



**SUBMISSION TO THE TREASURY
FREE RANGE EGG LABELLING
REGULATORY IMPACT STATEMENT**

NOVEMBER 2015

FINAL

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1. Executive summary

Egg Farmers of Australia (**Egg Famers**) welcomes the opportunity to provide a submission to the Treasury in relation to the free range eggs labelling standard.

Egg Famers strongly supports the free range egg labelling standard process and considers that greater clarity in the definition of free range eggs has the potential to deliver significant net benefits for consumers and the industry.

Egg Farmers also supports consumer protection regulation and the principle that consumers should not be misled in relation to aspects of free range production systems. There have been exaggerated claims in the past and regulatory intervention has and will continue to ensure that consumers are not misled

Egg Farmers has been disappointed by the scope and analytical basis of regulatory intervention to date and the impact it has had in creating uncertainty as to the definition of free range eggs. The prospect that the approach of 'most birds outside on most ordinary days' could be incorporated into a free range labelling standard is deeply concerning and Egg Farmers urges the Treasury not to characterise the relevant 'problem' to be addressed on this basis.

This is because the 'most birds, most days' approach:

- a) is flawed in that it seeks to define free range by reference to specific misrepresentations that have been the subject of enforcement action;
- b) is based on case law which has not considered, and cannot provide meaningful guidance on the meaning of free range; and
- c) would significantly distort the competitive process by imposing a definition of free range that the vast majority of free range egg suppliers could not be confident they could meet.

Egg Farmers proposes a basic information standard based on the published Egg Farmers definition of free range eggs. This definition provides that laying hens in free range farming systems:

- a) are unconfined within a ventilated hen house;
- b) have meaningful access to and are free to roam and forage on an outdoor range area during daylight hours in a managed environment; and
- c) a maximum outdoor stocking density of one hen per square metre.

The Egg Farmers definition of free range is supported by eight minimum standards which specify egg production systems that would ensure compliance with the Egg Farmers definition.

Tested against the criteria for good regulation, this proposed standard has the potential to deliver significant net benefits in a manner which the options set out in the Regulatory Impact Statement Consultation Paper (RIS) do not. In particular, the Egg Farmers proposed standard:

- a) is responsive to an identifiable failure of regulation in the form of an inappropriate definition being imposed as a consequence of consumer protection regulation;
- b) is confined to the relevant problem and would not regulate the market more broadly or traverse into related issues of animal welfare regulation;

- c) will be effective in addressing the problem by bringing clarity to the definition of free range eggs;
- d) is based on and is consistent with consumer expectations and current industry practice;
- e) is capable of being complied with by free range egg producers and would not disrupt the supply of free range eggs;
- f) is capable of being monitored and enforced by regulators;
- g) is inclusive in that it sets a minimum standard and will not distort competition by excluding some suppliers from the supply of free range eggs; and
- h) would have no impact on innovation or the ability of producers that operate differentiated production systems to make accurate claims in relation to the characteristics of those systems.

It is for these reasons that Egg Farmers urges the Treasury to adopt the proposed standard and bring clarity to this issue.

In addition to the substantive submission below, Egg Farmers has set out brief responses to each of the focus questions identified by the Treasury in the RIS in Attachment A to this submission.

2. Background

2.1 *Egg Farmers*

Egg Farmers of Australia is the name given to a group of egg farmer representative organisations that aim to further the interests of the Australian egg industry through developing and advocating policies, engaging with relevant stakeholders and participating in public debate.

Egg Farmers represents the whole of industry and sees great benefits to consumers in the range of egg production systems that are currently operating in Australia.

Egg Farmers is committed to promoting the benefits of and improving all egg farming for the benefit of the Australian community. Egg Farmers also has a role in promoting the good work done by its members who collectively make up the vast majority (over 80%) of the Australian egg industry.

Egg Farmers participating egg farmer representative organisations include: the Victorian Farmers' Federation Egg Group, the NSW Farmers' Association Egg Committee, the Commercial Egg Producers Association of Western Australia, the Tasmanian Commercial Egg Producers Association, Queensland United Egg Producers and the South Australian Local Egg Section. These organisations represent their members and are the voice of the Australian egg industry.

2.3 *Egg production in Australia*

Egg farms in Australia currently produce approximately 4 billion eggs per annum with demand and production expected to grow steadily in the near future. Due to the perishable nature of eggs and their low value to weight ratio, consumption is predominantly domestic. Eggs are an important and low cost source of protein and there is a relationship between egg consumption and the price of alternative protein sources such as meat.

The primary drivers of egg production costs are:

- a) the capital cost of pullets and establishing laying flocks, which represents approximately 25% of production costs;
- b) the capital cost of production and packing systems, which represents approximately 25% of production costs; and
- c) the cost of feed, predominantly grain, which represents approximately 50% of production costs.

There are currently a range of systems of egg production which, in general terms, provide for a range of animal welfare and potentially, egg quality outcomes. The three main production systems that are guided by the national Model code of practice for the welfare of animals - domestic poultry 4th edition (**Model Code**). According to the Model Code, production systems may be defined as:

- a) cage, in which hens are continuously housed in cages within a shed;
- b) barn laid, in which hens are free to roam within a shed which may have more than one level; and
- c) free-range, in which hens are housed in sheds and have access to an outdoor range.

The production systems have different cost profiles as a result of the different capital cost of establishing production infrastructure and the different biosecurity and predator risks associated with hens having access to outdoor areas. These costs are reflected in different farm gate, wholesale and retail prices. For instance, AZTEC data indicated that in 2013/14 the average retail price for:

- a) cage eggs was \$3.35 per dozen,
- b) barn laid eggs was \$4.80 per dozen; and
- c) free range eggs was \$5.34 per dozen.

The egg industry is relatively concentrated with a number of large scale producers supplying the majority of eggs supplied through supermarkets, both on a branded and 'home brand' basis.

2.3 The development of free range

The manner in which the free range egg category has developed in Australia is directly relevant to the issues raised in the RIS. Egg Farmers submits that an objective view of the industry will assist the Treasury in properly identifying the 'problem' to which regulation should be directed and confined.

Through the 1980s, egg production was regulated by State marketing boards and hens were predominantly kept in cages. Deregulation in most States during the 1990s led to the development by the industry of small scale free range egg production. This free range segment has continued to grow and now represents approximately 39% of eggs sold in supermarkets in Australia.

The relevant animal welfare concern that drove the growth of free range was that the quality of life and health of caged hens could be improved if they had greater mobility and were housed in production facilities that more closely reflected the natural environment. In response to consumer demand in this regard, the free range category developed on the basis that free range hens would not be caged and would be housed in barns that provided access to an outdoor range.

As consumer demand did not extend to ensuring that free range hens, or any proportion of them, did go outside for a specified period, the vast majority of the industry developed free range production systems without specific regard to this requirement. Instead, industry practices evolved to ensure that hens had meaningful access to the outdoors and could choose to go outside if they wanted.

The free range category has mainly developed based on production systems and accreditation schemes that reflect the Model Code, such as the accreditation scheme operated by the Australian Egg Corporation Limited (**AECL**). However, as free range egg producers have sought to differentiate themselves based on higher specification production systems, a number of alternative accreditation schemes have also emerged which provide for additional requirements, generally reflecting higher animal welfare outcomes.

As the free range category developed, it continued to reflect the structure of the egg industry more broadly with the vast majority of free range eggs being supplied by large scale producers and the remainder by a range of smaller scale producers.

Due to the difference in the price of cage, barn and free range eggs, there has always been competition between each category and the producers that supply eggs in one or more categories. In this context, there have been circumstances in which:

- a) some free range egg producers have made representations to consumers regarding their production systems that were inaccurate, including by exaggerating the extent to which free range hens spend time on an outdoor range and as a result, have been the subject of enforcement proceedings
- b) some free range egg producers and animal welfare groups have sought to promote high specification free range production systems by representing that they are 'genuine' free range systems whereas the systems of competitors are not; and
- c) some have blatantly mislead or substituted

In each case, these representations were made without a proper basis and instead relied upon inaccurate information and/or subjective assumptions.

The potential for misleading claims to confuse consumers and undermine consumer confidence in the free range category is a concern for all egg producers, particularly where there has been blatant substitution. Farmers recognise the importance of provenance in consumer purchase behaviour and we condemn activities that have eroded the confidence consumers have in our industry. Egg Farmers supports the intervention of consumer protection regulators to address representations of this nature. However, in order for regulatory intervention to be effective it needs to be both timely, evidence based and objectively focused on the relevant misrepresentations.

2.4 Regulatory intervention

In contrast to the potential benefits of regulatory intervention to address misrepresentations, regulatory intervention in the context of free range representations has been largely counterproductive.

This intervention has involved a review in response to complaints made by consumer groups, a number of investigations and enforcement proceedings, commentary regarding its enforcement activities and most recently, free range egg enforcement guidance.

In each case, the focus has not been solely on the relevant misrepresentation but instead has sought to define the concept of free range on behalf of the industry. Unfortunately, the approach adopted has been arrived at without consultation with the industry and does not reflect the practice of the vast majority of the industry.

