



**SUBMISSION TO THE AUSTRALIAN TREASURY
On behalf of
CONSUMER AFFAIRS AUSTRALIA AND NEW ZEALAND**

FREE RANGE EGG LABELLING

27 November 2015

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ABOUT VOICELESS

As an innovator, capacity builder and ideas-generator, Voiceless plays a leading role in the development of a cutting edge social justice movement, animal protection.

With a highly professional and well-educated team, Voiceless brings together like-minded compassionate Australians from the legal, academic, non-profit and education sectors to form strong and effective networks.

Voiceless believes in the provision of quality information, analysis and resources to inspire debate and discussion and to empower individuals and organisations to generate positive social change.

Voiceless is a non-profit Australian organisation established in May 2004 by father and daughter team Brian Sherman and Ondine Sherman.

To build and fortify the animal protection movement, Voiceless:

- gives grants to key projects which create the groundswell for social change;
- cultivates the animal law community through the provision of leadership, educational opportunities and resources; and
- raises awareness of animal protection issues within the education system in order to strengthen democratic skills, promote critical thinking and encourage advocacy amongst students.

PATRONS

J.M. COETZEE, Nobel Prize for Literature Winner 2003, author of 'Lives of Animals' and 'Elizabeth Costello'

BRIAN SHERMAN AM, businessman and philanthropist

DR JANE GOODALL, world-renowned primatologist and animal advocate

THE HON MICHAEL KIRBY AC CMG, former judge of the High Court of Australia

CHARLIE TEO, internationally acclaimed neurosurgeon

AMBASSADORS

HUGO WEAVING, Actor: Oranges and Sunshine, Last Ride, Little Fish, Lord of the Rings Trilogy, Matrix Trilogy, The Adventures of Priscilla Queen of the Desert

EMILY BARCLAY, Actor: Prime Mover, Piece of my Heart, Suburban Mayhem, In My Father's Den

ABBIE CORNISH, Actor: w.e., Suckerpunch, Limitless, Bright Star, Stop Loss, Elizabeth: The Golden Age, A Good Year, Somersault, Candy

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1 Voiceless's Position

- 1.1 Consumers and genuine free range producers (that is, free range producers who only make free range claims when their hens actually go outside, and whose production systems comply with the *Model Code of Practice for the Welfare of Animals: Domestic Poultry (Fourth Edition) 2002* (Model Code)) are significantly disadvantaged by the current lack of a national free range egg labelling standard.
- 1.2 The survey data¹ indicates that there is a considerable gap between consumer expectations around free range egg production and the production methods of, and the animal welfare standards adopted by, a large percentage of free range egg producers. This is particularly the case for the large-scale, intensive egg producers who supply at least 30% of the free range eggs available to the public.² Consumers are being misled by the misuse of the free range egg label, and are suffering substantial financial detriment as a result.
- 1.3 Genuine free range egg producers are being forced out of the market by large-scale, intensive producers who benefit from economies of scale whilst simultaneously misusing the free range label. The industry as a whole also lacks clarity around the requirements of free range egg production, particularly given the number of producers that have been prosecuted by the Australian Competition and Consumer Commission (ACCC) under the Australian Consumer Law (ACL) for misleading and deceptive conduct.
- 1.4 Consumers, genuine free range producers and the industry as a whole will benefit from a national free range egg labelling standard. Voiceless supports Option 3 of the Consultation Paper, namely the development of an information standard pursuant to section 134 of the ACL, with the below amendments. The purpose of a national information standard should not be to shield producers who are misleading consumers, but rather to ensure producers are accurately labelling their products in accordance with their adopted production system.
 - 1.4.1 All egg producers must be required to label their eggs either 'free range', 'access to range', 'barn' or 'cage' eggs. A simple and uniformly-styled graphic illustration of the production system is required on all packages and on supermarket shelves to assist time-poor consumers to make an informed choice.
 - 1.4.2 The free range label must be the premium egg label. To ensure the label is consistent with consumer expectations and the common law, producers using the free range label must ensure:
 - (a) The existing common law position for free range eggs is satisfied, namely that *'most hens are able to, and actually do, move about freely on an open range on most ordinary days'*;³
 - (b) The indoor stocking density is no greater than:
 - 7 birds/m² of the usable area for floor-based systems; or
 - 9 birds/m² of the usable area for tiered systems;
 - (c) The outdoor stocking density is no greater than:

¹ Refer to paragraphs 3.7 – 3.10 of this submission.

