

Barristers Animal Welfare Panel

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AECL Certification Trade Mark Application

Introduction

1. The ACCC seeks public comment on an application from Australian Egg Corporation Limited to register a proposed Egg Standards Australia/Australasia certification trademark.

Summary

2. It is contended that more than sufficient grounds exist for the ACCC to not certify AECL's application, including on the grounds that:
 - a) the technical requirements of the rules set out in section 173, *Trade Marks Act* 1995 are not satisfied because:
 - there are numerous and contradictory rules relevant to the certification mark depending on the method of egg production adopted;
 - there is no meaning behind the certification mark itself: any meaning may only stand to be derived after examination of egg packaging, for it is the egg packaging which displays the method of production;

- b) the rules governing the use of the CTM will cause significant detriment to the public, most notably in consumer protection and animal welfare; and
- c) it breaches the unfair practices portion of the trade practices test in that the mark is likely to mislead consumers or, at a minimum, cause significant consumer confusion.

The Application

- 3. The application comprises two documents:
 - a) Egg Standards Australia – Farm Standard for Egg Producers, Introduction and Scheme Rules (Revision 01, version January 2012); and
 - b) Egg Standards Australia – Certification Rules (Version 1.1, October 2010).
- 4. Broadly, the scheme can be broken up into three key areas:
 - a) general requirements for the production of shell eggs by the production systems described as: Caged, Barn, and Free Range (including Organic);
 - b) administration, including accreditation, audits, corrective action, termination and appeals; and
 - c) the trade marks themselves (including design, size, colours, shapes) and their permitted use.

It is said that the Egg Standards Australia Quality Assurance Scheme is a voluntary scheme open to all egg producers which meet relevant standards. Such producers

will be authorised to use the ESA trademark on company stationery, literature, on eggs, on packaging, labelling, marketing materials and in advertising media in a manner reflecting certification under ESA or as may be approved by the Certification Body.¹

Certification Trade Marks

5. As noted in the ACCC's guide to certification trade marks,² certification trade marks are important because:

In some circumstances, the use of a particular CTM on a product or service may confer a marketing advantage. This will be the case if prospective consumers are familiar with the mark and consider that it denotes a certain standard or quality and as a consequence may be more likely to purchase the product or service than if the CTM were not present.

This potential impact on consumers' behaviour highlights the need for CTM rules to be structured so that they ensure that products bearing the CTM meet the requisite standards. In situations where the CTM rules are not designed to ensure that the CTM standards are being met there may exist the potential for consumers to be misled by the presence of a CTM on a product or service.

The Trade Marks Act 1995

6. Section 173, *Trade Marks Act 1995* provides:

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¹ Certification Rules, page 3.

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ACCC, *Certification trade marks – the role of the ACCC*, 2011, p 4.

(1) *A person who has filed an application for the registration of a certification trade mark must, in accordance with the regulations, file a copy of the rules governing the use of the certification trade mark. The copy of the rules is to be filed in addition to any document prescribed under subsection 27(2).*

(2) *The rules must specify:*

- a) the requirements (the certification requirements) that goods and/or services must meet for the certification trade mark to be applied to them; and*
- b) the process for determining whether goods and/or services meet the certification requirements; and*
- c) 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; and*
- d) the requirements that a person, who is the owner of the certification trade mark or an approved user; must meet to use the certification trade mark in relation to goods and/or services; and*
- e) the other requirements about the use of the certification trade mark by a person who is the owner of the certification trade mark or an approved user; and*
- f) the procedure for resolving a dispute about whether goods and/or services meet the certification requirements; and*
- g) the procedure for resolving a dispute about any other issue relating to the certification trade mark.*

Section 175 (2) of the Act provides that in order to issue a certificate, the ACCC must be satisfied that:

- a) the attributes a person must have to become an approved certifier are sufficient to enable the person to assess competently whether goods and/or services meet the certification requirements;*
- b) the rules referred to in section 173:*
 - i. would not be of detriment to the public, and*
 - ii. are satisfactory having regard to the principles relating to restrictive trade practices in Part IV of the Competition and Consumer Act 2010 and the principles relating to unconscionable conduct (Part 2-2), unfair practices (Part 3-1), and safety of consumer goods and product related services (Part 3-3) in*

Schedule 2 (Australian Consumer Law) of the CCA (“the Trade Practices test”).³

Submissions, Section 173(1)

7. A certification trade mark, unlike a standard trade mark, is a sign used to distinguish goods as certified by a person in relation to quality, accuracy or some other characteristic, including mode of manufacture. That is, a certification trade mark is an assurance to consumers that the goods have a particular characteristic. In this case one such characteristic is the method of production.
8. It is implicit that a certification trade mark must thus have Rules that specify a characteristic, and not multiple mutually exclusive characteristics. If the certification Rules allow certification of products with inconsistent characteristics, the rules by definition are not certification Rules.
9. The present certification mark is said to provide assurance to consumers that the eggs are produced in accordance with particular standards, in particular in relation to animal welfare. The certification rules however provide that eggs produced as ‘cage laid’, ‘barn laid’ and ‘free range’ can all be certified. The standards by which each of these methods is judged is very different (and some may say inconsistent). In these circumstances the application of the certification mark to eggs will not provide any assurance that the goods have a particular characteristic, and if consumers believe the certification mark to provide an assurance as to characteristics they are in fact being misled.
10. The rules therefore fail the fundamental requirement in section 173(1) to be rules governing the use of a *certification* trade mark.

