



2 November 2012

## **Initial assessment of Certification Trade Mark application CTM1390450 filed by the Australian Egg Corporation Limited**

### **Initial assessment**

1. In accordance with the *Trade Marks Act 1995* (TMA) and the *Trade Marks Regulations 1995* (TM Regulations), the ACCC has made an initial assessment of certification trade mark (CTM) application 1390450 (CTM Application) filed by the Australian Egg Corporation Limited (AECL).
2. The ACCC's initial assessment is that it is not satisfied that the rules governing the use of the CTM the subject of the CTM Application (Rules) meet the criteria set out in section 175(2) of the TMA and regulation 16.6 of the TM Regulations.
3. In particular, the ACCC is not satisfied that the Rules are satisfactory having regard to relevant principles relating to unfair practices, because it is concerned that the Rules may mislead or deceive consumers regarding the nature of a certified egg production process described as 'free range'.
4. Interested parties have one month from the date IP Australia publishes the ACCC's Initial Assessment in the *Official Journal of Trademarks* to lodge a submission and/or call a conference.

### **The CTM Application**

#### **The applicant**

5. The AECL is a producer owned company which integrates marketing, research and development and policy services for its stakeholders.
6. The AECL is primarily funded through statutory levies collected under the *Egg Industry Service Provision Act 2002* and Australian government funds provided to the AECL for the purposes of research and development.

#### **The application**

7. The AECL filed the CTM Application with the Registrar of Trademarks (the Registrar) on 22 October 2010.

8. In accordance with section 174 of the TMA and regulation 16.2 of the TM Regulations, the Registrar of Trade Marks forwarded the CTM Application and relevant documents to the ACCC on 28 March 2011.<sup>1</sup>
9. The certification trade mark the subject of the CTM Application (proposed CTM) is depicted below. It is intended that the marks will be used in packaging in conjunction with other representations about the particular egg production method used – such as free range, barn laid or cage eggs.



10. The ACCC understands that the proposed CTM is intended to replace the AECL's existing *Egg Corp Assured* (ECA) CTM by establishing the AECL Egg Standards Australasia/Australia (ESA) certification programme for use by commercial egg producers.
11. The ACCC understands that the ESA certification scheme is intended by AECL to be a national egg quality assurance program that covers on farm practices relating to the rearing of pullets, grading facilities and the production of eggs. The scheme covers food safety, biosecurity and animal welfare.
12. The AECL has informed the ACCC that, as part of the ESA program, the proposed CTM is intended to provide a representation as to quality assurance. It will appear on egg packaging which of itself makes specific representations as to the farming method followed by the producer, for example, whether the eggs have been produced by hens using cage, barn or free range production methods. The proposed CTM could only be applied to eggs produced in accordance with the CTM requirements and in a manner consistent with the licence granted by the AECL.
13. The Rules are set out in a document titled *Certification Rules – version 1.1 October 2010*. The specific certification requirements that a CTM applicant must satisfy are set out in three separate standards:
  - Farm Standard for Egg Producers (a revised version was provided to the ACCC on 9 February 2012);
  - Farm Standard for Pullet Growers; and
  - Grading Floor Standard.
14. The AECL submits that the key driver for the CTM Application is to establish a national egg quality assurance program to help commercial egg producers develop an approved quality assurance program and/or to supersede current international egg standards.
15. The AECL submits that the Rules and certification requirements for the proposed CTM have been developed in consultation with key stakeholders, veterinary experts, food safety and nutrition experts, regulators and government in order to ensure that no relevant Australian legislation, code of practice or guideline is overlooked.

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<sup>1</sup> The ACCC's assessment was suspended from August 2011 until February 2012 to provide the AECL an opportunity to consult and provide the ACCC with a final version of the CTM Rules.

16. The ACCC has sought additional information from AECL in support of its application, including clarification of the operation of some provisions. The ACCC informed the applicant that the Commission was proposing to issue an Initial Assessment by mid October 2012.
17. On 1 November 2012, the ACCC received a late submission from AECL which only partially addresses some of the information sought by the ACCC which has not yet been considered the ACCC. This submission and any further information provided by the AECL will be taken into full consideration before a Final Assessment is made.

## **The ACCC's role in assessing CTM applications**

18. In general, the ACCC's role is to maintain and promote competition, remedy market failure, protect the interests and safety of consumers and support fair trading in markets.
19. The ACCC's role in the context of a CTM application is set out in the TMA. Apart from its general role of protecting the interests of consumers, the ACCC does not have a specific role in setting standards for egg production systems or requiring mandatory labelling of egg products.
20. Under section 175(2) of the TMA, the ACCC must give a Certificate to the CTM Applicant if it is satisfied that:
  - a) the attributes a person must have to become an approved certifier are sufficient to enable the person to assess competently whether the goods and/or services meet the requirements to become certified; and
  - b) the CTM Rules:
    - i. would not be to the detriment of the public; and
    - ii. are satisfactory having regard to the criteria prescribed in the TM Regulations, being:
      - o the principles relating to restrictive trade practices set out in Part IV of the Competition and Consumer Act 2010 (CCA);
      - o the principles relating to unconscionable conduct set out in Part 2-2 of the Australian Consumer Law (ACL) (as contained in Schedule 2 to the CCA); and
      - o the principles relating to unfair practices, product safety and product information set out in Parts 2-1 and 3-1 and Part 3-3 of the ACL respectively.<sup>2</sup>
21. A public detriment has been defined by the Australian Competition Tribunal in other contexts as any impairment to the community generally, or any harm or damage to the aims pursued by society, including the aim of achieving the goals of economic efficiency.<sup>3</sup>
22. Regulation 16.3 of the TM Regulations requires the ACCC to make an initial assessment of an application as soon as practicable and:
  - a) notify the CTM Applicant and the Registrar of the initial assessment; and
  - b) state in the notice to the CTM Applicant that:

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2 The reference to the Trade Practices Act 1974 in the TM Regulations have been read as references to the Competition and Consumer Act 2010, pursuant to the transitional provisions in the Trade Practices Amendment (Australian Consumer Law) Act No.2 of 2010).

3 Re 7-Eleven Stores Pty Ltd (1994) ATPR 41-357 at 42-683.

- i. the initial assessment will be advertised in the Official Journal (Advertisement); and
  - ii. the CTM Applicant or another person may respond in writing to the ACCC (Response) or request the ACCC in writing to hold a conference in relation to the Assessment (such response/request to be made within 1 month of the advertisement).
- 23. The ACCC must give the CTM Applicant a copy of any Responses and invite the CTM Applicant and each respondent to make a written submission on each such Response.
- 24. If a person makes a written request for a conference on a matter included in the ACCC's initial assessment, the ACCC must hold a conference and invite any person who has responded in writing to attend.<sup>4</sup>
- 25. In considering a CTM application for the purposes of making a decision, the ACCC must have regard to:
  - a) the initial assessment;
  - b) any Response that is relevant;
  - c) any relevant submission that is made to the ACCC in writing about the initial assessment, whether or not the submission is made in relation to a conference;
  - d) any relevant oral submission made during a conference; and
  - e) any other relevant matter.<sup>5</sup>
- 26. If the ACCC is not satisfied of the matters in section 175(2) of the TMA, it must notify the CTM applicant and the Registrar of its decision not to give a Certificate and the Registrar must advertise the matter in the *Official Journal*.<sup>6</sup>
- 27. Regulation 16.7 of the TM Regulations sets out matters which must be included in the advertisement by the Registrar, including a statement to the effect that the decision may be appealed to the Administrative Appeals Tribunal (AAT).
- 28. For more information about the ACCC's role, refer to Attachment A or the publication *Certification Trade Marks - the role of the ACCC* available at [www.accc.gov.au](http://www.accc.gov.au).

## **Codes, state legislation, standards and international perspectives**

- 29. There is no single definition of 'free range' eggs or universal code of practice or legislation governing the management of egg production in Australia. Rather, a national model code, adopted in some states by legislation, and a number of free range standards exist.
- 30. The Macquarie dictionary defines 'free range' as:
 

adjective	1. of, relating to, or denoting chickens reared in an open or free environment rather than in a battery.  2. of or denoting the eggs of such chickens.
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*Free* is defined in part as 'unimpeded, as motion or movements; easy, firm, or swift in movement'.

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4 Regulation 16.4, TM Regulations.  
 5 Regulation 16.5, TM Regulations.  
 6 Section 175(4), TMA.

