whilst the Federal Court decisions provide some guidance on the meaning of “free range” in the context of egg production, they are not definitive. In each case, the respondent producer admitted the contravention and the matter proceeded by way of agreed facts. For example, in *Pirovic* the producer admitted that by supplying for sale or causing to be supplied for sale eggs produced by laying hens and packaged in egg cartons bearing the brand “Pirovic Free Range Eggs” it represented to consumers that those eggs were produced by laying hens that were farmed in conditions where the laying hens were able to and did move around freely on an open range on most ordinary days when in fact the eggs were produced by laying hens most of which did not move about freely on an open range on most ordinary days due to the stocking densities and flock sizes in the barns and the restrictions on the ability of the hens to exit the barns. *Pirovic* admitted that in doing so it had engaged in conduct that was misleading or deceptive or likely to mislead or deceive. It is for this reason that it was said that the decision should not be regarded as the resolution of meaning of “free range” eggs for all purposes.⁶

³ *ACCC v Pirovic Enterprises Pty. Ltd. (No. 2)* [2014] FCA 1028. In marketing and promoting its eggs as “Free Range”, Pirovic Enterprises had regard to the fact that:

- (1) its farming conditions during the Relevant Period were consistent with the practices of most other competitors that sold and promoted for sale eggs as “Free Range”;
- (2) its labelling practices were reviewed by the peak industry body, the Australian Egg Corporation Limited and deemed to comply with its Egg Labelling Guide;
- (3) it was licensed by the Australian Egg Corporation Limited to use the Egg Corporation Assured Trademark as a consequence of Pirovic meeting the criteria under the Egg Corporation Assured National Egg Quality Assurance Program Trade Mark Certification Scheme. Each of Pirovic’s free range farms had a “Level A” accreditation for free range egg production; and
- (4) the NSW Food Authority deemed the Egg Corporation Assured Scheme to be compliant with the Primary Industries Standing Committee’s *Model Code of Practice for the Welfare of Animals – Domestic Poultry* (4th Edition, SCARM Report 83, 2002).

⁴ See Appendix B to Consultation Paper.

⁵ See the summary in paragraphs 2-8 of the Reasons for Judgment of Edelman J. in *ACCC v RL Adams Pty. Ltd.* [2015] FCA 1016 (11 September 2015)

⁶ Paragraph [21]. The *Pirovic* farms had stocking densities in barns of 3,439 to 4,814 birds per metre width of opening, with only 3,651 m² of open ranges and an overall stocking density of between 2.543 – 3.561 laying hens per square metre (although these densities were reduced for part of the period under consideration).

Further, it should be noted that the claims made on the *Pirovic* eggs packaging went considerably beyond a simple assertion that the eggs were “free range”: it was claimed that “the hens ... live in large barns and have the opportunity to go outside to roam and forage within a ranging area. They may travel in and out of the barns at free will or spend some portion of their day roaming outdoors”. This was coupled with an image of three hens in a grassy field.

The Federal Court decisions suggest that the term “free range” represents to consumers that the product is of a higher quality and produced in “more humane” environment⁷. However, in considering the meaning of these words, the Federal Court has given limited consideration to exactly which “ethical” and “humane” methods should be used in order to label a product as “free range”. Thus it is not entirely clear what the words “humane” and “ethical” mean when applied to egg production.

In *Australian Competition and Consumer Commission v C.I. & Co Pty Ltd* [2010] FCA 1511 (23 December 2010), the respondents were found to have labelled eggs as free range when in fact a large proportion of the eggs were not free range eggs. They were found to have engaged in conduct that was misleading or deceptive, falsely represented that goods were of a particular standard or quality, and misled the public as to the nature or characteristics of goods. North J observed:

“The representation suggests that the eggs are produced by a more humane environment for the laying hens and that consumers might regard free range eggs as having a different quality, that is to say, a different circumstance of production... (at 16).

Further, the conduct amounted to a cruel deception on consumers who mostly seek out free range eggs as a matter of principle, hoping to advance the cause of animal welfare by so doing” (at 31).

Research shows that consumers generally understand “free range” to be hens having freedom, greenery, being happier, chemical free and producing eggs with a “more yellow” yolk because of their environment⁸.