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³ See section 175 of the TMA and Regulation 16.6 of the *Trade Mark Rules 1995*.

Submissions, section 173(2)(a) (certification requirements)

11. It is submitted that the Certification Rules (**the Rules**) do not comply with section 173(2)(a) of the Act on the basis that they fail to adequately specify the certification requirements that must be satisfied for the ESA Mark to be applied to a Certified Applicant's goods/services.

12. In particular, the Panel submits that the Rules are unclear and imprecise in respect of specifying the certification requirements. For example:
 - a) the Rules (page 5, paragraph a) state that "The Certification Body shall offer to all potential applicants, upon request, a manual and/or website link, in which guidelines as to the requisite standards for compliance with ESA is set out". However, the Rules do not specify the standards, and on the basis of the information in the Rules the standards may not currently exist.;
 - b) the Rules (page 8, paragraph a) state that each Applicant and Certified Applicant has the obligation "to ensure that the Egg Business complies with the minimum standards of ESA as applicable and to maintain these standards at all times": yet the Rules fail to clearly specify what these minimum standards may be;
 - c) the Rules (page 11) state that "Eggs that are packaged ESA will be recognised as a high quality, safe product farmed by people who look after the health and welfare of their hens in environmentally sound conditions". However, the Rules do not adequately delineate between the certification requirements for the different categories of egg producing (for example, free-range, barn laid and organic). In fact, eggs produced by the three very different methods, with different standards and requirements, will all be

entitled to bear the same certification mark. This also has the potential to mislead the public;

- d) many other examples of this lack of clear requirements, or general absence of a quantifiable standard for the goods can be found throughout the Rules.

13. It is submitted that by reason of the above it is impossible to precisely determine from the Rules when an Applicant is able to use the ESA mark. Therefore the granting of a licence to use the ESA Mark will be at Australian Egg Corporation Limited's ultimate and broad discretion.

Submissions, section 173(2)(c) (who can apply)

14. It is submitted that the Rules do not comply with section 173(2)(c) of the Act on the basis that they fail to adequately specify the attributes that an applicant must have to become an approved certifier of the ESA Mark.

15. In particular, the Rules are unclear and imprecise in respect of defining the approved user and circumstances under which the certification mark can be used. For example:

- a) the Rules (page 4) define an "Applicant" as meaning "a person or a body of persons, whether corporate or unincorporated, who has applied for a licence under ESA and who is engaged in Pullet Rearing, Egg Production or Egg Grading/Packing or is *a marketing company* wholly owned by at least one egg business and has the appropriate resources to meet the requisite standards required for a licence to use the ESA Mark". However, the Rules also state that a licence to use the ESA Mark may only be granted to an Applicant

engaged in an egg business, which is narrower in scope to the definition of an "Applicant" which extends to a marketing company;

- b) the certification mark is generic in that it does not identify the method of production. The Rules require egg cartons to display terms describing the method of production (for example, "caged eggs"; "free range eggs"; or "barn laid eggs"). However, these terms are themselves unclear, not legally defined and the subject of public debate as to their meaning, save that in the case of free range eggs it appears to be accepted that 1,500 birds per hectare is the appropriate stocking density by comparison with the AECL's proposed stocking density of 20,000 birds per hectare. The requirement to add such terms does not adequately delineate between the different categories of egg production (for example, free-range, barn laid and organic). Therefore, the use of the ESA Logo by a Certified Applicant would have the potential to mislead the public.

16. By reason of the above it is not possible to clearly identify from the Rules the class of persons who may apply for a licence to use the ESA mark.

Lack of clarity

17. The application is characterised by a lack of clarity and precision in the certification requirements and the attributes that an applicant must have to become an approved certifier of the ESA Mark.

The public detriment test

18. The *Trade Marks Act 1995* does not specify what is meant by a ‘detriment’. The meaning of public detriment in the specific context of section 90, *Competition and Consumer Act 2010*, was discussed by the Competition Tribunal in *Re 7-Eleven Store Pty Ltd* (1994) ATPR 41-357. In that specific context, the Tribunal said that public detriment includes:

Any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goals of economic efficiency ...

