



Regulation Impact Statement

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Free Range Egg Labelling

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NSW Farmers' Association Background

The NSW Farmers' Association (NSW Farmers) is Australia's largest State farmer organisation representing the interests of its farmer members – ranging from broad acre, Livestock, wool and grain producers, to more specialised producers in the horticulture, dairy, egg, poultry, pork, oyster and goat industries.

Executive Summary

NSW Farmers welcome the opportunity to provide a submission to the Treasury in relation to the free range eggs labelling standard. NSW Farmers strongly support the free range egg labelling standard process and believes that there is a case for greater clarity to be provided as a resolution to this process.

From the outset, NSW Farmers acknowledges the important role of the competition and consumer protection regulator in enforcing misleading product claims. Where farmers have blatantly substituted eggs, they should be the subject of enforcement action. Where farmers have not provided meaningful access to the outdoors for their hens; we welcome appropriate policing. Where claims have been made regarding the extent to which hens are outside and where these claims have been inaccurate, we support the involvement of the regulator.

However, it must be noted that enforcement action has not been confined to such cases of obvious misleading and deceptive conduct. The regulator has over-reached and acted in a unilateral fashion without sufficient consultation with industry in relation to the free range egg issue.

The ACCC has used specific enforcement action to define the meaning of the entire free range category. An objective reading of the case law makes this plain. The extent to which this case law has now informed debate on this issue is highly concerning to industry. Suffice to say, the 'most birds. most days' approach should not be considered as a starting point for this debate. We provide comment on the limited utility of the current case law throughout this submission.

NSW Farmers supports a basic information standard based on the published Egg Farmers of Australia definition of free range. That definition prescribes 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.

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

This is the simplest and most effective way to ensure confidence with consumers and competition in the marketplace.

This standard is consistent with consumer expectations.

This standard will enliven rather than distort competition.

This standard reflects the principles of good regulation.

We submit this recommendation to the Treasury for its consideration.

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1. Eggs in Australia

1.1 Egg Supply

Here's a fun fact: every day Australians consume around 13 million eggs. On a per capita basis, that's around 220 eggs each year for every person in the country. And it's not hard to know why – eggs are delicious and healthy. They are a low carb, low sugar and high protein energy source and they're good for your health.

NSW Farmers is a big believer that we should all be eating a few more.

As with most healthy produce, eggs are perishable by nature and sustaining such a high supply of a fresh product requires sophisticated farming systems that put food safety, biosecurity and efficiency at the centre of production. These are the fundamentals of good egg production.

There are three main production methods that underpin egg production and these production systems create a range of animal welfare and egg quality outcomes.

Those production systems 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.

Each production system provides for different animal welfare outcomes. Hens housed inside sheds are not exposed to externalities such as predators or disease. Conversely, hens which have access to the outdoors are able to undertake social activity by roaming and foraging on an open range.

Each production system has different cost profiles which relate to issues such as capital investment, infrastructure and the management of biosecurity and predators risks associated with hens having access to outdoor areas.

These different overhead costs are reflected in different farm gate, wholesale and retail prices. 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.

With biosecurity, food safety and quality control at the centre of the egg industry's production systems, the industry is relatively concentrated with a number of large scale producers supplying the majority of eggs available through supermarkets, both on a branded and 'home brand' basis.

Whatever system you operate – caged, barn or free range – the safety and quality of the produce is central to the practices undertaken by farmers.

Our farmers would also argue that each production system has the health of the hen at the heart of its practices, mission and values.

1.2 Evolution of free range category

In the early 20th Century, most egg production would be described as free range. Operations were largely amateur, backyard style production systems. As production practices evolved, it became safer and more efficient to shift production indoors and this step-change in farming saw the expansion of the caged systems. Up until 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 for free range grew, production systems continued to evolve and they continue to evolve today.

Many of today's farmers provide proof of that ongoing evolution. The automation of pop hole openings and new farm-management techniques are both examples of the innovation that continues to occur. Such innovation is a demonstration of an efficient market.

2. Consumer Expectations

Considering the manner in which the free range category evolved it is entirely unsurprising that current production practices continue to meet consumer expectations.

In August 2015, the most far reaching study into Australians' attitudes, purchasing behaviours, category understanding and expectations of free range eggs was undertaken. The work involved an online survey of 1,200 free range egg buyers aged 18 and over across all states and territories. This robust sample provides accuracy and reliable insight into consumer preference and behaviours.

The process was conducted by an independent market research consultancy, Quantum Market Research (Quantum).