More than any other factor, it is the approach adopted by regulators that has given rise to ongoing confusion and uncertainty in the free range egg industry. In particular, the lack of effective regulation has created an environment in which:

- a) large scale producers, which represent the majority of free range eggs supplied in Australia have been demonised as systematically misleading consumers based on assumptions that do not reflect consumer expectations;
- b) small free range egg producers have continued to promote high specification free range production systems as representing the only genuine free range systems;
- c) animal welfare groups have been able to claim that free range production systems that do not correlate with their views are not genuine free range
- d) consumer groups, including CHOICE, have been able to join the debate as advocates for small producers and higher animal welfare standards on the basis of a misinterpretation of the stocking density specified in the Model Code (the code provides for an uncapped external stocking density provided for certain management practices where flocks are above 1,500. This has been misrepresented by some groups as a cap of 1,500); and
- e) the normal investment cycle in free range production systems has been interrupted

The fact that the most birds outdoors on most ordinary days approach adopted by regulators has been applied by the Federal Court in enforcement proceedings and that the Treasury has framed the options in the RIS with reference to that approach is of even greater concern.

Under the most birds outdoors on most ordinary days approach, the egg producers that supply the vast majority of free range eggs in Australia, some of which have pioneered the development of the category and supplied free range eggs for over two decades, are in position where they face:

- a) uncertainty that they may not be able to comply with a definition of free range; and
- b) the prospect of ongoing investigation and enforcement action by regulators in relation to a definition of free range that lacks a proper basis.

This uncertainty is having and will continue to have a detrimental impact on competition and investment in the free range egg category and forms the primary basis upon which Egg Farmers considers that targeted regulatory intervention is required to clarify the meaning of free range.

3. Approach to the RIS process

3.1 Regulatory principles

Given the disparate views that the Treasury is likely to be provided as part of the RIS process, it is imperative that the Treasury's consideration of this issue is grounded in sound regulatory principles.

Egg Farmers does not support regulation for the sake of regulation and considers that regulation should not exceed the scope of the problem that it seeks to address.

In this context, Egg Farmers notes that the analysis conducted and decision made by the Treasury should be consistent with the Australian Government Guide to Good Regulation and the Council of Australian Governments Best Practice Regulation - A Guide for Ministerial Councils and National Standards Setting Bodies. The relevant key principles are that regulation should:

- a) not be the default option;
- b) be in response to an identifiable market failure, regulatory failure or an unacceptable hazard or risk;
- c) be targeted to a specific problem and confined to that problem;
- d) be effective and proportional to the problem that is being addressed; and
- e) not restrict competition unless it can be demonstrated that the benefits outweigh the costs and the objectives of regulation can only be achieved through restricting competition.

Egg Farmers encourages the Treasury to rigorously test the regulatory options available in accordance with these principles. In particular, Egg Farmers considers that the impact of the options set out in the RIS on competition needs to be closely examined as it is likely that an inappropriate definition of free range egg production would substantially distort the competitive process.

In addition, it is important to recognise that the principles of good regulation do not identify a concern regarding the level of certainty that a consumer may have as to the manner in which a good is produced as a relevant category of market failure, regulatory failure or unacceptable hazard or risk. This reflects the fact that:

- a) consumers are largely unaware of the productions systems that are used to make the good they purchase and generally focus on the characteristics of the final good; and
- b) where the final good is the subject of a credence claim regarding the production system used to make the good, the consumer is in a position of inherent uncertainty.

If consumer uncertainty was a relevant concern in this regard, then it would be necessary to develop standards for all goods or at least all goods that are the subject of credence claims. The principles of good regulation recognise that this is unnecessary.

3.2 The problem

Egg Farmers does not accept the 'problem' articulated in the RIS as a relevant problem for the purpose of considering whether regulation is required.

The problem referred to, that free range eggs are not produced under conditions that consumers typically expect when they buy them, is entirely contingent on the most birds outdoors on most ordinary days definition of free range egg production. Egg Farmers has significant concerns in relation to this definition and its impact on the RIS process.

Further, as demonstrated below, the most birds outdoors on most ordinary days is not supported by evidence of consumer expectations in relation to free range productions systems. As a result, the 'problem' stated in the RIS lacks a proper basis and to the extent

that the Treasury adopts this approach then the free range egg labelling process will be completely undermined.

The free range egg debate is complex as it is entwined with issues of animal welfare (which are inherently subjective in nature) and the competitive position of various free range egg producers. In considering options for a free range egg standard, it is important that the many voices are separated from their perspectives so that clarity may be brought to this issues.

Egg Farmers submits that the main problem that should be the focus of the RIS process is that a debate has gained momentum, and been encouraged by regulators, in which:

- a) an evidentiary basis for the expectations of consumer in relation to free range eggs has been ignored or otherwise lost; and
- b) parties with vested interest have misrepresented the expectations of consumers and the extent to which free range egg producers meet those expectations.

While there is nothing wrong with issues being debated, the position taken by regulators in this process has generated significant uncertainty on behalf of consumers and free range egg producers. By joining animal welfare groups and high specification free range egg producers in redefining free range, regulators have provided credibility to the perspectives of these parties and, through enforcement action, sought to enshrine these perspectives in judicial findings and enforcement guidelines.

Egg Farmers submits that this is the problem that needs to be addressed through the national egg standard process. A definition of free range egg production that has been arrived at without reference to consumer expectations and without consultation with industry should not be allowed to continue to create uncertainty in the industry and undermine the competitive process.

Egg Farmers urges the Treasury to consider this issue objectively with a focus on the development of a standard that clarifies the existing confusion regarding the meaning of 'free range' and facilitates the process of competition and innovation.

4. The proposed 'definition' is unworkable

4.1 Most birds outdoors on most ordinary days

An examination of the history and analysis underpinning the approach of 'most birds outside on most ordinary days' demonstrates that it does not have a proper basis and, as a consequence, has the potential to significantly distort the competitive process in egg markets.

There are three major analytical flaws in the approach of defining free range with reference to most birds outdoors on most ordinary days.

Firstly, this approach ignores the history and development of free range egg production systems in Australia, the vast majority of which have always been based on hens having meaningful access to an outdoor range and the freedom to choose whether or not to go outside. This is what free range meant up to the point of regulatory intervention in response to exaggerations or misrepresentations regarding the extent to which free range hens spend time outdoors. It follows that this is what it should mean in the absence of those misrepresentations.

Rather than acknowledge this fact, the 'most birds, most days' approach makes the mistake of seeking to define the meaning of a free range production system by reference to the manner in which it has been exaggerated or misrepresented (that birds are predominantly outside). From here it is suggested that free range egg producers that do not meet this standard should be prevented from using the term 'free range'.

Far from being an application of common sense, this approach makes no sense. A food supplier that falsely represented its products were 'fat free' would not, as a consequence of regulatory intervention, be required to then change its production system to produce products that are fat free. Put simply, a misrepresentation should not be relied upon to define a product or specify a production system.

Secondly, the 'most birds, most days' approach has been developed without reference to consumer expectations. At no stage have regulators commissioned or provided evidence of consumer expectations in relation to the meaning of free range eggs. To the extent to which the ACCC has relied on evidence relating to free range production systems the only evidence cited is that provided by overseas academics that specialise in animal welfare research. This advice has been considered without regard for the extensive array of poultry research scientists in Australia

In fact, regulatory intervention has not even been in response to significant consumer concern regarding the meaning of free range. As the RIS points out the ACCC received a total of 179 contacts between January 2012 and June 2015 regarding egg labelling, only part of which related to complaints regarding free range representations. The ACCC Annual Report 2013-14 indicates that the ACCC, as the primary consumer protection enforcement agency in Australia, received a total of 185,640 contacts in 2012-13 and 202,363 contacts in 2013-14. In this context the focus on free range claims appears to be disproportionate and not supported by significant consumer concern or uncertainty.

Finally, the 'most birds, most days' approach is completely arbitrary. By focusing on the wrong issue (the extent to which birds are outside rather than the meaning of free range) it becomes necessary to articulate an acceptable period of time that birds are outside. The only evidence in this regard relates to issues of animal welfare and results in a range of views as to the amount of time that a hen 'should' spend outside. From here, a mid-point has been chosen in the form of 'most birds, most days' on the basis that it is somehow reasonable and represents common sense.

Egg Farmers considers this requirement that most hens are outside on most ordinary days has no connection to consumer expectations or the majority of free range production systems that are currently in operation. If anything, it demonstrates the lack of evidence upon which the approach has been developed and its arbitrary nature. As such, this approach does not form a basis for appropriate regulation.

4.2 *The limited utility of case law*

The main source of credibility for the 'most birds on most days' approach has been its application in Federal Court enforcement proceedings. However, an examination of the context of those proceedings demonstrates that the findings of the Federal Court cannot be relied upon as a basis for setting a free range egg standard.

In particular:

- a) the 'most birds, most days' approach has only been accepted by the Federal Court in consent judgements in which the parties agreed to settle the proceedings on the basis of agreed facts. These settlements were largely arrived at through a desire by the defendants to limit financial exposure;
- b) the high cost of enforcement proceedings means that there is limited ability for a party that wishes to resolve a proceeding with the regulator to impose its perspective on key issues in the proceeding as part of the agreed facts;
- c) consumer protection proceedings concern consideration of particular representations by a party to the proceeding rather than the meaning of terms generally;
- d) the key judgements do not rely on or refer to evidence of consumer expectations in relation to the meaning of free range; and
- e) the key judgement in which the Federal Court first accepted the most birds, most days approach explicitly states that the findings of the Court do not extend to providing a definition of free range in other contexts.

