

# **EXPLANATORY STATEMENT**

*Australian Consumer Law (Free Range Egg Labelling) Information Standard 2017*

## **Authority**

Section 134 of the *Australian Consumer Law* provides that the Commonwealth Minister may, by written notice published on the internet, make an information standard for goods of a particular kind.

## **Background**

Eggs are labelled in a variety of ways. The words used to label eggs influence consumer choices. Some labels represent eggs as produced by hens that are ‘free range,’ ‘barn’ or ‘caged’. Other variations such as ‘happy hens’, ‘free to roam’, ‘pastured’ and ‘farm fresh’ are used to suggest that hens are less confined than barn or caged hens without explicitly making a free range claim. Some packaging also shows pictures of hens in open pastures instead of, or as well as, a free range claim.

Many consumers favour eggs labelled as ‘free range’. An increasing number of consumers are prepared to pay more for eggs that have been laid by freely ranging hens—owing to personal and ethical, preferences—than for ‘barn’ and ‘cage’ laid eggs. In response, the proportion of eggs labelled as free range has increased substantially. Over the last decade egg producers have made significant investments in infrastructure to improve productivity, adapt to consumer preferences, and ensure compliance with animal welfare regulation. As a free range egg is not observably different from a cage or barn laid egg, consumers must rely on the label. Eggs labelled as free range sell at a higher price because such production systems are more expensive to run and consumers place an additional value on non-observable factors, such as the perceived improvement in the welfare of the hens.

The problem is that, in some cases, eggs may be represented as free range that are not farmed under conditions that consumers might expect when they buy them. In particular, some eggs labelled free range have been found to come from hens that either cannot or do not go outside on most ordinary days. It is relatively easy to mislead consumers and there is a financial incentive for producers to do so.

Consumers lose out when producers sell eggs labelled free range at a higher price when they are not genuinely free range according to consumer expectations. The producers of genuine free range eggs also lose.

In response to this problem, on 12 June 2015 Consumer Affairs Ministers from the Commonwealth, States and Territories requested the preparation of a draft national standard on free range egg labelling.

## **Consultation**

On 5 October 2015, the then Minister for Small Business and Assistant Treasurer, the Hon Kelly O’Dwyer MP, released a consultation paper to consider options to enhance consumer confidence and certainty around egg labelling. This consultation paper was to identify what further action may be required to offer consumers assurance that their free range eggs are labelled correctly.

In particular, the Minister noted that the Government's aim was 'to balance consumers' need for clear and accurate information with any potential red-tape burden for producers and retailers'.

The consultation process concluded in February 2016. 149 formal submissions were received in response to this consultation, including 35 confidential submissions.

## **Decision**

Based on those submissions, on 31 March 2016, Consumer Affairs Ministers agreed to the introduction of an information standard for the labelling of free range eggs. The reforms will give more information to consumers when they buy eggs, providing much-needed clarity about free range claims. At the same time, the changes will reduce the regulatory uncertainty faced by egg producers and retailers and encourage investment in the industry.

The Ministers expressed a desire for the information standard to be in place within twelve months.

## **Purpose and operation**

The purpose of this information standard is to provide for the labelling and sale of eggs that are produced and sold in Australia, and for other purposes.

This information standard requires that eggs that are sold in Australia must have been laid by hens that were kept in certain minimum conditions if those eggs are to be represented as free range. Where a free range representation is made in compliance with the information standard, a 'safe harbour' defence may preclude any action being taken under the misleading and deceptive conduct provisions of the *Australian Consumer Law*.

To allow producers to adjust their practices, there will be a twelve month transitional period from the commencement of the information standard. During this transition period, the restrictions on when a producer may label eggs as 'free range' will not apply. A producer will, however, only be able to take advantage of the 'safe harbour' defence during the twelve month transition period if they would be in compliance with the standard if those restrictions were in effect.

A detailed explanation of the provisions is included as an Attachment to this information standard.

# Attachment

## Detailed explanation of the Information Standard's provisions

### **Part 1 – Preliminary**

#### Section 1 – Name of Regulation

This section provides that the title of the information standard is the *Australian Consumer Law (Free Range Egg Labelling) Information Standard 2017* (Information Standard).

#### Section 2 - Commencement

This section provides that each provision of this Information Standard is taken to have commenced in accordance with the items in the table. The four parts of the Information Standard commence at different stages.

Part 1 will commence on the day the Information Standard is published by written notice on the internet.

Part 2 will commence twelve months after the day this Information Standard is published by written notice on the internet. As Part 2 contains the labelling and display requirements, the delay in its commencement is intended to provide a period of time for producers and sellers to adjust their labels and displays.