Suffice to say, the questions for consideration by the ACCC in the present application are not directed to matters of “economic efficiency” or, for that matter, questions of “detriment to the public constituted by any lessening of competition” (see section 90, *Competition and Consumer Act 2010*). Indeed, section 175(2)(b)(i), *Trade Marks Act 1995* is neither qualified in this way or at all.

In contrast, section 90 of the *Competition and Consumer Act 2010* contemplates a balancing of public benefit against public detriment. For example, section 90(5A) provides that the Commission must not grant an authorisation for a proposed contract, arrangement or understanding that may be a cartel provision, unless the Commission is satisfied in all the circumstances:

*“(a) that the provision would result, or be likely to result, in a benefit to the public; and
(b) that the benefit would outweigh the detriment to the public constituted by any lessening of competition...” [emphasis added]*

There is no reference to public benefit in section 175, *Trade Marks Act 1995*, let alone a provision stipulating that public benefit be weighed against public detriment. Accordingly, it is contended that public detriment in itself should be sufficient for the ACCC to decline to issue a certificate under section 175.

In summary then, public detriment contemplates a wide range of factors giving rise to “*any impairment to the community generally, any harm or damage to the aims pursued by the society...*”

19. The AECL application contends there are public benefits to its scheme because it addresses food safety, bio-security, animal welfare and egg labelling, and environmental management.⁴ It is said that the scheme meets and/or supersedes current international egg standards.⁵

And it is also said that the scheme will provide public benefits by way of assisting egg businesses to:

- minimise risks to the safety of eggs marketed to consumers;
- protect the welfare of their flocks;
- minimise the likelihood and impact of disease outbreaks;
- minimise risk that eggs are incorrectly labelled;
- ensure the production and delivery of consistent product quality;
- provide an indication of origins in an egg business;
- address specific environmental issues faced by Australian egg producers.

20. The Panel contends that the scheme is unlikely to deliver or substantially address any such so-called benefits and, a close analysis suggests there is likely to be significant public detriment. In addition, the incomplete and vague drafting suggests the scheme is not a serious attempt to confer public benefit by comparison with the advancement of the interests of intensive egg producers. In

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⁴ Certification Rules, page 1.

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⁵ Certification Rules, page 1.

this respect, we also note that AECL comprises overwhelmingly the three main producers of eggs in Australia, namely, Farm Pride, Sunnyside and Pace Farm.

Consumer Protection/Animal Welfare

Free range

21. In its Introduction and Scheme Rules, the AECL states that in relation to free range housing systems ‘outdoor stocking density can be up to but must not exceed 2 birds per m².’⁶ This is equivalent to a density of 20,000 birds per hectare. Put another way, this ‘free range’ density would provide for two birds to share the area of a typical front doormat.

22. Presently, the Code of Practice for Domestic Poultry, 4th edition, in respect of ‘free range’ production provides for an outdoors stocking density of 1,500 birds per hectare. Accordingly, the AECL application contemplates increasing the stocking density by more than 13 times the existing stocking density provided for in the Code of Practice for Domestic Poultry, 4th edition, despite the Code’s definition having wide acceptance throughout Australia. Under the various State animal protection statutes, compliance with the code of practice is a defence to a prosecution for a cruelty offence, namely:
 - VIC, sections 6 and 7; *Prevention of Cruelty to Animals Act* 1986;
 - SA, section 43, *Prevention of Cruelty to Animals Act* 1985;
 - WA, section 25, *Animal Welfare Act* 2002, and regulation 6, *Animal Welfare (General) Regulations* 2003;
 - QLD, sections 13 to 16 and 40, *Animal Care and Protection Act* 2001;
 - ACT, sections 20 (and 21 and 24), *Animal Welfare Act* 1992;

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⁶ Introduction and Scheme Rules, page 23.

NT, sections 79(1)(a) (and 24 and 25), *Animal Welfare Act*;
 NSW, section 34A(1) and (3), *Prevention of Cruelty to Animals Act 1979*,
 regulation 19 and
 Schedule 21, *Prevention of Cruelty to Animals (General) Regulations*
 2006, although there are also regulations instead of codes for certain
 animal industries such as hen egg production.

23. Animal welfare societies have long contended that these codes of practice by reason of being otherwise unenforceable were no more than ‘window dressing’. As a result, a few States promulgated regulations which made different codes of practice enforceable. For example, South Australia’s *Prevention of Cruelty to Animals Regulations 2006* by regulation 10 require compliance with nominated codes of practice for nominated activities: see Schedule 2; see also similarly Queensland’s *Animal Care and Protection Regulation 2002*, especially regulations 2 and 3, and Schedule 1.
24. Some States promulgated in particular regulations as to hens, breach of which can give rise to prosecution: see for example:

Victoria’s *Prevention of Cruelty to Animals (Domestic Fowl) Regulations 2006* (SR No 143 of 2006);
 Queensland’s *Animal Care and Protection Regulation 2002*, especially regulations 5 to 27;
 Western Australia’s *Animal Welfare (Commercial Poultry) Regulations 2008*;
 South Australia’s *Prevention of Cruelty to Animals Regulations*, regulations 13L to 13O; and
 Tasmania’s *Animal Welfare Regulations 1993*, regulation 6.