The results of the research indicate that consumers have a very consistent and simple configuration of what free range meant to them.

Indeed, 75% of consumers indicated that free range meant quite simply, 'not in a cage', 'unconfined' or 'access to outdoors.' An additional 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.

As noted in the Egg Farmers Australia submission:

“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.”

The research clearly demonstrated 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 their farming systems with direct and ongoing reference to consumer demand.

It has been particularly surprising and seriously concerning that whilst both the CHOICE research and industry research told a consistent story regarding consumer expectations, those expectations have been misrepresented by CHOICE. CHOICE has suggested there is significant confusion in the marketplace and a serious dislocation between production practices and consumer expectations. This is a blatant and egregious misrepresentation. What is particularly confounding for NSW Farmers is that there is nothing explicable about this misrepresentation; there is no apparent reason for it.

CHOICE's report *Free Range: Making the claim meaningful* fundamentally misrepresented the level of confusion in the market. In that report CHOICE argued that around 213 million eggs were sold that were not free range. The basis of that claim was that those eggs did not meet a stocking density of 1,500 birds per hectare and that this reflected true free range. The basis on which CHOICE claimed that 1,500 hens per hectare was the only true free range, was their suggestion that this stocking density was prescribed by the Model Code of Practice. This is an inaccurate reading of the Model Code and because of that, an entirely inaccurate report. Quite aside from incorrectly interpreting the Model Code, CHOICE went further by suggesting that this non-existent benchmark was somehow referable to consumer expectations. Research conducted Quantum shows that only 11% of free range buyers expected a stocking density of 1,500 birds per hectare.

The reasons for and the manner in which CHOICE has prosecuted this issue should be examined critically and should be questioned. There appears to be no rational explanation for the way this issue has been prosecuted. Moreover, the fact the abovementioned report was referenced 15 times in the public consultation document released by Treasury is of great concern to industry.

NSW Farmers encourages the government to critically and objectively examine data provided by CHOICE.

There is a clear case that instead of seeking resolution to this problem, CHOICE has actually added to the confusion around this issue and assumed the role of a specific interest group, rather than an objective consumer advocate.

Aside from the decision by CHOICE to pursue an agenda in this debate, it is worth noting that there has been a limited amount of consumer research conducted regarding consumer expectations on free range eggs. Where it has been conducted it is in broad alignment with industry practice and on this basis the government should consider the significance of the need for regulatory intervention

3. Competition

3.1 Facilitating innovation

One of the key considerations by government in this space should be the extent to which government intervention may stifle innovation.

The central benefit of the standard proposed by Egg Farmers Australia is that it would facilitate rather than distort competition and it has been extremely disheartening to see that this aspect of the free range debate has been overlooked to date.

A basic standard which reflects consumer expectations and current industry practice should be viewed as the way to enshrine best practice regulation within this decision.

If the government were to adopt a definition of free range that does not address what consumers want and does not reflect current industry practice it would have the effect of completely distorting the competitive environment. As a result, innovation would be significantly restricted in the market place and would favour some suppliers over others.

Practically, this could involve the stranding of production assets; require the need for farmers to reinvest in production facilities, and create the likely scenario where a significant transfer of value is facilitated by government 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.

As has been noted in the Egg Farmers Australia submission:

“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."

It has been surprising that this fundamental principle of competition theory has been lost in the debate.

4. Government and Regulatory Intervention

4.1 Most birds, most ordinary days

Option one canvassed in the RIS is for the status quo to continue. NSW Farmers has several problems with this approach.

Our principle objection to this approach being adopted is that the scope and analytical basis which was used in arriving at this definition is simply incorrect. This definition was proposed in an initial federal court judgement which tested specific representations which were the subject of enforcement action. In that case the judge explicitly stated that this notion of "most birds outside on most ordinary days" was **not** to be taken as a meaning or definition of the term free range in the abstract. In other words, Justice Flick made it clear that this term was not to be considered referable to the free range industry.

As was noted in the Egg Farmers Australia submission:

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.*

That this fundamental aspect of common law has been continually misrepresented is of great concern to the industry and the decision by the regulator to parlay a specific finding in relation to specific representations into a definition of a broad, nation-wide supply-chain needs to be explained.

NSW Farmers' asks Treasury to examine this issue objectively and to consider whether such a limited definition should apply to an entire industry. It is hugely worrying to NSW Farmers that this misrepresented definition has taken hold in the public debate and that through no other means than eternal recurrence by regulators has it been adopted now by the government. NSW Farmers asks that the Treasury test the validity of this definition.