In this context, it is misleading to suggest that the meaning of free range has in some way been considered or settled by the Federal Court. Further, it should not be suggested that the Federal Court has endorsed the 'most birds, most days' approach as having any application in the setting of standards for free range eggs.

4.3 Impact on competition

Of greater concern than the basis upon which the 'most birds, most days' approach has been developed is the potential for it to adversely impact competition in the production of eggs.

Regulatory intervention in response to exaggerations or misrepresentations regarding the extent to which free range hens spend time outdoors has been justified on the basis of competition theory. Where competitors are able to misrepresent their products or services as having particular attributes they are able to take sales away from innovative companies that are actually producing goods or services with those attributes. If this practice is allowed to continue, the incentive to innovate is undermined and consumers miss out on the benefits of innovation and the competition that it generates.

Egg Farmers fully supports this competition theory and the importance of consumer protection regulation and enforcement in ensuring competitive markets. However, this theory is not a basis for new regulation in relation to standards for free range egg production. This theory forms the basis for existing consumer protection legislation which on other markets is the subject of regular and effective enforcement action by regulators. To the extent that free range egg producers make representations that are false or misleading then Egg Farmers would expect regulators to take appropriate action to prevent this conduct from continuing.

What has been completely overlooked in the debate regarding the meaning of free range eggs is the potential for consumer protection enforcement activities to inappropriately expand into standard setting and distort the competitive process. If a regulator takes particular instances of misleading conduct and extrapolates them to define the meaning of a production system generally, there is a high risk that the standard arrived at will be exclusionary in nature, favouring some competitors at the expense of others.

This is precisely what has transpired in the context of free range eggs. The application of the 'most birds, most days' approach has reflected the production systems of producers that are responsible for a relatively small volume of free range egg production and not the

vast majority of free range egg producers. These producers have been championed as the drivers of innovation with remaining producers painted as seeking to 'redefine' free range to suit their purposes. As set out above, these perspectives are entirely based on a flawed definition of free range egg production and are without merit.

Attempts by regulators to engage in standard setting have already created significant uncertainty on behalf of free range egg producers. Some large producers that have been producing free range eggs for 20 years consider themselves at risk of either not meeting the 'most birds, most days' standard or not being able to substantiate that they do. In this context, their incentive and confidence to continue to invest in free range egg production capacity is being significantly undermined.

Importantly, this dynamic does not apply to a small number of producers that can be characterised as operating sub-standard free range production systems but to the vast majority of the industry. Given the uncertain nature of the 'most birds, most days' approach, it is impossible to determine what proportion of free range suppliers are currently meeting this requirement. Egg Farmers is aware that some large free range egg producers, that supply approximately 80% of free range eggs in Australia, are concerned that they either do not comply with the 'most birds, most days' approach or cannot be confident that they do. On this basis, the adoption of the standard based on the 'most birds, most days' has the capacity to shrink the free range category by up to 80%, thereby having a substantial impact on competition.

Egg Farmers members which are major suppliers have also indicated that they have already deferred investments as a direct result of the uncertainty created by regulatory intervention. This has had a direct impact on competition and the price of free range eggs to consumers as the industry is currently below the capacity required to meet expected demand for free range eggs and eggs generally.

If a free range egg standard is adopted based on the 'most birds, most days' approach then this distortion of the competitive process will be crystallised. The producers that currently supply the majority of free range eggs face a choice between:

- a) abandoning their free range production systems, stranding these assets;
- b) reinvesting in the modification to their free range production systems to meet the 'most birds, most days' standard without a concrete understanding of how this is to be achieved;
- c) attempting to sell free range eggs as 'barn laid' at a lower price point, in a limited brand category thereby forfeiting the return on their investment in free range production systems and facing uncertain returns; or
- d) risking ongoing enforcement action, including costly substantiation notices, enforcement proceedings and/or penalties.

Further, it cannot be suggested that these outcomes would impact producers and not consumers. There will be a direct and substantial detrimental impact on consumers as a result of the adoption of a standard based on the 'most birds, most days' approach. The exclusion of the majority of the free range category from selling free range eggs will significantly increase the price of free range eggs, taking the free range category from a broad and expanding product, to a niche product that is supported by a fraction of current free range buyers.

It is for these reasons that Egg Farmers considers that a free range egg standard that imposes this burden on part of the market and not the whole of the market is completely inappropriate. The fact that this exclusionary effect of the 'most birds, most days'

approach has been lost on consumer protection regulators is astonishing and disappointing.

The direct consequences of this approach have also been overlooked or ignored. For instance, the transfer of value from one group of producers to another by requiring them to change their labelling from free range to barn laid has been justified on the circular basis that those producers are misleading consumers. This demonstrates a lack of understanding of both consumer expectations in relation to the meaning of free range and the nature of consumer demand.

In relation to the latter, the key issue is that there is no broad consumer demand for barn laid eggs. Barn laid has always been a very small proportion of egg sales and there is no evidence to suggest that this category has scope for significant growth. The impact of forcing the free range egg producers that currently supply 80 per cent of free range eggs to instead supply eggs as barn laid would be spectacular, creating a massive oversupply of barn laid eggs and a massive under supply of free range eggs. This impact on consumers from increases in the price of free range eggs upon the removal of the majority of eggs currently supplied as free range appears to have been given no consideration by regulators.

Egg Farmers urges the Treasury not to repeat this mistake by adopting an approach that has been widely applied, but lacks a proper basis. Instead, the free range eggs standard should be developed on an inclusive basis so that clarity can be provided to consumers and producers, without distorting the competitive process.

5. Consumer expectations

Until recently, there has been limited quality research conducted that goes to the relevant issue of consumer expectations. The free range debate has been influenced by assumptions regarding the perspective of consumers which were either:

- a) baseless;
- b) based on subjective perspectives in relation to related issues of animal welfare; or
- c) driven by an objective of obtaining a competitive advantage through the setting of a particular standard for free range eggs, with or without reference to issues of animal welfare.

Egg Farmers considers that it is critical that any free range egg standard is developed with reference to the expectations of consumers and evidence of those expectations.

In August the NSW Farmers' Association commissioned a study into the expectations of Australian consumers that purchase free range eggs. The process was conducted by an independent market research consultancy, Quantum Market Research (**Quantum**) and involved:

- a) a qualitative phase in which focus groups were conducted to identify the concepts and language used by buyers of free range eggs in describing their expectations; and
- b) an online survey of 1,200 adult free range egg buyers across Australia in which the outcome of the focus groups was applied.

The results of the research indicate that no consumers identified the 'most birds outside on most ordinary days' approach as reflecting their expectations of free range eggs.

Instead, 75% of consumers indicated that free range means 'not in a cage', 'unconfined' or 'access to outdoors' and 18% of consumers had no view of what the term free range should mean. The Quantum study also tested the expectations of consumers in relation to the outdoor stocking density of free range hens. The study found that 72% of consumers consider one hen per square meter to either meet or exceed their expectations of an appropriate stocking density.

This outcome appears to be consistent with the findings of a survey conducted by CHOICE (CHOICE Free Range Survey 2014) as it relates to the definition of free range, although the methodology of the CHOICE survey has not been released publicly. CHOICE reports that when asked to describe conditions under which free range eggs are produced, consumer answered 'free to roam/move about', 'access to the outdoors/paddock/grass' and not confined in cages.

In addition, research conducted by Julie Dang and Associates Pty Limited for the AECL in 2012 concluded that:

- a) 79% of consumers were either satisfied or indifferent in relation to the terminology used to describe egg production systems;
- b) 81% of free range egg buyers considered that free range hens should be sheltered in buildings/not cages which have nests and perches, provide protection and are secured at night; and
- c) 65% of free range egg buyers considered that free range hens should have access to the outdoors for no more than daylight hours.

This research demonstrates that the 'most birds, most days' approach is a regulatory construct that has been developed without reference to the key issue of consumer expectations that it is intended to satisfy. In this context, it cannot form a basis upon which a free range egg standard should be imposed.

In addition, the market research indicates that free range egg producers are currently meeting the expectations of consumers. Just as free range production was developed to provide for laying hens to have greater mobility and access to the outdoors, consumers understand and expect that this is the basis upon which free range eggs are sold. It should be no surprise that this has been the result given that egg producers have developed and expanded their free range production systems in response to consumer demand.

6. Free range standard

6.1 Options set out in the RIS

The analysis above demonstrates that the options set out in the RIS do not meet the criteria for good regulation and are likely to have significant unintended consequences.

In particular, the 'most birds outdoors on most ordinary days' approach adopted by regulators in their enforcement activities means that Option 1 - Status Quo, with regulatory guidance is not appropriate. The industry needs a standard to clarify the meaning of free range in accordance with consumer expectations and the structure of the industry. Once a standard is in place the activities of consumer protection regulators will be appropriately confined to acting to prevent false and misleading representations.

In contrast, Option 3: Information standard for all categories of eggs is needlessly prescriptive and would have the effect of imposing regulatory restrictions across the industry. Egg Farmers considers that there is no basis for supplanting the role of consumer demand and competition. Even in the unlikely event that these categories could be developed in a way that did not distort the current structure of the market, restricting the basis upon which producers can compete would stifle future innovation to the detriment of consumers.

Option 3 also fails the other key criteria for good regulation in that it:

- a) is not responsive to an identifiable market failure;
- b) is not targeted to a specific problem and confined to that problem; and
- c) related to the problem that is being addressed.

