

MISLEADING THE ETHICAL CONSUMER: THE REGULATION OF FREE-RANGE EGG LABELLING

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In mid-2014, Australian consumer affairs ministers announced that they would together set 'a national, legally enforceable definition of free-range eggs'. A response to significant conflict, claims and counterclaims about what free-range should mean, the proposed code could take the form of a mandatory information standard under the Australian Consumer Law. This paper asks whether this approach would adequately respond to the underlying conflict between various actors as to what free-range means. Conflict over the meaning of free-range on the label is the latest expression in an ongoing series of challenges, defences and counter-challenges to the legitimacy of intense, industrial-scale animal food production and particularly conventional cage egg production. This paper briefly explains how it is that the regulation of welfare of layer hens is now largely a matter of voluntary labelling for consumer choice rather than mandatory government regulation of animal welfare in production conditions. It goes on to critically evaluate whether the current network of voluntary regulation of free-range labelling adequately informs consumers about animal welfare conditions using data collected about the claims on egg carton labels between 2012 and 2014 to do so. It goes on to assess the potential of a mandatory information code or other consumer regulation to improve animal welfare labelling on eggs.

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I INTRODUCTION

Consumers' intention to do the right thing is being exploited ... Their belief in the integrity of labelling is being destroyed. And their faith in the ability of consumers to effect ethical change is being shattered.¹

By the 1960s cage farming of hens had become the predominant method of egg production in the western world.² In conventional cage systems hens are

¹ Kelly Burke, 'Layers of Intrigue as the Barnyard Becomes the Battlefield', *The Sydney Morning Herald* (Sydney), 29 July 2006, 3.

typically kept in groups of five or six in wire cages with access only to water and a feed trough, no room to turn, move around, or stretch, and no opportunity to engage in instinctual behaviours such as dust bathing, scratching or pecking. Since they were first introduced, these 'battery' cages have been heavily criticised by animal rights activists as amongst the most industrialised and cruellest of animal food production practices.³

There have been some improvements in regulated animal welfare protections for caged hens over the years. These include government-mandated increases in cage size in many countries including Australia — although the total amount required is still less than one A4 sheet of paper per hen.⁴ Some jurisdictions, including the countries of the European Union,⁵ New Zealand,⁶

² See Annie Potts, *Chicken* (Reaktion Books, 2012) 139–73.

³ See, eg, Ruth Harrison, *Animal Machines: The New Factory Farming Industry* (Vincent Stuart Publishers, 1964) 37–61; F W R Brambell, *Report of the Technical Committee To Enquire into the Welfare of Animals Kept under Intensive Livestock Husbandry* (Her Majesty's Stationery Office, 1965); Peter Singer and Jim Mason, *The Ethics of What We Eat* (Text Publishing, 2006) 34–9. For summaries of animal welfare impacts of conventional cages vis-à-vis other systems, see Anonymous, 'Scientists' Assessment of the Impact of Housing and Management on Animal Welfare' (2001) 4 *Journal of Applied Animal Welfare Science* 3; M C Appleby and B O Hughes, 'Welfare of Laying Hens in Cages and Alternative Systems: Environmental, Physical and Behavioural Aspects' (1991) 47 *World's Poultry Science Journal* 109; D C Lay Jr et al, 'Hen Welfare in Different Housing Systems' (2011) 90 *Poultry Science* 278; Gaverick Matheny and Cheryl Leahy, 'Farm-Animal Welfare, Legislation, and Trade' (2007) 70(1) *Law and Contemporary Problems* 325; C M Sherwin, G Richards and C Nicol, 'Comparison of the Welfare of Layer Hens in 4 Housing Systems in the UK' (2010) 51 *British Poultry Science* 488.

⁴ Primary Industries Standing Committee, *Model Code of Practice for the Welfare of Animals: Domestic Poultry* (CSIRO Publishing, 4th ed, 2002) 25. The amount of space per hen in cages was increased from 450 to 550 square centimetres per hen in 2001 (with some variation depending on the size of the hen and how many in the cage). An A4 sheet of paper is 623.7 square centimetres.

⁵ Council Directive 1999/74/EC of 19 July 1999 Laying Down Minimum Standards for the Protection of Laying Hens [1999] OJ L 203/53.

⁶ National Animal Welfare Advisory Committee, *Animal Welfare (Layer Hens) Code of Welfare 2012* (at 6 December 2012). See, eg, at 12 (minimum standard 4) for an introduction of colony cages as an appropriate housing method. A minor increase in cage size was introduced in 2005 by the National Animal Welfare Advisory Committee, *Animal Welfare (Layer Hens) Code of Welfare 2005* (at 1 January 2005), which has been confirmed in the 2012 code: at 12 (minimum standard 4). See also at 23 (minimum standard 12(a)), which requires that all housing systems allow hens to express a 'range of normal behaviours ... [including] but not limited to nesting, perching, scratching, ground pecking, and dustbathing'; depending on when the particular system was first installed, it may have to satisfy these requirements by 2016, 2018, 2020, or 2022: at 23 (minimum standards 12(b)–(f)).

and (in effect) California and Michigan⁷ have now legally mandated the use of 'enriched' or 'colony' cages. These are larger cages with flaps to create a nesting box, perches and a scratch pad, which give the birds some opportunities to engage in natural behaviours. Australia has to date rejected the possibility of mandating such cages.⁸

Cage production (albeit enriched cages in some jurisdictions) remains the norm around the western world. The main policy response to concerns about the restriction of liberty involved in cage egg farming and the need for higher animal welfare production options is voluntary or mandatory labelling to allow consumers the opportunity to choose to buy non-cage eggs.⁹ As a number of commentators have pointed out, '[t]here appears to be a general — albeit vague — agreement among political actors in many countries' that 'soft' regulatory mechanisms such as labelling and voluntary accreditation standards are more legitimate and effective than 'hard' regulation such as bans and regulatory limits for dealing with all sorts of concerns with the contemporary

⁷ See Cal Health and Safety Code 14 § 25 990 (West 1999 & Supp 2009); *Animal Industry Act*, Mich Comp Laws § 287.746(2) (1988). In California and Michigan, citizen-initiated referenda have been passed providing that chickens and pigs cannot be tethered or confined in a way that prevents them from lying down, standing up, fully extending their limbs, and turning around freely. These laws have been interpreted in practice as requiring either enriched cages or free-range systems: Interview with Maurice Pitesky, Animal Welfare Scientist, University of California, Davis (University of California, Davis, 29 April 2015). See also Dan Charles, 'How California's New Rules Are Scrambling the Egg Industry' on The Salt, National Public Radio (29 December 2014) <<http://www.npr.org/sections/thesalt/2014/12/29/373802858/how-californias-new-rules-are-scrambling-the-egg-industry>>; Jonathan R Lovvorn and Nancy R Perry, 'California Proposition 2: A Watershed Moment for Animal Law' (2009) 15 *Animal Law* 149; J A Mench, D A Sumner and J T Rosen-Molina, 'Sustainability of Egg Production in the United States — The Policy and Market Context' (2011) 90 *Poultry Science* 229.

⁸ See below nn 17–23 and accompanying text.

⁹ See, eg, Commission of the European Communities, 'Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Options for Animal Welfare Labelling and the Establishment of a European Network of Reference Centres for the Protection and Welfare of Animals' (Report, No 584, 28 October 2009); Farm Animal Welfare Council, 'Report on Welfare Labelling' (Report, June 2006); D Fraser, 'Animal Welfare Assurance Programs in Food Production: A Framework for Assessing the Options' (2006) 15 *Animal Welfare* 93; Mara Miele and John Lever, 'Improving Animal Welfare in Europe: Cases of Comparative Bio-sustainabilities' in Terry Marsden and Adrian Morley (eds), *Sustainable Food Systems: Building a New Paradigm* (Routledge, 2014) 143.

industrial food system.¹⁰ Animal welfare in particular is seen as an 'ethical' issue with consumers expected to take responsibility for choosing animal food products in line with their own values.¹¹

This approach presumes that the market will track consumers' ethical preferences and provide the appropriate range of choice.¹² It also assumes that appropriate private voluntary accreditation and supply contract standards are available to back up and verify the various choices on the label. Under this approach, in theory the only government intervention required is enforcement of consumer protection laws to avoid misleading labelling.

In Australia, voluntary labelling has attracted considerable controversy and there has been much conflict over the meaning of the term free-range. As a result, Australian state, territory and federal consumer affairs ministers jointly announced in 2014 that they were considering setting 'a national, legally enforceable definition of free-range eggs'¹³ under the Australian Consumer Law ('ACL'),¹⁴ in the form of a mandatory information standard, which would define free-range and probably also require that all eggs be labelled as 'cage', 'barn' or 'free-range'.¹⁵ A consultation paper canvassing a

¹⁰ Mikael Klintman and Magnus Boström, 'Framings of Science and Ideology: Organic Food Labelling in the US and Sweden' (2004) 13 *Environmental Politics* 612, 613. See also Janice Albert (ed), *Innovations in Food Labelling* (FAO & Woodhead Publishing, 2009); Julie Guthman, 'The Polanyian Way? Voluntary Food Labels as Neoliberal Governance' (2007) *Antipode* 456; B Ilbery and D Maye, 'Marketing Sustainable Food Production in Europe: Case Study Evidence from Two Dutch Labelling Schemes' (2007) 98 *Tijdschrift voor Economische en Sociale Geografie* 507; Christine Parker, 'The Food Label as Governance Space: Free Range Eggs and the Fallacy of Consumer Choice' (2014) 35 *Recht der Werkelijkheid* 101.

¹¹ Mara Miele and Adrian Evans, 'When Foods Become Animals: Ruminations on Ethics and Responsibility in Care-full Practices of Consumption' (2010) 13 *Ethics, Place and Environment* 171.

¹² Cf Robin Jane Roff, 'Shopping for Change? Neoliberalizing Activism and the Limits to Eating Non-GMO' (2007) 24 *Agriculture and Human Values* 511; Deirdre Shaw and Iain Black, 'Market Based Political Action: A Path to Sustainable Development?' (2010) 18 *Sustainable Development* 385.

¹³ Esther Han, 'Free-Range Egg Will Get Legal Definition', *The Sydney Morning Herald* (Sydney) 14 June 2014, 17.

¹⁴ The Australian Consumer Law is the *Competition and Consumer Act 2010* (Cth) sch 2. Alternatively the code could take the form of a mandatory or voluntary consumer code under ss 51AE(1)(a)-(b).

¹⁵ See NSW Fair Trading, 'NSW To Lead Work on Egg Labelling' (Media Release, 13 June 2014) <http://www.fairtrading.nsw.gov.au/ftw/About_us/News_and_events/Media_releases/2014_media_releases/20140613_nsw_to_lead_work.page?>. See also Han, above n 13. Note that because of Australia's federal system, consumer protection law is promulgated and adminis-

number of options was released in October 2015.¹⁶ This paper addresses the desirability of a mandatory information standard by evaluating the impact of the current voluntary labelling for consumer choice approach on the market for retail eggs.

Part II of this paper briefly sets out the regulatory policy context for the current contest over free-range claims on egg carton labels. This paper argues that free-range labelling has become an issue because of a lack of mandatory government regulation of animal welfare in egg production.

Part III of this paper sets out the methodological approach used to ‘backwards map’ contested free-range egg labels in order to evaluate the impact of the current voluntary labelling system. It does so by collecting data on (a) the animal welfare claims made on free-range egg carton labels in Australia between 2012 and 2014; (b) the various public and private standards for free-range and animal welfare behind the label claims; and (c) the range of animal welfare practices used to produce eggs labelled free-range. These data are used to evaluate the quality of information provided by free-range egg labels, whether or not they are making animal welfare practices in egg production more transparent, and whether labelling is associated with real change in the animal welfare standards in production of eggs in Australia.

Part IV reports the findings of this evaluation. It finds that eggs are already labelled ‘cage’, ‘barn’ or ‘free-range’ in retail outlets. This appears to have encouraged an expansion in sale and consumption of a range of choices of free-range labelled eggs, and some innovation in small-scale and higher animal welfare production. However, this means that the term free-range encompasses a wide — and confusing — variety of eggs produced under different conditions and different accreditation systems. Overall there have been only minor improvements in information about different free-range egg production systems, and probably only minor improvement in the production systems used by most large-scale producers.

tered via a cooperative scheme between the federal government and the states and territories, and with a uniform law, the ACL, enforced by both federal and state agencies. Policy decisions like the decision to promulgate a standard for free-range are made by the Legislative and Governance Forum on Consumer Affairs which consists of all Commonwealth, state, territory and New Zealand ministers responsible for fair trading and consumer protection laws: Legislative and Governance Forum on Consumer Affairs, *Members* <<http://consumerlaw.gov.au/consumer-affairs-forum/members/>>.

¹⁶ Consumer Affairs Australia and New Zealand, ‘Free Range Egg Labelling’ (Consultation Paper, Australian Government, The Treasury, October 2015).

Part V concludes that the current network of public and private regulation of the meaning of free-range is inadequate to accurately inform consumers and may not drive sufficiently deep or widespread change on its own. This is unlikely to improve under a mandatory information standard. Although Australian Competition and Consumer Commission (‘ACCC’) enforcement action against misleading and deceptive free-range egg labelling is welcome and necessary, it is not sufficient to rely on consumer protection enforcement alone. A more sustainable system for animal welfare regulation is required, one that allows for multi-stakeholder input into a legitimate, transparent process with standards that are properly monitored and enforced. Substantive changes to, and greater enforcement of government regulation of, farm animal welfare in Australia is urgently needed.

