



Free-range egg claims in NSW

Super-complaint to NSW Fair Trading

29 August 2013

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About CHOICE

CHOICE exists to unlock the power of consumers. Our vision is for Australians to be the most savvy and active consumers in the world.

As a social enterprise we do this by providing clear information, advice and support on consumer goods and services; by taking action with consumers against bad practice wherever it may exist; and by fearlessly speaking out to promote consumers' interests - ensuring the consumer voice is heard clearly, loudly and cogently in corporations and in governments.

To find out more about CHOICE's campaign work visit www.choice.com.au/campaigns and subscribe to CHOICE Campaigns Update at www.choice.com.au/ccu.

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What is a super-complaint?

CHOICE signed a memorandum of understanding in September 2011 to give effect to an eighteen-month pilot of a super-complaints process with NSW Fair Trading. The super-complaints process provides a mechanism by which CHOICE can bring evidence of issues that are or appear to be significantly harming the interests of consumers in NSW to the attention of NSW Fair Trading. Under the process, the regulator is required to publicly respond within 90 days of receiving the super-complaint.

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Executive Summary:

Free-range egg claims have considerable potential to mislead New South Wales consumers. Consumers pay a premium assuming that free-range products meet their ethical expectations, but the lack of an enforceable standard means that many products labelled free-range are produced under conditions that are substantially inconsistent with voluntary standards and consumer expectations.

CHOICE believes that consumers should be free to buy whatever sort of eggs they choose, with the confidence that they are getting what they believe they are paying for. CHOICE is interested in free-range eggs because, as credence claims, they have the potential to mislead consumers who pay a premium for these products in the belief they meet higher standards.

This super-complaint provides NSW Fair Trading with an overview of the egg market in NSW, consumer expectations of free-range eggs and approaches to free-range egg standards. It also provides evidence of consumer detriment based on the prices and claims of free-range products, finding that free-range products cost more than double cage eggs and almost one fifth more than barn eggs, and that there appears to be no relationship between standards and price.

CHOICE's central recommendation is that NSW Fair Trading further investigate free-range egg claims and take action where there is evidence that these claims are likely to mislead NSW consumers.

Introduction:

1. CHOICE appreciates the opportunity to provide New South Wales Fair Trading with a super complaint on free-range egg claims in NSW.
2. Consumers have a fundamental right to be informed. This requires that consumers have the facts to make an informed decision and are protected against misleading conduct.¹
3. Food labelling is an important means of communicating product information to consumers. With credence claims like free-range, the average consumer is unlikely know what reasonable standards are and would rely on truthful claims to make informed purchasing decisions. Consistency and truth in free-range egg labelling are critical because consumers pay a premium in the belief that products meet their expectations of free-range production.
4. It is CHOICE's view that the words 'free-range' when used in relation to eggs represent:
 - To the reasonable person in the general public that birds have access to the outdoors and space to move around with limits on the number of birds on the outdoor range; and
 - To a significant subclass of persons in the general public that birds have access to the outdoors and space to move around with a maximum outdoor stocking density of 1,500 birds per hectare or lower.
5. The Model Code of Practice for the Welfare of Animals: Domestic Poultry² defines free-range egg production as having a maximum outdoor stocking density of 1,500 birds per hectare. The Model Code stocking density is reflected in a number of free-range certification schemes. Until recently, the Model Code stocking density was legislated in Queensland.
6. Nationally, free-range eggs account for nearly 40% of the egg market, yet the egg industry has admitted that many eggs labelled free-range are produced under conditions that do not meet the Model Code definition.
7. Failure to meet accepted free-range standards causes consumer detriment because consumers pay a premium for these products in the belief they were produced in accordance with their expectations, when this is not the case.
8. CHOICE has analysed free-range claims and prices, finding that free-range eggs are more than twice as expensive as cage eggs and cost nearly one-fifth more than barn eggs. While few products were labelled with stocking density, the two products labelled with a stocking density of 20,000 birds per hectare were the most expensive of all the free-range products, including more expensive than the product with a stocking density of 1,500 birds per hectare.
9. CHOICE recommends that NSW Fair Trading further investigate the use of free-range claims on eggs for retail sale in NSW and take enforcement action where it finds evidence that companies are misleading consumers by using free-range claims on products that do not meet consumer expectations and the Model Code definition of free-range.

¹ Consumers International 'Consumer rights' <http://www.consumersinternational.org/who-we-are/consumer-rights>.

² 4th Edition, 'the Model Code'.