As a result, Egg Farmers submits that Option 3 should not be pursued by the Treasury and that it is not necessary for the Treasury to form a view on the multitude of issues that are raised in the RIS in considering the scope of each category in the production of eggs.

Finally, for reasons set out in detail above, Egg Farmers considers that Option 2: 'Basic' information standard for free range egg labelling, as proposed, does not satisfy the criteria of good regulation. However, there are significant benefits to the adoption of a basic standard and the adoption of a revised Option 2 forms Egg Farmers proposal in response to the RIS.

6.2 Proposed free range labelling standard

Egg Farmers submits that the Treasury should develop a basic free range egg labelling standard which is based on a definition of free range that reflects consumer expectations, namely, that laying hens in free range egg production systems:

- a) are unconfined within a ventilated hen house;
- b) have meaningful access to and are free to roam and forage on an outdoor range area during daylight hours in a managed environment; and
- c) a maximum outdoor stocking density of one hen per square metre.

The Egg Farmers definition of free range is supported by eight minimum standards which specify egg production systems that would ensure compliance with the Egg Farmers definition, as follows:

- a) hen housing should:
 - i) provide shelter from inclement weather;
 - ii) provide protection from predators;
 - iii) be ventilated; and
 - iv) contain access to food and water,
- b) hens should be provided with a minimum of 6 hours of darkness per night;
- c) eggs must not be labelled as free range until such time that the flock is provided with unrestricted daily access onto the outdoor range area;
- d) popholes (openings) should be provided extending along the length of the hen house equating to 2 metres per 1,000 hens (min size 35cm high/40cm wide);
- e) the outdoor range area should provide:
 - i) vegetation;
 - ii) shelter;
 - iii) shade; and

- iv) reasonable protection from predators,
- f) access to an outdoor range should be unrestricted and be for a minimum of 8 hours per day during summer daylight hours and a minimum of 6 hours per day during winter daylight hours;
- g) outdoor stocking density must not exceed 1 hen per square metre. Where hens are stocked at higher than 1500 hens per hectare, close management must be undertaken and regular rotation of hens onto fresh outdoor range areas should occur with some continuing soil or fodder cover; and
- h) stocking density inside the hen house up to a maximum of 30kg per square metre of useable space.

Egg Farmers does not have a definite view as to the appropriate regulatory structure in which the standard should be imposed. It would appear unnecessary to impose this standard as an information standard under the Australian Consumer Law but it would be of no concern should the Treasury consider this the most appropriate structure. An alternative structure would be through the development of a voluntary or mandatory code of conduct in relation to free range egg labelling. Egg Farmers considers that if the right approach is adopted in setting a standard for free range eggs then compliance and enforcement will not be major issues for the industry and regulators.

Egg Farmers notes that it would be possible to avoid the cost of regulation and the implementation of a basic standard entirely through the use of regulatory processes such as regulator guidance or enforceable undertakings accepted by regulators. The only obstacle to this process is the acceptance by regulators of a definition of free range that reflects consumer expectations.

Egg Farmers does not consider it is critical that the Treasury adopt the minimum standards in addition to the Egg Farmers definition of free range as a basic standard. This is because:

- a) the industry is confident that the application of these minimum standards would result in free range egg production systems that meets the proposed standard; and
- b) the proposed review of the Model Code has the potential to result in revised animal welfare standards that conflict with the minimum standards in the Egg Farmers definition of free range.

However, to the extent that a detailed standard is developed, Egg Farmers submits that it should apply the minimum standards set out in the Egg Farmers definition of free range. To the extent that other standards are applied, there is a significant risk of ongoing uncertainty in relation to the meaning of free range and the objectives of regulatory action would be undermined.

Most importantly, the Egg Farmers definition of free range should be adopted by the Treasury as it meets the criteria for good regulation and provides a significantly greater net benefit than any of the options set out in the RIS. In particular, the proposed standard will:

- c) be responsive to address the problem identified;
- d) be workable in that it is capable of being complied with and enforced; and
- e) facilitate competition rather than distort the competitive process.

These issues are addressed in detail below.

For clarity, there is nothing in the Egg Farmers proposal that would sanction or encourage the use of exaggerated or misleading representations. In particular, free range producers should not be permitted to represent factual matters that are inaccurate such as the extent to which hens are outdoors or outdoor stocking density.

Whether the use of an image of a hen outdoors on free range egg packaging would involve a representation that most birds are outside on most days is a matter of debate but it is at least possible and should be considered high risk. In these circumstances, a producer would need to consider whether their production systems are configured in such a way to provide confidence that they can substantiate the representation or whether further representations are required to qualify the nature of the production system and accurately inform consumers.

This issue, which goes to a question of fact, is distinct from whether the eggs were produced using a production system in which hens have access to the outdoors and should appropriately be defined as free range. It is the conflation of these two issues that has given rise to the uncertainty that the industry currently faces.

6.3 *Responsive to the problem*

The basic standard proposed by Egg Farmers is the most appropriate approach as it is responsive to an identifiable failure of regulation. The current approach of 'most birds outside on most ordinary days' lacks a proper basis and is likely to continue to be applied by consumer protection regulators to the detriment of competition and consumers. The proposed information standard directly addresses this problem by setting a minimum standard for the use of the term free range and otherwise allowing the market to operate unrestricted.

The proposed standard is responsive to the problem because it is consistent with consumer expectations and the manner in which free range eggs have been produced and supplied since the development of the category. In this regard, the proposed standard will enhance consumer confidence and assist in growing the free range egg category.

Importantly, the proposed standard is confined to the relevant problem and does not inappropriately overreach into other aspects of the egg supply chain such as competition or animal welfare issues. There is no broader failure of the market or unacceptable hazard or risk arising from the debate regarding free range eggs. In particular, suggestions of consumer confusion and the purported need for greater clarity are based on a desire for a competitive advantage or improved animal welfare outcomes and do not form a proper basis for regulation in this context.

The fact is that consumers are not aware of every aspect of every production system of the products they purchase. They are, however, qualified and adept in determining which product attributes they value and do not require their hand to be held by government in this process. The lament that if consumers knew of the details of egg production systems they would change their behaviour could be applied to any product market. It is not the role of government to underwrite or sponsor innovation by highlighting potential or invalidated benefits of particular production systems and/or restricting the marketing of other production systems.

Finally, the proposed standard will be effective in addressing the problem in circumstances where other options would not. This is because it will bring clarity to the

meaning of free range eggs from the perspective of all relevant stakeholders. The proposed standard is also able to be clearly and meaningfully articulated to all parties including consumers in a manner in which detailed production system specifications are not.

6.4 A workable standard

The Egg Farmers proposed standard is capable of being complied with by current free range producers and new entrants to the category. Producers that have configured their production systems in accordance with the Egg Farmers definition and minimum standards can have a high level of confidence that they meet the free range standard by ensuring their hens are not in cages, are able to move around freely and have meaningful access to an outdoor range.

The risk of consumer protection enforcement for a producer that complies with the Egg Farmers definition and labels their eggs as free range is very low such that the inherent uncertainty currently faced by producers would be resolved.

The proposed standard is also capable of being monitored and enforced by regulators. By basing the standard on the structure of the production systems rather than a particular outcome, regulators will have clarity as to whether producers have or have not complied. Further, by avoiding the **unworkable notion of counting hens outdoors** to satisfy regulatory requirements, producers will be able to substantiate that their production systems meet the standard with relatively low resource burden.

6.5 Facilitating competition

The key benefit of the Egg Farmers proposed standard is that it would facilitate rather than distort competition. It is this aspect of the free range debate that has been largely overlooked to date.

A standard based on a definition of free range that does not reflect consumer expectations and the current industry practice would have the effect of significantly distorting competition as it would favour some suppliers over others. In practice, this would involve the stranding of production assets, the need to reinvest in production facilities and/or a significant transfer of value from one group of producers to another by requiring free range eggs to be sold in a different category with a significantly lower price point.

Instead of excluding competitors from the free range category, the Egg Farmers proposed standard is appropriately inclusive in that it sets a minimum standard that can be achieved by all existing free range suppliers. As a result, it will not distort competition by imposing a regulatory barrier to competition to protect a segment of the market.

Importantly, the proposed standard does not restrain competition or innovation or the ability of competitors to seek to increase sales by offering differentiated free range production systems. Provided claims are accurate, there would be nothing to prevent free range egg producers making claims in addition to labelling their eggs free range in accordance with the standard.

The only limit to the success of this differentiation would be the extent to which consumers value these characteristics. For example, if consumers consider the difference

between an outdoor stocking density for free range hens of 1,500 per hectare compared to 10,000 per hectare then they can respond to accurate claims in this regard and purchase accordingly. Consumers are qualified and adept at making such decisions and would continue to do so under the proposed standard.

In this context, the proposed standard would have the effect of facilitating the operation of the market by providing a high level of certainty as to the meaning of free range and otherwise avoiding intrusive market regulation. In contrast, the current approach of 'most birds, most days' does the opposite and should not be adopted by the Treasury in connection with the RIS process.

7. Conclusion

Egg Farmers strongly supports the free range egg labelling standard process and considers that greater clarity in the definition of free range eggs has the potential to deliver significant net benefits for consumers and the industry.