However, similar welfare standards apply under these regulations to those prescribed by the codes. For example, Victoria's domestic poultry regulations still provide for the confinement of an animal to a battery cage with a floor space area less than an A4 sheet of paper.

25. Further, Queensland promulgated the *Animal Care and Protection Regulation 2002* which, by clause 17 in respect of the outdoor area of a free range system provides:

A person must not keep more than 1500 laying fowl in a hectare in the outdoor area of a free range system.

The term '*free range system*' is defined in clause 4 as referring to:

a system consisting of:

- (a) a shed in which domestic fowl are kept other than in a cage; and*
- (b) an outdoor area that is accessible to the fowl.*

26. In this respect, it will be seen how the Queensland Regulation in effect mirrors the substantive provisions of Appendix 2, Code of Practice for Domestic Poultry, 4th edition.

So, without more, the AECL application proposes by way of a certified trademark a stocking density which would be contrary to law in Queensland.

27. However, the difficulties posed by the AECL application in respect of free range systems do not stop there. There is a movement Australia-wide to define free range systems with a stocking density in outside areas of no more than 1,500 birds per hectare: see the *Truth in Labelling (Free-range Eggs) Bill 2011*, introduced in the New South Wales Legislative Council by Dr John Kaye of The Greens; the *Food (Labelling of Free-Range Eggs) Amendment Bill 2012*

introduced in the South Australian House of Assembly on 29 March 2012 by a Liberal Opposition member, and a further Bill in identical terms introduced in the South Australian Legislative Council by Greens MLC, Tammy Franks; and see the announcement by the Tasmanian Government to phase-out caged egg production and in respect of which it is awaiting advice on an outdoors free range stocking density.⁷ However, having taken the step of announcing a phase out of cage production and an aim to create cruelty free egg production, is difficult to see why the Tasmanian government would go against the national trend (or the national Code of Practice) stipulating a maximum of 1500 birds per hectare. Further, for completeness only, we note that the ACT Chief Minister at the time, John Stanhope, by press release on 25 September 2007 declared that the ACT Government would offer \$1 million in industry assistance to help the ACT's only commercial egg producer, Pace Farms, change from battery egg production to the barn laid method, as part of a suite of measures desiring to phase-out battery egg production in the ACT. Notwithstanding the means by which the phase-out was achieved, the ACT was nevertheless the first Australian jurisdiction to act to phase out battery hen eggs.

AECL claims about free range stocking density under the Code of Practice

28. Despite the foregoing, the AECL in public statements has maintained that the Code of Practice for Domestic Poultry 4th Edition, permits almost unlimited stocking density for outdoor areas of free range systems.
29. An Australian Egg Corporation Limited 'Fact Sheet' on 'free range outdoor stocking densities' provides:

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⁷ <http://mps.tas.greens.org.au/2012/05/historic-win-for-animal-welfare-after-a-long-campaign/#more-7136> Viewed 9 July 2012. See further http://www.themercury.com.au/article/2012/06/27/340521_most-popular-stories.html viewed 9 July 2012.

1. *The current or 4th edition of the government, industry and RSPCA endorsed Model Code of Practice for the Welfare of Animals – Domestic Poultry (MCoP) allows unlimited outdoor stocking densities for free range egg production systems (A2.1.4, page 28).*

There is, in practice, no maximum density or cap. [emphasis added].

30. The Domestic Poultry code of practice, 4th Edition provides in Appendix 2 in paragraph A2.1.4 (page 28) under the heading ‘Maximum Acceptable Live Weight Densities for Free-Range Birds’, relevantly, as follows:

*Outdoors: layer hens a maximum of 1500 birds per hectare.
When meat chickens use only some weeks of the 10 week cycle of 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 range areas occurs and close management is undertaken which provides some continuing fodder cover.’
[emphasis added]*

31. The introductory paragraph of Appendix 2 states that the appendix supplements material in Section 2 – Housing, and Section 3 – Space Allowances.

Section 2.2.5 provides:

“Minimal acceptable housing standards including stocking densities are in Appendix 1 and 2.” [emphasis added]

Section 3.3 provides:

“Maximum stocking densities for various species of poultry are presented in the appendices. These densities apply only to birds housed under good management ...”

