



27 November 2015

RP:sr

Small Business, Competition and Consumer Policy Division
The Treasury
Langton Crescent
Parkes, ACT 2600

By email: AustralianConsumerLaw@treasury.gov.au

Dear Sir/Madam

Free Range Egg Labelling Consultation Paper

The Society welcomes the opportunity to present a submission on this topic.

The Society congratulates the authors of the Consultation Paper on the production of a detailed and meaningful document which references or appends most of the currently available information and material with relevance to the topic under discussion, as well as clearly addressing the arguments for and against the various alternatives posited.

The Society has considered the problem as articulated and also the three options suggested in the Consultation Regulation Impact Statement ('the Consultation Paper') and provides the following comments:

Option 1: Status quo, with upcoming ACCC guidance

The Society does not support this option- for the reasons that follow:

Since at least 2002 there has been a national Code (published by the CSIRO) which sets out various standards for animal welfare applicable to birds used in production of meat or eggs. •

The *Model Code of Practice for the Welfare of Animals - Domestic Poultry*.¹ ("the Domestic Poultry Code") is referenced in various publications and Court decisions.

The objective of the Domestic Poultry Code is to detail minimum standards for the welfare and husbandry of layer hens (and other fowl) in cage, barn and "free range" production systems. However, as the publisher of this Code would indicate (CSIRO), this is not a document designed to provide strict legal definitions of terms used in egg (or other production) facilities in order to ensure that consumers are not misled by labelling that the product is "free range" when purchasing eggs or poultry meat. For that reason, reference to

¹ *Model Code of Practice for the Welfare of Animals - Domestic Poultry* (4th Edition) CSIRO publishing, p 10

and reliance on it for the purposes of addressing issues arising from misleading labelling of eggs by producers is not appropriate.

In any event, not only is compliance with the Domestic Poultry Code (and the other Codes listed in Appendix C) entirely voluntary for producers, the fact this Code is currently under review, suggests there may be significant changes made in the next version (said to be due for release in 2017). Such changes may be as to definitions perhaps- and other matters, which would militate against any policy or legislative change being based on the 2002 version of the Code- or the as yet not finalised 2017 version of the Code.

Other bodies, such as the Free Range Farmers Association (Vic) have also published standards in addition to those set out in the Domestic Poultry Code.² However, again adherence to these standards is voluntary, and there is no consequence for egg producers who do not adhere to the standards (unless they mislead consumers via labelling which makes false claims) in which event they are liable for prosecution for misleading and deceptive conduct under consumer protection laws).

The variations in the various voluntary Codes would also not address consumer confusion as to exactly what the term "free range" means in the context of egg production- nor would consumers necessarily appreciate the absence of consequences for producers for failure to comply with such voluntary Codes- unless there is also labelling on packaging by which consumers are misled.

In the meantime, the Courts, producers and consumers are faced with lack of certainty as to the precise (legal) definition of the term "free range"- as well as other terms used in the labelling and packaging of eggs for the consumer market (such as "barn laid", "free to roam" – or even as to the place where the eggs are produced- see below).

It is trite but accurate to state that eggs produced in facilities which observe strict adherence to higher standards of animal welfare are considered by many consumers as superior to those produced at a facility which may only meet e.g. the minimum requirements of the Domestic Poultry Code (if indeed there is any compliance). It is widely acknowledged that some consumers are prepared to pay more for eggs they believe are produced from layer hens kept in conditions which are superior (from an ethical and/or animal welfare perspective) to the standard battery farm.^{3 4}

The community appetite for the development of regime whereby consumers and producers alike can readily understand what terms like "Free Range" and "Cage" mean is cannot be doubted (see also Appendix E – Complaints to ACL Regulators). (See also the Choice Consumer Association's surveys and publications referred to below).

² Free Range Egg Farmers Association Inc. "Standards – Egg Production"
<http://www.freerangefarmers.com.au/standards--info.html>.