A 2012 CHOICE survey of 900 respondents points up the importance to consumers of free range chicken and poultry products, concluding that:

- a. 93% of respondents had chosen free range products in the preceding 12 months;
- b. Respondents said that for a number of products the fact the products were free range was important. The highest number of participants (60%) categorised buying free range eggs as “essential when choosing”; and
- c. 85% of respondents cited greater animal welfare issues as a motivation for choosing free range products.

In response to questions about how those consumers select “free range” eggs, 43% said they rely solely on seeing the words “free range” on the product packaging, 39% said they want to see the logo of a free range certification body and 28% said they on seeing both the words “free range” and the logo of a free range certification body.

These results suggest that the average purchasing consumer with no direct insight into food production methods places heavy reliance on information on food packaging, including any logos or words describing the product. It is contended that this linkage between the information presented to consumers about a product at the point of sale, and a consumer’s ultimate product decision is crucial.

⁷ *Australian Competition and Consumer Commission v C.I. & Co Pty Ltd* [2010] FCA 1511; *Australian Competition and Consumer Commission v RL Adams Pty Ltd* [2015] FCA 1016.

⁸ “*Project Equilibrium: Qualitative research to determine consumer perceptions of free-range stocking densities*”, South Australia research debrief prepared for the Australian Egg Corporation Ltd (2012).

The CHOICE survey was more focused on eggs than poultry meat, and is thus a compelling indication of consumers' expectations about the meaning of "free range". In essence:

- a. Most survey respondents indicated that 'free range' meant to them that birds have room to move around and easy access to an outdoor area – 69% of participants indicated that free range means that birds are never confined in cages; 66% that birds have more outdoor space; and 65% that birds have easy access to pasture;
- b. 65% of respondents said that they did not know what a reasonable stocking density for free-range egg-laying hens should be. However, only 0.6% thought that a stocking density of 20,000 birds per hectare was reasonable for free range standards. Of those surveyed, 4% only thought that 10,000 birds per hectare was a reasonable stocking density for free range hens, 16% thought 1500 birds per hectare is reasonable, and 12% thought that 750 birds per hectare is reasonable.

The Federal Court decisions do not directly address animal welfare issues, including practices such as beak trimming. The Federal Court has not been called upon to determine whether eggs may be "free range" when produced on farms where beak trimming is used. While the practice is not actively endorsed,⁹ and there is no accredited scheme to ensure the practice is carried out by someone with the appropriate training, it is not banned.

As each Federal Court decision necessarily turned on the particular facts of each case the judicial pronouncements of the meaning of 'free range' remain limited in operation and application. It is unlikely that the Federal Court will determine a meaningful, universal definition of the term "free range" applicable in all circumstances (egg production and poultry meat production). Although the Federal Court has previously considered the use of the term "free to roam",¹⁰ as well as "free range"¹¹, producers may also use terms such as "barn laid", "cage free" and "organic." These terms have been found to cause confusion for consumers¹².

Most genuine free-range production systems allow birds to move around, socialise, nest, dust bathe and perch. However, some large-scale producers produce "free range" eggs from flocks of up to 120,000 hens. These hens are housed in huge sheds where they may never find the door or pop hole to exit the shed. How does the genuine free range farmer compete? How is the consumer not to be misled and thereby remain uninformed?

For the reasons set out above, the option of relying upon on a developing common law definition of eggs as "free range" and the option of an information standard codifying the case law but restricted to requirements for the labelling of 'free range eggs' should be rejected.

⁹ Domestic Poultry Code

¹⁰ *Australian Competition and Consumer Commission v Turi Foods Pty Ltd* (No 4) [2013] FCA 665. This case involved production and farming of meat chickens. Plain dictionary definitions of the words were considered and it was ultimately held that "free to roam" suggests, "...the largely uninhibited ability of the chickens to move around at will in an aimless manner" (p 100).

¹¹ *Australian Competition and Consumer Commission v Pirovic Enterprises Pty Ltd* [2014] FCA 544; above n 1.

¹² "Production Methods Understanding & QA Evaluation: A Market Research Report" prepared for the Australian Egg Corporation Ltd (2012), p 13.