Egg Farmers also supports consumer protection regulation and the principle that consumers should not be misled in relation to aspects of free range production systems. There have been exaggerated claims in the past and regulatory intervention has and will continue to ensure that consumers are not misled

Egg Farmers has been disappointed by the scope and analytical basis of regulatory intervention to date and the impact it has had in creating uncertainty as to the definition of free range eggs. We have also been confounded by the lack of consultation with industry by both the regulator and the Treasury in the preparation of the RIS. The prospect that the approach of 'most birds outside on most ordinary days' could be incorporated into a free range labelling standard is deeply concerning and Egg Farmers urges the Treasury not to characterise the relevant 'problem' to be addressed on this basis.

This is because the 'most birds, most days' approach:

- a) is flawed in that it seeks to define free range by reference to misrepresentations that have been the subject of enforcement action;
- b) is based on case law which has not considered, and cannot provide meaningful guidance on the meaning of free range; and
- c) would significantly distort the competitive process by imposing a definition of free range that the vast majority of free range egg suppliers could not be confident they could meet.

Egg Farmers proposes a basic information standard based on the published Egg Farmers definition of free range eggs. This definition provides that laying hens in free range farming systems:

- a) are unconfined within a ventilated hen house;
- b) have meaningful access to and are free to roam and forage on an outdoor range area during daylight hours in a managed environment; and
- c) a maximum outdoor stocking density of one hen per square metre.

Tested against the criteria for good regulation, this proposed standard has the potential to deliver significant net benefits in a manner in which the options set out in the Regulatory Impact Statement Consultation Paper (RIS) do not. In particular, the Egg Farmers proposed standard:

Submission to the Treasury – Free range egg standard

- a) is responsive to an identifiable failure of regulation in the form of an inappropriate definition being imposed as a consequence of consumer protection regulation;
- b) is confined to the relevant problem and would not regulate the market more broadly or traverse into related issues of animal welfare regulation;
- c) will be effective in addressing the problem by bringing clarity to the definition of free range eggs;
- d) is based on and consistent with consumer expectations and current industry practice;
- e) is capable of being complied with by free range egg producers and would not disrupt the supply of free range eggs;
- f) is capable of being monitored and enforced by regulators;
- g) it is inclusive in that it sets a minimum standard and will not distort competition by excluding some suppliers from the supply of free range eggs; and
- h) would have no impact on innovation or the ability of producers that operate differentiated production systems to make accurate claims in relation to the characteristics of those systems.

It is for these reasons that Egg Farmers urges the Treasury to adopt the proposed standard and bring clarity to this issue.

Attachment A - Focus Questions

Key focus questions	
1	<p><u><i>Do production system claims for eggs such as ‘free range’ sometimes mislead consumers? Is this the case for other claims, including ‘barn’ or ‘cage’ laid?</i></u></p> <p>There have been instances in which the extent to which free range hens spend time outdoors have been exaggerated or misrepresented but there is no evidence that this involves widespread misleading conduct. Assumptions regarding the extent to which consumers may be misled appear to be based on subjective perceptions on animal welfare issues.</p> <p>For example, it has been argued that free range labelling in the context of outdoor stocking densities of over 1,500 hens per hectare (1 hen per 6.1 square meters) are misleading. Egg Farmers considers this perspective is entirely subjective, does not reflect the relevant test of consumer expectations and should not form the basis of allegations of misleading conduct.</p>
2	<p><u><i>If so, how much detriment have consumers suffered due to misleading production system claims for eggs?</i></u></p> <p>Consumer detriment is impossible to qualify but Egg Farmers considers it is likely to be limited and in proportion to the limited scope of misleading claims regarding free range egg production.</p> <p>Egg Farmers rejects the estimates that have been put forward but consumer groups such as CHOICE that there has been substantial consumer detriment. The basis upon which this detriment has been calculated (1,500 hens per hectare) is entirely without merit and cannot be relied upon by the Treasury in considering this issue.</p>
3	<p><u><i>Do producers face significant uncertainty about how to ensure they do not make misleading production system claims for eggs?</i></u></p> <p>In the context of the 'most birds outside on most ordinary days' definition of free range adopted by consumer protection regulators, producers face substantial uncertainty. This approach is flawed and does not reflect consumer expectations. The uncertainty created by this approach could be addressed through the introduction of the basic standard proposed by Egg Farmers.</p>
4	<p><u><i>What detriment have producers and retailers suffered due to misleading production system claims for eggs made by competitors?</i></u></p> <p>Egg Farmers considers that the detriments suffered by producers and retailers due to misleading production system claims have been greatly exaggerated. This appears to have been driven by animal welfare groups seeking to increase animal welfare outcomes and competitors seeking a competitive advantage by defining free range production to a higher specification than consumer expectations.</p>
5	<p><u><i>An information standard for eggs labelled ‘free range’ could mandate that the eggs come from flocks in which most hens go outside on most ordinary days. Would this reduce the problem?</i></u></p> <p>Egg Farmers considers that the 'most birds outside on most ordinary days' approach is the problem. Adopting this approach would cause substantial distortion to competition in the market and be detrimental to consumers.</p>

6	<p><i>Do ‘free range’ egg producers want detailed guidance on production factors that reliably lead to compliance with the requirement that most hens go outside on most ordinary days?</i></p> <p>Egg Farmers considers that detailed guidance, in the form of government specified productions systems is not required and would be counterproductive. Provided the definition of free range is clarified in accordance with consumer expectations, producers can continue to compete and configure their productions systems in response to consumer demand.</p>
7	<p><u><i>Any detailed guidance on ‘free range’ egg production factors would need to be developed in consultation with industry. If this guidance is desired, should it be:</i></u></p> <p>a) <u><i>included as a ‘defence’ as part of an information standard?</i></u> b) <u><i>published by the Australian Competition and Consumer Commission (ACCC) as clear guidance about the current law?</i></u> c) <u><i>delayed until after the review of the current ‘Model Code of Practice for the Welfare of Animals — Domestic Poultry’ has been completed?</i></u></p> <p>The production of eggs is not illegal and should not require a defence. There is sufficient guidance available in relation to the current law. What is lacking is a standard that clarifies the meaning of free range. The definition of free range should be clarified in accordance with consumer expectations without delay as this will provide certainty to producers and would have no impact on the review of the Model Code, other than to clarify and set a maximum stocking density with is supported by the industry and is already the subject of Queensland regulation.</p>
8	<p><u><i>Should an information standard require prominent disclosure on ‘free range’ egg cartons of the indoor or outdoor stocking density of hens, or any other practices?</i></u></p> <p>There is no basis for mandatory labelling requirements at all, including with respect to aspects of free range egg production systems such as stocking. Further, there should be no restriction on producers accurately labelling their products with reference to aspects of their production systems that they anticipate consumers will value.</p> <p>Consumers are qualified and adept at determine the information they value and the process of competition will ensure that consumers receive the information that they demand.</p>
9	<p><u><i>Should an information standard require prominent disclosure of production methods for all hen eggs:</i></u></p> <p>a) <u><i>as either ‘free range’, ‘barn’ or ‘cage’ eggs?</i></u> b) <u><i>including optional categories such as ‘ to range’ and ‘premium free range’?</i></u></p> <p>All eggs sold in supermarkets are already labelled as ‘cage’, ‘barn’ or ‘free range’. There is no basis for regulations that restrict the categories in which producers should be permitted to sell eggs. Such an approach would not meet any of the criteria for good regulation and in particular, would involve the needless restriction of competition and innovation.</p>

10	<p><u><i>What are the benefits and what are the compliance costs of introducing an information standard? Do the benefits outweigh the costs?</i></u></p> <p>Egg Farmers considers that there are significant net benefits in introducing a basic standard that clarifies the meaning of free range in accordance with consumer expectations and industry practice. Substantial net costs are likely to arise from the introduction of a free range egg labelling standard that distorts competition and/or restricts innovation.</p>
Focus question	
1	<p><u><i>Why do some consumers prefer free range eggs?</i></u></p> <p>Egg Farmers understands that consumers purchase free range eggs in response to animal welfare issues and the consequent perception of product quality.</p>
2	<p><u><i>Would consumers and egg producers benefit from a clarification of the meaning of free range in relation to egg labelling?</i></u></p> <p>Egg Farmers considers that there are significant net benefits in introducing a basic standard that clarifies the meaning of free range in accordance with consumer expectations and industry practice.</p>
3	<p><u><i>Does the problem extend beyond the sale of shell eggs within the grocery retail market? To what extent does the problem apply to eggs purchased from supermarkets versus farmers markets?</i></u></p> <p>Egg Farmer considers the problem of free range being defined by regulators on a basis that does not reflect consumer expectations and applies across the wholesale and retail market, including supermarkets and farmers markets.</p>
4	<p><u><i>Does consumer and producer uncertainty extend beyond free range eggs to other classifications such as cage and barn laid eggs?</i></u></p> <p>Egg Farmers is not aware of any concerns in relation to the definition of cage eggs and barn laid eggs. The only problem is that free range has been defined by regulators on a basis that does not reflect consumer expectations and the scope of any regulatory intervention should be confined to this problem.</p>
5	<p><u><i>Are consumers interested in additional information about production methods used to produce free range eggs such as stocking density, number of hours hens range freely in daylight hours and hen mortality rates? If so, is this information currently available? If not, how would consumers like access to this information (e.g. displayed on packaging or online)?</i></u></p> <p>There is no basis for mandatory labelling requirements, including with respect to aspects of free range egg production systems such as stocking density. Further, there should be no restriction on producers accurately labelling their products with reference to aspects of their production systems that they anticipate consumers will value.</p> <p>Consumers are qualified and adept at determining the information they value and the process of competition will ensure that consumers receive the information that they demand. It is not the role of the government to underwrite or promote a producers investments in production system innovations by bringing them to the attention of the consumer. Producers that implement innovations that are valued by</p>