II HOW FREE-RANGE BECAME AN ISSUE

Over the last 20 years Australian governments have minimised their involvement in regulating animal welfare in food; especially in egg production or animal welfare claims on labels. This does not mean a regulatory vacuum. Rather it means there is a network of public and private actors who sometimes compete, sometimes contest and sometimes complement each other in regulating animal welfare through voluntary and contractual accreditation standards, labelling claims, minimal government regulation of animal welfare practices and recently, consumer protection enforcement against misleading and deceptive conduct in advertising and labelling.

A No Ban on Battery Cages

In 2000, despite decades of active campaigning by Australian animal advocacy organisations and strongly felt public opinion,¹⁷ Australia comprehensively rejected the possibility of banning conventional cages or requiring enriched

¹⁷ See, eg, Peter Parbery and Roger Wilkinson, ‘Victorians’ Attitudes to Farming’ (Research Paper No 2012.3, Department of Primary Industries, January 2012); Angela Southwell, Amarylise Bessey and Barbara Barker, ‘Attitudes towards Animal Welfare’ (Research Report, TNS Social Research, September 2006); Voiceless, ‘From Label to Liable: Scams, Scandals and Secrecy — Lifting the Veil on Animal-Derived Food Product Labelling in Australia’ (Report, May 2007). See also Christine Parker et al, ‘The Hidden Hand of the Market: Who Regulates Animal Welfare under a Labelling for Consumer Choice Approach’ (2016) 10 *Regulation & Governance* (forthcoming).

cages for layer hens.¹⁸ Instead, Australian state, territory and federal governments adopted a policy of ‘industry-led consumer choice’ in which cage, barn and free-range eggs would be clearly differentiated and labelled.¹⁹ This was based on a comprehensive review of layer hen housing and egg labelling which recommended that the preferable regulatory system was a national egg production and labelling quality assurance system to be developed and implemented by the egg industry body.²⁰ This would not be legislated in the first instance,²¹ but would be reviewed by government after 12 months with the possibility of enforceable standards under fair trading legislation at that point if necessary.²² The Australian Egg Corporation Limited (‘AECL’) was duly created (financed by levies from all egg producers) and introduced the Egg Corp Assured Quality Assurance Program to assist industry to comply

¹⁸ SCARM Working Group, ‘Synopsis Report on the Review of Layer Hen Housing and Labelling of Eggs in Australia’ (Synopsis Report, 22 June 2000). The Primary Industries Ministerial Council affirmed this decision and the result was the fourth edition of the model code of practice: see Primary Industries Standing Committee, above n 4; cf above nn 6–7 and accompanying text.

¹⁹ SCARM Working Group, above n 18, 4. The review recognised that an ‘increasing proportion of the general community’ oppose ‘conventional laying cages on animal welfare grounds’: at 3; and there were different welfare problems with all three layer hen housing systems in intensive commercial production and that they could not be meaningfully compared and ranked: at 24. Moreover investment in new sheds was very expensive for industry — only 10 per cent of consumers were buying non-cage eggs, and, the European Union ban on battery cages was still 12 years away from taking effect and other countries had not followed suit: at 25. There was also concern about the possibility of increased competition from imports of liquid and dried eggs from Asia for use in processed foods (the fastest growing and most cost sensitive sector of the egg industry) if the rules were changed: at 25. The ‘vision’ of the report is described at 3–4 as

quality assured health and welfare of fowls in a commercially viable, competitive and environmentally friendly egg industry producing a regular, reliable and affordable supply of eggs allowing for informed choice by consumers and according to contemporary standards for food safety and occupational health.

²⁰ *Ibid.*

²¹ *Ibid.* 4.

²² *Ibid.* 30–1, recommending that:

Implementation of national standards for egg labelling to be reviewed jointly by the egg industry and government after twelve months of operation. The review to determine the level of take-up of the standards and if any changes to them may be required. If implementation is not considered satisfactory, then uniform national legislation to enable stricter regulation of the standards should be immediately developed (possibly under TPA/Fair Trading legislation).

with all relevant legal requirements and guidance for egg production — including food safety, bio-risk security and animal health — and to differentiate cage, barn and free-range eggs in marketing.²³

Animal rights organisation Animal Liberation, and the New South Wales Egg Marketing Board, had agreed as early as 1985 on a scheme for allowing farmers to market their eggs as free-range if they ‘ensure that hens are not exposed to artificial light, do not have their beaks trimmed and have access to green feed and open spaces’.²⁴ After the 2000 decision not to ban cages and the introduction of the AECL’s quality assurance scheme, free-range labelled eggs became a much bigger part of the market. They also became a focus for activism by allowing consumers to ‘boycott’ cage eggs by choosing free-range instead.²⁵ Industry data show that at least 38 per cent of retail eggs sold in Australia are now free-range compared with 8 per cent in 2001.²⁶ Our own fieldwork²⁷ indicates that by 2014, 55 per cent of the shelf space in major supermarkets was devoted to free-range eggs.²⁸ Moreover, according to research by consumer agency Choice in 2013, free-range eggs commanded a price premium on average over 50 per cent more than cage eggs (93 cents compared with 43 cents per 100 grams).²⁹

²³ The AECL was created under the *Egg Industry Services Provision Act 2002* (Cth) s 6, was registered with the Australian Securities and Investments Commission on 18 November 2002, and commenced operations on 1 February 2003; see AECL, *About Us* (2009) <<https://www.aecl.org/about-us/>>.

²⁴ Greg Roberts, ‘The Free-Rangers and the Corporation Have Wrapped Up the Storm in the Egg-Cup’, *The Sydney Morning Herald* (Sydney), 13 September 1985, 2.

²⁵ See, eg, Animals Australia, *Here’s How We End Factory Farming, Make It Possible Campaign* <http://www.makeitpossible.com/take_action/>. The ‘Make It Possible Campaign’ suggests to consumers that government will not act but that consumers ‘can end animal abuse’ by making a ‘kinder choice’ in refusing to buy factory-farmed products, and therefore halting the demands for animal cruelty.

²⁶ AECL, *Annual Report 2012–2013* (2013) 3; Christine Parker, ‘Voting with Your Fork? Industrial Free-Range Eggs and the Regulatory Construction of Consumer Choice’ (2013) 649 *Annals of the American Academy of Social and Political Science* 52, 53.

²⁷ See below Part IV.

²⁸ Shelves were photographed and the proportion devoted to free-range and organic eggs was calculated and averaged: see 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 *Journal of Bioethical Inquiry* 165, 168.

²⁹ Choice, ‘Free-Range Egg Claims in NSW: Super-Complaint to NSW Fair Trading’ (29 August 2013) 11. Choice found barn eggs sold on average for 80 cents per 100 grams. There is however a huge range in free-range egg prices. See also Consumer Affairs Australia and New

B Conflict over Free-Range

As the market for free-range eggs has grown, so too has conflict and contention over the meaning of the various free-range, cage-free and animal welfare claims made on egg carton labels. The conflict is largely over intensity and scale of production.

Consumer and animal advocates question whether the label free-range can ever be legitimately applied to eggs produced in intensive large-scale, barn-based facilities. Yet it is precisely this sort of facility that produces most eggs for supermarket sale. Critics argue that the term free-range should only apply to eggs produced in smaller-scale pasture-based systems.³⁰

On the other hand, large-scale producers argue that intensive production is necessary to produce sufficient eggs at a commercially realistic price. They argue that allowing hens to move around a barn or aviary with litter on the floor, and with or without access to a range, is the most practical option for large-scale cage-free production. This allows hens to express natural behaviours such as foraging, pecking and dust bathing and gives consumers the cage-free option many prefer.³¹

Animal welfare scientists question whether any cage-free system (barn or free-range) is in fact better for animal welfare under large-scale commercial production conditions. Much animal welfare research suggests that cages are necessary for hen health in intensive production.³² This is because the cages protect hens from harming themselves and each other through feather-pecking, vent-pecking, cannibalism and fear responses in intense crowded conditions where natural behaviours are not possible. They also protect hens from exposure to predators and diseases. Thus literature suggests that enriched cages might represent the best balance between hen health and ability to express natural behaviours under 'commercially realistic' intensive

Zealand, 'Free Range Egg Labelling' (Consultation Paper, October 2015) 46, in which the reported data shows a similar price difference to that collected by the AECL and NSW Fair Trading.

³⁰ Christine Parker and Gyorgy Scrinis, 'Out of the Cage and into the Barn: Supermarket Power Food System Governance and the Regulation of Free Range Eggs' (2014) 23 *Griffith Law Review* 318, 338; Parker, Brunswick and Kotey, above n 28; Parker et al, above n 17. For a similar debate in the United States about 'organic' labelling of eggs, see The Cornucopia Institute, 'Scrambled Eggs: Separating Factory Farm Egg Production from Authentic Organic Agriculture' (Research Report, 2010).

³¹ The Cornucopia Institute, above n 30, 6.

³² See above n 3.

large-scale production conditions.³³ Yet the inherent restriction on liberty and ability to express natural behaviours in cages makes them completely unacceptable to animal rights advocates and many consumers.

This makes free-range both popular and fraught. The small-scale pasture-based farming that consumers imagine free-range to be may not be commercially realistic, yet large-scale free-range farming neither matches consumer expectations nor always adequately manages the health and welfare of hens as well as consumers might imagine.

As leading animal welfare scientist Michael C Appleby, and B O Hughes, point out, the issue is one of the expense of appropriate animal welfare management in cage-free systems.³⁴ He comments that '[t]here is ... a particular danger with alternative [to cage] systems [for egg-laying hens] that market forces rapidly lead to overcrowding and inadequate supervision and erode any welfare advantage they might have possessed',³⁵ and that 'competition between producers on price, resulting in attempts to reduce costs by increasing the number of birds in a house or by reducing input of labour per bird, is likely to reduce welfare'.³⁶

C No Mandatory Labelling

The contest over the scale of production that counts as free-range became public in 2008 when consumer organisation Choice gave the AECL a 'Shonky Award' for its definition of free-range with the comment that

most consumers were probably unaware that the scheme allowed up to 14 free-range birds to be packed into each square metre of barn ... Moreover, the scale

³³ These advantages and disadvantages of cage and non-cage systems in commercial large-scale intensive egg production are set out in the animal welfare science references: see above n 3. Proponents of free-range systems suggest that hens will behave appropriately when afforded sufficient opportunity for these behaviours and that the range can be appropriately planted and designed to provide adequate protection from fear, predators and diseases. However, it has also been suggested that adequate management and conditions are not possible for free-range and barn housing systems in commercially realistic large-scale egg production, and that enriched cages maximise the best and minimise the worst of cages on the one hand and barn or free-range systems on the other: see Coalition for Sustainable Egg Supply, 'Final Research Results' (Report, 2015).

³⁴ Appleby and Hughes, above n 3, 123–4.

³⁵ *Ibid* 124.

³⁶ *Ibid* 123.

of the giant factory sheds still used by many producers classified as free-range by the corporation meant that many birds were incapable of finding their way to the great outdoors.³⁷

The AECL responded that the correct number was 12 rather than 14 and that they were

not about to start strong-arming chickens out the barn door each morning, with an AECL representative noting: ‘We need to ensure each bird has access to an open range, but it’s a chicken’s freedom of choice.’³⁸

In 2009, New South Wales Greens member of Parliament John Kaye prompted much media debate by issuing a press release showing that many more eggs were being sold as free-range than could actually be produced by the number of free-range hens in Australia according to the industry’s own statistics.³⁹ Subsequently, fair trading regulators established that some egg producers had indeed engaged in misleading and deceptive conduct by putting cage eggs in cartons marked free-range in order to meet high demand for free-range eggs.⁴⁰

³⁷ Kelly Burke, ‘And the Shonky Award Goes to ...’, *The Sydney Morning Herald* (online) (26 November 2008) <<http://www.smh.com.au/news/national/shonky-awards-name-most-dodgy-products/2008/11/25/1227491548408.html>>.

³⁸ *Ibid.* See also Choice, ‘Choice Awards: The Shonkys’ (Information Sheet, December 2008) 15.

³⁹ John Kaye, ‘Free-Range Egg Consumers Taken for a Ride’ (Media Release, 6 September 2009).

⁴⁰ *Australian Competition and Consumer Commission v Bruhn* (2012) ATPR ¶42-414. In this case, Bruhn did farm her own free-range eggs, but she acquired additional eggs from cage egg producers to increase her volume of sales and sold them under her own free-range branding. She was penalized \$50 000 and ordered to publish a corrective advertisement and letter to customers. See also *Australian Competition and Consumer Commission v C I & Co Pty Ltd* [2010] FCA 1511 (23 December 2010), where the respondent acquired both cage and free-range eggs from other producers and supplied them to cafes, restaurants and shops prominently labelled ‘free-range’ and later ‘fresh range’ even though a substantial proportion were not free-range — the Court ordered penalties of \$30 000 and \$20 000 to be paid, plus corrective advertising and letters to customers; *Australian Competition and Consumer Commission v G O Drew Pty Ltd* [2007] FCA 1246 (16 August 2007), where the respondent displayed an organic accreditation logo on egg cartons when the eggs supplied had no organic accreditation. The respondent had trouble sourcing a consistent supply of organically accredited eggs and substituted non-accredited eggs when it ran out of supply. (Note that organic eggs must be free-range according to organic accreditation schemes.) The respondent was ordered by the Federal Court to contribute \$270 000 towards the development of a national organic standard.