The egg market in New South Wales

10. Eggs sold in Australia are labelled with production system and there are three options:³
 - Cage: hens are continuously housed in cages within a shed;
 - Cage-free or barn-laid: hens can move around in a shed; and
 - Free-range: hens are housed in sheds and have access to an outdoor range.
11. Of the three categories, free-range eggs experienced the most growth in 2011 and reached 39% of the egg market in value, according to Retail World Grocery Guide 2012.
12. NSW accounts for the highest percentage of Australia's egg production by volume and value. According to the Australian Bureau of Statistics, in 2009-10 NSW accounted for:
 - 34% of the gross value of eggs produced; and
 - 30% of the number of layer hens.

Consumer expectations of free-range eggs

13. In 2012, CHOICE conducted quantitative research on consumers' expectations of free-range labelling.⁴
14. Purchasing of free-range products was high with 93% of respondents having chosen free-range products in the preceding 12 months.
15. While respondents said choosing free-range was important across a range of products, buying free-range was essential for the greatest number of respondents when it came to eggs, at 60%.
16. A key aim of CHOICE's research was to find out what motivates consumers to buy free-range eggs. The most popular reason for choosing free-range products was animal welfare which was selected by 85% of respondents. Other popular reasons were perceptions that free-range eggs are chemical-free (52%), better tasting (47%) and better for the environment (44%).
17. CHOICE's research also looked at consumer expectations of free-range. When asked about the meaning of free-range, the most popular descriptions concerned the ability of hens to move around and access the outdoors:

³ NSW Food Authority website <http://www.foodauthority.nsw.gov.au/consumers/food-labels/labelling-and-the-law/egg-labelling/#.UXDId6JTCLE>.

⁴ A CHOICE online member survey was completed between 23 April 2012 and 4 May 2012 by 900 CHOICE members who elected to complete it.

- 69% said free-range meant birds are never confined in cages;
 - 66% said birds have more outdoor space as a maximum number of birds is allowed outdoors; and
 - 65% said birds have easy access to pasture.
18. Participants were asked what a reasonable outdoor stocking density was for free-range egg laying hens and given the options of 750, 1,500, 10,000 or 20,000 birds per hectare along with the option of 'I don't know'. While 65% of respondents said they didn't know, 28% of respondents selected 1,500 or 750 and less than 1% selected 20,000.
19. CHOICE is not surprised that the majority of respondents said they didn't know what a reasonable maximum stocking density was. While the survey results clearly show that consumers understand free-range to mean birds have access to the outdoors and space to move around governed by a maximum number of birds, there is an understandable difficulty in converting these expectations into a number.
20. CHOICE believes that these consumer expectations have in part been driven by free-range egg marketing, with egg cartons featuring images of chickens on open, lush and green pastures with plenty of room to move around (see Appendix 1 for examples of free-range egg packaging).
21. Based on the findings of CHOICE's research, we believe that consumers in general have a clear understanding of free-range, with a significant subclass having a more specific understanding. It is our view that the words 'free-range' when used in relation to eggs represent:
- To the reasonable person in the general public that birds have access to the outdoors and space to move around with limits on the number of birds on the outdoor range; and
 - To a significant subclass of persons in the general public that birds have access to the outdoors and space to move around with a maximum outdoor stocking density of 1,500 birds per hectare or lower.

Free-range egg standards

22. There is currently no national and enforceable definition of what free-range means in the context of egg production or labelling. There is a national voluntary definition as well as legislation in some jurisdictions and voluntary certification schemes. However, the absence of a national and enforceable standard has enabled egg producers to adopt a range of approaches, particularly around the issue of the outdoor stocking density.
23. Outdoor stocking density emerged as a key issue in the debate over free-range egg standards after the Australian Egg Corporation Limited (Egg Corporation) attempted to increase its stocking density limit to a level 13 times greater than the national voluntary definition.

Given the consumer expectation that free-range means birds have space to move around freely on the outdoor range, CHOICE believes that stocking density is a critical issue in free-range standards.

Model Code definition

24. The Model Code of Practice for the Welfare of Animals: Domestic Poultry⁵ defines free-range egg production at clause A2.1.4 using a maximum outdoor stocking density of 1,500 birds per hectare for egg layer hens.
25. CHOICE is aware that the Egg Corporation has a different interpretation of A2.1.4, suggesting it doesn't set a maximum stocking density for free-range eggs. It is therefore relevant to examine the clause.
26. Clause A2.1.4 appears in Appendix 2 and is headed 'Maximum Acceptable Live Weight Densities for Free-Range Birds', with 3 paragraphs following the word 'Outdoors'.