	the consumer will be rewarded by the competitive process.
6	<p><u><i>Where labelling is inaccurate, are egg producers purposely misleading and deceiving consumers, or do they have a different understanding as to what constitutes free range egg production?</i></u></p> <p>It is clear that there are producers that have a range of views as to what constitutes free range egg production. This issue should be tested objectively with reference to consumer expectations and industry practice. The question of whether a free range producer that has made a false or misleading claim in relation to their production systems did so on purpose is a question of fact and has no bearing on the free range egg labelling standard process.</p>
7	<p><u><i>Are free range egg producers disadvantaged when other producers mislabel their eggs as free range? Are there any quantitative estimates of the cost to free range egg producers from the distortion of the market?</i></u></p> <p>As a matter of competition theory, false and misleading claims have the potential to distort competition.</p> <p>There have been instances in which the extent to which free range hens spend time outdoors have been exaggerated or misrepresented but there is no evidence that this has involved widespread misleading conduct. Assumptions regarding the extent to which consumers may be misled appear to be based on subjective perceptions on animal welfare issues.</p> <p>The extent to which competition has been distorted as a result of misleading claims is impossible to quantify but Egg Farmers considers it is limited compared to the distortion of competition arising from an inappropriate definition of free range that is not supported by consumer expectations.</p>
8	<p><u><i>Are consumers who do not purchase free range eggs also interested in receiving information on production methods? Why?</i></u></p> <p>There is no basis for mandatory labelling requirements, irrespective of whether consumers do or do not purchase free range eggs.</p>
9	<p><u><i>What is the cost for free range egg producers to stay up-to-date with case law decisions?</i></u></p> <p>The cost of free range egg producers in staying up to date with case law decisions is impossible to quantify. It will be determined by the extent to which case law provides clear guidance on relevant legal issues and changes over time.</p>
10	<p><u><i>How do free range egg producers monitor compliance with the requirement that most hens move about freely on the open range on most ordinary days?</i></u></p> <p>It is not possible to monitor compliance with the requirement that most hens move about freely on the open range on most ordinary days. To do so would require counting or otherwise tracking the movement of hens which is not feasible.</p> <p>Egg Farmers understands that some free range egg producers have configured their production systems in a manner that makes it likely that most hens are outside on most days. However, the producers that supply the vast majority of free range eggs are not in a position to monitor or substantiate that this requirement has been complied with without incurring significantly increased production costs.</p>

11	<p><u><i>Do current judicial decisions and ACL regulator actions address the problem? What communication mechanisms exist and what is the cost of keeping up to date with judicial decisions? How could this be improved?</i></u></p> <p>Egg Farmers considers that the approach adopted in judicial decisions and ACL regulator actions approach is the problem. The uncertainty created by this approach is not impacted by the cost of keeping up to date with judicial decisions. Egg Farmers does not consider it necessary that communication mechanisms form part of the clarification of the meaning of free range through the introduction of a basic standard.</p>
12	<p><u><i>What is the cost on ACL regulators such as the ACCC to continue enforcing compliance under the ACL that producers not make false or misleading representations related to eggs to consumers?</i></u></p> <p>Egg Farmers does not have specific details of the resources deployed by the regulators. Egg Farmers understands the cost of the numerous enforcement proceedings is likely to be substantial. To the extent that the meaning of free range is not clarified through the introduction of a basic standard then this cost is likely to be ongoing.</p>
13	<p><u><i>What is the cost of producers having to contest legal action taken by the ACCC?</i></u></p> <p>The cost of producers responding to investigations and contesting legal proceedings is substantial. These costs fall directly on particular producers and can be devastating to their businesses. The prospect of ongoing consumer protection enforcement action and the consequent cost to producers is the main driver of producer uncertainty and deferred investment in free range egg production capacity.</p>
14	<p><u><i>Are producers disadvantaged by the uncertainty regarding free range egg labelling and associated production methods? If so, to what extent have judicial decisions under the ACL alleviated this detriment? To what extent could future court actions do this (that is, would more case law make it clearer)?</i></u></p> <p>Egg Farmers considers that the current uncertainty regarding free range egg labelling has been caused by ACL regulator actions and consequent judicial decisions.</p> <p>There is some prospect that future enforcement proceedings that involved evidence of consumer expectations could result in the clarification of the meaning of free range but this is an uncertain process and high risk for the producers that may become respondents to the enforcement proceedings.</p>
15	<p><u><i>Would guidance material provide producers with more certainty? Would it result in more egg producers complying with free range egg production requirements?</i></u></p> <p>Egg Farmers considers there is no benefit in providing guidance material to the industry that continues to define free range on a basis that is flawed and has not been developed with reference to consumer expectations.</p>
16	<p><u><i>Have industry's attempts (through accreditation and certified trademark schemes) to clarify the definition of free range eggs impacted on consumer uncertainty? Why/why not?</i></u></p>

	<p>Egg Farmers considers that the uncertainty in relation to the meaning of free range eggs has arisen from regulatory intervention that is not grounded in evidence of consumer expectations and industry practice.</p>
17	<p><u><i>Has industry’s attempt to clarify the definition of free range impacted on method of production for free range eggs? Why/why not?</i></u></p> <p>It is not possible to quantify the impact of the debate regarding the meaning of free range and consequent industry uncertainty on the method of production for free range eggs. Egg Farmers understands there has been reduced investment in free range egg capacity as a result of this ongoing uncertainty.</p>
18	<p><u><i>Would guidance material provide consumers with more certainty that free range egg products are produced in a manner consistent with their labelling?</i></u></p> <p>Egg Farmers does not consider that the provision of guidance material to consumers would provide a significant benefit. Provided the definition of free range is clarified to align with consumer expectations, the process of competition will ensure that consumers obtain the information they require to make purchasing decisions.</p>
19	<p><u><i>Is there a burden on egg producers if independent jurisdictions continue to manage the problem themselves, through state and territory specific voluntary codes and standards? Would a national approach alleviate any burden?</i></u></p> <p>Egg Farmers considers there is significant benefit in resolving the issue of the definition of free range on a national basis. The process to date demonstrates that through the subjective consideration of animal welfare issues, it is likely that independent jurisdictions would continue to adopt varied approaches. In circumstances where consumer expectations and industry practice is common nationally, it is highly preferable that there be a common resolution of this issue on a national basis.</p>
20	<p><u><i>Is the principle of most birds being outside on most ordinary days consistent with consumer expectations and an understanding of the production of eggs labelled as free range? Is ‘most ordinary days’, where ‘ordinary’ has the meaning provided in the Pirovic judgment, the best characterisation? Is there a better way of defining the frequency of birds being on the range?</i></u></p> <p>Egg Farmers considers the 'most birds, most days' approach is flawed and lacks a proper basis. The definition of free range should be clarified to align with consumer expectations that hens are not in a cage and have access to an outdoor range.</p>
21	<p><u><i>If all eggs labelled as free range conformed to this principle, would this enhance consumer confidence and certainty about egg labelling? Would Option 2 ensure consumers have the ability to identify free range eggs that they can be certain have been produced in line with their values and expectations?</i></u></p> <p>The 'most birds, most days' definition of free range eggs does not accord with consumer expectations and would lead to ongoing uncertainty for producers and consumers, as well as significantly distorting competition.</p> <p>There are benefits to consumer confidence in adopting a basic standard for free range that accords with consumer expectations and industry practice, as proposed by Egg Farmers.</p>

22	<p><u><i>Does a defence improve certainty for producers that their labelling is not false or misleading? Is a defence necessary?</i></u></p> <p>Egg Farmer recognises the conceptual overlap between a standard and a defence but does not consider the issue is appropriately framed in this way. Producers should not require a defence to produce eggs. There are standards that already apply in the form of the Model Code and regulation should be limited to clarifying that the definition of free range reflects this industry practice and the expectations of consumers.</p>
23	<p><u><i>Does the example list of conditions provide confidence that most birds would be outside on most ordinary days? If not, what changes are necessary? What set of conditions would ensure most birds are outside on most ordinary days?</i></u></p> <p>Egg Farmers considers that the example list of conditions are directed to compliance with a flawed definition of free range and should not be incorporated into a standard. Further, prescriptive standards are not required to meet any appropriately identified problem in relation to the production and supply of free range eggs and do not meet the criteria for good regulation.</p>
24	<p><u><i>Would an additional requirement to disclose indoor or outdoor stocking density be appropriate and beneficial? Why or why not?</i></u></p> <p>Egg Farmers considers that prescriptive standards are not required to meet any appropriately identified problem in relation to the production and supply of free range eggs and do not meet the criteria for good regulation. To the extent that consumers value the outdoor stocking densities applied in free range production systems then the process of competition will ensure that this information is made available and that producers are rewarded for any beneficial innovation.</p>
25	<p><u><i>What is the value of stocking density information to consumers? Will the disclosure of stocking densities enable consumers to distinguish between varying animal husbandry methods employed to produce free range eggs? Is it an appropriate factor on which consumers can base their choice?</i></u></p> <p>Egg Farmers considers that the issue of outdoor stocking density is an animal welfare issue and is likely to generate a spectrum of views on behalf of stakeholders. It is important that a standard is not implemented in which a position on stocking density is adopted which does not align with consumer expectations and industry practice. Beyond this, the disclosure of outdoor stocking density should be left to the competitive process.</p>
26	<p><u><i>If stocking density is to be labelled on the egg packaging, at what point should this be measured? When the hens are all inside or all outside or at a set time in an average day?</i></u></p> <p>It is important that a standard is not implemented in which a position on stocking density is adopted which does not align with consumer expectations and industry practice. Beyond this, the disclosure of outdoor stocking density should be left to the competitive process.</p>