## **The Model Code of Practice**

31. *The Model Code of Practice for the Welfare of Animals – Domestic Poultry 4<sup>th</sup> Edition* (The Model Code of Practice) was prepared by the Animal Welfare Committee within the Primary Industries Ministerial Council and published by the Commonwealth Scientific and Industrial Research Organisation (CSIRO) in 2002.
32. While the Model Code of Practice itself does not have legal effect, it is a national code which has been recognised as informing 'good practice' and has been widely adopted and used as the basis for other codes and state legislation in relation to the management of poultry and egg production in Australia for ten years.
33. The Model Code defines a number of parameters for free range egg production systems, particularly with respect to management of the range and outdoor stocking densities.

## **State legislation and voluntary codes**

34. The Model Code of Practice has been widely adopted and used as the basis for state voluntary codes and legislation in relation to the management of egg production in Australia. These include:
  - the *Eggs (Labelling and Sale) Act 2001 (ACT)*;
  - the *Animal Care and Protection Regulation 2002 (Qld)*;
  - the *Egg Industry Act 2002 (Tas)*;
  - the *Victorian voluntary Code of Practice for Shell Egg, Production, Grading, Packing and Distribution 2010*; and
  - the *Code of Practice for Poultry in Western Australia 2003*.
35. The *Eggs (Labelling and Sale) Act 2001* in the Australian Capital Territory requires egg production systems to be identified prominently on egg cartons. 'Free range' is defined as referring to hens that have continuous daytime access to outdoor runs, access at all times to indoor litter, perches and nests, adequate protection at all times from predators and the elements and is in accordance with stocking levels and other requirements for free range systems under the Model Code of Practice.
36. In Queensland, the Model Code of Practice is partially incorporated into the *Animal Care and Protection Regulation 2002* and provides that a free range system consists of a shed in which birds are kept other than in a cage and an outdoor area is accessible to the birds. In a free range system under the Regulation, a person must not keep more than 1,500 birds per hectare in the outdoor area of a free range system.
37. Various state and territory animal protection legislation provides that compliance with the Model Code of Practice is a defence to a prosecution for a cruelty offence.<sup>7</sup>
38. New South Wales and South Australia also currently have bills relevant to this CTM application before Parliament:
  - *Truth in Labelling (Free-range Eggs) Bill 2011 (NSW)*; and
  - *Food (Labelling of Free-Range Eggs) Amendment Bill 2012 (SA)*. This bill proposes to amend the *Food Act 2001 (SA)*.

## Other standards

39. A number of bodies have existing CTMs which relate to free range eggs including, Humane Choice, the Free Range Egg and Poultry Australia Pty Ltd (FREPA), the Victorian Farmers Federation, the RSPCA and the Free Range Farmers Association Inc.
40. For an overview of the various attributes of state legislation, state voluntary codes and other standards, see [Attachment C](#).

## The public consultation process

41. To inform its assessment of the CTM under the TMA requirements, the ACCC commenced public consultation on the AECL's proposed Rules on 23 May 2012.
42. The ACCC received over 1700 submissions with all but seven opposing the application. The majority of submissions were from individual consumers but submissions were also received from egg producers, industry associations, consumer and animal welfare organisations and members of parliament. [Attachment B](#) provides a broad overview of submissions.
43. In addition to receiving written submissions, the ACCC met with a number of organisations including the AECL, Humane Choice and Humane Society International, RSPCA, Choice, Animal Health Australia, Standards Australia, the Department of Agriculture, Forestry and Fisheries and the Victorian Department of Primary Industries.
44. ACCC officers have also visited three free range egg production facilities covering a variety of stocking densities and differing production practices.

## Issues raised during public consultation

45. While the proposed CTM covers a wide range of practices relevant to the production of eggs, the primary focus from submissions was in relation to the provisions involving the production of free range eggs contained in the *Farm Standard for Egg Producers*.<sup>8</sup> The submissions suggest that many consumers consider the concept 'free range' to incorporate higher standards of animal welfare than barn laid and cage egg production systems.
46. Broadly, submissions raised concerns that a number of aspects of the CTM Rules would conflict with consumer expectations and perceptions of what constitutes 'free range' eggs, namely that under the proposed CTM:
  - Outdoor stocking density can be up to 20,000 birds per hectare.
  - Indoor stocking density can be the same as for that in a barn laid system – 30 kg/m<sup>2</sup> (or approximately 15 birds per square metre).
  - The rotation of birds on to fresh pasture is only strongly recommended but is not a requirement. It is also only recommended that environmental management is practiced.
  - Certain management practices inconsistent with the concept of free range such as beak trimming, forced moulting and toe trimming are not dealt with.
47. These concerns are largely related to the question of whether the Rules are satisfactory having regard to the principles relating to unfair practices contained in Part 2-1 and 3-1 of the ACL.

48. Submitters also raised competition issues, as well as issues with some of the technical aspects of the Rules.

## **Misleading or deceptive conduct**

49. As noted above, the ACCC can only issue a certificate under s 175 of the TMA, if it is satisfied of the matters identified in s 175(2) of the TMA, including that CTM rules are satisfactory having regard to the principles of unfair practices set out in the ACL.

50. As part of this assessment, the ACCC considers whether the CTM raises misleading or deceptive concerns, including the following:

- a) whether the CTM indicates to consumers that a good and/or service meets a particular standard, but the certification requirements in the rules do not reflect this standard or the process for determining whether these requirements or standards have been met is not reliable; or
- b) while the CTM rules may be consistent with what the CTM purports to indicate to consumers, the mark itself may be ambiguous, confusing or misleading—that is, it might be interpreted by consumers to mean that a good and/or service complies with a different standard.<sup>9</sup>

51. The ACCC recognises that consumers are increasingly making food purchasing decisions based on production methods and processes (value based decisions). This was evident from submissions and documented in the recent Blewett Report<sup>10</sup>.

52. The Blewett Report acknowledged the negative consequences of misleading labelling:

Agreed standards utilise agreed terminology for values-based claims that enable manufacturers to make claims within a framework of agreed definitions. They are particularly suited to consumer values issues directly linked to food production methods or processes, where precise and agreed definitions are possible. Such an approach would be appropriate where value-based claims are clearly in use but ill-defined and where the lack of a clear definition has the potential to confuse or mislead consumers and prevent a level playing field for industry.<sup>11</sup>

53. The ACCC assesses whether conduct is misleading as a question of fact to be determined objectively, having regard to the context in which the conduct takes place and the surrounding facts and circumstances.<sup>12</sup>

54. In this context, the ACCC has regard to the relevant class or section of the public and the likely reaction to the conduct by ordinary or reasonable members of that section.

55. If the proposed CTM was approved, it would likely feature on egg packaging on products for sale in grocery retailers nationwide. The conduct by virtue of the proposed CTM would be directed to the public at large. Consequently, the ACCC considers that the relevant class of consumers to have regard to in the context of this CTM Application is, at least, all egg buying members of the public.

56. The ACCC acknowledges that conduct will only be misleading if it induces, or is capable of inducing, the relevant class of consumers into error<sup>13</sup> and that conduct is likely to

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9 Australian Competition and Consumer Commission, Certification trade marks – the role of the ACCC, (2011).

10 Independent Panel for the Review of Food Labelling Law and Policy, commissioned by the Australia and New Zealand Food Regulation Ministerial Council *Labelling Logic: Review of Food Labelling Law and Policy* (2011).

11 Labelling Logic: Review of Food Labelling Law and Policy (2011) paragraph 6.21.

12 Taco Co of Australia Inc v Taco Bell Pty Ltd (1982) 42 ALR 177.

13 Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd (1982) 149 CLR 191.

mislead or deceive if there is a 'real or not remote chance or possibility, regardless of whether it is less or more than fifty per cent'.<sup>14</sup>

57. In assessing whether the CTM Rules may mislead or deceive, the ACCC considers what an ordinary or reasonable egg buying consumer is likely to understand by the term 'free range' when applied to eggs in conjunction with the proposed CTM and whether this accords with the standards of production imposed by the Rules for eggs to which the proposed CTM is attached.