² Refer to paragraphs 3.9 – 3.10 of this submission.

³ *Australian Competition and Consumer Commission v Pirovic Enterprises Pty Ltd (No 2)* [2014] FCA 1028.

- 1,500 birds/ha of outdoor area to be available to birds in outdoor systems with no rotational range management strategies in place (i.e. a fixed outdoor area); or
 - 2,500 birds/ha of outdoor area to be available to birds in outdoor systems with rotational range management strategies in place; and
- (d) The practices of de-beaking and induced moulting are prohibited.
- 1.4.3 Producers that fail to meet all of the above free range standards must label their products in a way that more accurately reflects their production system, either access to range, barn or cage eggs. Producers should be audited, and the scheme enforced, by an independent third party.
- 1.4.4 The creation of a 'defence', as proposed under Option 2(a) is unnecessary. Such a defence will erode both the common law position on the use of the free range label, as well as limit the ability of the ACCC to properly regulate the egg industry. Instead, a set of guidelines could be established to assist producers to satisfy the common law position.
- 1.4.5 Stocking densities should be clearly disclosed on all egg packages, as proposed under Option 2(b). The stocking density should be accompanied with a graphical representation to assist time-poor consumers in making an informed decision.
- 1.4.6 Egg packaging should clearly disclose whether or not such husbandry practices as de-beaking and induced moulting are employed by the producer.
- 1.4.7 The inclusion of a 'premium free range' label (as proposed under Option 3(a)) is unnecessary. This term is ambiguous and may lead to further consumer confusion. The label would also dilute or downgrade the free range label to cater for large-scale, intensive producers that otherwise fail to meet consumer expectations and/or the common law position.
- 1.4.8 While introducing additional categories to the information standard is not ideal, the inclusion of an 'access to range' label (as proposed under Option 3(b)) would be appropriate for producers who fail to meet the free range standard, but who otherwise provide hens outdoor access.
- 1.4.9 Retailers should be required to clearly label and separately shelve eggs in accordance with their production systems (free range, barn or cage), as is currently required in the Australian Capital Territory under the *Eggs (Labelling and Sale) Act 2001*.⁴
- 1.4.10 To ensure the information standard remains consistent with changing consumer expectations and advances in animal welfare science, the information standard should be reviewed every two years.

2 Initial Comments on the Consultation Process

Animal welfare

⁴ Section 7, 7A and 7B of the *Eggs (Labelling and Sale) Act 2001*.

- 2.1 Animal welfare is important to this discussion, as survey data indicates that 68% of free range egg consumers are motivated by animal welfare.⁵ This is consistent with a 2015 survey conducted by the Humane Society Australia (97% of consumers purchase free range eggs on animal welfare grounds)⁶ and a 2015 CHOICE survey (which found 57% of consumers purchased eggs 'to support better animal welfare').⁷ NSW Fair Trading Commissioner Rod Stowe commented that consumers are dependent on labelling to inform them about the welfare conditions in egg production, given that they cannot individually test the veracity of claims made by producers.⁸ The ACCC, an expert in determining consumer expectations and whether consumers are likely to be misled or deceived by product labelling, has repeatedly acknowledged that consumers understand 'free range' to incorporate higher animal welfare outcomes than cage or barn laid egg production systems. This sentiment was reiterated by Justice North of the Federal Court of Australia about free range egg production:

"... the free range representation is a representation as to quality. The representation suggests that the eggs are produced by a more humane environment for laying hens ..."⁹

"... the conduct [placing cage eggs in cartons marked free range] amounted to a cruel deception on consumers who mostly seek out free range eggs as a matter of principle, hoping to advance the cause of animal welfare by so doing."¹⁰

- 2.2 As such, it is disappointing that discussions around animal welfare have been excluded from the consultation process. If animal welfare, or more specifically, consumer expectations regarding animal welfare, are not considered, the resulting information standard will invariably fail to address the underlying consumer protection concerns that have given rise to this process in the first place.