In 2001 the Australian Capital Territory passed legislation mandating that all eggs sold at retail be labelled with the production method used (cage, barn or free-range) on the carton and on the retail shelf together with a brief description of the method (based on the *Model Code of Practice for the Welfare of Animals: Domestic Poultry* ('*Model Code*'))⁴¹ and a red line placed along the edge of shelves where cage eggs were displayed.⁴² Consumer and animal activists argued that similar rules mandating labelling of egg production method and defining free-range should be implemented nationally via the *Australia New Zealand Food Standards Code*.⁴³ In 2011, however, a national review of food labelling regulation and policy determined that animal welfare is a 'consumer values' issue that did not warrant either mandatory labelling requirements nor legislated definitions of the claims (such as free-range) used.⁴⁴ Since 2011, the Australian Greens party has also made a number of attempts to introduce mandatory labelling of the production system used in egg production and to define free-range in various individual states and territories, but all have so far failed to pass into law.

This has left the making of animal welfare and cage-free claims on labels and the meaning of the terms used largely to a combination of producers' and retailers' discretion and 'private' regulation via various voluntary accreditation and logo schemes.⁴⁵

⁴¹ Primary Industries Standing Committee, above n 4.

⁴² *Eggs (Labelling and Sale) Act 2001* (ACT).

⁴³ Food Standards Australia New Zealand, *Australia New Zealand Food Standards Code* (at 20 December 2000).

⁴⁴ Food Labelling Law and Policy Review Panel, 'Labelling Logic: Review of Food Labelling and Policy' (Report, 2011); see also Alex Bruce, 'Labelling Illogic? Food Animal Welfare & the Australian Consumer Law [1]' (2012) 7 *Australian Animal Protection Law Journal* 5; Australia and New Zealand Ministerial Forum on Food Regulation, 'Overarching Strategic Statement for the Food Regulatory System' (Department of Health, Australian Government, 2013) 9.

⁴⁵ See below Part IV(B) table 3.

D *The Ambiguous and Contested Definition of Free-Range in the Model Code*

The only official definition of free-range in Australian regulation and policy is the minimal definition in the *Model Code*.⁴⁶ The various model codes of practice for food animals — including poultry — have status as guidance only in most states and territories.⁴⁷ Indeed their legal status is that they largely operate as safe harbours defining practices that are considered acceptable in food animal farming that would otherwise amount to animal cruelty under animal welfare legislation and not as aspirational standards.⁴⁸ Most states and territories do have animal welfare laws that prohibit cruel treatment of all animals.⁴⁹ Only Queensland has legislatively mandated compliance with the *Model Code* for domestic poultry across all production systems.⁵⁰ The Australian Capital Territory has banned cages and legislated for the conditions for barn and free-range production in the *Model Code*.⁵¹ The other states have only mandated the space requirement in cages as recommended by the *Model Code*.⁵² This means that the *Model Code* is not proactively enforced through monitoring and inspection by government agencies in most states. Government has largely left it to the AECL's voluntary quality assurance

⁴⁶ This was promulgated by the Primary Industries Ministerial Council, a collaborative working group between state and federal governments and other relevant agencies such as the Commonwealth Scientific and Industrial Research Organisation ('CSIRO').

⁴⁷ See Deborah Cao, *Animal Law in Australia and New Zealand* (Thomson Reuters, 2010) 135, 140; Arnja Dale, 'Animal Welfare Codes and Regulations: The Devil in Disguise?' in Peter Sankoff and Steven White (eds), *Animal Law in Australasia: A New Dialogue* (Federation Press, 2009) 174; Steven White, 'The Rationality of Animal Suffering in Australian Law' in Thierry Auffret Van Der Kemp and Martine Lachance (eds), *Animal Suffering: From Science to Law* (Thomson Reuters, 2013) 275.

⁴⁸ Graeme McEwen, *Animal Law: Principles and Frontiers* (Barristers Animal Welfare Panel, 2011) 1–2; Siobhan O'Sullivan, *Animals, Equality and Democracy* (Palgrave Macmillan, 2011); See also above n 47.

⁴⁹ O'Sullivan, above n 48; McEwen, above n 48.

⁵⁰ *Animal Care and Protection Act 2001* (Qld); *Animal Care and Protection Regulation 2012* (Qld) sch 1, sch 2 regs 2–3.

⁵¹ *Animal Welfare Act 1992* (ACT) s 9A(1). However, cage eggs can still be sold in the Australian Capital Territory. Cage production was banned after the only cage facility was shut down under an agreement between the Australian Capital Territory government and the operator of the facility.

⁵² *Prevention of Cruelty to Animals (Domestic Fowl) Regulations 2006* (Vic) regs 7–9; *Care and Protection Regulation 2012* (Qld) sch 1; *Animal Welfare Regulations 2012* (SA) reg 23; *Animal Welfare Regulations 2013* (Tas) reg 6; *Animal Welfare (Commercial Poultry) Regulations 2008* (WA).

standard to both interpret and apply the *Model Code* to egg production and labelling for producers and retailers who use it.

The *Model Code* applies to both layer hens and meat chickens. It states the following very minimal definitions for different production systems for these birds:

- 2.1.1.1 Birds in cage systems are continuously housed in cages within a shed.
- 2.1.1.2 Birds in barn systems are free to roam within a shed which may have more than one level. ...
- 2.1.2.3 Birds in free-range systems are housed in sheds and have access to an outdoor range.⁵³

It also sets out various other requirements for each system. In relation to free-range systems, the *Model Code* provides that:

- 2.4.5.3 All birds when fully feathered must have ready access through openings to the outdoor range during daylight hours for a minimum of 8 hours per day. Openings should be of a size and number and be evenly distributed to allow easy entry and exit for the birds with no impediments.
- 2.4.5.4 Birds on the range must have ready access to shaded areas and shelter from rain, and windbreaks should be provided in exposed areas.
- 2.4.5.5 Every reasonable effort must be made to provide protection from predators at all times.⁵⁴

There are some further provisions about the state of the range but no specific provisions about the indoor condition in which free-range hens are kept nor management practices such as beak trimming. The most controversial clause concerns outdoor stocking density in free-range systems. It provides:

For layer hens a maximum of 1500 birds per hectare. ... When meat chickens use only some weeks of the 10 week cycle on pasture (e.g. 4 weeks) a proportionately higher stocking density than for layers may be used. ... NB: Any higher bird density is acceptable only where regular rotation of birds onto fresh

⁵³ Primary Industries Standing Committee, above n 4.

⁵⁴ Ibid.

range areas occurs and close management is undertaken which provides some continuing fodder cover.⁵⁵

There is considerable contestation as to whether it is intended to allow only free-range meat chickens to be stocked at a density higher than 1500 birds per hectare (as long as there is rotation of the range) or whether it can also apply to layer hens. The AECL and larger egg producers have interpreted the *Model Code* to mean that there can be an outdoor stocking density for layer hens higher than 1500 hens per hectare where there is rotation of birds onto fresh range areas.⁵⁶ However, Choice and various small-scale free-range egg farmers argue that the most natural reading of the *Model Code* is that stocking densities higher than 1500 per hectare are only available for meat chickens.⁵⁷

The only government oversight over this debate has been enforcement of the general prohibition on conduct that misleads or deceives or is likely to mislead and deceive in trade and commerce by the ACCC and state fair trading agencies.

E *Consumer Protection Enforcement against Misleading and Deceptive Conduct*

Conflict over the interpretation of the outdoor stocking density clause in the *Model Code*, and the meaning of free-range, reached a peak in 2012. At that time the ACCC indicated it would refuse trademark approval to the AECL's revision of its quality assurance scheme on the basis that its interpretation of the definition of free-range in the *Model Code* was likely to mislead and deceive consumers, and thus contravene the ACL.⁵⁸ The ACCC pointed to the AECL's proposal that hens could be stocked at 20 000 hens per hectare outdoors, and also its failure to address how long the hens actually spent outside, what enrichment and protection there would be for the hens against

⁵⁵ *Ibid* app 2.1.4.

⁵⁶ AECL, 'Free Range Stocking Density' (Fact Sheet, 2012) para 3.

⁵⁷ See, eg, 'No Eggs "Free-Range" in Queensland: Choice', *Brisbane Times* (Brisbane), 24 July 2013.

⁵⁸ ACCC, 'Initial Assessment of Certification Trademark Application CTM1390450 Filed by the Australian Egg Corporation Limited' (2012). This assessment defines free-range as 20 000 birds per hectare: at [46]; with no guarantees about how long the hens actually spent outside, what enrichment and protection there would be for the hens and no prohibition on beak trimming or other practices seen as cruel by many consumers and activists.

beak trimming and other practices seen as cruel by many consumers and activists.⁵⁹ In particular the ACCC was ‘concerned’ that:

an ordinary or reasonable consumer would be likely to form the impression that eggs bearing the proposed [certified trademark (‘CTM’)] and marked as free range would be produced in an environment in which laying birds regularly access an attractive outdoor range and have sufficient space available to move freely and behave naturally indoors and outside. ...

The ACCC considers that at outdoor stocking densities of up to 20,000 birds per hectare, range areas will be rapidly denuded if all birds are ranging each day. The lack of a requirement in the AECL’s CTM Rules for regular range rotation means the Rules do not ensure that ranges will be sufficiently attractive to encourage most birds to leave the shed. ...

Such high stocking densities appear to reflect an expectation that only a small proportion of birds will access the range and this is inconsistent with consumer expectations of free range egg production systems.⁶⁰

Fair trading regulators had already established that some egg producers had engaged in misleading and deceptive conduct by putting cage eggs in cartons marked free-range in order to meet high demand for free-range eggs.⁶¹ Since 2012, the ACCC has also taken enforcement action against a number of other egg producers on the basis that their large-scale, intensive, barn-based production methods are misleadingly labelled free-range.⁶²

Consumer agency Choice has also remained active in the debate, campaigning, publishing statistics and making a ‘super-complaint’ to NSW Fair Trading in 2013 claiming that:

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 ...

⁵⁹ See below Part IV(B) table 3.

⁶⁰ ACCC, ‘Initial Assessment of Certification Trademark Application’, above n 58, [93]–[96].

⁶¹ See above n 40.

⁶² See below nn 100–8 and accompanying text.

[F]ree-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.⁶³

It was this complaint that prompted the recommendation for a mandatory information standard to define free-range and require labelling of production method for eggs under the ACL.⁶⁴

III EXPLANATION OF METHODOLOGY

The current consumer choice approach to food system governance presumes that labels can sufficiently inform consumers about the production practices used to make their food, and that consumers can then use that information to make purchasing decisions based on their own values. These ‘votes’ with the shopping dollar in turn feed back into retailer choices and producer practices. This makes the food label a highly contested ‘governance space’ in which a network of government, industry and civil society actors all vie for influence over what can be put on the label — and also what this means in terms of how that food is actually produced.⁶⁵ Consumers are increasingly expected to ‘vote’ with their shopping dollar to address social, environmental and ethical issues through market-based political action rather than direct government regulation.⁶⁶ This makes the product label — in contrast to the legislature or courts — an important space for democratic engagement. It is one of the most visible and accessible spaces in which citizen-consumers can critique and change the networks of public and private actors that govern the practices that produce the food they buy and eat.

Parker previously proposed a methodology for ‘backwards mapping’ the food label as governance space in order to critically evaluate the extent to which particular food label claims enable citizens’ democratic engagement in the food system.⁶⁷ This methodology starts with what the consumer sees in the market — food labelling and marketing claims — and then traces back the

⁶³ Choice, ‘Free-Range Egg Claims in NSW’, above n 29, 4.

⁶⁴ NSW Fair Trading, ‘NSW Fair Trading Response to CHOICE Super Complaint on Free-Range Egg Claims in NSW’ (Department of Finance and Services, 7 December 2013) 9 [3.4].

⁶⁵ See Parker, ‘The Food Label as Governance Space’, above n 10.

⁶⁶ Shaw and Black, above n 12.

⁶⁷ Parker, ‘The Food Label as Governance Space’, above n 10.

networks of public and private governance efforts that create and support the claims on the label, and finally, the underlying production practices themselves. The remainder of this article uses this methodology to evaluate current Australian free-range egg labelling practices, and goes on to suggest what regulatory measures might be taken to improve democratic engagement in animal welfare in egg production.

The data collection and analysis took place in three steps. The first step was a broad sweep of what free-range eggs were available for retail sale in a selection of supermarkets and alternative retail outlets (small fresh produce stores, urban markets, organic and wholefoods stores, and farmers' markets) in Melbourne⁶⁸ at three points in time: 2012, 2013 and 2014.⁶⁹

In each case the retail display and context of the eggs was observed and noted, the shelf space photographed and one carton of each of the free-range and organic⁷⁰ labelled eggs purchased. The images, information and evidence visible to consumers about how the eggs were produced, including the branding and labelling on packaging and associated websites, and claims made explicitly (written or spoken) and implicitly (pictures, signs and symbols and by context) about the ethical values instantiated in the product and its production, were noted. Particular attention was paid to whether the consumer is presented with any visual appeals to regulatory support (eg credence claim accreditation logos or mandatory labels) to evidence and legitimise the claims made. Observations were also made as to what changed over the sample periods. This data enables us to assess the information provided by the labels and whether or not the labels are improving the transparency of the egg production industry.