## **ACCC assessment**

58. The ACCC's initial assessment focuses on a series of issues where AECL's CTM Rules may be inconsistent with consumer expectations of free range egg production systems – including permitted stocking densities, the proportion of birds accessing the range, beak trimming and other animal welfare concerns. Potential competition issues are then examined. In each of these sections, the views expressed by interested parties are set out, followed by the ACCC's assessment. Finally a number of outstanding governance issues are discussed.
59. The ACCC's Initial Assessment takes account of all information provided to it by the applicant and interested parties up until 31 October 2012. As indicated above, the ACCC will consider the information the AECL provided to the ACCC on 1 November 2012, and any further information provided, including in response to this Initial Assessment, before a Final Assessment is made.

## **Permitted stocking densities under free range egg production systems**

60. Permitted stocking densities under the proposed CTM were the primary focus of submissions.
61. The requirements proposed by CTM 1390450 set out the permitted outdoor stocking densities for free range egg production as follows:
- Outdoor stocking density:
- 3.19 (a) Outdoor stocking density can be up to but must not exceed 2 birds per m<sup>2</sup>.
- Note: It is strongly recommended that regular rotation of birds onto fresh range areas occurs and that environmental management is practiced.
- Indoor stocking density:
- 3.22 (b) Maximum permissible stocking density within the shed is 30 kgs live weight or 12 birds /m<sup>2</sup> of total available floor area.
62. The vast majority of submissions considered that the maximum outdoor stocking density of two birds per square metre - or 20,000 birds per hectare, under the CTM Rules would significantly affect the welfare of birds, creating an inhumane environment. Concern was expressed that even if only half of the birds were on the range at one time, this number would quickly denude pasture and would be unsustainable without frequent rotation onto new land. Submissions suggested that the only way outdoor ranges could be sustained under the Rules would be if the vast majority of birds did not venture out onto the range regularly.
63. Some parties also argued that increasing the stocking density from the current 1,500 birds per hectare prescribed in the Model Code would cause further confusion, making it harder for consumers to make informed purchasing decisions and reduce confidence in products labelled 'free range'.



64. Similar concerns were raised with respect to the proposed indoor stocking densities – namely that consumers reasonably expect that egg production systems designated as ‘free range’ would typically have significantly lower indoor stocking densities than cage or barn laid production systems. References were made to other free range standards which limit indoor stocking densities to half or two thirds of those proposed in the CTM Rules.

*Comparisons to the Model Code of Practice, legislation and other standards*

65. There are a number of existing trademarks and various state and territory laws which stipulate stocking density for ‘free range’ production systems.
66. The proposed 20,000 birds per hectare is well above maximum stocking densities of the existing Model Code of Practice, state legislation and other standards, which generally prescribe maximum stocking densities of 1,500 birds per hectare.
67. The Model Code of Practice provides the outdoor maximum stocking density for free range egg production as:
- A.2.1.4 For layer hens a maximum of 1,500 birds per hectare.
- When meat chickens use only some weeks of the 10 week cycle on pasture (e.g 4 weeks) a proportionally higher stocking density than for layer hens may be used.
- NB: Any higher density is acceptable only where regular rotation of birds onto fresh range areas occurs and close management is undertaken which provides some continuing fodder cover.
68. The AECL interprets this provision of the Model Code as effectively not placing an upper limit on stocking density for layer hens, arguing that the *nota bene* at clause A.2.1.4 of the Model Code should be read as applying to both meat chickens and layer hens. The AECL submits that the proposed stocking density in its CTM Rules places a cap on the currently unlimited outdoor stocking density for free range hens.
69. A number of submissions disagree with the AECL’s interpretation of the Model Code’s free range stocking density provisions. Some submissions referred to and/or included legal advice to the effect that the correct interpretation of the *nota bene* is that it only applies to meat chickens and hence free range layer hens are capped at 1,500 birds per hectare.<sup>15</sup> Regardless of the differing interpretations, the ACCC does not consider that consumers would contemplate stocking densities as high as 20,000 birds per hectare to be consistent with the Model Code of Practice.
70. The *Eggs (Labelling and Sale) Act (ACT) 2001* provides that free range hens are kept in accordance with the stocking level and other requirements for range systems under the Model Code of Practice.<sup>16</sup>
71. The Animal Care and Protection Regulation (Qld) 2002 relevantly provides:
- A person must not keep more than 1500 laying fowl in a hectare in the outdoor range of a free range system.<sup>17</sup>
72. Other jurisdictions are currently debating the need to legislate a maximum outdoor stocking density for free range eggs:

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15 The argument is that the *nota bene* is explicitly a reference to meat chickens and the reference to “proportionately higher stocking density than for layer hens” suggests that any increased stocking density for meat chickens is not unlimited and only applies where regular rotation of birds on to fresh range occurs and there is close management of the range.

16 Schedule 1, 4(d).

17 Section 17.

- a) A *Truth in Labelling (Free-range Eggs) Bill 2011* has been introduced in the New South Wales Legislative Council in August 2011. The Bill has been amended to increase the limit on stocking density of free range to 1,500 birds per hectare (it was initially proposed to be 750 birds per hectare).
  - b) A *Food (Labelling of Free-Range Eggs) Amendment Bill 2012* has been introduced in the South Australian House of Assembly in March 2012<sup>18</sup>. If enacted, eggs may only be labelled 'free range' if the birds that produce the eggs are kept at outdoor stocking densities that do not exceed 1,500 per hectare.
73. The ACCC also notes that some submissions have indicated that stocking densities of 20,000 hens per hectare contradicts AECL's own *Environmental Guidelines for the Australian Egg Industry* which provides that the range area should not have a stocking density in excess of 1,500 birds per hectare.<sup>19</sup>
74. The Egg Corp Assured (ECA) CTM is AECL's current certification scheme (registered with IP Australia in March 2005). The ECA provides a maximum outdoor stocking density of 1,500 birds per hectare and the indoor stocking density provides for a maximum of 30 kg/m<sup>2</sup>.
75. Humane Society International Incorporated's True Free Range CTM was registered with IP Australia in May 2011. The Humane Choice True Free Range CTM is intended to certify that products bearing its CTM logo have been produced humanely and ethically in a free range environment. The Standard in the CTM for poultry provides that for free range layer hens and meat chickens the outdoor stocking density shall not exceed 1,500 birds per hectare. The indoor stocking density for both layer hens and meat chickens is not less than 1 square metre for every 5 birds including the roosting area.
76. The Free Range Egg and Poultry Australia Pty Ltd (FREPA) registered CTM 959378 with IP Australia in June 2003.<sup>20</sup> The Rules provide:
- Outdoor stocking density:
- The maximum stocking density for layer hens under the FREPA Code is 750 birds per hectare.
- Indoor stocking density (provided by way of sliding scale depending on the total number of birds):
- 10 birds per square metre up to 1000 birds
  - 9 birds per square metre up to 2000 birds
  - 8 birds per square metre up to 3000 birds
  - 7 birds per square metre up to 4000 birds
  - 6 birds per square metre over 4000 birds.
77. The RSPCA registered *Approved Farming Scheme Standards for Layer Hens* as a trade mark with IP Australia in June 2010. The RSPCA standards relevantly provide:
- The outdoor stocking density for free range facilities is:
- A maximum of 1500 birds per hectare of range area to be available to hens in a free range system with no rotational range management strategies (ie a fixed area).

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18 A similar bill was introduced in the Legislative Council in April 2012.

19 Page 16 of the Guidelines: The maximum stocking density of free range is 30kg/m<sup>2</sup> in the shed. It is recommended in the Model Code of Practice that the range area should not have a stocking density in excess of 1500 birds/ha.

20 FREPA previously lodged a CTM application under the name Free Range Egg and Poultry Association of Victoria Inc on 5 July 2009, which was approved by the ACCC in 2002.

A maximum of 2500 hens per hectare of range area to be available to hens in free range systems with rotational range access, where it can be demonstrated that hens access a well maintained sustainable range area.