Parts 3 and 4 will commence on the later of the day this Information Standard is published by written notice on the internet, or the same time as Schedule X to the *Treasury Laws Amendment (2017 Measures No. Y) Act 2017*. This is because Parts 3 and 4 rely on the amendments contained in that Schedule, so cannot commence beforehand. If that Schedule does not commence, then those Parts do not commence.

#### Section 3 - Authority

This section states that the Information Standard is made under section 134 of the *Australian Consumer Law*.

#### Section 4 - Definitions

The below definitions only apply within the Information Standard.

**Egg** means an egg laid by a hen.

**Free range egg** has the meaning given by section 7.

**Hen** means a female domestic fowl (*gallus gallus domesticus*). This includes both pullets and adult birds.

**Laying cycle** for hens means the period of a group of hens' lives across which the hens are kept together, managed in the same way and are able to lay eggs. This concept is used to apply a time period across which the conditions in which the hens are kept are to be assessed. This period mirrors existing industry practice as generally a group of hens are raised and kept together as a flock for the purpose of producing eggs, so consumers would expect that the hens that laid the eggs would be subject to those conditions for this period.

**Packaging** for eggs means anything that completely or partly encloses, contains or packs the eggs. This may include a carton or box in which eggs are packed.

**Stocking density** for hens means the maximum number of hens per hectare that have access to an outdoor range across the laying cycle. The stocking density is framed as a ‘maximum’ stocking density because the number of hens that are raised as part of a flock may vary over time. Therefore, to be compliant with the labelling and display requirements, producers will not need to state their precise stocking density as at a point in time.

The term access is used in relation to the outdoor range, so non-accessible portions of the outdoor range are not intended to be included in the calculation of the number of hens per hectare.

### Section 5 - Application

This section provides that the Information Standard applies to packaging of eggs for wholesale or retail sale, and eggs that are displayed for retail sale without packaging. This application restricts the labelling requirements of section 8 to packaging containing eggs for sale. It also restricts the application of the display requirements of section 9 to where eggs without packaging are displayed for retail sale.

The application provision makes it clear that the Information Standard only applies to the sale of eggs, including for non-retail sale, and the information that is provided in connection with the sale of eggs. The Information Standard does not require eggs to be produced according to any minimum standards, but requires eggs labelled or otherwise represented as free range to meet the conditions set out in section 7 if they are to be represented as free range at the point of sale.

### Section 6 – Inconsistency of State and Territory laws

This section provides that the Information Standard does not operate to exclude or limit the operation of a law of a State or Territory that is capable of operating concurrently with the provisions of Part 2, which relate to labelling and display requirements.

## **Part 2 – Free range egg labelling and display requirements**

### Section 7 – Meaning of the term free range

Subsection 7(1) provides that eggs are free range eggs for the purposes of this standard if they meet a two limb test:

- the first limb requires that the eggs are laid by hens that had meaningful and regular access to an outdoor range during daylight hours across the laying cycle; and
- the second limb requires that the hens that laid the eggs were subject to a stocking density of 10,000 hens or less per hectare.

### *Meaningful and regular access*

The definition is access based so that producers are not required to ensure that hens go outside during daylight hours every day across the laying cycle but are required to provide conditions which encourage access to and use of the range. Where the indoor environment in which the laying hens are kept when not on the outdoor range impedes, prevents or discourages the hens from accessing that range, then the hens will not have meaningful and regular access to the range.

In determining whether the hens have meaningful access, paragraph 7(2)(b) requires regard to be had to the extent to which hens are able to roam, forage and display natural behaviours on the outdoor ranges to which they have access. This does not preclude other relevant factors from being considered. For example, if the outdoor range was poorly maintained or configured in a way that adversely affected the hens' experience on the outdoor range, or led to the hens' sickness, then access may not be considered meaningful.

The requirement that access must be regular suggests that access is not intended to be absolute. However, the intention is that hens must be able to regularly or routinely access an outdoor range during daylight hours across the laying cycle.

Paragraph 7(2)(a) provides that in determining whether the hens that laid the eggs had meaningful and regular access, occasions when hens were prevented from accessing the outdoor range may be disregarded where:

- the hens were undergoing nest box training;
- the weather conditions endangered the safety or health of the hens; or
- the hens would have been exposed to predators; or
- the hens were being medicated or otherwise cared for; or
- there were exceptional circumstances that prevented the hens from accessing the range.

What constitutes exceptional circumstances is a question of fact, but may include other circumstances in which the hens were endangered or where it would be adverse to the welfare of the hens if they accessed the range.

The use of the term 'occasions' implies that access may not be permanently or routinely denied for any of the reasons listed in that paragraph. These 'occasions' are intended to be a carve-out which relaxes the requirement when intervening circumstances, such as weather conditions or exposure to predators, are present.