Options 3, 3a and 3b:

The Panel supports a nationally consistent and enforceable information standard requiring prominent disclosure of production methods for all hen eggs including optional categories such as ‘access to range’ and ‘premium free range’.

A clear and consistent national Information Standard would remove the burden and complexity of incompatible and contradictory State and Territory standards.

There is no logical reason why a national regulatory scheme would be limited in the way suggested under Option 2, namely to define only one of many terms used in the industry which capture the attention of consumers and their purchasing dollars.

There should be a national regime applicable to all eggs produced and marketed in all States and Territories of Australia, both as to the geographical source of the eggs and the animal welfare standards applied to the layer hens, including (but not limited to) stocking densities, coupled with clear definitions of terms used and a prohibition on the use of other terms.¹³ Options 3, 3a and 3b should be implemented so that welfare issues such as induced moulting and beak trimming are addressed.¹⁴

The implementation of options 3, 3 and 3b would ensure that consumers would readily be able to determine information in relation to stocking densities, animal welfare standards and other issues relevant to their egg purchasing decision making. Purchasing decisions could be made with confidence against the backdrop of a national level playing field for producers.

The Information Standard should compel all egg producers to label their eggs with one of a number of defined descriptive terms. Each of these terms should be defined with sufficient particularity to enable producers to ensure compliance with their obligations (without exposure to prosecution for misleading/deceptive conduct). Consumers will then understand what each term means in relation to the methods of production and will be able to make informed decisions as to which eggs to purchase depending upon the level of concern in each consumer regarding the welfare of layer hens.

Any industry concern that costs will increase to meet a national standard must be considered against the evidence that consumers are willing to pay more for certainty as to the animal welfare standards in which eggs are produced. In fact, 59 per cent of "free range" egg buyers would be willing to pay over \$1.00 more than they currently pay if they had confidence that their eggs were truly "free range" under a standard.¹⁵

The consumer confidence engendered by a nationally consistent and enforceable standard would boost demand for "free range" eggs and reward those producers whose practices align with the standard, enabling the industry to invest in positive development. It is also to be expected that

¹³ There seems little point in limiting any enforceable Information Standard under the ACL to "free range" eggs only. The opportunity exists to ensure that meaningful standards and descriptors are developed and utilised in relation to all eggs sold – not just those for which the producers seek to claim "free range" production conditions.

¹⁴ Whilst the discussion in relation to Option 2b in the paper suggests that information about stocking density and beak trimming confers no added benefit to consumers, this assertion must be viewed with circumspection given it is referenced to research carried out on behalf of the Australian Egg Corporation. It is said that consumers find animal husbandry practices ‘difficult to interpret without a high degree of knowledge or interest.

¹⁵ Choice Free Range Egg Survey 2014

with increasing consumer demand¹⁶ for ethically produced foods in all areas (not just eggs), which are typically more expensive, market forces would support the egg production industry (and others) in investment in “free range” and the other more expensive production methodologies (which provide higher animal welfare standards for layer hens) as well as reducing the need for serial prosecutions for misleading and deceptive conduct.

If all of the relevant terms were clearly and consistently defined and applied across the egg production industry in all parts of Australia, it is inevitable that egg producers, marketers and retailers will provide consumers with information as to the standards applicable to the terms. However, to ensure consumers are well informed, the inclusion of that information should be a mandatory part of the labelling requirements.

Consistency across all jurisdictions would only serve to reduce economic trade barriers between States and Territories and remove confusion for consumers crossing borders or buying eggs in their home State which are produced elsewhere.¹⁷

The definitions and the production/husbandry standards which would stand behind them should be enshrined in legislation with breaches by producers rendering them liable to prosecution and sanction.¹⁸

¹⁶ The participation in the RSPCA farming scheme and the retailing of eggs and chicken products in supermarkets by the bigger retailers like Coles and Woolworths, clearly demonstrates the consumer demand for ethically produced products for which they will pay more- and which producers and retailers presumably find it commercially viable to supply.

¹⁷ It is acknowledged that to achieve nationwide consistency, there would be a period of adjustment while the varied State regulatory schemes and voluntary codes (Appendix C) were replaced by the national regulatory regime.

¹⁸ As part of the Australian Consumer Law, Schedule 2 of the Competition and Consumer Act 2010 (or Regulations or a mandatory Code thereunder)