78. The Victorian Farmers' Federation registered CTM 972253 with IP Australia in September 2003. The ACCC approved the Rules on 5 September 2005. The Rules provide the following stocking density for layer hens in a free range system:

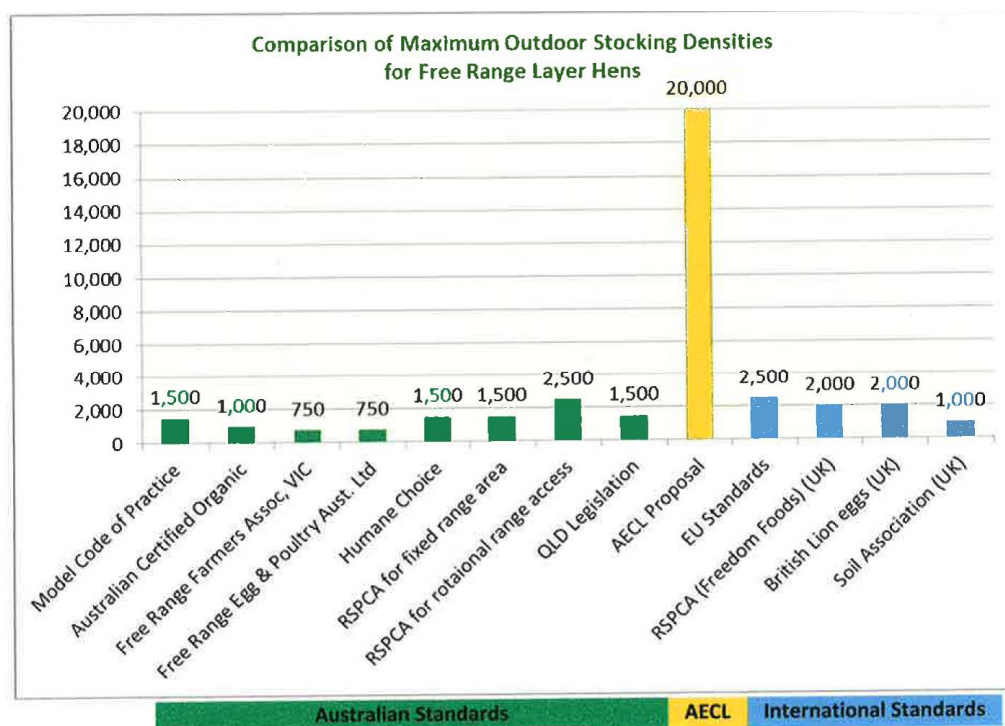
Outdoor stocking density:

No more than 1500 hens per hectare.

Indoor stocking density:

40kg/m<sup>2</sup> (approximately 30 birds per metre square for layer hens).

79. Free Range Farmers Association (FRFA) has a free range accreditation scheme which it states is an extension of the Model Code of Practice. FRFA's standard provides for a maximum outdoor stocking density of 750 hens per hectare. The maximum indoor stocking density is 15 kg/m<sup>2</sup> (approximately 7 birds per square metre).
80. The Australia Certified Organic Standard 2010 provides that the indoor stocking density for laying hens must not exceed 16kg/m<sup>2</sup> (approximately 8 birds). In addition, the Standard provides that the number of birds per shed should be such as to enable balanced utilisation of the acreage around sheds and as a guide this should not exceed 1,500 birds without an application to the certifying organisation verifying the system conforms with the principles of the Standard.
81. For an international perspective, the European Council, *Council Directive 1999/74* provides for a maximum stocking density of 2,500 hens per hectare.
82. A submission from Humane Society International<sup>21</sup> provides the following illustrative comparison of maximum outdoor stocking densities for free range birds contained in various voluntary standards, regulations and jurisdictions:



### *ACCC assessment*

83. While the ACCC does not consider stocking density alone is likely to be determinative of whether a particular production system can be accurately represented as 'free range', the ACCC considers that use of the term 'free range' in the context of egg production conveys to consumers that birds are farmed in conditions in which they have substantial space in which to move around freely both in the shed and on the range.
84. As the above chart indicates the AECL's outdoor stocking density proposal is a significant departure from all current free range egg production legislation and standards.
85. The ACCC also notes that the proposed indoor stocking density is the same as for that in a barn laid system – 30 kg/m<sup>2</sup> (or approximately 15 birds per square metre).
86. The ACCC understands that high stocking densities within a shed are likely to impact on a bird's ability and willingness to make its way out on to the range and impede a bird's ability to engage in natural behaviours and in the ACCC's view would contradict consumer's perceptions of what constitutes free range egg production.
87. The ACCC considers that the proposed maximum outdoor stocking density of 20,000 birds per hectare is inconsistent with consumer expectations of farm practices adopted in free range egg production.

### **Proportion of birds accessing the range**

88. Submissions point to an expectation by consumers that birds in free range production systems regularly access outdoor ranges that are environmentally enriched to allow the birds to engage in natural behaviours such as foraging, socialising in groups and dust bathing.
89. Many submissions expressed the view that 20,000 birds per hectare would quickly denude pasture and is unsustainable without frequent rotation onto new land. Concerns were expressed that the fixed nature of large scale sheds did not easily allow for the kind of regular land rotation that would be required to maintain vegetation on the range if 20,000 birds per hectare were all ranging.
90. Concerns were also raised by parties that the scale and style of egg production systems allowed under the proposed CTM would not enable the majority of birds to engage in many of the natural behaviours that consumers associate with 'free range' – including foraging, sun bathing, dust bathing and socialising in small groups. This outcome is likely to be due to the majority of birds staying inside the sheds for much of the time as a result of not only high indoor and outdoor stocking densities but other elements of the Rules which relate to the size and number of pop holes in the sheds and other management practices associated with the birds and the range.
91. An adequate amount of sizeable pop-holes will influence the regularity and frequency at which birds will venture onto the range. Parties considered that without adequate entry and exit points, birds will rarely venture onto the range. The CTM Rules<sup>22</sup> propose:
  - 3.29. Openings must be of a size and number and be evenly distributed to allow easy entry and exit for the birds with no impediments. As a guide openings should be a minimum of 35 cm high and 40 cm wide with 2 metres per 1000 birds taking into account the climatic conditions.Exit space equal to the combined length of four pop-holes, as set out above, is allowable in these circumstances. Where a shed is divided into sections, each section must have direct access to the range area.

### ACCC assessment

92. The ACCC considers that 'free range' conveys more than just the theoretical possibility that birds can range. If many birds do not range for a significant proportion of the day, the ACCC considers that the flock cannot accurately be described as free range.
93. The ACCC is concerned that an ordinary or reasonable consumer would be likely to form the impression that eggs bearing the proposed 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.
94. The ACCC understands that if all birds were to range under AECL's proposal, the flock would be crowded and the range would be quickly denuded. Such pasture would be unsustainable without frequent rotation onto new land. The ACCC considers that the more likely outcome under the AECL proposal, where the majority of producers use large, fixed sheds, is that the majority of birds in each shed would not range frequently, instead remaining indoors for much of the time. This view is supported in submissions and was reinforced by site visits undertaken by the ACCC.
95. 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.
96. 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.
97. The ACCC considers that the pop-hole requirements in the CTM Rules are not sufficient to meet consumers' expectations of free range. The Rules merely provide guidance on the number and size of openings, which are subject to producers taking into account climatic conditions. The ACCC considers that these guidelines are not sufficient to ensure that the majority of birds will spend much of each day out on the range.

### Beak trimming practices under free range egg production systems

98. Feather-pecking and 'cannibalism' tends to occur in environments that frustrate the behavioural needs of foraging birds.<sup>23</sup> For this reason, many submissions considered that the practice of beak trimming was an important litmus test of whether birds under the AECL proposal would truly be able to free range and engage in natural behaviours regularly.
99. Beak trimming involves the partial removal of the bird's upper and lower beak (not the whole beak) either with a hot blade, a laser or infrared technology. The consequences of beak trimming for bird welfare include trauma during the procedure, pain caused by tissue and nerve damage and loss of normal function due to reduced ability to sense materials with the beak.<sup>24</sup> It is performed to avoid or mitigate the effects of feather pecking and cannibalism as the beak becomes blunt and, when pecking other birds, there is no or very little impact.<sup>25</sup>

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23 Picket MSc BSc (hons), Heather (2009) 'Controlling Feather Pecking and Cannibalism in Laying Hens without Beak Trimming' *A Compassion in World Farming Report* page 5.

24 *Ibid.*

25 RSPCA Australia, [http://kb.rspca.org.au/What-is-beak-trimming\\_359.html](http://kb.rspca.org.au/What-is-beak-trimming_359.html), last retrieved 12 September 2012.

100. The Rules do not prohibit beak trimming. The AECL advised the ACCC that beak trimming is a routine practice for most large scale free range egg producers – that is, chicks have their beaks trimmed at one day old prior to being supplied to commercial egg farms.
101. A large number of submissions expressed concern that routine beak trimming is more likely to occur in large scale egg production systems (i.e. 20,000 birds per hectare as opposed to 1,500 or less) given the higher densities the birds must live in and the resultant greater risk of behavioural issues.
102. Submissions indicated that the practice of beak trimming was unlikely to adhere to a ordinary or reasonable consumer's perception of free range. It was advocated that consumers would envisage that free range birds would be able to fully engage in natural behaviours such as foraging on the range.