³ 'Choice'. Free Range Eggs; Making the Claim Meaningful. June 2015'

⁴ See also remarks of Edelman J at paragraph 1 of his Reasons for Judgement in *ACCC v RL Adams Pty. Ltd.* [2015] FCA 1016 (11 September 2015)

Despite the farming practices at various facilities being quite different (relying on different Codes of Practice or differing interpretations of terms such as “free range”) if the status quo continues the term “free range” can clearly be validly applied to vastly different production methods, some of which do not constitute what most consumers would understand to be “free range”. (However, it is acknowledged that some consumers may have only a vague understanding of that the term actually means for practical purposes at the egg production facilities).

Currently, there is no legislative or precise common law definition of the term “free range” as it applies to egg production. As set out in Appendix B to the Discussion Paper, 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.⁵ There have also been various prosecutions of producers of chicken and duck meat also claiming “free range” credentials⁶.

The basis of the prosecutions detailed in Appendix B has been that the producers in question have engaged in misleading conduct as regards consumers in making false claims that eggs were “free range” and, thus, that certain production methods were being used, when this was not, in fact, the case. The absence of any clear legislative source of definition for the term “free range” has meant the Courts have had to derive the meaning of the term from other sources.

Whilst the case law has provided some guidance on what constitutes “free range” in the context of egg production, it was specifically pointed out in the 2014 *Pirovic*⁷ decision that the decision should not be seen as a resolution of what constitutes “free range” eggs for all purposes (see paragraph 21). This was because the matter was ultimately resolved between the parties on the basis of a statement of agreed facts and admissions, as well as agreement as to penalty (subsequently approved by the Judge). 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.

In fact, at the time, 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).

The respondent in *ACCC v RL Adams Pty. Ltd.* admitted “*that the free range representations were false or misleading representation as to the quality and history of the eggs contained in*

⁵ See Appendix B

⁶ 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)

⁷ *ACCC v Pirovic Enterprises Pty. Ltd. (No. 2)* [2014] FCA 1028, Flick J.

*the free range egg cartons and that the representations were liable to mislead the public as to the nature and characteristics of the eggs contained in the free range eggs carton”*⁸

The Court’s interpretation of the term “free range” is necessarily broad and has been understood to suggest to consumers that the product is of a higher quality and produced in “more humane” environment⁹. Research shows that consumers generally understand “free range” to be hens having freedom, greenery, are happier, chemical free and produce eggs with a “more yellow” yolk because of their environment¹⁰. In considering the meaning of these words, the Courts have given limited consideration to exactly what “ethical” and “humane” methods should be used in order to label a product as “free range”. However, it is not entirely clear what the words “humane” and “ethical” mean when applied to egg production.

There are a number of practical difficulties in relying on a developing common law definition to police labelling of eggs as “free range” in order to ensure consumers are not misled- and to enable them to make informed purchasing choices. The Federal Court has previously considered use of the term “free to roam”,¹¹ as well as “free range”¹². Current legislation permits use of terms such as “barn laid”, “cage free” as well and these various terms have been found to cause confusion for consumers¹³. The term “organic” has also been shown to create confusion for consumers who form a view that it suggests “free range”, as well as describing the type of feed fed to the animals¹⁴. The lack of a uniform standard or definitions creates confusion for the consumer by creating an impression which may be markedly different from the reality of how the product was produced.

The Society accepts that while there is some indication (following these decisions) that egg producers are becoming keen to comply with their legal obligations as regards avoiding misleading consumers via egg labelling practices, the effectiveness of requiring egg producers to keep abreast of prosecutions and developing case law definitions of the term “free range” (and other terms relating to egg production practices) is seen as a somewhat ineffective tool to ensure compliance (so consumers are not misled) - particularly when the lack of proper definition of the term is seen by both producers and consumers as a substantial impediment to improvement.

⁸ (ibid para 33).

⁹ *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.