Consumer contribution to the consultation process

- 2.3 Further, Voiceless is concerned about the accessibility of the consultation process to the average consumer. The paper is lengthy and complex, and has been drafted in such a way that the average consumer will be unable and/or unwilling to contribute to the process. A simpler and more succinct process would have enabled those directly impacted by the process to voice their concerns. Accordingly, we urge CAANZ to engage directly with consumers to better understand their expectations for a national information standard.

Genuine free range producers

- 2.4 Voiceless is also concerned that genuine free range egg producers stand to lose a great deal from this process, while large-scale intensive producers (represented by Australian Egg Corporation Limited (AECL)) stand to benefit from continuing to misappropriate the free range egg label. While the AECL is intended to represent the interests of the egg industry as a whole, it is clear by its past conduct (including seeking to register a free range egg standard trade mark that permits stocking densities of up to 20,000 birds/ha) that its advocacy efforts

⁵ Rachel Clemons and Katinka Day, *Do You Shell Out for Free-Range Eggs?* (7 August 2014) CHOICE <https://www.choice.com.au/food-and-drink/meat-fish-and-eggs/eggs/articles/free-range-eggs>.

⁶ Humane Society International (HSI), 'HSI Free Range Egg Labelling Consumer Survey' (October 2015).

⁷ 2015 CHOICE Free Range Egg Labelling Survey.

⁸ Amy Bainbridge, *Free-Range Eggs: States, Territories to Try to Agree on National Code to Stamp out Misleading Products* (13 June 2014) Animal Welfare Labels, <http://www.animalwelfarelabels.org.au/index.php/news/146-amy-bainbridge>.

⁹ *Australian Competition and Consumer Commission v C I & Co Pty Ltd* [2010] FCA 1511, 16.

¹⁰ *Ibid* 30.

are more aligned with that of large-scale intensive producers than genuine free range producers.

- 2.5 Over the last 30 years, genuine free range egg producers have invested significant time and money developing their production systems in line with the Model Code and the premise that free range eggs come from hens who have access to the open range, and who actually go outside, on most ordinary days. The consultation process risks diluting the free range egg label, which will have a detrimental competitive impact on these producers and serve only to benefit intensive large-scale producers who profit from larger flock sizes, increased stocking densities and reduced animal welfare standards. The result of this consultation process and the development of an information standard should not be to shield otherwise misleading or deceptive producers from the ACCC, nor to water down the protections afforded to consumers and genuine free range producers under the ACL or the common law.
- 2.6 It is vitally important that genuine free range egg producers are properly represented and given appropriate weight in this consultation process, and we urge the CAANZ to consult with small-scale free range farmers to gauge their concerns with the status quo. Whilst beyond the scope of this consultation process, Voiceless believes that free range farmers should have a body independent from the AECL to represent its interests.
- 2.7 We outline the detriment experienced by genuine free range producers further in paragraphs 3.13 to 3.16 of this submission.

Independent survey data

- 2.8 The process also would have benefited from an independent survey of free range egg consumers and producers to gauge their expectations of the free range egg label. Voiceless has particular concerns with the NSW Farmers Association's 'Quantum Market Research' (QMR) survey that was released in October 2015.¹¹ Despite being commissioned for the consultation process, the survey questions and responses are irrelevant to the consultation process. None of the responses referenced in the QMR survey report mention an external stocking density, and there is little mention of outdoor space. The report states that one of the findings of the survey is that the "proposed maximum stocking density of 1 bird per m² [or 10,000 birds/ha] satisfies consumer expectations". The report, however, contains no questions about what consumers expect of free range stocking densities, or what they think a genuine free range stocking density should be. Instead, the survey asked respondents (at question 17) what they "perceived [were] the current minimum standards",¹² which is an entirely different question, and irrelevant to the current process. Accordingly, Voiceless respectfully submits that the CAANZ should not take the findings of the QMR survey into consideration.

3 Response to Key Focus Questions

- 3.1 Voiceless refers to the 'Key Focus Questions' in the Consultation Paper and submits the following:

¹¹ Quantum Market Research, 'Topline Research Report: Defining consumer expectations: what production practices are necessary to underpin confidence in free range labelling' (September 2015) NSW Farmers Association, http://www.nswfarmers.org.au/_data/assets/pdf_file/0004/45607/Defining-Consumer-Expectations-Free-Range-Topline-Findings-Aug-15.pdf.

¹² Ibid.