*Comparisons to the Model Code of Practice, legislation and other standards*

103. Under the Model Code of Practice, beak trimming is only permitted if there are ongoing problems with pecking or cannibalism in a flock and if numerous other measures have failed to control the problem such as reducing the stocking density, light intensity, temperature, humidity or disturbances to the pecking order, removing injured birds, removing birds observed to be instigating pecking or eliminating shafts of bright sunlight.<sup>26</sup> Beak trimming under the Model Code of Practice should be considered in consultation with an expert in animal welfare to prevent further injury or mortality in the flock and must be performed only by an accredited operator in accordance with agreed accreditation standards.<sup>27</sup>
104. FRFA's free range accreditation scheme prohibits all bird mutilation practices such as beak trimming. In FRFA's view, mutilation practices are unnecessary at lower stocking densities (such as 750 hens per hectare under the FRFA standard).
105. The *European Council, Council Directive 1999/74* prohibits beak trimming, however member states can authorise beak trimming provided it is done by a qualified operator on birds less than 10 days old.

*ACCC assessment*

106. The ACCC considers that consumers expect that free range birds would access a genuine range environment where they can frequently perform most, if not all, of their natural behaviours. Consumers would also expect higher animal welfare practices in free range systems relating to the management of flock size and density as well as preventative management practices (for example, providing opportunities for dust bathing and perching) to alleviate the need for routine beak trimming.
107. Consequently, the ACCC considers that routine beak trimming, which may impact on a bird's ability to engage in natural behaviours (particularly foraging), is not an animal welfare outcome that consumers would typically associate with free range egg production.

**Other animal welfare concerns regarding the proposed CTM**

108. The proposed CTM does not require perches be provided for birds,<sup>28</sup> with some submitters arguing that perching is an innate behavioural need. Parties argue that 'good practice'<sup>29</sup> would include requirements for access to perches.

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26 Clause 12.5.

27 Clause 13.2

28 Clause 3.36.

109. Concerns were expressed that the Rules also do not explicitly deal with management practices such as forced moulting and toe trimming.

#### *ACCC assessment*

110. The ACCC considers that consumers understand 'free range' to incorporate higher animal welfare outcomes than cage or barn laid egg production systems. Recent comments by Justice North in the Federal Court of Australia about free range egg production support this view:

...the free range representation is a representation as to quality. The representation suggests that the eggs are produced by a more humane environment for the laying hens and that consumers might regard free range eggs as having a different quality, that is to say, a different circumstance of production...<sup>30</sup>

...the conduct [placing cage eggs in cartons marked free range] amounted to a cruel deception on consumers who mostly seek out free range eggs as a matter of principle, hoping to advance the cause of animal welfare by so doing.<sup>31</sup>

111. The ACCC considers that the proposed Rules do not ensure an environment for birds that is consistent with consumers' perception of a higher level of animal welfare associated with free range egg production.

#### **Competition concerns**

112. Under s 175 of the TMA, the ACCC must also be satisfied that CTM rules are satisfactory, having regard to the principles relating to restrictive trade practices set out in Part IV of the CCA. In this context, the ACCC considers whether competition concerns may arise from a proposed CTM by assessing whether the CTM rules require or encourage the CTM user to engage in anti-competitive conduct.

113. Anti-competitive conduct may include conduct which restricts market entry, imposes restrictions on advertising or marketing, establishes prices for goods and/or services, imposes geographical boundaries on the use of the mark or imposes other restrictions that may adversely affect competition.

114. A large number of submissions expressed concern that the proposed standard would allow large scale egg producers with outdoor stocking densities well in excess of 1,500 birds per hectare and hence significantly lower operating costs, to label their eggs as 'free range' and that this would have a detrimental competitive impact on smaller scale producers with lower stocking densities that have established their business in accordance with the Model Code of Practice.

115. Submitters also expressed concerns related to information asymmetries between the Certification Body and the AECL Board. Some submitters considered that clause 1.7.1 means that there is insufficient distance between the Certification Body and the AECL Board. It is argued that this is different from the current ESA CTM clause. A number of parties argue that this raises anti-competitive concerns and a commercial conflict because the egg producer who is being audited may be a competitor of a member of the AECL Board.

#### *ACCC assessment*

116. The ACCC recognises that CTMs by their nature are intended to confer a degree of competitive advantage – by indicating that the products that feature the mark meet a particular standard or set of requirements.

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29 As referenced in Clause 1.2 of the Rules.

30 ACCC v C.I & Co Pty Ltd [2010] FCA 1511 at paragraph 16.

31 Ibid, at paragraph 30.

117. Egg producers that operate systems that are consistent with consumer expectations of free range systems will typically incur higher production costs per egg than producers operating systems where birds rarely leave the shed and substantially less range per bird is provided.
118. The ACCC considers that the first competition concern will only arise if the larger scale producers are able to label their eggs as free range in accordance with the CTM Rules but where doing so is likely to be misleading or deceptive to egg buying consumers.
119. As such, it is a related secondary issue to whether the Rules are considered to be likely to be misleading and deceptive and is appropriately dealt with in that context rather than as a competition concern. It is important to note that competition law does not seek to prevent larger scale, more efficient producers from entering a market and potentially under cutting existing, smaller producers where both are producing essentially the same product.
120. In relation to the second competition concern raised by submitters, the ACCC has sought further information from AECL regarding the interaction of the AECL Board with the Certification Body. Any potential for conflict of interest would need to be addressed before the ACCC can be satisfied that the Rules are satisfactory having regard to the criteria in section 175(2) of the TMA.

### **Outstanding governance issues**

121. Since receiving the CTM application in March 2011, the ACCC has engaged in ongoing dialogue with the AECL, expressing concern and identifying areas of the application relating to governance arrangements that appear to be deficient, such that the ACCC cannot be satisfied of the criteria in s 175 of the TMA. Whilst the AECL has amended some of the proposed Rules, a number of outstanding concerns remain. These are outlined below.
122. Under the TMA, CTM rules must contain requirements (the certification requirements) that goods or services must meet for the CTM to be applied to them.<sup>32</sup> The Rules must provide that an applicant to use the CTM must:
- a) be an 'egg business'<sup>33</sup>;
  - b) have demonstrated that it has taken all the necessary steps to develop a HACCP<sup>34</sup> Plan as required under the Standards and the AES;
  - c) be accredited as meeting all the requirements of the Standards; and
  - d) have paid the licence fee.
  - e) The majority of governance concerns the ACCC has relate to the accreditation process.

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<sup>32</sup> Section 173(2)(a), TMA.

<sup>33</sup> An 'egg business' is defined in the Rules as a primary producer directly engaged in and conducting the activities of pullet rearing, egg production, or egg grading/packing and/or a registered marketing business wholly owned by such primary producer/s. Pullet rearing: is a business function that purchases layer chicks and rears them until they are dispatched to egg laying facilities. Egg production: is a business function that produces eggs for the purpose of sale. Egg grading/packing: is a primary producer whose business function is to grade and pack eggs for sales.

<sup>34</sup> Hazard Analysis Critical Control Point (HACCP) is defined by the AECL as a system for preventing food safety hazards, adopted by food companies around the world, identifying hazards and developing monitoring and control procedures to protect against important hazards at critical points in the production process.



*Process for determining compliance with certification requirements*

123. Given that the purpose of a CTM is to illustrate that a trader's goods or services are certified as meeting particular standards, CTM Rules are required to detail the process the CTM owner or approved certifier will use to determine whether or not the goods or services meet the certification requirements.
124. In the publication, *Developing a new Standard for Australian eggs: Your questions answered*, the AECL states that it has created a wholly owned subsidiary company to be the Certifying Body.
125. The ACCC considers that AECL's Rules provide insufficient information about the objective criteria and decision making process that the Certification Body will follow in deciding whether to grant a CTM licence subsequent to receiving an auditor's report.
126. Furthermore, the ACCC considers that the CTM Rules do not sufficiently detail the criteria the Certification Body will have in regard to making a decision to refuse, cancel or suspend a licence where such a decision is not based solely on an auditor's report.