¹⁰ “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).

¹¹ *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).

¹² *Australian Competition and Consumer Commission v Pirovic Enterprises Pty Ltd* [2014] FCA 544; above n 1.

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

¹⁴ Ibid.

Appendix C to the Consultation Paper is a four page document which summarises the various legislative provisions and Codes of Practice (all of the latter are voluntary) which go some way to defining the term "free range"; however, it is apparent from the multitude of different Codes and Regulations that there is a lack of consistency across the country. This is seen as undesirable and productive of confusion in consumers and producers alike – particularly in the case of the latter when producers may be marketing eggs across State and Territory borders.

In relation to package labelling and sale display requirements, the ACL applies except in Queensland and the ACT (and possibly also in South Australia shortly¹⁵).

There are also various "free range" eggs accreditation and certified trademark schemes (see Appendix D).

It is obviously a complex matter for egg producers to navigate their way through various different regulations and codes. It is likely that very few consumers understand the complexities involved, the differences between voluntary codes and regulation (e.g. under the *Queensland Animal Care & Protection Act*) and what that means in practice in respect of issues at the p[roduction facility such as stocking density and other animal welfare issues.

The Choice investigation¹⁶ of 55 egg products claiming to be "free range" found:

- (a) Of 55 "free range" egg products, it was possible to identify the stocking densities for only 35 of them (17 had this information listed on the packaging: for 7 the information was available from the producer's website or online and in relation to the other 11 information was obtained by way of enquiries of individual producers).
- (b) Of these 35 egg products (claiming to be "free range") with known stocking densities, the lowest stocking density was 185 hens per hectare and the highest stocking density was 10,000 hens per hectare.

This huge variation in stocking density coupled with evidence of high stocking densities for producers which claim their products are "free range" serves to emphasise the problem; the highest stocking densities seem to be at odds with consumers' expectations of what a "free range" stocking density should be^{17 18}.

Choice found it costs on average an additional 21 cents per 100 grams to buy "free range" eggs (produced in line with the model Code's recommended stocking density) but consumers still have no guarantee they are getting higher standards if they pay more as

¹⁵ See discussion paper released by John Rau, SA Minister for Business Services and Consumers 'Industry Code for Growing Free Range Eggs in South Australia' June 2013.

¹⁶ Choice, "Free Range Eggs: Making the Claim Meaningful", June 2015

¹⁷ 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

¹⁸ 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

there is no absolute correlation between price and stocking density. In some cases (according to Choice) the larger producers appear to be cashing in on consumers' desire to buy eggs that meet a higher standard of animal welfare without delivering a product that meets the claims made.

Choice is also of the view that the absence of a nationally consistent and enforceable standard for "free range" eggs has clear implications for the industry. It is said that many "free range" egg producers are calling for a standard so that they can achieve certainty over what "free range" means. The Australian Egg Corporation has warned that investment is not keeping up with demand because the industry is waiting for a national standard on "free range" eggs.¹⁹

It is said that many genuine "free range" egg producers are feeling the effects of an unfair playing field for themselves and their customers, when they are competing with producers claiming "free range" on a dubious or frankly misleading basis.

The current landscape is fragmented with "free range" egg producers employing an array of different practices, of which consumers are largely unaware.

Whilst there may be some concern from the industry that costs will have to increase to meet a national standard, it is known 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 more than \$1.00 more than they currently pay if they had confidence that their eggs were truly "free range" under a standard.²⁰

In addition, it is thought that the confidence of a standard would boost demand for "free range" eggs rewarding those producers whose practices align to the standard and enabling the industry to invest in positive development.

According to Choice, the ACCC has put significant resources into investigating "free range" eggs claims in Australia and in the prosecutions referenced in Appendix B to the Consultation Paper. Whilst the public may be pleased to hear that action is being taken against those who would mislead them, there are better approaches to ensuring producers know what is required of them and consumers can know with confidence what they are buying.