The first paragraph of A2.1.4 states: 'For layer hens a maximum of 1500 birds per hectare.' The drafters of the Model Code have used clear language to set a limit on stocking density for egg layers, choosing to use the word 'maximum'. The Macquarie Dictionary defines 'maximum' as 'the greatest quantity or amount possible, assignable, allowable, etc.; the highest amount, value or degree attained or recorded (opposed to minimum)'.

The second paragraph states that for meat chickens, '*a proportionately higher stocking density than for layer hens may be used*'. This reinforces CHOICE's interpretation that A2.1.4 sets a maximum stocking density for egg layers: not only does the reference to a higher stocking density **than for layer hens** suggest there is a maximum stocking density **for layer hens**, the possibility of a higher stocking density is introduced in a way that is limited to meat chickens.

The third and final paragraph of A2.1.4 contains a note which states '*Any higher bird density is acceptable only where regular rotation of birds onto fresh range area occurs...*'. CHOICE believes the correct interpretation of the note is that it only applies to stocking densities for meat chickens and not egg layers because the clear statement of a **maximum** for egg layers does not envisage circumstances in which a higher stocking density may be permitted. It is logical to confine the note to meat chickens because the idea of a proportionately higher stocking density is raised in the second paragraph in relation to meat chickens, in contrast with the first paragraph which states there is a maximum for egg layers.

CHOICE understands that the Egg Corporation's different interpretation of A2.1.4 is based on this note, however we disagree with their interpretation because the wording and structure of the clause makes it clear that the note is confined to meat chickens. Even if we were to accept that A2.1.4 permits stocking rates above 1,500 birds per hectare, we believe the clause would only permit an increase proportionate to the limit of 1,500 and only where it

⁵ 4th Edition, 'the Model Code'.

can be shown that there is regular rotation onto fresh range areas, which we understand is not the case with many large-scale 'free-range' egg operations.

27. CHOICE supports the Model Code definition because it is the result of a comprehensive process that involved input from government, industry and animal welfare experts. The Model Code was prepared by the Animal Welfare Committee (AWC), which had representation from the federal, state and territory agriculture departments and the CSIRO, under the Primary Industries Ministerial Council. CHOICE believes that any alteration to the maximum stocking density would only be acceptable through a review of the Model Code based on broad stakeholder input and independent, peer-reviewed research by animal welfare experts.
28. We understand that a Model Code review process is underway, but is likely to be a lengthy process as the Code covers all aspects of poultry welfare, meaning the free-range definition in the current Code may remain the best approach available for some time.

Legislative Approaches

29. Queensland and the Australian Capital Territory are the only jurisdictions to have free-range legislation. The ACT has labelling regulations requiring eggs labelled free-range to meet a maximum stocking density of 1,500 birds per hectare, while Queensland approaches free-range as a primary production question.
30. Until recently, the *Animal Care and Protection Regulation 2002 (QLD)* adopted the Model Code stocking density maximum of 1,500 birds per hectare. However, that Regulation was amended in June 2013 and an increased stocking density of 10,000 birds per hectare introduced, with producers allowed to exceed 1,500 where they meet specific conditions.

Certification schemes

31. There are a number of free-range egg certification schemes in the market that set stocking density limits at or below the 1,500 birds per hectare maximum permitted in the Model Code. For example:
 - Humane Choice: maximum 1,500 birds per hectare.
 - Free Range Poultry Association of Queensland: maximum 1,000 birds per hectare.
 - Australian Certified Organic: maximum 1,000 birds per hectare.
 - Free Range Farmers Association (Vic): maximum 750 birds per hectare.
32. The RSPCA's Approved Farming Scheme does not require that birds have access to an outside range but where there is access, it sets a maximum of 1,500 birds per hectare on a fixed range system. Producers may apply for approval for to up to 2,500 birds per hectare where there is rotational range access.

33. In October 2010, the Egg Corporation applied to the Australian Competition and Consumer Commission (ACCC) for approval of a Certification Trade Mark (CTM) that included a rule that the maximum stocking density for free-range eggs would be 20,000 birds per hectare. The ACCC rejected the application in its initial assessment in November 2012 on the basis that the rules may mislead or deceive consumers around 'free-range' egg production claims, stating:⁶

The proposed 20,000 birds per hectare is well above maximum stocking densities of the existing Model Code of Practice, state legislation and other standards, which generally prescribe maximum stocking densities of 1,500 birds per hectare.