32. So, the question arises whether, as a matter of construction of the Domestic Poultry code of practice, 4th Edition and in particular the relevant part of paragraph A2.1.4 of Appendix 2, the Australian Egg Corporation Limited claim is correct (that the code provides for outdoor unlimited densities for free range egg

production systems with, in practice, no maximum density or cap). It is plain that a maximum stocking density is provided for by the code for free range egg production systems. Accordingly, in the Panel's opinion the Australian Egg Corporation Limited claim in its 'Fact Sheet' is incorrect. Our reasons are as follows.

33. First, Appendix 2 supplements material in Sections 2 and 3 about housing and space allowances. Those sections in turn each state that the *maximum* stocking densities are provided for in the appendices, the relevant one of which for layer hens is Appendix 2. Second, no qualification or proviso exists in paragraph A2.1.4 of Appendix 2 to enable the stocking density for free range layer hens to be more than “a maximum of 1500 birds per hectare”. Whilst there is a qualification or proviso in the case of meat chickens for a “higher bird density” to be “acceptable”, it does not extend to layer hens. Indeed, layer hens are expressly excluded from any higher stocking density. This is because of adoption in the second sentence in respect of meat chickens of the phrase “a proportionately higher stocking density *than for layers* may be used” [emphasis added].

If layer hens, for the purposes of the argument, were to be assumed to be not excluded from the qualification or proviso, what work would be left to be done by the phrase “a proportionately higher stocking density than for layers may be used”? And what would be the base from which the “proportionately higher” number is calculated if the layer hen maximum of 1500 were not adopted, but instead it was assumed that the layer hen maximum was free to be increased (on the AECL argument) in some indeterminate manner? In other words, put simply, “proportionately higher” than what?

It follows that a proportionately higher stocking density than the maximum of 1500 birds per hectare for layers may be used only in the case of meat chickens.

(In turn such a higher stocking density for meat chickens is only permissible if the terms of the next and final sentence are satisfied.)

34. Third, the second sentence (as to meat chickens' stocking density) and the final sentence (as to the requirements for a higher bird density to be permissible) adopt respectively the phrases "higher stocking density" and "higher bird density". This makes plain the link between the two paragraphs and their application only to meat chickens.
35. We would finally add by way of observation only that the terms of the second and third sentences contemplate no more than a "higher" bird density and not an unlimited density. That density is subject to the seemingly strict terms of the third sentence, which in turn arises from the particular circumstances of the meat chicken "cycle". It is difficult to appreciate how the seemingly strict terms of the last sentence can be viewed as a sanction for an unlimited or unqualified stocking density, given also we might add the terms of Sections 2.2.5 and 3.3.

Further AECL claims about free range stocking density

36. The AECL Fact Sheet also provides in its opening lines as follows:

Given economic, consumer, animal welfare and environmental science research, the Australian Egg Corporation Limited (AECL) believes there should be a free range outdoor stocking density cap or maximum of 2 birds per square metre.

37. Further, in an Estimates Hearing before the Senate's Rural and Regional Affairs and Transport Legislation Committee on 22 May 2012, Mr James Kellaway, Managing Director of AECL, admitted to having made the following comment:

If the current recommendation for free range hens of 1,500 hens per hectare was not lifted to 20,000 per hectare then Australia would be forced to import eggs

from the Philippines, Indonesia, Vietnam and Cambodia.

We note from the transcript of the Hearing that Mr Kellaway was compelled to resile from this assertion on the basis that importation of shell eggs is presently unlawful.⁸

38. In promoting a free range stocking density of 20,000 birds per hectare, the AECL has purported to rely on research conducted by the Scottish Agricultural College. However, the College has denied that its research relied upon by AECL supports a free range stocking density of 20,000 birds per hectare.
39. AECL maintains that it has considered
... 10 known national and international standards of free range egg farming, conducted extensive, independent and robust consumer research into understanding and expectations of consumers, consulted rigorous and reputable scientific research on hen husbandry and engaged in extensive industry consultation to ensure that these minimum standards are rigorous and practical
40. The Scottish Agricultural College research was relied upon in an AECL fact sheet, which provided:
...there are no research findings that stipulate the best density. However, research conducted by the Scottish Agricultural College shows that densities greater than one hen per 5,000 square centimetres (2 hens per square metre) 'impose some constraint on free expression of behaviour.' AECL does not believe that free range hens should be constrained from their repertoire of natural behaviours.
41. The '*Scottish Agricultural College*' study appears to be a reference to a paper by C J Savory, M C Jack and V Sandilands of that College entitled '*Behavioural responses to different floor space allowances in small groups of laying hens*' (British Poultry Science 47:120–124, April 2006). However, the results of that

⁸ Please see the transcript here at:
<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;adv=yes;db=COMMITTEES;id=committees%2Festimate%2F3359f3f-fe51-4a97-9a04-c97a8c52d786%2F0006;orderBy=customrank;page=8;query=Date%3A21%2F05%2F2012%20%3E%3E%2025%2F05%2F2012%20Dataset%3Aestimate;rec=3;resCount=Default>

study, namely, that '*any space allowance of less than 5000cm² per hen imposes at least some constraint on free expression of behaviour*' was directed toward '*alternative housing*', not free range housing. Indeed, the following features of the study render the results inapplicable to free range systems:

- the study was conducted indoors, not outdoors
- it only used groups of five and six hens, not larger numbers
- it only used small pens, not large areas
- it only considered four types of hen behaviour (being stationary, walking, ground pecking and preening), which do not provide an adequate account of hen health or welfare generally.