**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?**

- 3.2 Consumers are primarily misled by the free range label because they associate it with higher animal welfare standards, and yet these expectations are not always met. As consumers expect a lower standard of the barn or cage egg labels, they are less likely to be misled when purchasing these products. Accordingly, we have focused our attention on consumer expectations around free range eggs. In saying this, we note the sheer variety of egg labelling claims (including ‘free to roam’, ‘access to range’, ‘barn laid’, ‘barn’, ‘cage’, ‘organic’, etc) means that all egg consumers are likely to experience some degree of confusion when purchasing eggs. Consumers wishing to purchase free range eggs currently face a ‘moral and cognitive burden’ in seeking to understand the methods of free range egg production. The absence of a national standard renders them unable to distinguish between products that do and do not meet their expectations.¹³
- 3.3 In order to answer the above question, it is important to outline consumer attitudes to the status quo, what consumers expect of a free range label, and how a large representation of free range egg producers are failing to meet these expectations. To answer these questions, we have relied on survey data provided by Humane Society International (HSI, 2015),¹⁴ CHOICE (CHOICE, 2014 and 2015)¹⁵ and the Free Range Farmers Association (FRFA, 2010).¹⁶
- 3.4 We have also relied on public statements and guidelines issued by the ACCC on free range egg labelling. While the ACCC is not an industry expert, it relies on industry experts to inform its position. The ACCC is also an expert in determining consumer expectations and the type of claims likely to mislead consumers.
- 3.5 Public submissions received by the ACCC as part of the Certification Trade Mark Application (CTM1390450) filed by AECL in 2012 (ACCC, 2012) are also relevant to this consultation process.¹⁷ While the Trade Mark Application dealt with separate, but related, issues to that which is under consideration in this consultation process, the ACCC’s assessment of the application and the public submissions opposing the submission provide a useful summary of consumer expectations around free range egg labelling and egg production more generally.
- 3.6 For the reasons outlined in paragraph 2.8, we do not think it is appropriate to rely on the NSW Farmers’ Association QMR survey data.
- 3.7 Consumers have the following concerns with the status quo:
- 28% of free-range egg buyers do not have confidence that the free range eggs they buy are produced under what they expect to be free range conditions (CHOICE, 2014).
 - An overwhelming majority believe there is a need for a mandatory national standard for eggs labelled free range (HSI, 2015 and CHOICE, 2015).
 - Most consumers who chose not to purchase free range eggs did so because they didn’t trust that they met their expectations of free range (HSI, 2015).

¹³ Christine Parker, ‘Voting with Your Fork? Industrial Free Range Eggs and the Regulatory Construction of Consumer Choice’ (2013) 649(1) *The ANNALS of the American Academy of Political and Social Science* 52, 61.

¹⁴ Humane Society International (HSI), ‘HSI Free Range Egg Labelling Consumer Survey’ (October 2015).

¹⁵ Clemons and Day, above n 5; 2015 CHOICE Free Range Egg Labelling Survey.

¹⁶ Consumer Research by the Free Range Farmers Association (2010).

¹⁷ Australian Competition and Consumer Commission, *Initial Assessment of Certification Trade Mark Application CTM1390450 filed by the Australian Egg Corporation Limited*, 2 November 2012.

- 88% of consumers want a standard that allows them to differentiate between genuine free range eggs and eggs that fall short of their expectations of free range (CHOICE, 2015).

3.8 Consumers expect the following from eggs labelled free range:

General expectations

- When eggs are marketed as free range, it conveys to consumers that hens have substantial space to move around freely, both indoors and outdoors (ACCC, 2012 and CHOICE, 2015).
- The majority of respondents believe that free range means free to roam, access to the outdoors and cage-free (CHOICE, 2014).
- Consumers believe a mandatory national standard for free range egg labelling should make provisions for outdoor shelters (79%) and green cover outside (89%) (HSI, 2015).
- 87% of consumers believe an important element of a free range standard is that birds actually go outside regularly (CHOICE, 2015).
- 96% of consumers believe the definition 'hens must be allowed to move around freely on an open range on most ordinary days' is consistent with their expectations around free range eggs (CHOICE, 2015).