27	<p><u>Should the information standard be more prescriptive regarding the format, size and placement of the disclosure of stocking density?</u></p> <p>Egg Farmers considers that prescriptive standards are not required to meet any appropriately identified problem in relation to the production and supply of free range eggs and do not meet the criteria for good regulation.</p>
28	<p><u>Should the proposed information standard apply to eggs sold at the farm door, or at farmer's markets, to retail consumers?</u></p> <p>The information standard proposed by Egg Farmers should apply to all free range eggs produced. It should permit but not require the labelling of free range eggs as free range. This would apply to eggs sold in any retail channel.</p>
29	<p><u>Should the proposed information standard apply to eggs sold at a wholesale level?</u></p> <p>The information standard proposed by Egg Farmers should apply to all free range eggs produced. It should permit but not require the labelling of free range eggs as free range. This would apply to eggs sold in any wholesale channel.</p>
30	<p><u>Should the proposed information standard apply to other products containing eggs, either at a retail grocery level or for consumption on the premises?</u></p> <p>Egg Farmers considers that standards with respect to products containing eggs are not required to meet any appropriately identified problem in relation to the production and supply of free range eggs and do not meet the criteria for good regulation.</p>
31	<p><u>Is there consumer detriment associated with the labelling of barn and cage laid eggs? If so, how and why does this occur? Is it comparable with the consumer detriment associated with the misleading labelling of free range eggs?</u></p> <p>Egg Farmers does not consider there is consumer detriment associated with the labelling of barn and cage laid eggs.</p>
32	<p><u>Would the proposed definitions in Option 3 clearly define and capture the three broad methods of egg production?</u></p> <p>Standards with respect to barn and cage are not required to meet any appropriately identified problem in relation to the production and supply of free range eggs and do not meet the criteria for good regulation.</p>
33	<p><u>Are the proposed definitions of 'barn' and 'cage' eggs consistent with existing regulation and practices? Are they consistent with consumer expectations? If not, how should they be amended and what would be the likely impact of this change?</u></p> <p>Egg Farmers is not aware of any concerns being raised in relation to the definition of 'cage' or 'barn' eggs. Standards with respect to barn and cage are not required to meet any appropriately identified problem in relation to the production and supply of free range eggs and do not meet the criteria for good regulation.</p>
34	<p><u>Should the information standard be more prescriptive regarding the format, size and placement of the required information message?</u></p> <p>Egg Farmers considers that prescriptive standards are not required to meet any appropriately identified problem in relation to the production and supply of free</p>

	range eggs and do not meet the criteria for good regulation.
35	<p><u><i>Should the scope of the proposed information standard be broadened to other markets (wholesale, farm-gate sales, and restaurants)?</i></u></p> <p>Egg Farmers considers that prescriptive standards are not required to meet any appropriately identified problem in relation to the production and supply of free range eggs and do not meet the criteria for good regulation.</p>
36	<p><u><i>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?</i></u></p> <p>Egg Farmers does not support the introduction of extra category of 'premium free range'. Where producers have invested in production systems that provide for hens to be outdoors for a relatively high proportion of the time or other animal welfare benefits, then they should be entitled to bring these production system attributes to the attention of consumers through their own marketing efforts. The competitive process would then determine whether these attributes are valued by consumers.</p>
37	<p><u><i>Do the three specific animal husbandry methods identified provide an adequate indication of animal welfare outcomes in keeping with consumer expectations? Is 'premium' the best descriptor?</i></u></p> <p>The descriptors proposed will be appropriate in some but not all circumstances. Egg Farmers considers that consumer expectations and industry practice support the definition of free range as including access to range.</p>
38	<p><u><i>Would the inclusion of an 'access to range' category in the proposed information standard accurately reflect the 'grey area' between free range and 'barn' eggs for consumer expectation and production methods?</i></u></p> <p>Egg Farmers does not support the introduction of 'access to range' category as it considers that consumer expectations and industry practice already support this principle.</p>
39	<p><u><i>Would an 'access to range' category potentially increase consumer confusion about what is and what is not free range?</i></u></p> <p>Egg Farmers considers that creating an additional 'access to range' category will increase consumer confusion as they already regard free range as meaning that hens have access to an outside area.</p>
40	<p><u><i>What benefits would Option 2 provide to consumers? Would consumers be willing to pay more than they currently do for free range eggs to secure greater certainty? How much more per dozen?</i></u></p> <p>An information standard based on the 'most birds, most days' approach would have substantial net detriments for consumers, principally through the distortion of the competitive process.</p>
41	<p><u><i>What benefits would Option 2 provide to egg producers? What are the current costs (in \$ estimates) imposed on producers from the existing regulatory uncertainty —</i></u></p>

	<p><u>for example reduced investment or costs of responding to regulators' enforcement actions?</u></p> <p>The costs of regulatory uncertainty have arisen from enforcement and compliance costs imposed on consumers and deferred investment in free range egg capacity. An information standard based on the 'most birds, most days' approach would have substantial net detriments for most producers and consumers. This approach would also provide substantial benefits to some producers in the form of an ongoing competitive advantage.</p>
42	<p><u>How much time and effort do producers need to invest to comply with the status quo? How would this be affected if Option 2 were adopted?</u></p> <p>Egg Farmers does not have information regarding the time and effort producers expend in complying with the status quo.</p>
43	<p><u>What practical issues would producers face in complying with the requirements of Option 2? What are the likely costs, both in terms of any changes to labelling and any changes to production methods?</u></p> <p>An information standard based on the 'most birds, most days approach is completely unworkable. The requirement that producers must count hens outside on an ongoing basis is impractical and the uncertainty this approach creates has and will have a distortionary impact on competition.</p>
44	<p><u>How would the adoption of the detailed defence provision under Option 2a affect the structure and size of the free range egg market? While the conditions outlined in such a defence would be intended to be voluntary, would producers feel compelled to comply?</u></p> <p>Given the uncertain nature of the 'most birds, most days' approach, it is nigh impossible to determine what proportion of free range suppliers are currently meeting this requirement. Egg Farmers is aware that some large free range egg producers, that supply approximately 80% of free range eggs in Australia, are concerned that they either do not comply with the 'most birds, most days' approach or cannot be confident that they do. On this basis, the adoption of standard based on the 'most birds, most days' has the capacity to shrink he free range category by up to 80%, thereby having a substantial impact on competition.</p>
45	<p><u>What proportion of eggs currently labelled as free range would not be produced under conditions that would comply with those outlined in Option 2a?</u></p> <p>Egg Farmers is not aware what proportion of free range suppliers are currently meeting this requirements. As the production conditions specified differ to those under the Model Code Egg Farmers expect that a small proportion of producers that supply free range eggs would meet these requirements.</p>
46	<p><u>What would be an appropriate transition period for the adoption of Option 2?</u></p> <p>An information standard based on the 'most birds, most days approach should not be adopted over any timeframe. The Egg Farmers proposed standard reflects consumer expectations and industry practice and could be adopted immediately, without the need for a transition period.</p>

47	<p><u>Can you provide more accurate data, including:</u></p> <p>a) <u>The number and size of free range egg producers?</u> b) <u>The number of free range egg products available?</u> c) <u>The cost of changing egg labelling?</u> d) <u>The proportion of egg products currently labelled as free range that may be produced in conditions that would not conform to the information standard?</u></p> <p>This information is not available and would require assumptions and speculation that are subjective in nature.</p>
48	<p><u>What benefits would Option 3 provide to consumers? How would they differ from Option 2?</u></p> <p>Egg Farmers considers that prescriptive standards are not required to meet any appropriately identified problem in relation to the production and supply of free range eggs and do not meet the criteria for good regulation.</p> <p>The Egg Farmers proposed standard is the only option in which satisfies the criteria for good regulation and produced net benefits for consumers.</p>
49	<p><u>Do consumers require additional certainty regarding barn and cage laid eggs? Will Option 3 provide this certainty? Would Option 3 assist consumers to identify eggs that they can be certain have been produced in line with their values and expectations?</u></p> <p>Egg Farmers is not aware of any concerns being raised in relation to the definition of 'cage' or 'barn' eggs. Standards with respect to barn and cage are not required to meet any appropriately identified problem in relation to the production and supply of free range eggs and do not meet the criteria for good regulation.</p>
50	<p><u>Would Option 3 significantly change the demand for or supply of eggs? Will prices for eggs, or particular categories of eggs, change?</u></p> <p>Egg Farmers considers that imposition of prescriptive categories of production systems and marketing restrictions will needlessly stifle innovation and provide net detriments to consumers. Egg producers should be able to develop production systems in response to consumer demand.</p>
51	<p><u>What are the practical issues and likely costs for producers associated with complying with the requirements in Option 3? How do these differ from Option 2?</u></p> <p>The practical issues and likely costs for producers and consumers from adopting an inappropriate definition of free range are ongoing uncertainty and the distortion of competition.</p>
52	<p><u>Will producers benefit from additional clarification regarding the terms 'barn' and 'cage' eggs?</u></p> <p>Egg Farmers is not aware of any concerns being raised in relation to the definition of 'cage' or 'barn' eggs. Standards with respect to barn and cage are not required to meet any appropriately identified problem in relation to the production and supply of free range eggs and do not meet the criteria for good regulation.</p>
53	<p><u>Do the definitions of 'barn' and 'cage' comply with existing industry practice? Would</u></p>