The current ad hoc State/Territory based approach will plainly hinder interstate trade and add complexities to supply chain operation within the egg industry. Additional costs are inevitable as larger egg manufacturers need to adhere to a variety of different rules and regulations across Australia, the effect of which is that egg producers will need to keep eggs sold in different states separated and have different packaging and labelling requirements for products within each state.

¹⁹ <http://www.abc.net.au/news/2015-04-18/call-for-national-standards-in-booming-free-range-egg-industry/6401694>

²⁰ Choice Free Range Egg Survey 2014

Choice has called for a national enforceable standard that meets consumers' expectations in relation to "free range" eggs.

According to Choice's research, an overwhelming majority of egg buyers (84 per cent) agree that a mandatory national standard is needed for "free range" eggs²¹ and, in fact, only 2 per cent of consumers do not believe there should be such a standard.²²

The Society endorses the Choice recommendation that a nationally enforceable standard for eggs labelled "free range" should require the producer to:

- (a) List the stocking density of the hens clearly and consistently on each egg carton (perhaps in the format of "xx hens per hectare" so that consumers are able to make informed decisions on egg purchasing.
- (b) Ensure that the eggs are produced by laying hens that are farmed in conditions that the lay hens are able to move around freely on an open range on an ordinary day, be it laying hens most of which move about freely on an open range on most ordinary days.

This solution is said to combine the common sense definition of "free range" by the Courts and a consistent display of stocking density so that consumers are able to buy eggs that meet their expectations.

A clear and consistent national solution would remove the burden and complexity of incompatible and contradictory State and Territory standards. As canvassed above the consumer research done by Choice indicates that the Federal Government should respond to consumers' preferences and provide certainty. This approach (which the Society endorses as to a national regime) which would militate against the adoption of Option 1- and hopefully alleviate the need for serial prosecution of egg producers by ACCC so resources can be directed elsewhere.

The production of the Consultation Paper and the call for submissions represents an opportunity for Government to provide clear and understandable definitions for the guidance of producers and to assist consumers in understanding what various forms of words used in egg production and labelling actually mean so they can make purchasing decisions based on issues which are of importance to them including stocking densities, other animal welfare issues and also, perhaps the region where eggs are produced.

It is also important to note that whilst some consumers take the view that "free range" eggs are somehow healthier for them than "cage" eggs, the majority of consumers with an interest in this topic are interested in the issue of the welfare of the layer hens – which the ACCC prosecutions (based on misleading and deceptive conduct) address only incidentally.

²¹ Choice Free Range Egg Survey 2014 reported in *"Free Range Eggs: Making the Claim Meaningful"*, June 2015

²² *ibid*

The Court's interpretation of the term "free range" in this context, does not directly address animal welfare issues, including practices such as beak trimming. While the practice is not actively endorsed,²³ and there is no accredited scheme to ensure the practice is carried out by someone with the appropriate training, it is not banned. The common law definition does not consider whether eggs may be "free range" when produced on farms where beak trimming is used.

The Society is of the view it is not practical to expect the Courts to determine a meaningful, universal definition of the term "free range" applicable in all circumstances (egg production and poultry meat production). The fact that the Courts have only commenced this process in the rather narrow context of prosecutions for misleading and deceptive conduct (as regards consumers) ignores the clear consumer appetite for improvement in animal welfare standards as part of this process.

Appendix E sends out details of the complaints to ACL and it can be seen that the vast majority of contacts are in relation to what is described as "false representation of free range".

Whether or not four successful prosecutions of egg producers (and possibly two more positive results for ACCC) will ameliorate this obvious problem is not known but clearly there is confusion amongst producers and consumers alike.