⁶⁸ In 2012 the same information about eggs in the Australian Capital Territory was also collected as a point of comparison since the Australian Capital Territory has mandatory labelling laws: *Eggs (Labelling and Sale) Act 2001* (ACT). Little difference was found and therefore no further data was collected in later years.

⁶⁹ We collected free-range, barn and organic labelled egg cartons from major supermarkets in a variety of locations around Melbourne in February and March 2012 (with another check in September 2012 for some cartons); and again in the same supermarkets in September and October 2013, as well as October and November 2014. See also Parker, 'The Food Label as Governance Space', above n 10; Parker and Scrinis, above n 30.

⁷⁰ We include organic as well as free-range eggs because the major organic certifications in Australia and internationally require eggs to be free-range: see Australian Certified Organic, 'Australian Certified Organic: Standard 2013' (2013); National Association for Sustainable Agriculture Australia, 'NASAA Organic Standard' (2004). In Australia many more eggs labelled free-range are sold than eggs labelled organic.

In the second step, the various free-range claims on the packets were compared with information about the actual production of the eggs by documentary sources including the brand owners' websites, technical literature, media reporting, activist documentation and websites, interviews with producers and activists, site visits,⁷¹ legal enforcement cases and other matters in which free-range claims were investigated. These observations were compared with data about whole egg production and retail activity from industry reports⁷² and through media reporting. Each accreditation system appealed to in the labelling and marketing of the eggs was also researched via the various accreditation organisations' websites, as well as interviews with a total of 24 representatives from each accreditation system, the animal welfare and consumer advocacy organisations that had participated in the debate over free-range egg labelling, and a range of smaller-scale free-range farmers (some who did and some who did not use accreditation).

The aim was to uncover or 'backwards map' the various formal and informal governance arrangements that support and stabilise the relationships along the food chain, the representations made to the consumer and how they are contested. This allows assessment of whether the information on the labels is accurate or misleading and whether change is occurring in actual production practices or not.

The third step draws conclusions on the basis of the data collected in the previous steps about the values and interests emergent from the network of regulation behind the label. This is the basis for an assessment of how well the current regulatory network addresses the substantive values of animal welfare that the regulatory policy of consumer choice is supposed to address, and how it might be improved.

The results of steps one and two are set out in Part IV of this paper. The analysis from step three is set out in Part V of this paper.

⁷¹ Full visits were only made available by alternative, small-scale producers; other sites could be observed by the researcher driving to the outside or virtually via Google Earth.

⁷² See, eg, IBISWorld, 'Eggs Farming in Australia' (Industry Report No A0172, October 2014).

IV FREE-RANGE CLAIMS ON AUSTRALIAN EGG LABELS AND THE REGULATORY NETWORK BEHIND THE LABELS

A Are Labels Improving Over Time?

The terms used to describe eggs on carton labels can include cage-free, barn or barnyard, free-range, pastured, organic, biodynamic, vegetarian, grain-fed, (farm) fresh, field range, ethical, carbon-neutral, family (farm), quality, open range, and natural.⁷³ Despite the lack of mandatory labelling legislation, most retail eggs in all outlets do clearly show the production system used — cage, barn or free-range. Moreover, since at least 2009, supermarkets have intentionally separated cage, barn and free-range eggs with cage eggs often on the bottom shelves, enabling and possibly prompting consumers to choose cage-free.⁷⁴ Average shelf space dedicated to the display of free-range eggs of various brands marginally increased from 50 per cent to 55 per cent from 2012 to 2014, a larger space than the actual 38 per cent market share for free-range according to industry statistics. Moreover cage eggs are often in plainer packaging on the bottom shelves. In the Australian Capital Territory, in compliance with the law, they are displayed with a red line along the shelf.

Table 1: Free-Range (Including Organic) Egg Brands Available in Melbourne 2014

Brand Owner or Producer	Brands	Price per dozen	Accreditation on label
Super-market Own Brands	Coles — Coles Free Range Eggs	\$4–6	No free-range accreditations shown
	Woolworths — Woolworths Select Free Range; Macro		All probably have Egg Corp Assured accreditation but not shown on label
	Wholefoods Market Free Range (introduced in 2014); Macro		
	Wholefoods Market Organic Free Range (introduced in 2013)		Product of Australia logo
	IGA — Signature		National Heart Foundation
	Aldi — Lodge		Tick of Approval (most)

⁷³ Based on Parker's observations in Australia, the United Kingdom and United States.

⁷⁴ Darren Gray, 'New Pecking Order Laid Out for Eggs', *The Sydney Morning Herald* (online), 14 August 2009 <<http://www.smh.com.au/lifestyle/new-pecking-order-laid-out-for-eggs-20090813-ek4w.html>>. This is consistent with the findings of our 2012 to 2014 research.

Brand Owner or Producer	Brands	Price per dozen	Accreditation on label
Independent Brands Available in Selected Coles	Family Homestead Genuine Free Range	\$9	Free Range Farmers Association Humane Choice National Heart Foundation Tick of Approval
	Loddon Valley Sunrise Free Range	\$6.5	None shown
	Down on the Farm Free Range	\$6.3	
Three Dominant Brand Owners	Sunny Queen — McLean’s Run Free Range; Sunny Queen Farms Free Range; Ellerslie Farm Organic Free Range; Organic Egg Farmers Organic Free Range; Sunny Queen Farms Organic Free Range	\$5.2–7.8 (free-range) \$6.2–11 (organic)	No free-range accreditations shown All probably have Egg Corp Assured accreditation but not shown on label
	Farm Pride — Essential Foods Free Range; Farm Pride Free Range; Farm Pride Pink Pack Free Range; Hunter Valley Free Range; Family Value Free Range		Australian Certified Organic (4 organic brands) National Heart Foundation Tick of Approval (most)
	Pace — Pace Free Range Natural Living; Pace Omega 3 Free Range; Pace Organic Free Range		
	Free-Range Supply Specialists Available in Various Supermarkets	Borella — Nature’s Best Free Range; Sunshine Farm Free Range; Veggs Free Range	\$6–8.2
H&L Premium — Ecoeggs Free Range; Field Fresh Free Range; Just Free Range Eggs; Port Stephens Free Range			
Brands Distributed by Exceptional Foods Available in IGAs	Country Pride Free Range; Eggceptional Eggs Free Range; Kangaroo Island Free Range; Misty Mountains Free range; Organigrow Free Range; Pure Organic Grain Fed Hencoop (which are in fact neither organic certified nor free-range but label sounds like they are); South Gippsland Free Range	\$6.3–10 (free-range) \$15 (organic)	Australian Certified Organic (1 brand) Humane Choice (1 brand) No certification labels (5 brands) National Heart Foundation Tick (all)

Brand Owner or Producer	Brands	Price per dozen	Accreditation on label
Brands at Alternative Supermarkets, Green-grocers, Urban Markets	Many (more than 20 identified in our small sample of retail locations)	\$5.5–13	No accreditation shown (most); some show Egg Corp, Australian Certified Organic, Humane Choice, Free Range Farmers Association, Free Range Egg and Poultry, RSPCA Approved, South Australia Free Range

Table 2(a): Changes to Statements of Stocking Density on Cartons of Supermarket Free-Range Eggs between 2012 and 2014

Brand	Statement in 2012	Statement in 2014
Supermarket own brands	Coles — no statement	'Free range eggs: that's a maximum of 10,000 hens per hectare outdoors'
	Woolworths — no statement	Woolworths Free Range — '1 bird per metre squared outdoors — equals 10,000 birds per hectare'
		Macro Free Range — '1500 birds/ha outdoors'
		Macro Organic Free Range — no statement
	IGA and Aldi — no statement	No statement
Three Dominant Brand Owners	Sunny Queen, McLeans Run — 'Open range, independently audited only 1500 hens per hectare'	No change
	Other Sunny Queen brands — no statement	
	Farm Pride — no statement	'<1 bird per square metre — <10,000 birds per hectare maximum density outside'
	Pace — no statement	'<1 bird per square metre on outdoor range': ie 10 000 hens per hectare

Free-range specialists	Ecoeggs — no statement on carton but did refer to website	'Our hens range outside at only 2 hens p/m ² ': ie 20 000 hens per hectare, added 2013 'Our hens range outside at only 1 hen p/m ² ': ie 10 000 hens per hectare, changed 2014
	No statement on other brands	No change
Exceptional foods	Fryars Kangaroo Island — no statement	Stocking density stated as 1500 hens per hectare
	No statement on other brands	No change

Table 2(b): Changes to Other Information about Meaning of Free-Range Claims on Supermarket Free-Range Eggs between 2012 and 2014

Brand	Statement in 2012	Statement in 2013–14
Supermarket own brands	Coles — no statement	'Free Range Eggs from hens free to roam'
	Woolworths — no statement	Woolworths Free Range — 'A maximum hen stocking density of 10,000 birds per hectare where hens are regularly rotated onto fresh range areas and some continuing fodder cover is provided' 'Our Free Range eggs have been laid by hens that are free to roam outdoors during the day and nest in barns at night'
	IGA — no statement	'Birds in free range systems are housed in sheds and have access to an outdoor range'
	Aldi — 'Our hens are free to stretch, socialise, perch and move around on open ground'	No change
Three Dominant Brand Owners	Sunny Queen — no statement	In 2014, added 'chook-tracker' and 'egg cam' References to 'pasture' removed; meaningless free-range logos removed

Brand	Statement in 2012	Statement in 2013–14
	<p>Farm Pride — ‘Free range eggs from free range farms where chickens roam free’</p> <p>Pace — ‘Our healthy hens enjoy life on our free range farms, laying their premium eggs whilst taking in the sunshine and exploring the great outdoors, the way nature intended’</p>	<p>In 2013, added ‘Live Chook Cam’; in 2014, added ‘Free Range Viewer’</p> <p>Claim that ‘chickens roam free’ removed; meaningless free-range logos also removed</p> <p>Now certified Australian Certified Organic. Previously certified by lesser known and respected Organic Food Chain. No longer hold Queensland Free Range Farmers logo (which has lesser standards than Humane Choice and Victorian Free Range Farmers Association)</p> <p>References to ‘pasture’ removed; carton states: ‘Proudly free range since 1985’. Removed statement from inside carton which said:</p> <p>‘Our healthy hens enjoy life on our free range farms, laying their premium eggs whilst taking in the sunshine and exploring the great outdoors, the way nature intended. Our happy hens produce nutritious eggs, that are rich in flavour and wholesome goodness you’ve come to expect from Pace Farm’</p> <p>‘Our hens graze on natural grains in open pasture’</p>
Free-range specialists	<p>Ecoeggs — ‘Our hens graze on open pastures and eat select grains ...’</p> <p>Veggs Free Range — ‘Our hens are free to roam and socialize, with safe roosting for their protection, allowing hens to live a stress-free existence; — freedom from fear and distress; — freedom from pain and injury; — freedom from hunger and thirst; — freedom from discomfort; — freedom to express normal behaviour’</p> <p>No statement on other brands</p>	<p>In 2013, Ecoeggs adds ‘chook cam’ and adjusts statement:</p> <p>‘Free Range Eggs: Birds in free-range systems are housed in sheds and have access to an outdoor range ... Ecoeggs are certified free range, check our website ChookCam to see our happy hens in action. Our hens range outside at only 2 hens p/m², graze on open pastures and eat a special balanced diet of select grains boosted with natural supplements rich in good Omega fats and certain essential vitamins. We think happy, healthy hens produce nutritious, great tasting eggs’</p> <p>No change on other brands</p>

Brand	Statement in 2012	Statement in 2013–14
Exceptional foods	<p>Fryars Kangaroo Island — ‘12 Fresh tasty eggs from full beaked free range hens’</p> <p>Other brands — no statement</p>	<p>Fryars Kangaroo Island — In 2013, statement on carton:</p> <p>‘Free range; Maximum 1500 hens per hectare; A proudly South Australian sustainable farm’</p>
Independent Brands Available in Selected Coles	<p>Family Homestead Free Range — ‘Our hens are never locked up! Proudly 100% Australian owned and grown family farm using ethical farming methods; no factory farming; no beak trimming; no meat meal; no egg yolk colour additives; pasture and grain fed’</p> <p>Loddon Valley — ‘Produced from Australian registered free range egg farms where the hens are free to roam, foraging, socialising, eating grass and natural feeds such as corn, wheat and other vegetable matter throughout the day’; and ‘All our hens are well cared for in conditions which comply with the Australian Model Code of Practice for the welfare of animals — domestic poultry’</p> <p>Manning Valley — ‘The happy hens of Manning Valley Free Range Eggs are free to roam as nature intended on open pastures producing premier eggs under natural Australian conditions. The real currencies of the future clean earth, air and water are found in abundance on our properties in NSW, so we can guarantee that these eggs are produced in the most natural feeding environment possible’</p>	<p>Overall, less stock available in store, and some changes to decrease information on package</p> <p>In 2013, removed fake ‘Bendigo Farms Free Range Accreditation’ (our research has not discovered any Bendigo Farms Free Range Accreditation System) and statement from carton</p> <p>In 2014, removed Egg Corp Assured logo and other free-range claims; removed statement from carton</p>

Table 1 summarises the various brands that claimed to be free-range in supermarkets and other retail outlets in Melbourne. Table 2 summarises the way the information included on packaging changed over the three years 2012 to 2014. The brands available and the type of information on the label varied by the type of retail outlet.