Stocking density

- Almost all consumers (99%) think a maximum limit is necessary for the number of birds kept inside each shed (HSI, 2015).
- 67% said that they would prefer to pay more for free-range eggs that are guaranteed to have an appropriate stocking density under a mandatory national standard for eggs labelled free range (CHOICE, 2014).
- Almost all individuals believe the maximum outdoor stocking density for free range hens should be capped at 1,500 hens/ha, in line with the Model Code (HSI, 2015; ACCC, 2012; FRFA, 2010).
- Almost all consumers (99%) believe that eggs from farms stocking 10,000 hens/ha fail to meet their expectations of 'free range' (HSI, 2015). This is consistent with the 2015 CHOICE survey which found only 2% of respondents considered a stocking density of 10,000 hens/ha was appropriate (CHOICE, 2015).¹⁸
- Consumers reasonably expect that free range egg production systems have lower indoor stocking densities than cage or barn laid systems (barn systems are permitted under the Model Code to have indoor densities of 30kg/m² or 15 birds/m²) (ACCC, 2012).

Husbandry practices

- 89% of consumers believe a mandatory national standard for free range egg labelling should not allow beak trimming (89%) (HSI, 2015).
- Most free range consumers believe that free range hens should not be de-beaked (FRFA, 2010).

¹⁸ Note, the CHOICE 2015 survey found that 41% of consumers didn't know / were unsure of an appropriate free range stocking density; 47% stated 1,500 hens/ha or less is appropriate; 9% stated 2,500 hens /ha is appropriate and 2% were 'other'.

- Consumers believe that de-beaking is not required for free range birds because having the ability to peck other hens or engage in cannibalism is only a problem that occurs in crowded conditions (ACCC, 2012).
- Routine de-beaking and forced moulting would not be considered by consumers to be consistent with the concept of free range egg production (ACCC, 2012).

3.9 A large percentage of free range egg producers are failing to meet consumer expectations:

- AECL claims that, according to an anonymous survey, “29% of free range egg production in Australia stocks at densities higher than 2 hens per square metre (20,000 birds/ha) on the range area”.¹⁹
- The AECL’s estimation is consistent with a 2015 CHOICE report, which estimated that of the 696 million eggs sold as free range in 2014, 213 million of them (over 30%) did not meet consumer expectations of what the label requires.²⁰
- The 2015 CHOICE report notes further that of the 55 free range egg brands, stocking densities could only be found for 35 brands. Of these, 21 egg products were not compliant with the Model Code and had a stocking density over 1,500 and up to 10,000 birds/ha.²¹
- The CHOICE report also noted that Pace Farms, Manning Valley and Farm Pride - three of the four largest egg producers - accounted for 30.7% of the number of free range eggs sold in Australia in 2014. These producers sell their free range eggs at a stocking density of 10,000 birds/ha.²²
- Aldi, Coles, Eco Eggs, Farm Pride and Woolworths, also of the largest producers and sellers of free range eggs in Australia, produce their eggs at a stocking density of 10,000 birds/ha.²³
- It is difficult to ascertain the number of free range egg producers that permit de-beaking. The FRFA states that nearly all chicks that end up in free range systems are de-beaked at hatcheries.²⁴ The AECL’s Egg Corp Assured Scheme (which covers Woolworths Select free range eggs), RSPCA Approved Farming Scheme and Coles’ free range standards all permit hens to be de-beaked.
- In the past five years, five egg producers have been prosecuted for having made misleading ‘free range’ claims by the Federal Court of Australia under the ACL.

3.10 The above data shows that consumers lack confidence in the free range egg label. Whilst consumers have clear and consistent expectations around free range egg production, and in particular, the minimum standards of animal welfare expected of free range egg producers, these expectations are not being met by a significant proportion – at least 30% – of the large-scale, intensive producers that supply free range eggs to the public. Large-scale producers are cashing in on consumers’ desire to buy eggs that meet a higher standard of

¹⁹ Christine Parker, Carly Brunswick and Jane Kotey, ‘The Happy Hen on Your Supermarket Shelf: What Choice Does Industrial Strength Free-Range Represent for Consumers?’ (2013) 10(2) *Journal of Bioethical Inquiry* 165-186, 173.

²⁰ CHOICE, ‘Free Range Eggs: Making the Claim Meaningful’ (Report, June 2015) <https://www.choice.com.au/~media/619b60e5a1f04b2191d09fd9dab4c72e.ashx>, 6.