42. Indeed, Dr Victoria Sandilands of the Avian Science Research Centre at SAC Auchincouibe, Ayr as one of the authors, said in a prepared statement, amongst other things "*If AECL think that 20,000 hens/hectare ... is acceptable outdoors, then it would be too far a stretch to say this is based on our work.*"⁹ Of course, even if the study was considered to apply to free range housing systems (which it does not), the study's findings were only ever couched in negative terms, i.e. stocking densities of less than 5,000 square centimetres per hen are inappropriate, rather than stocking densities of 5,000 square centimetres or greater are appropriate.

43. Finally, in this respect, we note that the AECL also states in a fact sheet:

Through independent research commissioned, consumers expect that free range means: never kept in a cage, able to scratch in the dirt, dust bathe, peck in the grass, roam in the range and flap their wings outside of a hen house. Hens can display all these behaviours at 2 birds per square metre.

44. The wording of the passage extracted above suggests that the '*independent research*' relates to the issue of consumer expectations, rather than the issue of

⁹ <http://lee-rhiannon.greensmps.org.au/content/estimates/estimates-australian-egg-corporation> viewed 8 July 2012.

whether hens are able in fact to engage in relevant behaviour at a density of two hens per square metre. No evidence in support of the latter issue is cited in the Fact Sheet.

45. By paragraph 3.22 of the proposed ESA Requirements (p. 14) the stocking density within the shed for a free range production system is stipulated to be as follows: *Maximum permissible stocking density in the shed is 30kg live weight per m² of usable space (C1)*. It is noted that the same stocking density in respect of barn production systems is provided for in paragraph 3.33 of the proposed ESA Requirements.

46. Assuming each bird is about 2kg in weight such prescriptions of stocking density would stipulate some 15 birds per square metre.

47. By comparison, the stocking density stipulated in paragraph 3.17 (e) (p.12) of the proposed ESA Requirements for a cage production system is as follows:

At least 550 cm² of cage area, measured in a horizontal plain, which may be used without restriction, must be provided for each laying hen; or cages must meet legislation requirements. (Critical).

48. The cage area of 550 centimetres reflects the requirements of Appendix 1, Code of Practice for Domestic Poultry, paragraph A. 1.4. Accordingly, this stocking density for a cage production system would result in some 18 birds per square metre, assuming a 2kg weight for each bird. Accordingly, it may be safely said that there is little difference between the stocking densities proffered by AECL for free range systems within the shed and barn production systems, on the one hand, and the stocking density prescribed for cage production systems. Certainly, it may be said to that birds kept in such stocking densities within the shed of a free range or barn production system are not kept in cages, and are therefore freer than birds

kept in a cage production system. However, the provision for floor area is distinctly similar.

49. Further, paragraph 3.19 (g) in respect of free range production systems provides;

The ground to which the birds have access must...provide access to vegetative cover.

The extent or nature of the vegetative cover is not stipulated. Yet proper and extensive vegetative cover is necessary to encourage birds to leave the shed for the outdoor area. It is well documented that this is because the birds are fearful of overhead predators.

50. By paragraph 3.28(a) of the proposed ESA Requirements (p.16) it is provided in respect of 'Light' only that:

There must be a documented lighting program. And birds must be exposed to light for a minimum of 8 hours.

Paragraph 3.28(c) it is provided that:

In a multi-level system of housing, light must be available at all levels to permit observation of the birds as required.

It is common practice in bird production in Australia for lighting of only 2 lux in brightness to be provided whereas in Europe, for example, lighting is required of no less than 20 lux. The difference in brightness between the two levels is considerable. Lighting of only 2 lux is provided so that the birds may be kept inactive.

Barn laid systems

51. The threshold point for the ACCC to consider in determining questions of public detriment is whether existing standards for housing of hens, such as those described in the code of practice for Domestic Poultry 4th edition, are sufficient to serve the public interest. Will they cause public detriment, whether by way of harm or damage to the community aim of an informed consumer choice, where the consumer seeks to purchase a product produced by a system involving the humane treatment of the animals? Further, will they cause public detriment to a community aim or purchaser preference which encourages such humane treatment of animals? It is contended that the code of practice standards do not. For example, to keep an animal in a state of floor area confinement commensurate with that sanctioned for the battery hen (about three quarters the area of an A4 sheet of paper) would ordinarily constitute a cruelty offence under the various state animal protection statutes. However, because such confinement is sanctioned by the code of practice, the producer is conferred with a complete defence.