In the two major supermarkets, there appear to be a wide variety of eggs available, but the many brands are in fact dominated by three major brand owners and the two supermarket own brands, which themselves obtain eggs from one of the same three suppliers.⁷⁵ Each supermarket will usually stock a few more expensive alternatives from one or other of the up-and-coming free-range supply specialists or independent brands.⁷⁶ The information about what free-range means was minimal but had improved, at least marginally, between 2012 and 2014. All own brand eggs for sale in Australia's two dominant supermarkets showed outside stocking density in 2014 (albeit at 10 000 hens per hectare, still much higher than stated by the *Model Code* and recommended by other accreditation systems).⁷⁷ The same outdoor stocking density also appeared on the labels of two of the three major branded free-range egg products — Farm Pride and Pace. Previously, stocking density had only appeared on certain premium brand eggs.⁷⁸ The two dominant supermarkets had also raised the prominence of free-range claims on labels (see illustration 2). As of the end of 2014, the competitor supermarkets, Aldi and IGA, had not followed suit with their own brand eggs and there was little change in information for the various egg brands available in these supermarkets.⁷⁹

⁷⁵ Brooke Tonkin, 'Sunnier Times Ahead: The Industry Has Been Shifting from Cage to Free-Range Eggs' (Industry Report A0172, IBISWorld, May 2015) 15–25. Note that of the three major brands Sunny Queen operates only as a distributor and brand owner, whereas the other two companies own some farms and source from other farms that they do not own. Sunny Queen therefore distributes a wider range of brands. Some were only identified as owned or distributed by Sunny Queen by a common address.

⁷⁶ Checks in other states indicate this is not always true in other states and may not be true across all stores even in Melbourne.

⁷⁷ See below illustration 1.

⁷⁸ The premium line, McLean's Run, offered by the third major brand owner, Sunny Queen, showed 1500 hens per hectare in line with best practice animal welfare according to the *Model Code* and organic certifications for all three years. Two other premium products had always shown stocking density — Family Homestead Genuine Free Range Eggs at 750 hens per hectare, and 'Ecoeggs' at 20 000 hens per hectare, which was changed to 10 000 hens per hectare in 2014.

⁷⁹ But note that IGA stores are individually managed and may stock high quality, local or niche products. Indeed it is an IGA store that lays claim to being the first Australian supermarket to have permanently removed all cage and barn eggs from sale: see Animals Australia, *Australian First: Supermarket Removes All Factory-Farmed Eggs from Sale!* (4 September 2014) Animals Australia: The Voice for Animals <<http://www.animalsaustralia.org/features/australias-first-cage-egg-free-supermarket.php>>. Note also that outside the data collection period,



Illustration 1: Coles own brand free-range packaging 2012, 2013 and 2014



Illustration 2: Farm Pride statement of stocking density on carton 2014

in October 2015, Aldi's eggs, branded as 'Lodge Farms', stated 'our hens are free to stretch, socialize, perch and move around on open ground when outdoors. Minimum 1 m² per laying hen when outdoors'. This is in line with the Coles and Woolworths outdoor stocking density rule.

The labels of eggs available in the various supermarkets provide little further information about the living conditions of the hens such as indoor stocking density, whether the hens have had their beaks trimmed or removed, the availability of cover and protection on the range, enrichment opportunities both indoors and outdoors and what degree of access to pasture they actually have on an ordinary day.⁸⁰ Nor are other aspects of the intensity and style of supervision and management of the birds addressed.⁸¹ Beak removal or trimming is a particular issue. Information about de-beaking is not available at all on any egg brand in the two major supermarkets.⁸² Large producer statements in the media sometimes comment that beak removal or trimming is necessary to manage hen welfare, but proponents of smaller-scale egg production argue that if beak trimming is necessary then that is a sign that hens are crowded together, stressed and deprived of real opportunities to engage in natural pecking behaviours and socialization.⁸³

There has been some attempt at transparency through the addition of 'chook cam' to the labels of free-range egg lines offered by two of the three major brand owners (Sunny Queen and Farm Pride) and two of the smaller, premium specialist free-range brands available in some supermarkets (Ecoeggs and Manning Valley). The chook cam does at least show the basic set-up of those facilities where the producers choose to put the camera. However the cameras are largely stationary and can only be put in one or

⁸⁰ See, eg, *Australian Competition and Consumer Commission v Pirovic Enterprises Pty Ltd [No 2]* (2014) ATPR ¶42-483; ACCC, 'Initial Assessment of Certification Trademark Application', above n 58.

⁸¹ Appleby and Hughes, above n 3. See also Michael C Appleby, 'The European Union Ban on Conventional Cages for Laying Hens: History and Prospects' (2003) 6 *Journal of Applied Animal Welfare Science* 103.

⁸² One premium brand did show extra information along these lines in 2012 and 2013 — but it was removed from the carton in 2014. Family Homestead Genuine Free Range previously stated (on an insert to the carton in 2013, and on the carton in 2012):

No factory farming — Low stocking density — 750 chickens per hectare compared with 20,000–50,000 per hectare

No meat meal or colour additives

No de-beaking or beak trimming

Accredited & independently audited by the Free Range Farmers Association of Victoria

Farm waste recycled — cardboard boxes, manure and organic material composted on the farm. Worms are released into the compost in order to get worm castings which are then spread onto our 100 acre property.

⁸³ See ACCC, 'Initial Assessment of Certification Trademark Application', above n 58.

two locations among the many barns and sites that make facilities large enough to provide a reliable supply of free-range eggs to the two major supermarkets. The chook cams reveal that the hens are usually only let out mid-morning after they have had ample opportunity to lay their morning egg in the barn. They come back into the barn by mid to late afternoon, depending on the weather.

A consumer who goes to an alternative retail space such as a farmers market, organic store or urban market, would find eggs for sale with more detailed and comprehensive information relating to farming conditions. This might include statements that the hens are not de-beaked, that they have access to pasture at all times, or that their housing consists of mobile sheds that move around (thus allowing a pasture-based system and access to new areas of the range every few days). There may also be further information about what they are fed.⁸⁴ A number of egg farmers who supply direct to the public at farmers' markets in Melbourne provide quite extensive information and photos of their farms on placards and posters at their stalls sometimes with photos of alternative battery cage and barn or aviary birds as a contrast.⁸⁵ These invite contrast with, and a challenge to, dominant supermarket eggs.

They indicate to those consumers who see them that the practices used to produce these eggs are different to those used to produce supermarket eggs. These labels thus reveal information about alternative production methods and also by comparison reveal the lack of information on supermarket egg labels about the dominant production method. This may feed consumer demand for greater information and wider values to be considered in mainstream egg production and retail.

⁸⁴ See below illustration 3.

⁸⁵ See below illustration 4.

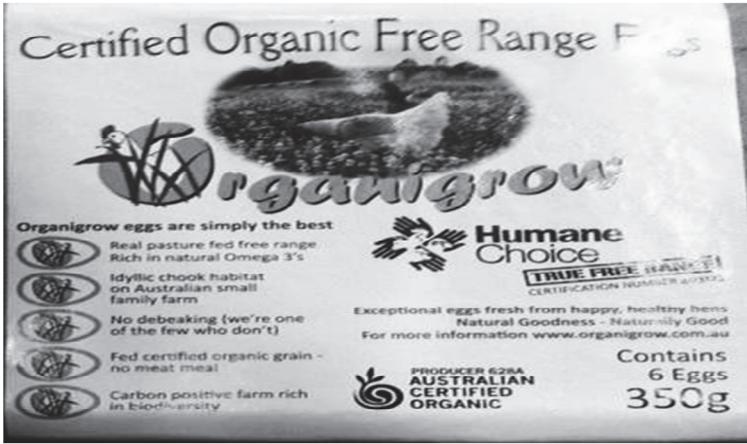


Illustration 3: Alternative free-range packaging — Organigrow



Illustration 4: Placard at Dan's Real Free-Range stall at Flemington Farmers' Market, 12 May 2013

B *Regulatory Standards That Lie behind Free-Range and Animal Welfare Claims on Labels?*

As indicated above in table 1, many brands of free-range eggs available are marked by logos indicating they comply with voluntary accreditation systems that define free-range or other higher animal welfare standards during production. The key features of the standards behind the various logo and accreditation schemes used on the labels found in our research are summarised below in table 3. Our research suggests that none of these standards provides a satisfactory means of accrediting free-range claims. All have weaknesses and their standards vary so significantly that little clear and consistent guidance is available to consumers and producers about what free-range should mean from this source.

In addition to the accreditation logos shown below in table 3, the research also found some egg cartons with meaningless logos with no systematic accreditation standards backing them up. These included 'seals' or 'promises' of quality, freshness and so on. The National Heart Foundation Tick of Approval and Product of Australia logos also featured highly on supermarket eggs.

Egg Corp Assured is the voluntary industry-based quality assurance scheme introduced in 2003 to assure compliance with food safety and labelling responsibilities, after the government decided not to ban battery cages. Its interpretation and application of the standards for free-range in the *Model Code* are minimal at best. It facilitates farming of layer hens in industrial scale conditions which can include large multi-tier barns with limited outside access, bare and unattractive ranges, crowded, stressful conditions and beak trimming or beak tipping to manage feather pecking and cannibalism in these conditions.

Table 3: Summary of Major Voluntary Accreditation Standards for Free-Range and Organic Eggs in Australia

	AECL	RSPCA	Free Range Farmers Association (Victoria)	Humane Choice	Australian Certified Organic	National Association for Sustainable Agriculture Australia	South Australia Free Range
Logo	 CERTIFICATION TM 1214 1215 1220						
Density inside	15 hens per square metre	7–9 hens per square metre	7 hens per square metre	5 hens per square metre	7 hens per square metre	5 hens per square metre	No maximum
Max hens per shed	No maximum	5000 advised	1000	2500	1500	2500	No maximum
Density outside (maximum)	No maximum (1500 without rotation) Two major supermarkets: 10 000 hens per hectare	2500 hens per hectare (1500 without rotation)	750 hens per hectare	1500 hens per hectare	2500 hens per hectare (1500 without rotation)	Not specified	1500 hens per hectare
Ground cover required?	No	Yes	Yes	Yes (extensive)	Yes (very extensive)	Yes	Adequate shelter

	AECL	RSPCA	Free Range Farmers Association (Victoria)	Humane Choice	Australian Certified Organic	National Association for Sustainable Agriculture Australia	South Australia Free Range
Beak-trimming?	Yes	No (exceptions allowed)	No	No	No (exceptions allowed)	No	Yes
Induced moulting?	Yes	No	No	No	No	Not stated (but probably considered inhumane)	No
Cages allowed at same site?	Yes	Yes	No	No	No	No	Yes
Also accredited cage or barn?	Yes (cage and barn)	Yes (barn)	No	No	No	No	No
Mostly sold where?	Coles and Woolworths	Coles and Woolworths	Farmers markets; organic stores (Victoria only)	Farmers markets; organic stores	Organic stores	Farmers markets; organic stores	Unknown

	AECL	RSPCA	Free Range Farmers Association (Victoria)	Humane Choice	Australian Certified Organic	National Association for Sustainable Agriculture Australia	South Australia Free Range
Scale of most farms accredited?	Large and intensive; medium-scale	Large and intensive	Small and medium-scale	Small and medium-scale	All	Small and medium-scale	Unknown
Orientation	Mainly business to business quality assurance — little consumer orientation Discredited for consumers after ACCC decision Two major supermarkets require Egg Corp Assured plus 10 000 hens per hectare	Accredit mostly only barn Barn lacks consumer appeal despite high level of consumer trust in RSPCA	Very open to consumer questions and visits — but small — scale accreditation may lack consistency, and independence of monitoring and enforcement, and not highly available to consumers		Highly professional, visible and well marketed standards overall — but lack of focus on animal welfare may not appeal to consumers concerned about animal welfare		Focus on promoting South Australian produce Advertising on quality, South Australian product and animal welfare guarantee

Egg Corp Assured is aimed more at allowing producers to assure brand owners and supermarkets of food safety than marketing higher animal welfare eggs to consumers. Although the major supermarkets appear to require Egg Corp Assured as a condition of supply,⁸⁶ the relevant logo was often not present on the retail carton, or was small and hidden away on a side panel. Some brands did however put a statement or a made-up logo on their product indicating that their free-range production was independently accredited or audited, presumably referring to their Egg Corp Assured accreditation. Nor are the Egg Corp Assured standards readily visible to the consumer. The standards are private and were only publicised when the AECL applied to the ACCC for permission for a new trademark and to revise its standards.⁸⁷ The revised standards were intended to be marketed to consumers,⁸⁸ but when they were publicised they were heavily criticised upon publication (specifically the 20 000 hens per hectare outside stocking density) and thus lost legitimacy.