*Process for determining the attributes of approved certifiers*

127. CTM Rules should set out the attributes that a person must have to become a person (an approved certifier) approved to assess whether goods and/or services meet the certification requirements. These attributes may be the qualifications, skills or abilities a person must possess to be able to assess whether or not the goods or services meet the standards set by the CTM owner.
128. The *Farm Standard for Egg Producers* states that the Certification Body is representative of the relevant sectors of the food industry and collaborates with the Technical Advisory Committee (TAC). The TAC exists independently within the Certifying Body and is responsible for drafting and amending the Standards<sup>35</sup>. The AECL have advised the ACCC that the Certification Body members have not yet been appointed.
129. The Rules state that the Certification Body will train auditors, who are accredited Food Safety Auditors by the Registered Accreditation Board Quality Society of Australasia in the requisite Standards so that they are qualified to conduct audits of applicants to determine compliance with the Standards.<sup>36</sup>
130. The ACCC considers that the Rules do not sufficiently outline:
- a) the proposed structure of the Board;
  - b) how decisions will be made by the Board;
  - c) how the Board will maintain independence from AECL and the degree to which it will be independent;
  - d) the process for appointing members to the Board; and
  - e) general information about the qualifications and/or general experience required of Board members.

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35 Paragraph 1.71.

36 The Rules, page 5, paragraph (b).

### *Dispute resolution processes*

131. Given that CTMs, by their nature, confer a degree of competitive advantage, the ACCC places weight on effective dispute resolution processes in CTM rules. The TMA broadly provides<sup>37</sup> that CTM rules must contain a procedure for:
- a) resolving disputes about whether or not goods and/or services meet the certification requirements; and
  - b) a procedure for resolving a dispute about any other issue relating to the CTM.
132. Following a process of internal review, CTM rules should have an independent dispute resolution process to provide comfort that an application to certify goods or services under a CTM will not be denied for reasons beyond the CTM rules.
133. The Rules provide for an Applicant or Participant to appeal a certification decision directly to the Board of the Certification Body. If the dispute relates to an audit report, the Certification Body will seek further information from the auditor and may also seek the advice of a more senior auditor and the Certification Committee in reviewing the decision. The Certification Body shall commence its review of the decision within one month of the notice of dispute having been received and will advise the Approved User or Applicant of the outcome of the review in writing.
134. In the event that the Board of the Certification Body maintains the decision to refuse the licence to use the ESA Mark, the Applicant or Approved User may then have the decision of the Certification Body reviewed and may apply for such review to be conducted by an arbitrator appointed by the Chartered Institute of Arbitrators.
135. The ACCC considers that the Rules establishing the dispute resolution process are currently inadequate. Specifically:
136. Both the initial decision to refuse, cancel or suspend a licence and the review of this decision is to be undertaken by the Certification Body. The ACCC considers that an appropriate review mechanism should provide for review of the disputed decision by an appropriately qualified review body which is at arm's length from the original decision to refuse, cancel or suspend a licence.
137. It appears that only a decision to refuse the grant of a licence to an Applicant can be reviewed. An Approved User appears unable to seek review of the Certification Body's decision to cancel or suspend a licence to use the mark.
138. The Rules do not provide a process for resolving disputes about other issues relating to the CTM, including disputes about corrective actions ordered by auditors (applying to both Applicants and Approved Users) and the use of the mark by Approved Users.
139. Apart from the requirement that the Certification Body shall commence its review within one month, no time frames are specified for any appeals process.
140. The ACCC has sought further information from AECL regarding the outstanding governance issues outlined above. These matters would need to be addressed prior to approval of this CTM application.

### **Conclusion**

141. The ACCC considers it likely that consumers are prepared to pay more for free range eggs because they associate it with a higher standard of animal welfare, including that the birds spend a significant proportion of most days out on the range in an enriched environment unlike birds in barn laid or cage egg production systems.

142. The ACCC is therefore concerned that the AECL Standards governing free range egg production as proposed by CTM Application 1390450 are inconsistent with consumer expectations and understanding of free range egg production. The ACCC is concerned that the use of the CTM in the circumstances of such inconsistency has the potential to mislead or deceive consumers.
143. In accordance with the requirements of the TMA, the ACCC has completed its Initial Assessment of the CTM Application.
144. The ACCC's initial assessment is that it is **not satisfied** that the Rules are satisfactory having regard to the criteria in section 175(2) of the TMA, including the principles relating to unfair practices set out in Parts 2-1 and 3-1 of the ACL and for these reasons would be to the detriment of the public.
145. The ACCC therefore proposes not to give a certificate under s 175(2) of the TMA.

#### **Next steps**

146. The AECL or any other interested person who wishes to comment on this Initial Assessment has one calendar month from the date the Registrar publishes the ACCC's initial assessment in the *Journal of Trademarks* to lodge a written submission with the ACCC and/or request that the ACCC hold a conference to make an oral submission. Submissions may be sent to [CTMs@accc.gov.au](mailto:CTMs@accc.gov.au) or to Adjudication, ACCC, GPO Box 3131 Canberra ACT 2601.
147. After holding a conference (if one is called) and considering any additional submissions and information provided (including that provided by the AECL on 1 November 2012), the ACCC will proceed to make its Final Assessment.
148. If the ACCC is satisfied that the relevant criteria are met, the ACCC will provide a certificate stating that it is so satisfied to the CTM applicant and the Registrar. A certified copy of the rules will also be provided to the Registrar.
149. If the ACCC is not satisfied that the relevant criteria are met, the ACCC must notify the CTM applicant and the Registrar of its decision.
150. An application may be made to the AAT to review a decision by the ACCC to refuse to give a certificate.

## **Attachment A**

### **The ACCC's role in assessing CTM applications**

A Certification Trade Mark (CTM) certifies that a good or service is of a particular standard.

Before a CTM can be registered by the Registrar of Trademarks, the ACCC must be satisfied under section 175 of the *Trade Marks Act 1995* (TMA) that:

- a) the owner of the CTM or the approved certifiers demonstrate the attributes necessary to assess whether the goods/services in question meet the required standard; and
- b) the rules governing the use of the CTM are not to the detriment of the public; and
- c) the rules governing the use of the CTM are satisfactory having regard to the principles relating to restrictive trade practices set out in Part IV of the Competition and Consumer Act 2010 (CCA) and the principles relating to unconscionable conduct (Part 2-2), unfair practices (Parts 2-1 and 3-1), and safety of consumer goods and product related services (Part 3-3) in Schedule 2 (Australian Consumer Law) of the CCA.

Section 173 of the TMA specifies a number of matters which CTM rules must address, namely (in broad terms):

- a) the certification requirements that goods and/or services must meet for the certification trade mark to be applied to them;
- b) the process for determining whether goods and/or services meet the certification requirements and any ongoing requirements;
- c) the attributes that an approved certifier must have to assess whether goods and/or services meet the certification requirements;
- d) the requirements that a person must meet to use the certification trade mark and any ongoing requirements; and
- e) the procedure for resolving a dispute about whether goods and/or services meet the certification requirements or a dispute about any other issue relating to the certification trade mark.

In assessing CTM applications the ACCC has regard to whether or not the proposed rules meet these requirements. The ACCC may also require applicants to amend rules.

## **Attachment B**

### **Generalised summary of submissions**

The ACCC received over 1700 submissions commenting on AECL's CTM Application. Approximately 80 of these were from organisations, with the remainder from individuals. Seven submissions supported AECL's application, the remainder opposed it. In addition, Choice provided a petition with 3101 signatures opposing the Application and an individual provided a petition opposing the Application with 136 signatures.

The key issues raised in submissions have been summarised below, grouped by class.

#### *Individuals*

- The appropriate stocking density for free range birds is 1,500 birds per hectare or less.
- Birds are only free range when they can engage in natural behaviours, including dust bathing and being able to peck/forage for food.
- De-beaking is not required for free range birds because having the ability to peck other hens or engage in cannibalism is only a problem that occurs in crowded conditions.
- The proposed standard will cause consumer confusion with egg labelling, making it difficult for consumers to make an informed choice.
- Having another different standard will add to consumer confusion.
- The proposed increased stocking densities will be unsustainable in terms of the impact on the surrounding land and environment.
- The proposed CTM will negatively impact on smaller or 'genuine' free range producers (those producers who farm at outdoor stocking densities of 1,500 birds per hectare or less), creating unfair competition.
- Egg cartons should include a stocking density graphic to inform consumers.
- Research should be undertaken to develop a mandatory national standard for what constitutes 'free range'.
- Cage egg production should be banned.
- Bird welfare should be given more weight in developing standards.
- Large commercial producers are exploiting the premium free range label.