As was noted in the Egg Farmers Australia submission:

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 been 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.*

4.2 Regulation

NSW Farmers acknowledges that the Treasury is likely to be presented with a series of views on this debate and we encourage Treasury to confine its considerations to the true nature of the problem.

Whilst free range egg farming is inherently tied up with considerations of animal welfare, the perspectives provided by groups whose sole purpose is to promote and progress and agenda of animal welfare should not be considered in the context of the labelling problem. These concerns are valid and deserving of robust debate but should be the subject of conjecture in different arenas.

NSW Farmers considers itself a leading voice on issues of animal welfare and is pleased to be part of ongoing discussions in this area. We remain interested, engaged and proactive in adopting the important work of Australian poultry scientists who examine issues related to hen welfare. Our farmers interact and support this function - doing so is simply good business.

Given the imminent challenge of this debate being couched solely in issues of animal welfare, NSW Farmers encourages the Treasury to stick to sound regulatory principles.

NSW Farmers does not support regulation which extends into realms that are external or ancillary to the problem and this separation of agendas and voices must be a primary consideration in deliberations about any solution. In line with this we urge Treasury to ensure its actions remain 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.

These principles are particularly instructive in relation to this debate. Of particular concern to NSW Farmers is point e) above which notes that "regulation should not restrict competition unless it can be demonstrated that the benefits outweigh the costs and the objectives." and in this context we ask the government to be mindful that an inappropriate

definition of free range egg production would substantially distort the competitive process and unnecessarily stifle innovation.

As was noted in the Egg Farmers submission:

.... 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 production 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.

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.

An adherence to such principles of good regulation requires an objective analysis of both the problem that has been inappropriately defined in the paper and, more broadly, a thorough examination of the history of this issue and the extent to which government intervention is required.

NSW Farmers supports the intervention of government in this matter though we submit that this is mostly to ensure that consumer confidence can be understood and rationalised; that the industry can have confidence to invest and confidence that they are appropriately protected from enforcement action.

4.3 Intervention by the regulator

NSW Farmers fully supports and completely endorses appropriate intervention by the regulator. Enforcement action regarding misleading and deceptive claims is an essential component of ensuring ongoing consumer confidence in the industry.

Where farmers have sold eggs as free range and have failed to provide meaningful access for hens to the outdoors, then we welcome the regulators role in enforcement and through that, appropriate market correction. We welcome and endorse the role of the regulator in undertaking enforcement for unscrupulous operations.

We are concerned however, that the actions of the regulator have not been aimed at misleading and deceptive conduct and instead appear to be geared toward redefining an industry.

We submit to Treasury that such redefinition should be the role of the market and not the regulator. 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 they do not require the government to qualify and describe all credence claims.

As was noted in the Egg Farmers submission:

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.

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.

4.4 The 'good government' response

With respect to the issues set out above, the options put forward in the RIS are incompatible with industry practice and we see little merit through adoption of any of the proposals. Whilst Option 2: 'Basic' information standard for free range egg labelling, as proposed, does not satisfy the criteria of good regulation there are significant benefits to the adoption of a basic standard and the adoption of a revised Option 2 forms NSW Farmers proposal in response to the RIS.

NSW Farmers urges Treasury to develop a basic free range egg labelling standard which is based on a definition the Egg Farmers Australia 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.

NSW Farmers support Egg Farmers in noting that we do not have a definitive view as to the appropriate regulatory structure in which the standard should be imposed. We note that it seems 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.

A viable alternative structure would be through the development of a voluntary or mandatory code of conduct in relation to free range egg labelling. 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.

To the extent that a detailed standard is developed, NSW 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.

Conclusion

NSW Farmers urges Treasury to reach a commonsense definition to an unnecessarily confused issue.

We submit that farming practices have and continue to evolve to meet consumer expectations.

We submit that there is an important role for the regulator in policing misleading and deceptive conduct. However we strongly suggest that this role should be confined to players in the industry who are making false claims and that this should not extend to a definition of the entire supply chain.

We submit that the industry has and will continue to be responsive to consumer expectations.

We submit that the government must examine this issue with respect to the principles of good regulation which ensure that any distortion in the competitive process is utilised only when necessary.

We ask the government to examine this issue objectively and as part of a labelling standard. Insofar as animal welfare forms a part of that labelling standard, we welcome the consideration of that issue. Where it is ancillary to this specific problem, the government must look to separate the voices in this debate so that the solution is focussed on the relevant problem and not hijacked by ideological agendas.

NSW Farmers remains eager to continue its dialogue with all decision makers in this process.