The dominant organic accreditation logos, Australian Certified Organic and the National Association for Sustainable Agriculture Australia, are highly detailed standards focusing on organic production but including some animal welfare and free-range requirements. Implementation, monitoring and enforcement of these standards is highly professionalised. The supermarkets stock some premium-priced organic eggs (see above table 1) and there is a growing and apparently commercially viable specialist organic retail store sector where organic eggs are available.⁸⁹ But organic accredited eggs are generally very expensive and therefore unlikely to move beyond a premium

⁸⁶ As far as ascertainable, all egg suppliers to the major supermarkets were listed on the AECL website as accredited, even if this was not advertised on packaging.

⁸⁷ See AECL, *Egg Standards Australia: National Egg Quality Assurance Program — Farm Standard: For Egg Producers* (January 2012) <<https://www.accc.gov.au/system/files/Revised%20Farm%20Standard%20for%20Egg%20Producers.pdf>>; AECL, *Certification Rules — Version 1.1* (October 2010) <<https://www.accc.gov.au/about-us/consultations-submissions/public-consultations/australian-egg-corporation-ctm-2012>>. The AECL needed to apply for authorisation to operate the logo as a trademark and to apply to the ACCC for permission for the trademark registration. The ACCC realised that the definition of free-range in the standard was controversial and therefore released the draft standard and old standard for public comment and called for submissions.

⁸⁸ AECL, *Developing a New Standard for Australian Eggs: Your Questions Answered* (2011) <<https://www.aecl.org/assets/Uploads/QA-resources/ESA-QA-A4brochure-web.pdf>>.

⁸⁹ A Monk et al, 'Australian Organic Market Report 2012' (Biological Farmers of Australia, October 2012).

option in supermarkets. Some quite large and intense operations are organic certified and their need to find a broader market via supermarket sales may put pressure on the interpretation and application of the standards to water them down and hence make organic production more affordable.

The alternative small-scale Free Range Farmers Association Inc and Humane Choice accreditation logos have lower stocking densities and are aimed more at small-scale pasture-based systems. These accreditation logos, however, have little mainstream retail penetration and are not well known to consumers. However, interviews and tracking of social media discussions also indicate that these alternative and informal schemes have occasionally failed amidst claims and counterclaims of fraud or impracticality. (At the time of writing it is not clear whether either of these two schemes will continue to operate, but alternatives will probably develop.) They are heavily dependent on the active involvement and integrity of the communities that produce them, which can create problems when the community disagrees among itself about what the standards are and how they should be enforced and implemented.

Eggs with these logos are mostly only available at farmers' markets and organic stores where consumers are already looking for alternative products and have alternative mechanisms available to them to ascertain how the eggs were produced, such as asking the farmer stall-holder directly at a farmers market, reading detailed information available at the site of purchase or trusting the store-owner to source only appropriate products. These alternative accreditation schemes may operate more as a support mechanism for like-minded producers to join a community and build their skills, than as an effective and legitimate marketing tool for consumers.⁹⁰

The RSPCA Approved Farming Scheme logo ('RSPCA Approved'), which was first introduced in the mid-1990s, is designed to provide a higher animal welfare certification for large-scale (supermarket) egg production.⁹¹ It therefore sets its standards above Egg Corp Assured and the *Model Code*, but not as high as those of the organic and other free-range certifiers on issues like stocking density, number of hens in a barn or flock and conditions on the range. The RSPCA is more concerned with ensuring that what it judges to be

⁹⁰ See also K Weber, K L Heinze and M Desoucey, 'Forage for Thought: Mobilizing Codes in the Movement for Grass-Fed Meat and Dairy' (2008) 53 *Administrative Science Quarterly* 529.

⁹¹ RSPCA, 'RSPCA Approved Farming Scheme Standards' (Operations Manual, July 2015) 5.

certain basic animal welfare measures are observed in dominant large-scale egg production systems than to facilitate free-range as such.⁹² Indeed when first introduced, RSPCA Approved was only available for barn (and not free-range) production on the basis that it was easier to ensure hens' welfare when they were kept indoors.⁹³ The only RSPCA Approved eggs available in supermarkets in Melbourne are barn produced. Because barn laid is less popular with consumers,⁹⁴ and because only RSPCA Approved barn eggs are available in supermarkets, RSPCA Approved eggs have not achieved the market penetration that might otherwise be expected of an accreditation logo supported by such a trusted charity.⁹⁵

In 2014 the South Australian government announced it would promote its own voluntary 'SA Free-Range Egg Certification Trade Mark'.⁹⁶ South Australia is a small state with only one large egg producer and none of the three dominant Australian egg producers. The focus of this scheme is on addressing consumer confusion over 'free-range' in a way that supports the broader marketing of South Australia, and especially Kangaroo Island (where most smaller-scale free-range egg production takes place) as a gourmet, artisan food region.⁹⁷ As such, this standard cannot at present be applied to eggs from other places.

With the failed legitimacy of the AECL's standard, the two dominant supermarkets stepped up to take on the role as powerful regulators of egg

⁹² Interview with Anonymous, RSPCA Representative (Melbourne, 4 May 2012): 'the objective of the [RSPCA Approved farming] scheme is really to improve the lives of as many animals as possible ... and make humane food accessible to as many people as possible'.

⁹³ RSPCA, 'RSPCA Approved Farming Scheme: Giving Farm Animals a Better Quality of Life' (Report, May 2014) 13.

⁹⁴ See Tonkin, above n 75, 12.

⁹⁵ Some RSPCA Approved barn laid eggs are sold in supermarkets, and own-brand chicken meat at Coles is RSPCA Approved.

⁹⁶ Attorney General's Department, 'Fair Trading (SA Free-Range Egg Industry Code) Regulations and Certified Trademark' (Information Paper, Government of South Australia, 2015). Gail Gaio, 'Egg-citing Vote Underway: South Australians to Choose Free-Range Logo' (Media Release, 8 September 2014).

⁹⁷ Interview with Dini Soulio, South Australian Commissioner for Consumer Affairs (Adelaide, 6 March 2015). On the idea of terroir in food labelling see Brian Ilbery et al, 'Product, Process and Place: An Examination of Food Marketing and Labelling Schemes in Europe and North America' (2005) 12 *European Urban and Regional Studies* 116. See also Attorney-General's Department, above n 96.

production and distribution. Both Coles and Woolworths have advertised that they would only be selling cage-free eggs. Coles stated an outdoor stocking density for free-range of 10 000 hens per hectare, with Woolworths following soon after.⁹⁸ The details of the supermarkets' supplier standards are difficult, if not impossible, for consumers to ascertain.⁹⁹ It seems that the two dominant supermarkets still require suppliers to have Egg Corp Assured accreditation and then the supermarkets add their own stocking density requirements on top of this. Supplier complaints in public fora and to regulators indicate that the supermarkets' ethical sourcing policies are often in the context of overwhelming requirements for supply of produce at a large-scale, low cost, and perfect quality and appearance.¹⁰⁰

On the other hand the supermarkets comment that they have consulted with and worked with suppliers to ensure that they can have the right housing, range areas and management practices in place to meet the supermarkets' 10 000 hens per hectare requirement. For example, in one media release, Coles states:

we have issued a standard that sets out a maximum stocking density of 10,000 birds a hectare. ... We came to this figure after consulting with industry and welfare groups, and we believe it strikes the appropriate balance between animal welfare and keeping free-range egg prices within reach of most Australians.¹⁰¹

But contention continued, and in 2014 the ACCC won a court ruling that the term free-range had been used in a misleading way by a producer who kept free-range hens in such intense and crowded conditions that most did not in fact go out on the range most days despite the opportunity for them to

⁹⁸ Parker and Scrinis, above n 30, 331–2.

⁹⁹ It is possible to find some supplier standards through website searching but these do not necessarily give all the up to date information about what the supermarkets actually require: see, eg, Coles, 'Coles Supplier Requirements — Food: Supplier Standard — CSR-FV3' (May 2011); Woolworths Limited, 'WQA Standard: Primary Production — Eggs' (8th ed, 2013).

¹⁰⁰ Carol Richards et al, 'A Toothless Chihuahua? The Australian Competition and Consumer Commission, Neoliberalism and Supermarket Power in Australia' (2012) 21 *Rural Society* 250; Madeline Taylor, 'Wrestling with Giants: A Critical Account of Supermarket Power and Competition Law in Australia and the United Kingdom' (2013) 41 *Australian Business Law Review* 270.

¹⁰¹ Clare Peddie, 'Free-Range Eggs Panned', *The Advertiser* (Adelaide), 8 June 2012, 9.

do so.¹⁰² In his ruling on the case, Flick J of the Federal Court of Australia made the following statement of the minimum standard of what consumers expect free-range to mean on the label:

[Eggs] were produced:

- (c) by laying hens that were farmed in conditions so that the laying hens were able to move around freely on an open range on an ordinary day (where an ordinary day is every day other than a day when on the open ranges weather conditions endangered the safety or health of the laying hens or predators were present or the laying hens were being medicated); and ...
- (d) by laying hens most of which moved about freely on an open range on most ordinary days ...¹⁰³

The ACCC indicated that it planned to prosecute more egg producers and that the supermarket standard of 10 000 hens per hectare was ‘not consistent with consumers’ understanding of free range’.¹⁰⁴ The ACCC still has proceedings on foot against Snowdale Holdings, a Western Australian egg producer, on a similar basis as its successful action against Pirovic.¹⁰⁵ In December 2014 the ACCC commenced action against the companies behind the Ecoeggs, Field Fresh Free Range Eggs and Port Stephens egg brands, alleging false and misleading use of the free-range label.¹⁰⁶ In September 2015 the ACCC won a \$250 000 penalty against RL Adams Pty Ltd for marketing and labelling its

¹⁰² *Australian Competition and Consumer Commission v Pirovic Enterprises Pty Ltd [No 2]* (2014) ATPR ¶42-483, 44 467 [8] (Flick J).

¹⁰³ *Ibid* 44 464.

¹⁰⁴ Melissa Fyfe and Royce Miller, ‘10,000 Hens to a Hectare Is No Free Range: ACCC’, *The Age* (Melbourne), 5 March 2013, 5:

While not commenting directly on Coles — whose new free-range standard is 10,000 hens per hectare, almost a seven-fold reduction in space from the voluntary guidelines — ACCC commissioner Sarah Court said the watchdog believed 10,000 hens per hectare was not consistent with consumers’ understanding of free range.

Ms Court said the commission was ‘very concerned’ the egg industry was trying to redefine ‘free range’ to ‘increase their own profitability’ without regard to consumers’ views. ‘The ACCC is concerned about the redefinition of what is meant by free range by industry to suit itself, and the fact that the redefinition has the very real potential of misleading consumers’, she said.

¹⁰⁵ ACCC, ‘ACCC Institutes Proceedings against Free Range Egg Producers’ (Media Release, MR 288/13, 10 December 2013).

¹⁰⁶ ACCC, ‘ACCC Takes Action against Ecoeggs Supplier for Free Range Claims’ (Media Release, MR 301/14, 9 December 2014).

eggs as free-range when in fact the barn doors providing access to the range had been kept shut for approximately nine months and hence laying hens had been continuously confined to barns and had never had access to the outdoors.¹⁰⁷ The ACCC has also successfully taken action against a number of chicken meat producers for claiming chickens were ‘free to roam’ even though they only had space equivalent to an A4 sheet of paper within a shed.¹⁰⁸

This suggests that the Coles and Woolworths supermarkets’ standards for free-range may well also lose legitimacy, meaning there is currently no legitimate private accreditation standard for free-range claims on supermarket eggs.

C Production Practices behind Free-Range

Looking again at the retail egg cartons, against the background of the supply chains and regulatory governance arrangements uncovered, it is evident that there are currently four main meanings for free-range (see below in table 4). Each of the four types is available in different retail spaces, supported by different contractual and accreditation schemes and providing different qualities and quantities of supporting information and images to the consumer.

This does not mean they are isolated and independent from one another. There is movement, exchange and interaction between the different categories. In particular mainstream supermarket eggs are taking on some of the features of premium free-range and organic eggs — especially as the eggs stocked in the two dominant supermarkets move from industrial free-range to dominant supermarket assured free-range. Some premium organic free-range and premium free-range eggs are also scaling up production and distribution to become available as premium higher-priced products in supermarkets.¹⁰⁹

¹⁰⁷ *Australian Competition and Consumer Commission v RL Adams Pty Ltd* [2015] FCA 1016 (11 September 2015).

¹⁰⁸ *Australian Competition and Consumer Commission v Turi Foods Pty Ltd [No 2]* [2012] FCA 19 (23 January 2012); *Australian Competition and Consumer Commission v Turi Foods Pty Ltd [No 4]* [2013] FCA 665 (8 July 2013); *Australian Competition and Consumer Commission v Pepe’s Ducks Ltd* [2013] FCA 570 (14 June 2013).

¹⁰⁹ For example Coles recently started stocking Buckleberry Farm eggs, a new supplier with mobile housing for eggs: see, eg, Humane Society International, ‘Highlights of Humane Society International’s Program Activities’ (Technical Bulletin No 24, 2014) 13.

The first category is ‘non-assured free-range.’ Here there is no certification or assurance process and no real information on the carton so that it is not clear how the eggs have been produced. Some cartons have unknown logos and unverified claims. Some claim to be ‘organic’ but have no certification. It is quite possible that some are battery cage eggs fraudulently shown as free-range or otherwise misleadingly labelled. Others may range from large-scale barn-based production through to small-scale operations of varying degrees of quality.