The Federal Court has previously ordered producers who have contravened the legislation to attend compliance training and/or publish notices at their own expense, as well as applying substantial pecuniary penalties.²⁴

Should Option 1 (to retain the status quo with governance by the ACCC) be the preferred Option at this time, consideration should at least should be given to some means to ensure compulsory compliance with the Domestic Poultry Code in the short term- as it stands or as amended in 2017. While compliance with the Domestic Poultry Code will not address the confusion to consumers around terms such as "organic" and "cage free", it will ensure production standards are improved and customers may be satisfied that at least some of what they perceive as "free range" farming methods have been used.

In any event, the Society is of the view continuing with the status quo is undesirable. As the examples given demonstrate, the industry is evidently rife with producers and suppliers of eggs making claims in their packaging and marketing materials that the eggs they sell are sourced from eggs produced in "free range" conditions, when that is not the fact. There is plainly a perception that some consumers would prefer to purchase "free range" eggs- and are prepared to pay more for those eggs than for eggs produced in standard battery conditions, and some producers then seek to capitalise on that whilst not producing their eggs in what most consumers would consider "free range" conditions for the layer hens.

²³ Domestic Poultry Code

²⁴Waters, C. "Court slaps fake free-range eggs producer with \$50,000 fine after she swindled 109 businesses" <http://www.smartcompany.com.au/legal/27786-court-slaps-fake-free-range-eggs-producer-with--50-000-fine-after-she-swindled-109-businesses.html>; above n 1.

The fundamental principle underpinning the relevant parts of the Australian Consumer Law ('ACL') is that consumers must not be misled in packaging or advertising materials; thus there is a clear benefit to consumers in being able to understand what is meant by any term on egg packaging relating to the conditions in which the hens are kept (whether it be "free range" or 'free to roam' or anything else) so they can make their egg-purchasing decisions accordingly. If clear definitions of terms are given with reference to detailed mandatory production standards, those consumers to whom the welfare of the layer hens is important enough to pay extra for eggs, could then be confident that the eggs they pay extra for were in fact produced in conditions which animal welfare experts would consider an improvement in conditions (for the hens) on intensive battery farm conditions- and not just labelled as such by unscrupulous producers eager to 'cash in' on consumer appetite for ethically produced animal food stuffs.

Whilst the fact there have already been various successful prosecutions of egg producers by ACCC demonstrates that to a degree the ACL is sufficient to some degree to enable prosecution of some producers who flagrantly ignore the precepts of "free range" egg production, while claiming it on the packaging, the fact that there have only been 4 successful prosecutions since 2011 (with judgments pending on two others) suggests only the most flagrant conduct may be the subject of prosecution and the lack of clear definition has presumably militated against many more prosecutions being instituted.

Unless consumers are familiar with the provisions of voluntary codes (and understand that any departure from such codes will not constitute an offence which may or will result in the prosecution of the producer) labelling which refers to such codes is of little assistance to the decision making of the consumer.

Another example of this in the production and marketing of eggs (but unrelated to the definition of terms like "free range" relating to production conditions) was the media reports about two years ago about the production and marketing of 'Barossa Ridge Eggs'. These eggs had a picture of grape vines on the box and this was plainly designed to give the impression that the eggs were produced in the world-famous (rural) Barossa Valley wine region, and to capitalise on the commercial benefit of consumers believing these eggs were produced in the Barossa Valley. This labelling was reported to the SA Office of Consumer and Business Affairs by a member of Parliament when it transpired that the eggs may not have come from the Barossa Valley and in fact may not have been produced in South Australia at all; the 'fine print' simply stated the eggs were 'product of Australia' and they were produced and marketed by a Victorian company 'Farm Pride Eggs' based in Melbourne²⁵

Again, consumers buying these eggs (and paying whatever price premium was applied) would be misled- by the packaging into believing the eggs were produced in South Australia

²⁵ 'The Advertiser' 23rd May 2013

and in particular the Barossa Valley.²⁶ The local egg producers in the Barossa Valley were also understandable concerned.²⁷

Thus it can be seen the manner in which eggs are labelled (in order to give consumers an impression as to where the eggs are from and/or the conditions in which the layer hens are kept) is a problem that goes beyond the issue of the definition of the term "free range" or other similar terms -which one can only assume have been cynically designed to gain such commercial advantage as may be available to the producer from giving consumers an understanding or impression of certain issues which may prove (on closer analysis) not to be entirely correct- and may even be frankly misleading.