52. Model codes of practice are drawn within the Standing Council of Agriculture comprising, in round terms, the federal and state ministers of agriculture and their departments. It was formerly known as the Australian Primary Industries Ministerial Council. These departments view themselves as ‘the friend of industry’. Accordingly, producer interests are served in the text of the codes of practice where they conflict with even the most rudimentary animal welfare. Further, these ministers and departments of agriculture suffer from the most self-evident conflict of interest. For example, a minister for resources would not also act as minister for the environment.

53. Against this background, it is contended that the ACCC can inform itself of the almost universally acknowledged bleak existence of the battery hen. Simply put, legislative or other standards which defy the public interest should not be followed. In terms of consumer protection, it is apparent that today the consumer

wishes to exercise an *informed* choice in products they purchase. Consumers for example may wish to purchase free range or barn laid eggs in preference to eggs produced by battery hens.

54. It is further contended that a barn laid system invokes in consumer thinking notions of a hen not confined to a cage and the welfare of which is otherwise better than that of a battery hen. The space allowance by way of floor area for hens raised in a barn production system is all but commensurate with that sanctioned for the battery hen. Yet the consumer would not be aware of this and would assume a general freedom to roam within the shed. Further, it will be recalled that the Rules (P.11) provide that:

eggs that are packaged ESA will be recognised as a ... product farmed by people who look after the health and welfare of their hens in environmentally sound conditions: [emphasis added] see paragraph 12(c)(p.6) above. How can this reasonably be suggested? More relevantly, it is seriously misleading.

55. As to 'Light' a provision in identical terms to that stipulated for free range systems is to be found in paragraph 3.32 of the proposed ESA Requirements (p.17). The same comments made above in paragraph 50 apply.

Cage production systems

56. The Panel's contentions adumbrated in paragraphs 51, 52 and 53 above apply in like manner to the plight of hens confined to cages, and thus they are referred to and repeated. In terms of public detriment, the ACCC is urged to consider whether the creation of a CTM in respect of eggs produced by battery hens may constitute an assurance in the consumer's mind that somehow the welfare of these animals is appropriately addressed in producing the product. The AECL Application asserts that its scheme will confer public benefits by way of assisting egg producers 'to protect the welfare of their flocks': yet the very fact of such

confinement in the case of the battery hen surely suggests this cannot be so. Is it not likely that a consumer will infer that a CTM somehow, although not identified, reflects appropriate or better welfare standards for these particular caged hens? But the only specific provision (paragraph 3.10, p.8) of the proposed ESA Requirements about and headed 'Flock Welfare' provides as follows:

- α) The Egg Producer must have a procedure that specifies how the health and welfare of the stock is assured and the checks required must be recorded in a check list which meets the requirements of Appendix 12: Shed Management Checklist at a minimum (Category 1).*
- β) All feeding and watering systems must be checked for efficient operation at least twice each day to ensure all birds have access to feed and water.*

Sub paragraphs (c) to (g) of paragraph 3.10 deal with 'handling and transportation'. The principal provision for welfare in sub-paragraphs (d) and (g) extend no further than that the stock person 'must be able to demonstrate competence' with regard to the welfare of the flock or in culling of sick or injured birds.

- 57. As to 'Light' a provision in identical terms is made in paragraph 3.8 to that referred to in paragraphs 50 and 55 above for free range and barn laid production systems.
- 58. By comparison with the provisions in the proposed ESA Requirements for free range production (paragraphs 3.19 to 3.29) and barn productions (paragraphs 3.30 to 3.39), there are only two paragraphs on cage production (paragraphs 3.17 and 3.18).
- 59. We refer again to the floor area provided for in paragraph 3.17 e) of 'at least 550cm²... measured in a horizontal plain...'

60. Yet there is no requirement for this or any other method of production that there be cooling systems and ventilation fans in place to ensure temperature control during hot weather. Indeed, the only requirement appears to be reposed in paragraph 3.16 g). That paragraph simply requires for ‘mechanically ventilated sheds’ a back up power supply with an alarm for power failure or temperature fluctuation ‘outside defined limits’, whatever they may be. But there is no requirement that sheds be mechanically ventilated.
61. In this respect we note that, paragraph A.1 of Appendix 1 of the Code of Practice for Domestic Poultry, 4th edition provides:
- It is not possible to relate stocking density to welfare in a simple manner. Adequate welfare involves consideration of group size, the housing system, the feeding and watering system, the breed and strain of fowl, temperature, ventilation, lighting and other husbandry factors. The observance of any particular stocking density on its own cannot ensure the welfare of birds* [emphasis added].