### *Stocking density of 10,000 hens or less per hectare*

Eggs that are laid by hens subject to a stocking density of 10,000 hens or less per hectare, while on the outdoor range to which the hens have access across the laying cycle. This is not intended to include any other area in which the hens may be kept.

## Section 8 – Labelling requirements

This section sets out the requirements for labelling packaging containing eggs for sale. The labelling requirements apply to any sale of packaged eggs, including the wholesale of eggs.

The labelling requirements prohibit a person from labelling packaging with the words ‘free range’ unless the conditions of the section are met.

To be labelled as free range, the packaging must:

- contain free range eggs, within the meaning of section 7; and
- use the words ‘free range’ in relation to the eggs that are packaged; and
- display the stocking density prominently on the packaging.

The requirement that words are used in relation to the eggs does not prescribe how the term is to be used. The intention is that a person reading the label would be able to discern that the term free range is used in relation to the eggs contained in the packaging.

To be compliant with the labelling requirements, the stocking density must be prominently displayed on the packaging, so that a person reading the label can easily read it when inspecting the packaging.

## Section 9 – Display requirements

This section sets out the display requirements for eggs that are sold without packaging in a retail sale. Because this only applies to eggs without packaging, it is an alternative to the labelling requirements in section 8. This is intended to cover sales such as market sales, where the eggs may not be displayed in traditionally labelled packaging. Unlike the labelling requirements, this is restricted to the retail sale of eggs, and does not include the wholesale.

The display requirements prohibit a person from displaying eggs without packaging as ‘free range’ unless the conditions of the section are met. The conditions are that:

- the eggs must be free range eggs within the meaning of section 7; and
- the display must have a sign containing the words ‘free range’; and
- the sign must prominently display the words ‘free range’; and
- the stocking density must be prominently displayed on the sign; and
- if eggs other than free range eggs are being displayed at or near the display of free range eggs, the display of free range eggs must be separate from the display of other eggs, so that a person at or near the displays can reasonably distinguish between eggs to which the sign relates and other eggs.

## *Sections 8 and 9 – Maximum stocking density*

The intention for requiring the display of the stocking density is so consumers have an indicator of the conditions in which the hens were kept. Stocking density is defined to mean ‘hens per hectare’ on the outdoor range to which the hens have access across the laying cycle, so it is intended that either on packaging or on a sign in a display the stocking density must be expressed in terms of hens per hectare. This allows consumers to easily compare the conditions without having to do any calculation to determine equivalency.

Because the stocking density is defined by reference to a maximum number of hens, compliance does not require producers to constantly monitor and state the precise number of hens per hectare on a label or on a sign in a display. Producers will only be in breach where they have understated the total number of hens per hectare. For example, where eggs are labelled indicating that the hens that laid the eggs were subject to a stocking density of 8,000 hens per hectare, but the actual stocking density was 9,000 hens per hectare, the label will be in breach of the labelling requirements. This is a breach regardless of the fact that the eggs are free range eggs.

## **Part 3 – Misleading or deceptive conduct**

### Section 10 – Safe harbour for free range egg representations

This section provides that a person does not contravene section 18, paragraph 29(1)(a), section 33 or paragraph 151(1)(a) of the *Australian Consumer Law* merely by making a representation that complies with the labelling and display requirements in the Information Standard.

The use of the word ‘merely’ is intended to indicate that where other representations are made in conjunction with representations that are compliant with this Information Standard, a person may still be in breach of the specified provisions of the *Australian Consumer Law*. For example, if images on the packaging indicated that the chickens were subject to a substantively different stocking density than what the label or sign indicated, there may still be a contravention of those sections.

The protection that is offered by the safe harbour is only for use of the term free range when done in compliance with the Information Standard.

### *Section 11 – Proceedings relating to misleading or deceptive conduct or representations*

This section provides that if a person seeks to rely on the safe harbour provided by section 10, that person bears an evidential burden in relation to whether the representation made was in compliance with Part 2.

## **Part 4 – Transitional provisions**

Because of the commencement provisions of the Information Standard, a person does not have to comply with the labelling or display requirements until twelve months after the Information Standard is on the website. To allow early compliance with the Information Standard, the transitional rules provide that if a person makes a representation that would comply with either the labelling or display requirements during the twelve month transitional period, they are able to take advantage of the safe harbour provision in section 10 as a defence against any action for an alleged breach of section 18, paragraph 29(1)(a), section 33 or paragraph 151(1)(a) of the *Australian Consumer Law*.

The transitional provisions are intended to provide certainty for those that adjust their labels and displays early that they will not be liable for particular actions under the *Australian Consumer Law* for merely making a free range representation.

The commencement provisions of the Information Standard provide that the transitional period commences once Schedule X to *Treasury Laws Amendment (2017 Measures No. Y) Act 2017*. If that Schedule commences after the commencement of this Information Standard, the timing of the end of the transitional period will be unaffected.