²¹ Ibid 5.

²² Ibid 6.

²³ Ibid.

²⁴ Free Range Farmers Association Inc., ‘Hen Welfare’ <http://www.freerangefarmers.com.au/hen-welfare.html>.

welfare without delivering a product that meets the claims made. It is reasonable to conclude that consumers purchasing eggs from these producers are being misled, highlighting an urgent need for regulatory reform.

If so, how much detriment have consumers suffered due to misleading production system claims for eggs?

- 3.11 According to the 2015 CHOICE report, consumers can pay nearly double for eggs labelled free range compared with eggs labelled barn or cage.²⁵ Relevantly, per 100g, consumers are paying on average \$0.99 for eggs labelled free range, as opposed to \$0.71 for eggs labelled barn laid and \$0.55 for eggs labelled cage.²⁶ Based on the survey data outlined above, if we accept that at least 30% of eggs labelled free range are failing to meet consumer expectations, and accordingly, should more appropriately be labelled either barn or cage eggs, consumers are wrongfully paying a premium of at least 28% to 44% for free range eggs (or at least \$21 million to \$43 million per year) that are not genuinely free range. Consumers are unlikely to be compensated for this detriment.
- 3.12 We note potential non-financial detriments to consumers who have purchased eggs from producers that have not met consumers' expectations regarding animal welfare, including moral or ethical concerns.

What detriment have producers and retailers suffered due to misleading production system claims for eggs made by competitors?

- 3.13 We have outlined our concerns for genuine free range producers above at paragraphs 2.4 – 2.7 of this submission. The ACCC highlights that genuine free range egg producers 'who only make free range claims when their hens go outside' suffer a competitive disadvantage relative to low-cost, lower-welfare intensive producers that mislead consumers in their egg production system claims.²⁷
- 3.14 Major supermarkets typically select producers that are able to meet the onerous demands of supplying eggs in large quantities, for national distribution and at a low cost.²⁸ Therefore, competition on price between suppliers to the major supermarkets has incentivised large-scale, intensive farming practices that benefit from economies of scale. In many cases, this has diminished market entry for genuine free range egg producers who have smaller and less intensive production systems, and who produce eggs consistent with consumer expectations and the Model Code, often with more costly overheads.²⁹
- 3.15 The response from egg producers to the AECL's Trade Mark Application to the ACCC highlights the concerns of free range egg producers around the misuse of the free range label. Whilst the responses deal specifically with the AECL's application for a free range egg standard that would set an external stocking density of 20,000 birds/ha, the responses are still applicable to producers that adopt external stocking densities of 10,000 birds/ha or higher, which is a significant departure from the Model Code position of 1,500 birds/ha. Egg producers noted that the use of the label would be anti-competitive, as it would remove the

²⁵ CHOICE, above, n 17, 3.

²⁶ Ibid.

²⁷ ACCC, *Initial Assessment of Certification Trade Mark Application CTM1390450 filed by the Australian Egg Corporation Limited* (2 November 2012); ACCC, *ACCC Enforcement Guidance - Free Range Hen Egg Claims* (October 2015) https://www.accc.gov.au/system/files/1029_Free%20range%20Eggs%20guidelines_FA.pdf.

²⁸ Parker, above n 13, 52-73.

²⁹ Parker et al, above n 19.

product differentiation (by significantly expanding the stocking rate) of those eggs originating from producers with stocking rates at 1,500 birds/ha. Egg producers further stated that the use of the trade mark would disadvantage producers who have established, in good faith, their businesses in accordance with the Model Code and would push smaller producers out of the market so that larger producers could establish their dominance.³⁰

- 3.16 For producers and retailers in general, Voiceless notes such non-quantifiable impacts as consumer distrust in the free range label, resulting in consumers opting for other brands of eggs (including organic eggs, or even cheaper egg labels such as barn or cage eggs) or boycotting the purchasing of eggs altogether. The free range egg industry has much to gain from implementing a nationally consistent free range egg labelling standard that legitimately complies with consumer expectations. Indeed, the 2014 CHOICE survey indicates that 59% of free range egg buyers would be willing to pay \$1 more than they currently pay if they had confidence that their eggs were truly free range under a standard.³¹ The 2015 CHOICE survey found similar results, with 61% of consumers being willing to pay \$1 or more if a standard for free-range eggs were in place that met their expectations.³²

Do producers face significant uncertainty about how to ensure they do not make misleading production system claims for eggs?