The status quo fails to address these broader issues and thus is not supported by the Society

Option 2: 'Basic' information standard for free-range egg labelling.

Option 2 proposes that an Information Standard be established under the ACL, which mirrors the statements made in the *Pirovic* and *RL Adams* Federal Court decisions i.e. that "free range" egg producers would have to ensure hens can move about freely "on most ordinary days". However, this would apply only to eggs labelled "free range" and ignores the fact the prosecutions were dealt with on the basis of agreed facts and admissions made by the respondents. This means the definition of "free range" proposed (whilst utilised for the purposes of the two cases mentioned), has not been tested in the context of competing sources of expert opinion and judicial pronouncements in the context of contested litigation over the meaning of that term. Both respondents admitted they had made misleading claims that their eggs were "free range". Plainly, there may be better definitions available. As expressly stated in the *Pirovic* decision, the Court did what it had to do to decide the case, but no more. There is no particular reason to seize on this definition- given the circumstances in which it came about and the express limitations on its use articulated by the Judges in each case.

An opportunity exists to cover the field in relation to the labelling and marketing of all eggs (not just those for which the producers may seek to claim the epithet "free range"). There is no logical reason why a national regulatory scheme would be limited in this way to define only one of many terms used in the industry to capture the attention of consumers- and their purchasing dollars.

The Society supports a national regime which applies 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

²⁶ According to this report, Minister for Consumer and Business Services (and Attorney General) John Rau said he was "outraged" by the labelling and said: "I've referred this matter to Consumer and Business Services - as a regulator of Australian Consumer Law - to see whether or not this is an example of misleading or deceptive food labelling," he said yesterday.

²⁷ Barossa Food - representing local food producers was reported to have said "with Barossa eggs you would expect the chooks to come from the Barossa Valley". "It is hoodwinking consumers because they may not recognise the eggs are not from the Barossa," Barossa Food committee member Jan Angus said. "I implore the government to ... help us."

densities, coupled with clear definitions of terms used- and a prohibition on the use of other terms.

This would ensure that consumers would readily be able to determine information in relation to stocking densities, and animal welfare standards and other issues which are relevant to their egg purchasing decision- making.

It is noted in the Choice publication referred to in the Consultation Paper²⁸ surveyed consumers nationally and the report is based upon a statement that "*consumers' desire to back better animal welfare and support free range egg producers has contributed to free range being the fastest growing egg sector, with growth expected at eight times that of caged eggs*" (with it being far from a niche product as 65 per cent of Australians had bought free range eggs in the previous 12 months).

However (Choice says), with no national standard for "free range" eggs, consumers are being sold eggs under the "free range" level that do not meet a common sense definition of "free range". Consumers pay a premium for "free range" eggs but there is no guarantee that they are getting what they pay for. Not only are consumers being 'ripped off' but the current environment creates uncertainty for "free range" egg farmers and presents significant costs to government.

Choice argues that the solution is clear. There should be a nationally consistent and enforceable standard for "free range" eggs to give consumers confidence and provide a level playing field for producers.

The Society is of the view the national regime should go further and not be limited to the narrow compass of eggs claimed to be "free range". The capacity for this to be abused is obvious: Producers would simply come up with another term which gives an impression to consumers of certain animal welfare standards and stocking densities being observed in egg production and use that. Of course, they could still be prosecuted by ACCC if consumers are misled, but, as canvassed above- this is a somewhat blunt tool and the process is time consuming and expensive. The preferable course is clearly legislated definitions which everyone (producers and consumers) can understand and rely upon, supported by detailed production standards.