34. The Egg Corporation withdrew the CTM application before the ACCC released a final decision.

35. CHOICE understands that the maximum stocking density under the previous Egg Corporation CTM was 1,500 birds per hectare.

36. The NSW Primary Industries Minister has recognised that consumers may be confused when trying to interpret the different certification schemes.⁷ While CHOICE notes that the NSW Food Authority has information about some certification schemes on its website,⁸ we don't think it is reasonable to expect consumers trying to make an informed choice to have to scroll through a website while they are at the supermarket. Further, the information is based on the flawed interpretation of the Model Code taken by the Egg Corporation.

Retailers

37. Coles has adopted a maximum stocking density of 10,000 birds per hectare for its own brand free-range eggs.⁹

38. To CHOICE's knowledge, Woolworths has not publicly announced a stocking density limit for its own brand free-range eggs. The Woolworths website states its free-range eggs meet the requirements in the Model Code and are labelled accordingly.¹⁰

⁶ Australian Competition and Consumer Commission *Initial assessment of Certification Trade Mark application CTM1390450 filed by the Australian Egg Corporation Limited* 2 November 2012, p 15.

⁷ The Hon Katrina Hodgkinson MP *Media Release: Government opposes Greens' Truth in Labelling Bill* 29 August 2013.

⁸ NSW Food Authority Labelling: Egg production systems <http://www.foodauthority.nsw.gov.au/consumers/food-labels/labelling-and-the-law/egg-labelling/#.Uh7M9tKnq-E>.

⁹ Coles website <http://www.coles.com.au/helping-australia-grow/responsible-sourcing-and-sustainability/cage-free-eggs>.

¹⁰ Woolworths website

http://www.woolworthslimited.com.au/page/A_Trusted_Company/Responsible_Sourcing/Animal_Welfare/.

Consumer detriment

39. Free-range eggs command a price premium which many consumers are prepared to pay in the belief that these products meet higher standards than the cheaper alternatives, barn and cage eggs.

40. The ACCC recognises free-range claims as 'credence claims' which it defines as:¹¹

Claims that give the impression that a product, or one of its attributes, has some kind of added benefit when compared to similar products and services.

The ACCC says credence claims can be made "as long as the claims are not misleading and can be substantiated".

41. However, the Egg Corporation has admitted that nearly a third of egg production uses stocking densities greater than 20,000 birds per hectare.¹² Given this admission, CHOICE believes it is likely that a further considerable proportion of egg production would use densities between the Model Code limit of 1,500 birds per hectare and 20,000 birds per hectare.

42. CHOICE believes that consumer detriment is caused by the wide variation in free-range egg stocking densities and the fact that a significant proportion of free-range eggs are produced under stocking densities that considerably exceed the Model Code limit.

43. The consumer detriment can be quantified by examining egg prices and claims. CHOICE examined the prices in a Sydney supermarket of 16 egg products in the three categories of cage, barn and free-range, finding that free-range commands a significant price premium. The average price per 100g of eggs from each production method was:¹³

- Cage eggs: 43c/100g
- Barn eggs: 80c/100g
- Free-range eggs: 93c/100g

44. CHOICE also compared the price of free-range eggs which had a stocking density declared on pack. The majority of products labelled free-range did not declare a stocking density. Of the 5 products that did, we found that the one product which met the Model Code definition of 1,500 birds per hectare was in fact cheaper than the brand that declared a stocking rate equivalent to 20,000 birds per hectare on its two products. The cheapest products were the two that declared a stocking density of 10,000 birds per hectare. The average cost per hundred grams according to stocking density was:

¹¹ Australian Competition and Consumer Commission "False or misleading claims"
<http://www.accc.gov.au/business/advertising-promoting-your-business/false-or-misleading-claims>.

¹² Australian Egg Corporation Limited "Fact Sheet: Free Range Stocking Densities".

¹³ CHOICE compared the prices and claims of eggs for sale in Coles Leichhardt on 24 August 2012.