- 3.17 It is evident that the egg industry faces significant uncertainty. In the last five years there have been eight major instances where the ACCC has instituted or taken action against egg or chicken meat producers for allegedly misleading consumers with their free range claims (6 involving egg producers). Earlier this year, the CEO of the AECL noted that industry uncertainty had resulted in a lack of industry investment and development, stating that the egg industry could only move forward once it had knowledge of ‘what free range needs to be or should be’.³³ Producers appear to agree this uncertainty can be resolved through the introduction of a national standard.³⁴

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?

- 3.18 See Section 1 – Voiceless’s Position which sets out our response to this question.

Stocking density

- 3.19 In addition to codifying the common law position, the information standard must mandate a maximum indoor and outdoor stocking density for free range systems. According to the ACCC, when eggs are marketed as free range it conveys to consumers that hens have substantial space to move around freely, both indoors and outdoors.³⁵ Indoor and outdoor

³⁰ ACCC, *Initial Assessment of Certification Trade Mark Application CTM1390450 filed by the Australian Egg Corporation Limited*, Attachment B.

³¹ CHOICE Free Range Egg Survey 2014, as cited in Clemons and Day, n 5.

³² 2015 CHOICE Free Range Egg Labelling Survey.

³³ Sean Murphy, ‘Free-Range Egg Producers Call for National Standards, Definition to Give Booming Industry Certainty’, *ABC News* (online), 18 April 2015 <http://www.abc.net.au/news/2015-04-18/call-for-national-standards-in-booming-free-range-egg-industry/6401694>.

³⁴ Murphy, above n 33.

³⁵ ACCC, above n 17.

stocking densities are an important factor in determining whether hens are able to access the outdoor range, and to roam freely.

- 3.20 As indicated by the consumer survey data outlined above in sections 3.7 – 3.10, the vast majority of free range egg consumers expect external stocking densities that comply with the current Model Code of Practice of 1,500 hens/ha. Further, the vast majority of free range egg consumers agree that an external stocking density of 10,000 hens/ha or higher fails to meet their expectations. In Voiceless's view, if producers that employ stocking rates of 10,000 birds/ha or higher are permitted to use the free range label under the introduced scheme, then such claims will be capable of inducing an ordinary or reasonable egg buying consumer into error, and there is a real or not remote possibility that such conduct is likely to mislead or deceive these consumers.
- 3.21 In the absence of scientific consensus on the most appropriate indoor and outdoor stocking densities for free range systems, Voiceless supports the RSPCA Australia's position that free range standards must have:
- An indoor stocking density no greater than 7 birds/m² of the usable area for floor-based systems; or 9 birds/m² of the usable area for tiered systems; and
 - The outdoor stocking density no greater than: 1,500 birds/ha of outdoor area to be available to birds in outdoor systems with no rotational range management strategies in place (i.e. a fixed outdoor area); or 2,500 birds/ha of outdoor area to be available to birds in outdoor systems with rotational range management strategies in place.

De-beaking and induced moulting

- 3.22 Voiceless agrees with the ACCC's position that the production practices of routine de-beaking and induced moulting would not be considered by consumers to be consistent with the concept of free range egg production.³⁶ The consumer data outlined in sections 3.7 – 3.10 above shows that the vast majority of consumers believe a free range standard would not allow hens to be de-beaked. While the survey data does not provide guidance on consumer expectations around induced moulting, given the majority of consumers purchase free range eggs for ethical and animal welfare reasons, we can reasonably extrapolate that consumers would expect induced moulting to be prohibited in free range systems.

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: (a) included as a 'defence' as part of an information standard? (b) published by the Australian Competition and Consumer Commission (ACCC) as clear guidance about the current law? (c) delayed until after the review of the 'Model Code of Practice for the Welfare of Animals – Domestic Poultry' has been completed?