In any event, an obvious criticism of Option 2 is that, like Option 1, it does not really address animal welfare issues, despite the clear consumer appetite for regulation of those issues.

As discussed above, relying on the common law is problematic for a number of reasons. The term "ordinary day" was not considered in all cases that have been heard by the Federal Court and there was, for example, no factual findings in the *Pirovic* case as it proceeded on the basis of agreed facts. The Consultation Paper references the views of Professor Nicol from the University of Bristol and suggests "ordinary day" be considered to be eight hours of daylight.²⁹ It is uncertain exactly when those hours should occur. The Domestic Poultry Code expands on the issue of exactly what is required for "free range" farming, but again in

²⁸ Choice "*Free Range Eggs: Making the Claim Meaningful*", June 2015

²⁹ The Treasury, *Free Range Egg Labelling: Consultation Paper* (Oct 2015) p 20.

the context of animal husbandry procedures rather than product labelling and consumer protection. The current version of the Domestic Poultry Code specifies flooring types and that poultry farms need to be sited to avoid muddy conditions and contaminated areas. The *Animal Care and Protection Regulation 2012 (QLD)* prescribes that there must be reasonably sufficient shelter in the area to provide fowl with shade and protection from adverse weather conditions. It is apparent that "free range" farming involves more than just freedom for the layer hens to roam about and that the common law discussion has not really addressed these issues.

Issues such as beak trimming discussed above are not addressed. There is no obligation for farmers to control and manage maximum stocking densities. Currently, Queensland has legislated against farmers keeping more than 10,000 layer hens per hectare, and goes onto to limit the stocking density to 1500 layer hens per hectare unless certain additional measures are taken for the welfare of the birds.³⁰

Conversely, research conducted on behalf of the Australian Egg Council found that consumers are visually comfortable with 22,000 hens per hectare.³¹ It is not clear why there is such a significant discrepancy between the two. The Domestic Poultry Code recognises that the relationship between animal welfare and stocking density is not a simple one, but ultimately states that outdoor layer hens should be limited to 1500 per hectare.³² This recommendation (in relation to outdoor areas) is supported by the RSPCA via the standards applicable to those egg producers who choose to pay the requisite fee and become part of its approved farming scheme which in turn enables them to use the 'RSPCA Approved Farming' logo on their eggs.³³ (It is noted however, that these Standards and the use of the RSPCA logo encompass eggs produced in both indoor and outdoor systems and no-where is the term 'free range' used). The Domestic Poultry Code also recommends that outdoor layer hens (in 'non-cage systems') should not exceed a stocking density of 1500 birds per hectare.³⁴

Options 2a proposes specified conditions for a 'defence' provision which would not be mandatory; Option 2b proposes disclosure of stocking density on packaging- but at a rate yet to be determined.

For the reasons canvassed above, the Society does not support Option 2 at all- but does endorse the concept embodied in Option 2b of requiring disclosure of stocking density.

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. It must be noted the

³⁰ S 14(2) *Animal Care and Protection Regulations 2012 (QLD)*; Schedule 1, item 4 *Eggs (Labelling and Sale) Act 2001 (ACT)*.

³¹ "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).

³² Appendix 2, *Model Code of Practice for the Welfare of Animals - Domestic Poultry* (4th Edition) CSIRO publishing, p 28.

³³ See RSPCA Approved Farming Scheme Standards for Layer Hens, September 2015

³⁴ Domestic Poultry Code, Appendix 2

suggestion is referenced to research carried out on behalf of the Australian Egg Corporation, which is said to indicate that consumers find animal husbandry practices "difficult to interpret without a high degree of knowledge or interest"³⁵. Regardless of which option is adopted, if the ACCC carries out an educational program as proposed (and the THE SOCIETY is of the view this should be done regardless of which Option is ultimately adopted), information about stocking density and beak trimming (and other animal welfare issues as well as geographical location of the producer) should comprise part of that regulatory regime and the education program. The fact that standards have been created and legislation has been passed should demonstrate acknowledge that animal welfare is an important issue about which consumers should be informed so they can make informed choices themselves based on as much information as they wish to digest - rather than choices based on often misleading information from producers.