#### *Consumer organisations*

- AECL's CTM would create public detriment by setting a free range standard that is inconsistent with the reasonable expectations of consumers and may mislead them.
- Choice conducted quantitative research on consumers' expectations of free range labelling. Although most participants expect free range to mean birds have more space with a maximum number allowed outside per hectare, the majority didn't know what the maximum stocking density should be.
- Choice survey results showed that 38 per cent of consumers rely solely on the words 'free range'. This highlights the need for robust free range standards.
- 20,000 birds per hectare has the potential to cause negative impacts like soil degradation and contamination of ground and surface water.

- If the AECL CTM is accepted, there should be a requirement or condition requiring all retail packaging and advertising to include bird density information.
- The AECL CTM proposed stocking density of 20,000 birds per hectare defies the Model Code of Practice and AECL's own environmental guidelines.
- If the AECL CTM was accepted, producers with stocking densities of 750 – 1,500 birds per hectare would be unable to compete with eggs produced en masse and under such different conditions yet still labelled as free range.
- The consumer has been neglected through the development of the AECL CTM proposal.

#### *Egg producers*

- A stocking density of 20,000 birds per hectare would significantly affect the hen's welfare creating an inhumane environment, ultimately leading to a lesser quality product for consumers.
- The AECL CTM would severely conflict with consumers' perception of what constitutes 'free range' eggs.
- Free range eggs should represent a stocking density of 1,500 birds per hectare rather than 20,000. A stocking density of 20,000 hens per hectare should be termed 'Barn Yard Eggs' or some other category that better reflects the production system.
- The AECL CTM is anti-competitive as it removes the product differentiation (by significantly expanding the stocking rate) of those eggs originating from producers with stocking rates at 1,500 birds per hectare or below.
- The AECL CTM would disadvantage producers who have established, in good faith, their business in accordance with the Model Code of Practice.
- The AECL CTM misuses the term 'free range' to the detriment and outright deceit of consumers. Birds under a stocking density of 20,000 birds per hectare are not 'free to range' but 'restricted to range'.
- The AECL's assertion that prices would increase if a stocking density of 1,500 birds per hectare was adopted is inaccurate.
- Producers with stocking densities of 750-1,500 birds per hectare will be unable to compete if the AECL CTM was approved because of the lower production costs of producing eggs at 20,000 birds per hectare.
- The AECL CTM intends to push smaller producers out of the market so that larger producers can establish their dominance.
- If the AECL CTM is accepted, the ACCC should impose a condition that AECL's constitution be amended to give each member of the AECL a single vote for the election of directors, regardless of the number of birds owned by that member.
- Under the AECL CTM, ESAs will not be conducted at arms' length from directors, and therefore the three large marketers of AECL. The AECL needs to be restructured to take the large voting power from the large players so that the directors have no input into the certification process.
- Research and experience has proven that higher stocking densities are unsustainable, with undesirable issues which include, but are not exclusive to: environmental degradation, manure contaminated water pooling in winter, increased leaching of nitrates, increased risk of reduced hen wellbeing and reduction of vegetation for forage, shelter and nutrient uptake. These are not issues that the consume associates with 'free range'.

- It is highly likely that consumers will lose confidence in the industry with the confusion created by massively increased stocking densities and the perception that all free range can be adverse for birds.
- The damage to the environment and the de-beaking of birds because of overstocking (20,000 birds per hectare) is unacceptable to the 'true free range egg producer'.
- If densely stocked farms (20,000 birds per hectare) must continue, there must be at least honest and informative packaging.

#### *Animal welfare organisations*

- The AECL proposal of 20,000 birds per hectare does not meet expectations of how free range birds should be housed and farmed.
- Other free range egg standards currently in use in Australia and internationally set maximum outdoor stocking densities between 750 and 2,500 birds per hectare.
- If the AECL proposal was accepted, producers who adhere to other free range schemes that specify lower stocking outdoor densities will be at a competitive disadvantage and at risk of becoming financially unviable.
- While the proposed free range definition of 20,000 birds per hectare may be substantiated by practical experience, the definition would benefit from more detailed scientific study and wider consideration of the impacts on birds welfare.
- 20,000 birds per hectare exceeds the maximum (approximately by ten times) number of birds that the science-based standards of the RSPCA allows to be kept.
- The AECL CTM should be considered as the industrialisation of cage free egg production rather than free range egg production.
- The AECL CTM will mislead consumers into purchasing products for which they may reasonably assume that higher standards apply.
- The AECL CTM would be detrimental and unacceptably misleading to Australian consumers and could result in the financial ruin of smaller, genuine free range egg producers.
- The AECL CTM contradicts the Model Code of Practice which stipulates that birds must be allowed access to the range once they are fully feathered, around six weeks old.
- The AECL CTM is not in line with the latest scientific research on stocking densities for free range birds, demonstrating improved animal welfare where stocking densities are low and aggression is minimal or absent. This also highlights the absence of the need for beak trimming when stocking densities are kept low.
- The AECL CTM is not environmentally sustainable and contradicts the AECL's existing 2005 environmental guidelines.
- There is insufficient scientific literature available to support conclusions of appropriate stocking densities for laying hens. Guarantees cannot be made on bird welfare with the proposed density increases.
- The AECL CTM is inconsistent with the provisions of the Model Code of Practice and the legal requirement in Queensland that birds be kept at a density not greater than 1,500 hens per hectare.
- AECL's references to the science it claims support its claim are misleading.

- 'Free range' should not be defined by reference to space allocation alone, as the currently available scientific knowledge suggests that other factors must also be considered, including the provision of shelter and overhead cover.
- AECL's Standards are consistent with the Model Code.
- Government Departments, Members of Parliament and Local Counsellors
- The AECL CTM lacks reference to legislation and codes and as such there is a risk that egg producers applying it may unwittingly expose themselves to claims of breaching animal cruelty and welfare legislation.
- The AECL's proposed definition of 'free range' is contrary to its own stated aims and ignores recognised 'best practice' and extensive community consultation which has informed relevant Australian legislative requirements and the Model Code of Practice.
- The AECL's CTM application seeks to effectively supersede accepted definitions of 'free range' by owning and using a CTM that will mislead the consumer into buying eggs that would exceed the Model Code of Practice for free range egg layers by over 1200 per cent.
- The removal of product differentiation (stocking densities) removes information guiding consumers in choosing eggs originating from what is understood to be a more ethical and humane production system.
- The AECL CTM of 20,000 birds per hectare would effectively devalue the free range 'brand'.
- The increasing exploitation of loopholes and vagaries which existing in food labelling laws is a significant issue throughout the supply chain for consumers, processors, retailers and the government.
- AECL's assertion in its 'Fact Sheet' that there is no maximum stocking density or cap for free range egg production systems in the Model Code of Practice is incorrect.

#### *Industry representative organisations*

- The AECL CTM will create unfair competition in the egg industry and deceive consumers.
- There is insufficient evidence on which to base a decision to allow free range stocking densities to be increased to 20,000 birds per hectare.
- The AECL's proposed stocking densities contradict animal welfare regulations in some jurisdictions.
- The integrity of free range production in the eyes of consumers will be compromised if the AECL's proposed outside stocking density of 20,000 birds per hectare becomes the standard for those certified under the ESA.
- There is insufficient distance between the board of the certification body (ESA) and the AECL board. There is a clear commercial conflict of interest when an egg producer is audited by a competitor on the AECL board.
- A stocking density of 20,000 birds per hectare will negatively impact consumers' confidence in this product.
- The AECL CTM will result in fewer and larger egg producers with the subsequent increase in the price of eggs at point of sale.



- Support for the two birds per square meter density maximum which has been shown to be supported by consumer research undertaken at a national level through AECL.
- Support for defining an upper limit of 20,000 birds per hectare, while recognising producers will need to demonstrate sustainable farming practices which take into consideration soil types, harvested nutrient loadings, rainfall and water tables, such that their rotational programs maintain their compliance with animal welfare and environmental and legislative requirements.
- Support for independent third party auditors that are accredited under the Joint Accreditation System of Australia and New Zealand and aligned with major certification bodies.