- 3.23 (a) See Section 1 –Voiceless's Position which sets out our response to this question.
- 3.24 It is undesirable for a detailed guidance to constitute a defence for producers who may otherwise find it difficult to prove that hens have access to an open range and do in fact go outside. Voiceless anticipates that large-scale producers will lobby for a set of conditions that reinforce the status quo. That is, these producers will lobby for conditions that will advantage producers that operate production systems that are not consistent with consumer expectations or the position under the common law, and will operate to the

³⁶ Australian Competition and Consumer Commission, above n 28.

detriment of genuine free range egg producers. This will invariably diminish the broad common law position that applies to free range egg producers, and will operate to reduce the effectiveness of the ACCC and the ACL in regulating the industry against misleading and deceptive conduct.

- 3.25 Instead of constituting a defence, a set of non-mandatory and non-exhaustive guidelines or recommendations could be established for free range egg producers. Compliance or non-compliance with the recommendations or guidelines could be adduced as evidence in any proceedings to determine whether producers are compliant or non-compliant with the common law. In this way, compliance or non-compliance with the guidelines could be taken into consideration by the ACCC or a court when determining whether producers are compliant or non-compliant with the information standard or the ACL.
- 3.26 (b) Yes, once an information standard is developed, it would be desirable for the ACCC to publish clear guidelines to inform producers about the factors that may satisfy the definition of free range under the information standard. Again, compliance with these guidelines should not constitute a defence for producers, but could be adduced as evidence in any proceedings to determine whether producers are compliant or non-compliant with the common law.
- 3.27 (c) It is unnecessary to delay guidance until review of the Model Code, as it is not concerned with consumer expectations around free range eggs. Voiceless further anticipates that the completion date for the revision of the Model Code in late 2017 is optimistic, with consumers and genuine free range producers continuing to be disadvantaged in the interim.

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?

- 3.28 See Section 1 – Voiceless's Position which sets out our response to this question.
- 3.29 As indicated by the survey data at paragraphs 3.7 – 3.10, consumers have clear expectations around stocking densities for free range eggs. Accordingly, stocking densities should be prominently disclosed on all egg packaging to assist consumers in making an informed choice. Research has shown that consumers pay a premium for the free range label, but there is no correlation between price and stocking densities or other attributes of higher animal welfare.³⁷ Requiring producers to clearly label stocking densities on packaging may operate to rectify this lack of correlation.
- 3.30 A clear image and textual display of stocking density is necessary to assist time-poor consumers to make an informed choice about the standard of welfare associated with particular egg products.
- 3.31 As an ideal, Voiceless suggests that the practices of de-beaking and forced moulting also be disclosed on packaging. According to the 2015 HSI survey, it is apparent that consumers desire this, with an overwhelming 91% of respondents stating that they were in favour of beak treatment practices being displayed on egg boxes.³⁸

Should an information standard require prominent disclosure of production methods for all hen eggs: (a) as either 'free range', 'barn' or 'cage' eggs? (b) including optional categories such as 'access to range' and 'premium free range'?

³⁷ Parker, above n 11, 61.

³⁸ HSI Free Range Egg Labelling Consumer Survey – October 2015 (Survey Questions and Results).

- 3.32 (a) See Section 1 – Voiceless’s Position which sets out our response to this question.
- 3.33 Voiceless agrees that the prominent disclosure of production methods will assist consumers in purchasing eggs. Simplifying the options to three basic categories – ‘free range’, ‘barn’ and ‘cage’ – will resolve the current consumer confusion around egg production systems. However, as indicated below, we see some merit in introduce a fourth category of ‘access to range’ for producers who fail to meet the free range standard, but who provide hens access to the open range.
- 3.34 (b) See Section 1 – Voiceless’s Position which sets out our response to this question.
- 3.35 Voiceless opposes the introduction of the ‘premium free range’ category because it will serve only to increase consumer confusion around the free range label. Genuine free range producers stand to lose the most from the introduction of this label, as welfare-conscious but otherwise ill-informed consumers will most likely be unaware of the differences between the categories, and will naturally gravitate towards the cheaper option.
- Further, Voiceless is concerned that the introduction of a ‘premium free range’ category will enable production systems that currently house 10,000 birds/ha or greater, and continue to force-moult hens and/or carry out de-beaking practices, to use the lesser free range label, even though these practices are inconsistent with consumer expectations and arguably fail to comply with the common law and ACL. If this were permitted, large-scale producers would be permitted to continue to misuse the free range label and potentially mislead consumers with impunity; reinforcing the status quo, whilst appearing to appease the welfare-based concerns of consumers.