The second category, ‘supermarket assured industrial free-range’, has appeared since 2012 when Egg Corp Assured lost legitimacy. The main difference is the outside stocking density of 10 000 hens per hectare clearly marked on the label and required by Coles and Woolworths for their own brand free-range eggs, with other dominant brands following.¹¹⁰ This category is still subject to contestation via consumer criticism¹¹¹ and the ACCC’s ongoing actions.¹¹²

The third category is ‘premium organic free-range.’ These are eggs produced in accordance with an organic assurance and certification system and sold at a premium price (much more expensive than free-range as indicated above in table 1) in major supermarkets, gourmet and organic stores, and farmers’ markets. In supermarkets they are often sold in a six-pack rather than the normal dozen, presumably to keep the price per packet down. Although all organic certification systems require layer hens to be kept as free-range, they do not usually emphasise their animal welfare measures or the fact they are free-range on their cartons. Some may be quite large-scale.

The fourth category is ‘premium free-range’ from small to medium-scale alternative farming. This category is largely available at farmers markets and specialist organic stores but is creeping into more mainstream supermarkets including independently controlled supermarkets and as a premium high-priced product in dominant supermarkets. These have required the invention of new technologies (such as mobile housing), new management practices

¹¹⁰ Parker and Scrinis, above n 30, 333–4.

¹¹¹ See, eg, Rachel Clemons and Katinka Day, *Free-Range Eggs: What Does ‘Free Range’ Really Mean, and Are Consumers Being Misled?* (7 August 2014) Choice <<https://www.choice.com.au/food-and-drink/meat-fish-and-eggs/eggs/articles/free-range-eggs>>.

¹¹² ACCC, ‘Initial Assessment of Certification Trademark Application’, above n 58; *Australian Competition and Consumer Commission v Pirovic Enterprises Pty Ltd* [No 2] (2014) ATPR ¶42-483.

(such as putting Maremma guard dogs and alpacas with hens to protect them) and new distribution channels (such as farmers' markets and organic chain stores each with their own private regulatory standards) to facilitate the sale of eggs. It remains to be seen whether they can create and standardise stable enough production systems and supply and retail chains, and an affordable enough price, to create a viable alternative to dominant supermarket eggs.

V ASSESSMENT AND CONCLUSION

This final Part draws together the findings to evaluate the impact of the Australian government's labelling for consumer choice approach to animal welfare in egg production. This Part V addresses three questions about the impact of the voluntary labelling approach.

First, how informative is the information on free-range egg labels? Is the quality and quantity of information improving? Secondly, is the labelling for consumer choice approach associated with changes in the animal welfare standards in production of eggs in the Australian retail marketplace? That is, has it made a difference to the choices available in the market? While other research has sought to evaluate this question by reference to consumer attitudes and willingness to pay,¹¹³ the research reported here looked for evidence of impact in terms of the actual choices available on the market and what standards they met. Thirdly, how adequate is the current network of public and private regulatory actors to ensure ongoing improvement and quality of the information on the label and the choices actually available in the market? Fourthly, would a mandatory information standard under the ACL improve consumer opportunities for democratic engagement in animal welfare in egg production through free-range labelling? Finally, this article concludes that the free-range labelling controversy indicates the urgent need for substantive revision and improvement of mandatory government regulation of animal welfare.

¹¹³ Philip Davies, Kristen Macpherson and Emma Froud, 'Public Attitudes towards, and Use of, General Food Labelling: Final Report' (Unit Report No 4, Social Science Research Unit, UK Food Standards Agency, January 2010); Charo Hodgkins et al, 'Understanding How Consumers Categorise Nutritional Labels: A Consumer Derived Typology for Front-of-Pack Nutrition Labelling' (2012) 59 *Appetite* 806; R Shepherd and M Raats, *The Psychology of Food Choice* (CABI Publishers, 2006); Carl Johan Lagerkvist and Sebastian Hess, 'A Meta-analysis of Consumer Willingness To Pay for Farm Animal Welfare' (2011) 38 *European Review of Agricultural Economics* 55.

A *How Informative Is the Information on the Free-Range Egg Label?*

We have seen above that eggs are generally clearly labelled according to production system and separated on the shelves even though no law currently requires this (except in the Australian Capital Territory). The quality and quantity of information about the production system on the egg label has improved at least a little over the last few years as the meaning of free-range has been contested and discussed in the media. Four of the five major egg brands in the two dominant supermarkets now show outside stocking density (albeit at 10 000 hens per hectare), and alternative brands with much more comprehensive information included on their labels are available at an expanding range of specialist and organic stores and farmers markets.

The continuing spectre of ACCC action for misleading and deceptive conduct in relation to free-range labelling and continuing media and consumer interest in the controversy over the meaning of free-range may bring on further changes. There is pressure to clearly label outside stocking density on all cartons.¹¹⁴ While this is not the sum total of information relevant to the meaning of free-range, it is a reasonable marker of a key issue of concern to consumers: namely, how large-scale and intensive is the production system used for the eggs? Ongoing media interest and competition among brand-owners, retailers and accreditation systems may also encourage disclosure of further information on the label such as whether hens' beaks have been trimmed or removed, indoor stocking density, how frequently hens use the range area and whether production is barn or pasture based.¹¹⁵

An expanding concern with other environmental issues relevant to factory farming of animals may also encourage other issues to emerge, such as the food miles and the energy used in large-scale refrigerated transport of eggs to ensure reliable supply to supermarkets.¹¹⁶ Other issues might include the nutritional content of eggs produced (different production methods, feed and

¹¹⁴ See Clemons and Day, above n 111.

¹¹⁵ See, eg, B Forkman and L Keeling (eds), *Assessment of Animal Welfare Measures for Layers and Broilers* (Welfare Quality Reports, 2009).

¹¹⁶ In relation to the significance of refrigeration in the food chain see Susanne Freidberg, *Fresh: A Perishable History* (Harvard University Press, 2009). In relation to food miles see, eg, Meredith Kolsky Lewis and Andrew D Mitchell, 'Food Miles: Environmental Protection or Veiled Protectionism?' (2014) 35 *Michigan Journal of International Law* 579; Alastair Iles, 'Learning in Sustainable Agriculture: Food Miles and Missing Objects' (2005) 14 *Environmental Values* 163.

breeds of chicken may produce eggs with slightly different nutritional content),¹¹⁷ the freshness of the egg (when laid, time in storage and transport), and food safety and biosecurity issues (including outbreaks of avian influenza or incidences of salmonella).¹¹⁸

B Have Production Practices Changed under the Voluntary Labelling Approach?

Our research suggests that the expansion of free-range labelling since 2000, and debate and discussion about what free-range on the label should mean since about 2009, have helped increase the range and availability of free-range labelled eggs in Australia. The 'supermarket assured free-range' egg category is new, and the organic store and farmers' market segments are also multiplying the consumer choices available through products that meet more aspirational standards and innovate to create new technologies and management strategies for free-range. Some of these new production systems are even scaling up or translating to premium free-range products in supermarkets.

Yet there is also constant pressure from supermarkets and consumers to create free-range products that can be supplied at large-scale and low cost. Doing so runs the risk of watering down and making more ambiguous free-range standards.¹¹⁹ This raises the question of whether the voluntary labelling approach can improve the minimum floor and stop the cruellest practices rather than just expanding the range of choice to include better practices without excluding poor ones.¹²⁰

¹¹⁷ See, eg, H D Karsten et al, 'Vitamins A, E and Fatty Acid Composition of the Eggs of Caged Hens and Pastured Hens' (2010) 25 *Renewable Agriculture and Food Systems* 45; S Rakonjac et al, 'Laying Hen Rearing Systems: A Review of Chemical Composition and Hygienic Conditions of Eggs' (2014) 70 *World's Poultry Science Journal* 151.

¹¹⁸ For a summary of issues consumers are concerned about in egg production, see P B Thompson et al, 'Values and Public Acceptability Dimensions of Sustainable Egg Production' (2011) 90 *Poultry Science* 2097.

¹¹⁹ See, eg, Parker and Scrinis, above n 30; Christine Parker, 'Voting with Your Fork?', above n 26. See also Marion Fourcade and Kieran Healy, 'Moral Views of Market Society' (2007) 33 *Annual Review of Sociology* 285; Henry Buller and Emma Roe, 'Modifying and Commodifying Farm Animal Welfare: The Economisation of Layer Chickens' (2014) 33 *Journal of Rural Studies* 141.

¹²⁰ See Aaron C Timoshanko, 'Limitations of the Market-Based Approach to Farm Animal Welfare' (2015) 38 *University of New South Wales Law Journal* 514. See also Errol Meidinger, 'Competitive Supra-governmental Regulation: How Could It Be Democratic?' (2008) 8 *Chicago Journal of International Law* 513.

The major supermarkets' decision that free-range means an outdoor stocking density of 10 000 hens per hectare on own brand free-range eggs may create a de facto minimum floor for free-range since they control up to 78 per cent of the retail market for packaged groceries.¹²¹ This is only a very minimal improvement on previous practice (which had allowed 20 000 hens per hectare or more), and no improvement on the *Model Code*, which sets a maximum of 1500 hens per hectare.

This raises the final question of whether the current mix of public and private regulatory actors and the tools available to them are adequate to improve how informative labels and standards are overall; or whether a mandatory information standard or some other regulatory intervention is desirable.

C *Is Misleading and Deceptive Conduct Regulation Adequate?*

Currently the strongest force for change and improvement is ACCC (and other fair trading) enforcement action against misleading and deceptive conduct. There are, however, four potential problems with relying on misleading and deceptive conduct enforcement for regulating the meaning of free-range on egg labels.

First, the decision in *Australian Competition and Consumer Commission v Pirovic Enterprises Pty Ltd [No 2]* ('*Pirovic*') sets an outcome standard for free-range (most hens moving around freely on most days),¹²² but provides no proactive mechanisms for implementation, monitoring and enforcement. Monitoring and enforcement is reactive and fragile because it relies on a consumer protection regulator choosing to respond to complaints and concerns and prioritise acting on misleading egg labelling among the many issues it could investigate and enforce. To ensure the *Pirovic* standards are monitored and enforced into the future, there will need to be concerned consumers and activists who are aware of the standards set down in the case itself, know that the production system used to produce particular free-range eggs does not meet that standard, and convince the ACCC or one of the state consumer protection regulators to investigate and take action.

¹²¹ See ACCC, 'Report of the ACCC Inquiry into the Competitiveness of Retail Prices for Standard Groceries' (Commonwealth of Australia, July 2008).

¹²² (2014) ATPR ¶42-483.

Secondly, from the point of view of producers and retailers, the *Pirovic* decision as an outcome standard does not in itself provide sufficient guidance for implementation. It must be supplemented with further information and support as to how to achieve the desired outcome. Voluntary accreditation systems (such as Egg Corp Assured or the various organic and alternative free-range standards) or extension and educational activities provided by government have traditionally provided this education for compliance. Currently the failure of legitimacy of the Egg Corp Assured standard means there is no one standard that can adequately guide producers seeking to supply eggs to supermarkets compliant with *Pirovic*. The supermarkets themselves may end up filling the gap with their own supplier standards and educational and investment support for suppliers.¹²³ Yet to date their standards are inadequate. It would require a high degree of pressure from consumers and advocacy organisations for supermarket standards to keep improving. Supermarkets are well equipped and motivated to gather and act on consumer opinion — but they will interpret and apply the information they gather from consumers within the framework of their own business model.¹²⁴ Producers have suggested that this involves unfair tactics against suppliers to keep prices down and the ACCC has taken enforcement action against the supermarkets for unconscionable conduct in this regard.¹²⁵ Supermarket interpretations of free-range will not necessarily lead to the best practice animal welfare management, although it may lead to affordable, incremental improvements.

A third concern is that prohibitions on misleading and deceptive conduct are inherently circular in the sense that they can only enforce what consumers reasonably expect free-range to mean. Misleading and deceptive conduct cases do not necessarily set their own standard by reference to independent assessment of expert and scientific evidence. Consumers' perception of what free-range should mean may not in fact reduce animal suffering if their idea of free-range has been co-opted by industry interests from one side or another. As we have seen, there is a serious argument that 'commercially realistic' large-scale intensive free-range is no better, and may even be worse for animal welfare, than enriched cages on some measures.¹²⁶ The effective-

¹²³ Parker and Scrinis, above n 30, 321–3.

¹²⁴ *Ibid* 339.

¹²⁵ See, eg, *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2014] FCA 1405 (22 December 2014).

¹²⁶ See above n 3.

ness of misleading and deceptive enforcement ultimately depends on the meanings of free-range developed by private regulators, such as supermarkets and voluntary accreditation agencies. It is these private standards, created by the regulatory network behind the label, that govern and circumscribe the range of choice given to consumers to 'vote' with their shopping dollar. In other words, the food label as a space for democratic engagement with the food system is only as good as the range of standards and governance arrangements for supporting the claims on the label. The vast majority of consumers buy free-range because they believe it affords greater animal welfare to the hen. Choice's 2012 'Survey on Consumer Expectations of Free Range Egg Labelling' found that 85 per cent of consumers choosing free-range did so for animal welfare reasons.¹²⁷ This suggests the need for a legal standard that sets out a sustainable, substantive definition of free-range based on animal welfare science and best practice. This should be continuously revised and improved as knowledge and practice increase. Under the current system the two major supermarkets may end up becoming the major interpreters of free-range through their supplier conditions and labelling requirements. This may stunt opportunities for the development of more innovative alternatives and create a consumer perception of free-range that does not match best practice possibilities.