#### *Legal centres/law societies*

- AECL's interpretation of the Model Code of Practice is incorrect.
- More than sufficient grounds exist for the ACCC to not certify AECL's application, including on the grounds that:
  - there are numerous contradictory rules relevant to the CTM depending on the method of egg production adopted;
  - the CTM Rules will cause significant detriment to the public, most notably in consumer protection and animal welfare;
  - the CTM is likely to mislead consumers or, at a minimum, cause significant consumer confusion. The CTM will give rise to breaches of sections 29 and 33 of the *Australian Consumer Law*.
- The AECL CTM would be a significant departure from the public expectation of free range standards and conditions.
- Whilst there is a need for industry standards, the AECL is not the appropriate body to create standards.
- There is no benefit to the public of creating another set of standards which are lower than the current Model Code of Practice and there is significant risk of further market confusion and reduction of consumer choice should the AECL be granted the CTM.
- Allowing a CTM that can be used in circumstances which depart significantly from a recognised established standard is likely to mislead and confuse consumers who are likely to assume that the free range eggs they purchase are produced in line with the minimum standards set for the industry.
- The AECL's CTM may provide for unfair competition between intensive producers and producers who act in compliance with the Model Code of Practice.
- High stocking densities contradict the purpose of 'free range' egg production.

## Attachment C

### Existing Voluntary Standards

There are a number of existing voluntary standards covering free range eggs which are all broadly based on the *Model Code of Practice for the Welfare of Animals, Domestic Poultry 4th Edition (2002) (Model Code of Practice)*. An overview of each of these standards is provided below.

**Humane Society International Incorporated** applied to register its True Free Range CTM 1424025 with IP Australia in 9 May 2011. The ACCC received the application from IP Australia on 11 September 2011 and a Final Assessment approving the rules was issued on 7 February 2012.

The Humane Choice True Free Range CTM is intended to certify that the products bearing the CTM logo have been produced humanely and ethically in a free range environment. The CTM Rules cover the Farm practices relating to the rearing of sheep, pigs, cattle and poultry. And seek to provide a framework for the ethical treatment of farm animals through all stages of production, including transport and slaughter.

The Standard in the CTM for poultry provides that for free range layer hens and meat chickens the outdoor stocking density shall not exceed 1500 birds per hectare. The indoor stocking density for both layer hens and meat chickens is not less than 1 square metre for every 5 birds including the roosting area.

The **Free Range Egg and Poultry Australia Pty Ltd (FREPA)** applied to register CTM 959378 with IP Australia on 27 June 2003. A Final Assessment approving the rules was issued on 5 April 2006. The Rules provide.

The maximum stocking density for layer hens under the FREPA Code is 750 birds per hectare.

The indoor stocking density provides a sliding scale depending on the total number of birds:

10 birds per square metre up to 1000 birds

9 birds per square metre up to 2000 birds

8 birds per square metre up to 3000 birds

7 birds per square metre up to 4000 birds

6 birds per square metre over 4000 birds.

The **Victorian Farmers' Federation** applied to register CTM 972253 with IP Australia on 30 September 2003. A Final Assessment approving the rules was issued on 5 September 2005. The Rules provide the following stocking density for layer hens in a free range system:

Outdoors: No more than 1500 birds per hectare

Indoors: 40kg/m<sup>2</sup> [approximately 20 birds per metre square for layer hens]

The **RSPCA** registered Approved Farming Scheme Standards for Layer Hens as a trade mark with IP Australia in 28 June 2010. The RSPCA standards relevantly provide:

Stocking density for free range facilities is as follows:

A maximum of 1500 birds per hectare of range area to be available to hens in a free-range system with no rotational range management strategies (ie a fixed area).

A maximum of 2500 hens per hectare of range area to be available to hens in free-range systems with rotational range access, where it can be demonstrated that hens access a well maintained sustainable range area.

The **Australia Certified Organic Standard 2010** provides that the Indoor stocking density for laying hens must not exceed 16kg/m<sup>2</sup> (approximately 8 birds). In addition, the Standard provides that the number of birds per shed should be such as to enable balanced utilisation of the acreage around sheds and as a guide this should not exceed 1500 birds without an application to the CO verifying the system conforms with the principles of the Standard.

In relation to outdoor stocking density the Standard provides that as a guide, maximum outdoor stocking rates should not exceed 1000 birds per hectare.

	Outside Stocking density	Beak trimming	Access to outdoor area
AECL proposed CTM	20,000 per hectare	Accepted practice	Birds must be kept inside for the first 25 weeks.
The Model Code	1,500 per hectare	Should be avoided, but if necessary should be carried out by an accredited operator	Birds must have access to outdoor areas when fully feathered, during daylight hours for a minimum of 8 hours.
ACT [legislation]	1,500 per hectare <sup>38</sup>	NA	Continuous daytime access to outdoor runs
QLD [legislation]	1,500 per hectare	NA	NA
VIC [voluntary code]	1,500 per hectare	Should be avoided, but if necessary should be carried out by an accredited operator	Birds must have access to outdoor areas when fully feathered, during daylight hours for a minimum of 8 hours.
WA [voluntary code]	1,500 per hectare	Should be avoided, but if necessary should be carried out by an accredited operator	Birds must have access to outdoor areas when fully feathered, during daylight hours for a minimum of 8 hours.

Other standards:	RSPCA <sup>39</sup>	2,500 per hectare where it can be demonstrated that hens access a well-maintained sustainable range or 1500 per hectare otherwise	Should be avoided and only used as a last resort by an accredited operator.	All birds must have access to the range for a minimum of 8 hours per day once they are reasonably feathered (i.e. by onset of lay).
	FREPA <sup>40</sup>	750 birds per hectare	Beak trimming in accordance with Egg Industry Accreditation	When fully feathered, in accordance with the current edition of the appropriate State Animal Welfare Code, birds must have easy access to an area on which to range during daylight hours.
	Human Choice Australia Standards <sup>41</sup>	1,500 birds per hectare	Not permitted	Chicks must be given access to the outdoors when well feathered or at a maximum of 21-28 days of age (depending on current temperatures) for meat birds, and 8 weeks of age for layer hens
	Free Range Farmers	750 birds per	Not permitted	Hens must have unrestricted access to

39 RSPCA, Layer hens – Approved farming scheme standards, <http://www.rspca.org.au/assets/files/ApprovedFarming/RSPCALayerhensStandards.pdf>, August 2011.

40 FREPA, Free range care egg standards, <http://www.frepa.com.au/standards/egg-standards/>

41 Humane Choice, True Free Range Standards – Poultry, 2011, version `2  
<http://www.humanechoice.com.au/Resources/Documents/Humane%20Choice%20Standard%20-%20Poultry%202011%20Version%201.2.pdf> .

Association Standards <sup>42</sup>	hectare		the free-range run during daylight hours	151.
International: EC Directive 1999/74/ and EC regulation 318/2003 <sup>43</sup>	2,500 birds per hectare	Not permitted, however, member states can authorise beak trimming provided that it is carried out by an accredited operator on chickens that less than 10 days old. <sup>44</sup>  The UK has prohibited beak trimming. <sup>45</sup>	Hens must have continuous daytime access to open-air runs which are mainly covered with vegetation.	
Australian Certified Organic	1000 birds per hectare	Not permitted. But application to do this is possible and shall only be allowed in individual and non systematic circumstances in the interest of individual animal welfare.	All birds shall have access to pastured areas during the substantial majority of daylight hours.	

42 Free Range Farmers Association Standards, Farm Accreditation Standard – Free range eggs, December 2010, <http://www.freerangefarmers.com.au/fact-sheets.html>.

43 European Council, Council Directive 1999/74/EC of 19 July 1999 laying down minimum standards for the protection of laying hens, [http://eur-lex.europa.eu/smartapi/cgi/sga\\_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=31999L0074&model=guichett](http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=31999L0074&model=guichett) ; European Council , COMMISSION REGULATION (EC) No 318/2003 of 19 February 2003 amending Regulation (EEC) No 1274/91 introducing detailed rules for implementing Regulation (EEC) No 1907/90 on certain marketing standards for eggs, 20 February 2003, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:046:0020:0020:EN:PDF> .

44 CIWF Trust, European Union Law on the welfare of farm animals, 2004. Available at [http://www.animalmosaic.org/Images/eu\\_law\\_2004\\_tcm46-28494.pdf](http://www.animalmosaic.org/Images/eu_law_2004_tcm46-28494.pdf) .

45 The Welfare of Farmed Animals (England) Regulations 2000, S.I. 2000/1870, as amended by The Welfare of Farmed Animals (England) (Amendment) Regulations 2002, S.I. 2002/1646, Schedule 3D, paras. 8 and 9.