- 1,500 birds per hectare - 98c/100g (1 product)
 - 10,000 birds per hectare - 69c/100g (2 products - different brands)
 - 20,000 birds per hectare - \$1.25/100g (2 products - same brand)
45. The comparison of egg prices and labelling shows that consumers buying free-range are paying more than double the average cost of cage eggs, and close to one-fifth more than barn eggs, demonstrating a considerable price premium for free-range eggs.
46. Further, just one of the sixteen free-range products declared a stocking density consistent with the Model Code definition. Two further products declared a stocking density that is nearly 7 times greater than the Model Code limit, and two declared a stocking density 14 times greater. The remaining 11 products did not declare a stocking density at all, and given the Egg Corporation's admission, it is reasonable to assume that a good number would be produced with stocking densities well in excess of 1,500 birds per hectare.
47. The comparison shows that consumers can have very little confidence they are getting what they pay for when they choose free-range eggs. In fact, in some cases, consumers are paying considerably more for eggs produced under lower standards.
48. Consumers in NSW therefore suffer detriment by being unable to make informed choices due to the lack of a consistent standard for free-range egg claims, and also by paying a premium for products that do not meet their expectations. We therefore believe there is a strong case for NSW Fair Trading to further investigate free-range egg claims and take enforcement action where those claims are clearly inconsistent with consumer expectations and the Model Code definition of free-range.

The need for enforcement to protect consumers

49. The absence of a nationally consistent and enforceable standard for free-range eggs means that consumers have little way of knowing whether free-range claims on egg cartons meet their expectations. It is clear that there is wide variation in stocking densities with a considerable proportion of free-range eggs appearing to be produced using stocking densities that considerably exceed the Model Code limit. While free-range is currently the fastest-growing category of egg sales, consumer confidence may diminish as consumers become aware that products do not meet their expectations.
50. CHOICE wants consumer protection authorities to further investigate free-range egg labelling and take enforcement action where there is evidence that claims are likely to mislead consumers - that is, where conditions do not meet consumer expectations and where stocking densities are higher than the Model Code definition.
51. In recent years, the ACCC has taken action against a number of companies for making credence claims around egg and poultry production that were likely to mislead consumers:

- **C.I. & Co Pty Ltd, 2011:** An egg substitution case where the Federal Court found the company had misled the public by labelling eggs 'free-range' when a substantial proportion of the eggs were that were from cage production. Justice North stated in his judgement that "The conduct amounts to a cruel deception of consumers who seek out free range eggs as a matter of principle."¹⁴
- **Rosie's Free Range Eggs, 2012:** An egg substitution case where the court found the company had misled the public by claiming eggs sold to business customers were free-range when a substantial proportion were cage eggs.¹⁵
- **Turi Foods, 2012:** In a case that also involved Baiada and Bartters (below), Turi Foods admitted to misleading conduct in claiming meat chickens were 'free to roam', agreeing to pay a \$100,000 fine and undertake corrective advertising.¹⁶
- **Baiada Poultry Pty Ltd and Bartter Enterprises Pty Ltd, 2013:** Baiada and Bartter contested the ACCC's case and the Federal Court found they had engaged in false, misleading and deceptive conduct with claims that meat chickens were 'free to roam'. In his judgement, Justice Tracey found that those words meant "the largely uninhibited ability of the chickens to move around at will in an aimless manner" when stocking rates were so dense that each chicken had an area that was less than the size of an A4 sheet of paper and could only move a metre or so before being obstructed by other chickens.¹⁷
- **Pepe's Ducks 2013:** The Federal Court fined the company \$375,000 and ordered it to undertake corrective advertising over misleading claims that its ducks were 'open range' and 'grown nature's way'. The ducks were found to be raised entirely indoors without access to the outdoors.

52. While the ACCC identified credence claims as an enforcement priority for 2013,¹⁸ to date it has not taken action against companies for having poor free-range standards.

53. CHOICE believes that there is evidence of systemic consumer detriment when it comes to free-range egg standards, with a significant proportion of the eggs currently labelled free-range failing to meet consumer expectations and being inconsistent with the Model Code definition of free-range. The evidence goes beyond the individual cases of misleading conduct where the ACCC has taken action, providing the grounds for a super-complaint and justifying enforcement action by NSW Fair Trading.

54. Based on the size of the NSW egg market and the evidence of systemic consumer detriment, CHOICE recommends that NSW Fair Trading further investigate free-range claims with a view to enforcement action where consumers may have been misled.

¹⁴ <http://www.accc.gov.au/media-release/court-penalises-wholesaler-for-cruel-deception-on-free-range-eggs>.

¹⁵ <http://www.accc.gov.au/media-release/sa-supplier-penalised-50000-for-egg-substitution>.

¹⁶ <http://www.accc.gov.au/media-release/court-finds-chicken-companies-made-false-and-misleading-claims-following-accc-action>.

¹⁷ <http://www.accc.gov.au/media-release/court-finds-chicken-companies-made-false-and-misleading-claims-following-accc-action>.

¹⁸ <http://www.accc.gov.au/about-us/australian-competition-consumer-commission/compliance-enforcement-policy>.

APPENDIX 1: Examples free-range egg packaging