	<p><u><i>adoption of Option 3 cause significant structural changes in the egg industry?</i></u></p> <p>Egg Farmers is not aware of any concerns being raised in relation to the definition of 'cage' or 'barn' eggs. Standards with respect to barn and cage are not required to meet any appropriately identified problem in relation to the production and supply of free range eggs and do not meet the criteria for good regulation.</p>
54	<p><u><i>To what extent would Option 3 inhibit innovation in the industry? For example, is it flexible enough to incorporate new production methods (such as 'aviary eggs') developed to address biosecurity, food safety or additional animal welfare concerns?</i></u></p> <p>Egg Famers considers that imposition of prescriptive categories of production systems and marketing restrictions will needlessly stifle innovation and provide net detriments to consumers. Egg producers should be able to develop production systems in response to consumer demand.</p>
55	<p><u><i>What would be an appropriate transition period in order to allow industry to comply with the requirements under Option 3?</i></u></p> <p>An information standard based on Option 3 should not be adopted over any timeframe. The Egg Farmers proposed standard reflects consumer expectations and industry practice and could be adopted immediately, without the need for a transition period.</p>
56	<p><u><i>Do the additional categories of 'access to range' or 'premium free range' provide consumers with additional valuable information when purchasing eggs? What is the value of that benefit to consumers?</i></u></p> <p>Egg Farmers does not support extra categories being created of 'access to range' or 'premium free range'. Where producers have invested in productions systems that provide for hens to be outdoors for a relatively high proportion of the time or other animal welfare benefits, then they should be entitled to bring these production system attributes to the attention of consumers. The competitive process would then determine whether these attributes are valued by consumers.</p>
57	<p><u><i>What are the practical issues and likely costs for producers associated with complying with one or both of these additional categories? Given the additional categories are intended to reflect those methods of egg production that are similar to, but not entirely, free range, will this correspond with lower costs for producers compared to Option 3?</i></u></p> <p>Egg Farmers considers that consumer expectations and industry practice support the definition of free range as including access to range. The practical issues and likely costs for producers and consumers from adopting an inappropriate definition of free range are ongoing uncertainty and the distortion of competition.</p>
58	<p><u><i>Will producers benefit from additional clarification of the term 'access to range'?</i></u></p> <p>Egg Farmers considers that consumer expectations and industry practice support the definition of free range as including access to range.</p>
59	<p><u><i>Is the definition of 'access to range' consistent with existing industry practice? What are existing industry practices regarding hens' access to an outdoor range? Would adoption of one or both additional optional categories cause significant structural</i></u></p>

	<p><u>changes in the egg industry?</u></p> <p>Egg Farmers considers that consumer expectations and industry practice support the definition of free range as including access to range. A regulatory requirement that the vast majority of current free range egg suppliers label their eggs as access to range would have a substantial distortionary impact on competition and as a consequence, impose net detriments on consumers.</p>
60	<p><u>What would be an appropriate transition period in order to allow industry to comply with the requirements?</u></p> <p>An information standard based on Option 3a and/or 3b should not be adopted over any timeframe. The Egg Farmers proposed standard reflects consumer expectations and industry practice and could be adopted immediately, without the need for a transition period.</p>
61	<p><u>Can you provide more accurate data, including:</u></p> <p>a) <u>The number and size of egg producers?</u> b) <u>The number of egg products available?</u> c) <u>The cost of changing egg labelling?</u></p> <p>This information is not available and would require assumptions and speculation that are subjective in nature.</p>
62	<p><u>Will the methodologies outlined accurately reflect the potential benefits of the options? Are all benefits identified? What would be a more accurate methodology?</u></p> <p>Egg Farmers considers that the methodologies outlines make reference to the relevant criteria but do not provide for a comprehensive analysis of the Options identified and broader options, particularly with reference to the impact of regulatory intervention on competition.</p>
63	<p><u>Are the data available to allow these (or other) methodologies to be adopted? Can you provide useful data, either on an individual or industry level, including on:</u></p> <p>a) <u>The proportion of egg products currently labelled as free range that may be produced in conditions that would not conform to the information standard?</u> b) <u>The non-financial benefit consumers will receive from greater certainty regarding egg labelling?</u> c) <u>The proportion of other types of egg products that are mislabelled or misleading (including barn, cage and higher animal welfare)?</u> d) <u>What proportion of consumers currently purchasing free range eggs would purchase access to range eggs? How much of a price differential would consumers expect? What is the production cost saving to ‘access to range’ producers compared to ‘free range’ production?</u> e) <u>What would be the change to the volume and type of egg supply under Option 2? Under Option 3?</u></p> <p>This information is not available and would require assumptions and speculation that are subjective in nature.</p>

Attachment B - Summary of ACCC legal action

C.I. & Co Pty Ltd - 2011

This case concerned an allegation that an egg wholesaler had misled retail customers and consumers by labelling eggs as 'free range' when they had been produced using a caged egg production system.

The case was settled before a trial took place and the orders of the Federal Court were made with the consent of both the ACCC and the egg wholesaler based on facts agreed between the parties. The rules of the Court do not require evidence to be put before the Court where the facts are agreed.

The judgment does not refer to any evidence having been put before the Court in relation to the meaning of 'free range' or the expectations of consumers in relation to the meaning of 'free range'.

The judgement does not make any finding or comment in relation to the meaning of 'free range' or the or the expectations of consumers in relation to the meaning of 'free range'.

The judgement, which is approximately 13 pages in length and capable of being understood by any member of the public, can be accessed through the following link.

<http://www.austlii.edu.au/au/cases/cth/FCA/2010/1511.html>

Rosie's Free Range Eggs - 2012

This case concerned an allegation that an egg supplier had misled retail customers by labelling eggs as 'free range' when a substantial proportion of the eggs had been produced using a caged egg production system.

The case was settled before a trial took place and the orders of the Federal Court were made with the consent of both the ACCC and the egg supplier based on facts agreed between the parties. The rules of the Court do not require evidence to be put before the Court where the facts are agreed.

The judgment does not refer to any evidence having been put before the Court in relation to the meaning of 'free range' or the expectations of consumers in relation to the meaning of 'free range'.

The judgement includes a comment that: 'a representation that eggs are free range eggs is a representation in relation to the nature and characteristics of the eggs, because the representation conveyed is that the eggs have been produced from hens that are not kept in cages but enjoy a free range.'

The judgement, which is approximately 17 pages in length and capable of being understood by any member of the public, can be accessed through the following link.

<http://www.austlii.edu.au/au/cases/cth/FCA/2012/959.html>

Pirovic Enterprises Pty Ltd 2014

This case concerned an allegation that an egg producer had misled consumers by supplying eggs labelled as 'free range' in combination with representations that the hens 'roam freely on green pastures' and images of hens in a grassy field 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.

The case was settled before a trial took place and the orders of the Federal Court were made with the consent of both the ACCC and the egg producer based on facts agreed between the parties. The rules of the Court do not require evidence to be put before the Court where the facts are agreed.

The judgment does not refer to any evidence having been put before the Court in relation to the meaning of 'free range' or the expectations of consumers in relation to the meaning of 'free range'.

The judgement includes a comment that: 'it was quite properly submitted on behalf of Pirovic Enterprises that the present case should not be seen as a resolution of what constitutes 'free range' eggs in the abstract [...]'.

The judgement, which is approximately 20 pages in length and capable of being understood by any member of the public, can be accessed through the following link.

<http://www.austlii.edu.au/au/cases/cth/FCA/2014/1028.html>

RL Adams Pty Ltd (t/a Darling Downs Fresh) - 2015

This case concerned an allegation that an egg producer had misled consumers by supplying eggs labelled as 'free range' in combination with representations that 'birds are free to roam the farm' and images of a flat open range in front of a mountain range and eggs in green grass when in fact the eggs were produced by laying hens, all of which were unable to and did not move about freely on an open range.

The case was settled before a trial took place and the orders of the Federal Court were made with the consent of both the ACCC and the egg producer based on facts agreed between the parties. The rules of the Court do not require evidence to be put before the Court where the facts are agreed.

The judgment does not refer to any evidence having been put before the Court in relation to the meaning of 'free range' or the expectations of consumers in relation to the meaning of 'free range'.

The judgement includes a comment that: 'RL Adams eggs were labelled, and marketed to consumers, as "free range". This labelling sought to differentiate RL Adams 'free range' eggs from other eggs that were labelled as 'cage', which are eggs produced by laying hens housed in cages. The labelling also sought to differentiate its eggs from eggs that were labelled as "barn laid", which are eggs produced by laying hens confined to barns.

The judgement, which is approximately 25 pages in length and capable of being understood by any member of the public, can be accessed through the following link.

<http://www.austlii.edu.au/au/cases/cth/FCA/2015/1016.html>