The Information Standard proposal (Option 2) does not directly the address issues of confusion for consumers, beyond the definition of "free range". If this option was adopted, terms such as "barn laid", "organic" and "cage free" could still be used by producers who decide not to describe their products as "free range" and thus avoid having to comply with the regime. The proposal suggests that the scope of similar words should be limited, but it is unclear exactly how it proposes to limit the use of other similar words. Those terms will inevitably continue to be interpreted by consumers as largely synonymous with "free range".

There is also a further problem in labels which disclose stocking densities where no national regulation exists. One product may describe a maximum stocking density of 22,000 hens per hectare. Another may describe 1,500 per hectare. In some circumstances presently both may be considered "free range" because they are free to roam on an "ordinary day". There is no certainty how this confusion will be resolved for the consumer other than through the ACCC leading an education campaign. It is questionable whether education is sufficient, however. Consumers cannot be expected to understand that such a wide range of stocking densities will qualify for the same descriptive terminology.

The Society does not support option 2.

Option 3. Information Standard for all categories of Eggs

As canvassed above, 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.

An Information Standard should compel all egg producers to label their eggs with one of a number of defined descriptive terms: the Discussion Paper suggests three descriptive terms: "cage", "barn" or "free range". Each of these terms would be defined with sufficient particularity for producers to ensure they comply with their obligations (without exposure to prosecution for misleading/deceptive labelling). This would enable consumers to gain an

³⁵ibid.

understanding of what these terms mean in practice to enable them to make informed decisions (based on the labelling) as to which eggs to purchase (which would, it is suggested be largely a function of how much the individual consumer is concerned about the welfare of the layer hens).

The Society supports this option – with the inclusion of what are described as optional additional categories set out in Box 7 (Option 3a “Premium free range” and Option 3b “Access to Range”).

The expectation would be that once all of these terms were clearly and consistently defined and articulated –and applied across the egg production industry in all parts of Australia, egg producers, marketers and retailers would provide consumers with information as to the standards applicable to the terms (that could even be mandated). It is also to be expected that with increasing consumer demand 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 (hopefully) reducing the need for serial prosecutions of all but the most recalcitrant egg producers for misleading and deceptive conduct. (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).

The Society is of the view the definitions (and the production/husbandry standards which would stand behind them) should be mandated by legislation (probably conveniently in the Competition and Consumer Act (or Regulations or a mandatory Code thereunder) with breaches by producers rendering them liable to prosecution and sanction.

Not only would this achieve maximum national effectiveness for the standards, but it would avoid the current consumer confusion arising from trying to identify the differences between voluntary compliance with various different Codes and understanding the lack of sanctions available to any regulator should producers depart from any Code they may choose to comply with from time to time, without also misleading consumers via their packaging.

Consistency across all jurisdictions would only serve to reduce economic trade barriers between States and Territories and remove confusion for consumers who may travel or buy eggs in their home State which are produced elsewhere; however, 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.

The main justification for this is the obvious fact that eggs produced in one State or Territory can easily be sold across the border in other States and Territories, and there is no cogent argument to justify or explain why eggs labelled “free range” in e.g. New South Wales could come from layer hens kept in markedly different conditions to the layer hens from which eggs are produced in e.g. Queensland which are sold with the same term on the label.

The Society thanks you for considering this submission and looks forward to being apprised of the end result of this consultation process.

I trust these comments are of assistance.

Yours sincerely

A handwritten signature in black ink, appearing to be 'R Perrotta', with a long horizontal flourish extending to the right.

Rocco Perrotta

PRESIDENT

Ph: (08)8229 0222

Email: president@lawsocietysa.asn.au