Fourthly and perhaps most importantly, enforcement against misleading and deceptive free-range claims can at best only improve standards for products that claim to be free-range. They cannot address the conditions of barn and cage hens that still produce the vast majority of eggs.¹²⁸ A preferable labelling for consumer choice approach would set out science-based indicators of animal welfare for all production systems that consumers could use to

¹²⁷ Choice, 'Survey on Consumer Expectations of Free Range Egg Labelling' (Key Findings Report, May 2012).

¹²⁸ Even with the expansion of the market for free-range eggs, cage eggs are still the majority of eggs produced and probably expanding in real numbers. This is because, over the same period that free-range has expanded, so has consumption of eggs in general. Australian egg consumption has risen from lows of around 140 eggs per capita in the 1980s and 1990s to more than 213 eggs per capita in 2011–14: see AECL, 'Australian Egg Industry Overview' (Report, June 2014). Moreover, in 2014 egg production in Australia was worth \$1.7 billion (grocery equivalent) and retail egg production accounted for significantly less than half (\$800 million) of this amount: at 1. The remainder go into processed foods and hospitality and catering, where free-range eggs only form a miniscule proportion: see Tonkin, above n 75, 13.

‘vote’ for higher animal welfare overall, rather than relying on an unreliable free-range claim on the label.

D *Would a Mandatory Standard Improve Free-Range Labelling?*

One solution currently proposed is a mandatory information standard under the ACL that would define free-range and probably also mandate labelling by production system.¹²⁹ Mandatory information standards under the ACL have been used mainly to mandate essential safety information to be placed on certain products such as information that the product complies with Australian standards and how to use it safely. Car jacks are a good example.¹³⁰ Mandatory information standards have also been used in other ways including ingredient labelling for cosmetics and care labelling for clothing and textile products. Most famously, Australia’s plain packaging requirements for tobacco are found in a mandatory information standard. A definition of free-range could also be achieved via either a mandatory industry code or voluntary code under the ACL.¹³¹ However neither of these options could mandate labelling.

A mandatory information standard may be a good way to introduce a mandatory labelling requirement given that other options such as a food labelling standard under the *Australia New Zealand Food Standards Code*¹³² or mandatory labelling legislation in each state or territory¹³³ have not succeeded. However, it was noted above that egg cartons and retailers already clearly differentiate the production system used in egg labelling. So it is not the mandating of a labelling production system as such that would make a

¹²⁹ See above nn 14–15. For a general description of uses of this power, see ACCC, *Mandatory Standards*, Product Safety Australia <<http://www.productsafety.gov.au/content/index.phtml/tag/mandatorystandards>>.

¹³⁰ See ACCC, *Jacks (Vehicle)* (2015) <<https://www.productsafety.gov.au/content/index.phtml/itemId/974838>>.

¹³¹ *Competition and Consumer Act 2010* (Cth) sch 2 s 51AE. See also: at sch 2 s 51ACA (definition of ‘voluntary industry code’).

¹³² Rejected by the Food Labelling Law and Policy Review Panel: see Food Labelling Law and Policy Review Panel, above n 44 and accompanying text.

¹³³ As introduced by the Greens (but not passed) in a number of state legislatures: see, eg, Truth in Labelling (Free-Range Eggs) Bill 2011 (NSW); Eggs (Display for Retail Sale) Bill 2015 (SA).

difference. Free-range, or some other indicator of higher animal welfare, must also be adequately defined.

The experience in the Australian Capital Territory is illustrative. As noted above, in the Australian Capital Territory there is already mandatory labelling legislation but it simply imports the current extremely minimal definition of free-range from the *Model Code*. Our check of eggs available in the Australian Capital Territory indicated that this does not make any difference to the brands actually available, and therefore to the clarity of meaning of free-range, compared with the other states of Australia. The only discernible difference was compliance with the requirement that there be a notice on the shelf marking each of cage, barn and free-range and a red line along the shelves where cage eggs were stocked. There are no publicly available sales data disaggregated by state to test whether mandatory labelling, and especially the red line, has made a difference to the proportion of cage egg sales in the Australian Capital Territory as compared with the rest of Australia.

Similarly in the European Union, labelling of all eggs by production system (cage, barn, free-range or organic) has been mandatory since 2004.¹³⁴ According to Compassion in World Farming, this has resulted in an increased proportion of cage free (ie barn and free-range combined) egg production and purchase:

European Commission figures show the proportion of cage-free egg-laying hens in Europe rose from 19.7% in 2003 to 42.2% in 2012. ... In the UK cage-free egg production rose from 31% in 2003 to 51% in 2012.¹³⁵

The figures from the European Union are around the same level, and the United Kingdom figures are a little higher, as achieved in Australia via voluntary labelling.

The crucial issue is defining what free-range means. Even a minimal definition could make a difference to the current situation. In the European

¹³⁴ Labelling Matters Partnership, *European Commission's Poultry Meat Labelling Review — Our Recommendations* (8 August 2014) <<http://www.labellingmatters.org/39days4rosa/european-commission-s-poultrymeat-labelling-review-our-recommendations.html>>, citing *Commission Regulation (EC) No 589/2008 of 23 June 2008 Laying Down Detailed Rules for Implementing Council Regulation (EC) No 1234/2007 as Regards Marketing Standards for Eggs* [2008] OJ L 163/6, art 12(2). See also *Council Regulation (EC) No 2052/2003 of 17 November 2003 Amending Regulation (EEC) No 1907/90 on Certain Marketing Standards for Eggs* [2003] OJ L 305/1, art 1(6).

¹³⁵ Labelling Matters Partnership, above n 134 (citations omitted).

Union, the regulated definition of free-range for the purposes of labelling includes that:

- the hens have continuous daytime access to open-air runs (with certain exceptions);
- the open-air runs must be mainly covered with vegetation and not used for other purposes except for orchards, woodland and livestock grazing if authorised; and
- the maximum outdoor stocking density does not exceed 2500 hens per hectare at all times.¹³⁶

The South Australian free-range voluntary standard provides for the following minimum standards for certifying chickens to count as free-range:

- stocking densities must not exceed 1500 hens per hectare within the range;
- each hen must be provided with ready access to the range for a minimum of eight hours per day during daylight hours, except during adverse weather conditions, or during outbreaks of disease or threat of disease, which require management and control;
- shelter on the range must include reasonable windbreaks and shade throughout the day; and
- induced moulting by food deprivation is prohibited.¹³⁷

Both of these are higher standards than what is currently included in the Australian Capital Territory legislation or enforced by the Egg Corp Assured quality certification. However, at a minimum, indoor stocking density, beak trimming and forced moulting should also be clearly addressed to meet consumer concerns.¹³⁸

It is unclear whether the state and federal consumer affairs ministers are in a position to agree on a definition of free-range that would satisfy consumers, producers, retailers and animal welfare advocates. The usual way to overcome this problem for mandatory information standards is to prescribe a Standards

¹³⁶ *Council Directive 1999/74/EC of 19 July 1999 on Laying Down Minimum Standards for the Protection of Laying Hens* [1999] OJ L 203/53, art 4.

¹³⁷ Attorney-General's Department, 'South Australia Laid, Free Range Eggs Industry Standard' (Discussion Paper, Government of South Australia, June 2013) 5.

¹³⁸ See Clemons and Day, above n 111.

Australia standard as the information standard under the ACL.¹³⁹ This takes advantage of Standards Australia's well-honed process for using experts and stakeholders to draft and comment on standards.

A mandatory information standard that defines free-range may still have the same limitations as misleading and deceptive conduct enforcement noted above since it is created in a consumer protection framework. That is, it may be aimed more at consumer sentiment than scientific and practical evidence of appropriate animal management. It may not provide sufficient guidance to producers.

Moreover it is not clear how its implementation would be monitored and enforced. Some mandatory information standards can be easily monitored simply by observing the product itself and the label at retail. For example one can see very simply whether tobacco products are or are not sold in plain packaging in store. Free-range claims by contrast are 'credence claims' that can only be verified by checking at the time and place of production. It is unreasonable and ineffective to expect a consumer protection agency such as the ACCC to check whether farms are operating in accordance with the definition of free-range in any new mandatory information standard. Thus an effective mandatory information standard would have to include an independent auditing and inspection service that producers and retailers would be required to engage.

This suggests (again) the need for improved accreditation systems with input from consumers, producers, retailers and animal welfare experts to not only support and guide producer compliance with any new definition of free-range (as argued above), but also to monitor, inspect and enforce compliance. The Egg Corp Assured scheme is discredited and none of the other voluntary standards currently have sufficient support to apply to a wide range of free-range suppliers. The mandatory information standard process could conceivably prompt a Standards Australia standard to address these issues, but an appropriate monitoring and enforcement system is still likely to be an issue.

E Need for Revised Animal Welfare Regulation

One way to address all three concerns with the current system and proposed mandatory information standard would be to improve the basic public

¹³⁹ This is specifically provided for by *Competition and Consumer Act 2010* (Cth) sch 2.

interest-oriented animal welfare regulatory system in Australia. Currently, Australia's regulatory standards for farm animal welfare are very low, and rarely enforced.¹⁴⁰ A solution to the currently ambiguous and under-specified definition of free-range would require at the very least significant revision of the substantive standards in the *Model Code*. It would also mean making the *Model Code* enforceable by giving it legislative force in all the states and territories, and providing adequate resourcing to independent animal welfare regulators to monitor and enforce its provisions. It is currently being revised, but the process is slow and the outcomes uncertain.¹⁴¹ A whole new legislative system with enforceability and resources for implementation is required.

The *Model Code* already explicitly recognises that because it allows battery cage farming of eggs, this means that 'there are particular behaviours such as perching, the ability to fully stretch and to lay eggs in a nest' that are desirable but not possible.¹⁴² It goes on to state that this state of affairs will 'remain the subject of debate and review'.¹⁴³ It is certainly time for further debate and review. Indeed, in the future, Australia's food animal welfare strategy should be revised beyond its current status as a series of guidance codes to a legitimate, effective and proactive regulatory system. It is also desirable to ban battery cages and at the very least require enriched cages as a minimum standard, in addition to better defining and regulating free-range.

¹⁴⁰ Cao, above n 47, 135, 140; Dale, above n 47; White, above n 47.

¹⁴¹ White, above n 47.

¹⁴² Primary Industries Standing Committee, above n 4, 1.

¹⁴³ *Ibid.* SCARM Working Group also recommended substantive revisions and updating to the *Model Code* to continually take into account new findings in animal welfare science about animal management and cage design and welfare in alternative housing systems: see SCARM Working Group, above n 18, 26–7.

Table 4: Four Meanings of Free-Range

	Where sold?	What information and accreditation on label?	How produced?	Who regulates?
Non-assured free-range	Supermarkets; fresh produce stores; delis and butchers; market stalls at urban markets; cafes	Little specific information No certification logo shown or very low key Egg Corp Assured logo	Varies — hens may be housed at high stocking densities in large barns with limited access to an outdoor range, and little to no guarantee that the hens access the range	No set standards or assurance mechanisms Retailer may regulate which eggs to stock
Premium organic free-range	Organic stores; organic chain stores; whole food and gourmet supermarkets; market stalls at established urban markets; standalone stores; stalls at farmers markets; as a premium option at some supermarkets	Well designed, glossy packs, emphasizing premium nature of product and 'naturalness' (in terms of farming and health) Where a brand also sells cage and free-range eggs, the organic brand matches the suite of packs and fits with the corporate branding strategy Smaller brands have less well-designed packaging and graphics	Large-scale, intense production focuses on whether inputs are organic (eg feed). Outdoor access (hens must be housed in a facility where they can access the outdoors), outdoor stocking density of 2500 hens per hectare Small-scale producers may incorporate higher standards	Highly professionalised and formalised organic certification agencies (Australian Certified Organic; National Association for Sustainable Agriculture Australia) Small-scale certifiers with informal practices (Demeter) also exist

	Where sold?	What information and accreditation on label?	How produced?	Who regulates?
<p>Supermarket assured industrial free-range</p>	<p>Coles and Woolworths</p>	<p>Stocking density of 10 000 hens per hectare; brief definition of free-range National Heart Foundation Tick of Approval Product of Australia logo or other made in Australia claim Egg Corp Assured logo may be shown</p>	<p>Stocking density of 10 000 per hectare; access to outdoors Hens may be housed at high stocking densities in large barns with limited access to an outdoor range, and little to no guarantee that the hens access the range</p>	<p>Egg Corp Assured accreditation is required</p>
<p>Premium free-range</p>	<p>Farmers markets; specialist organic or wholefood stores</p>	<p>Labels often have a homemade look to them May include informative information about production methods used Displays and placards at farmers market or store may include graphics or photos documenting production methods</p>	<p>High animal welfare and environmental standards Stocking density of 750 to 1500 hens per hectare; limits on shed sizes; and requirements for management of range</p>	<p>Relatively informal producer groups (Free Range Farmers Association; Humane Choice); or no certification because it is too expensive</p>