It will be recalled that paragraph 3.17(e) of the Requirements provides that:

At least 550cm(2) of cage area, measured in a horizontal plane which may be used without restriction, must be provided for each laying hen; or cages must meet legislation requirements. (Critical)

Notwithstanding this, the stipulation of cage area does not acknowledge matters of the kind identified in paragraph A.1 of the codes Appendix 1. It does so inferentially, but only as an alternative, by reason of the phrase “or cages must meet legislation requirements”.

62. Suffice to say that Appendix 2, of the Code of Practice for Domestic Poultry 4th Edition stipulates in respect of non caged production systems as follows:

A2.1.2 Maximum acceptable live weight densities for rearing layer and breeder birds and adult birds.

These maximum densities may be used only if there are cooling systems and ventilation fans in place to ensure temperature control during extreme conditions. Lower densities should be targeted, and will frequently be lower than the maximum states here.

63. Otherwise it is noted that the 'Introduction' to the proposed ESA Requirements (p.3) provides that:

This section of the Standard contains all the production related requirements with which each licensed Egg Producer must comply.

Under paragraph 3.2(a) of the Requirements, it is only stipulated that an egg producing business '... must be able to demonstrate an awareness of the current legislative requirements or Codes of Practice that are relevant to this Standard.' One would have expected at a minimum - on the basis that the AECL asserts the scheme will provide public benefits because it addresses animal welfare and will assist egg businesses to 'protect the welfare of their flocks' - that essential matters going to the welfare of the birds would have been provided for in the Requirements. Instead it is only required in paragraph 3.2(a) that the business be able to demonstrate 'an awareness of current legislative requirements or Codes of Practice that are relevant to this Standard'. 'Awareness' does not correspond, with for example, 'a sound knowledge'. Further, if the Codes of Practice were thought to be adequate (as the AECL would no doubt contend), one would have expected that these essential matters going to the welfare of the bird would have been provided for in a specific way. It will be appreciated however, from this submission, that the Panel is of the view that the Code of Practice does not remotely satisfy the requirements of the public interest, whether as to consumer protection, or animal welfare.

Further comment upon the ESA Introduction and Scheme Rules

64. Paragraph 1.2 provides:

Certification to the Standard, however, will only be granted to farms that meet the relevant requirements as set out in these Scheme Rules.

It is contended that this is a hollow requirement as not only are the other rules contradictory, but relevantly deficient in terms of public detriment. We also refer to and repeat in this respect our comments in paragraph 63.

65. Paragraph 1.3 provides that producers “check currency of legislative requirements”. Paragraph 1.5 asserts that 'the requirements of this Standard will help Egg Producers to comply with ... relevant State / Territory legislation ...'. In turn, such provisions correspond with paragraph 3.2 of the Requirements (referred to above) that each egg producing business must 'be able to demonstrate an awareness of the current legislative requirements and Codes of Practice that are relevant to this Standard.' This does not point up a Scheme concerned to establish a public benefit which addresses animal welfare and by way of assisting egg business to 'protect the welfare of their flocks': see paragraph 19 above.

66. The application process provided for in paragraph 1.6.1 of the Scheme Rules involves an unidentified 'full independent audit' to establish whether the applicant farm has complied with the requirements of the Standard. Accordingly, there is no audit as to whether the Code of Practice, for example, is complied with. Moreover, there are no measures provided for in the Standard which go to a substantial, let alone a minor, enhancement of the welfare of the bird confined to a cage or the high stocking density of barn production. Even the stocking density for free range systems has been made 13 times higher than that suggested by the code of practice.

67. By paragraph 1.7.2 of the 'Introduction and Scheme Rules' the process of audit is described. These provisions do not identify how the auditor will be 'independent'. If the auditor is paid for by ESA, the auditor cannot be viewed as independent. Indeed, the entity contemplated for the process of conducting such audits is not identified.

It appears that the provisions of paragraph 1.7.2 are more directed to the process of self-regulation than independent third party audit. Yet a properly particularised audit process independent of the AECL to monitor compliance would be thought to be a necessary first step to address the public interest, even at the low welfare thresholds adopted by the Standard. The absence of a proper audit process combined with diminished welfare standards provided for in the Standards only add to the picture of public detriment.

68. The doubts about the audit process are compounded by the categories of non-compliance specified in paragraphs 1.8.1 and 1.8.2. The category 'Critical' appears to involve a two-stage test. First, has there been a breach of a requirement? Second, due to the breach, does a serious and immediate hazard exist or is one likely to occur, including in respect of '...major welfare issues?' 'Major welfare issues' are not particularised.
69. The next category is 'Category 1'. Category 1 non-compliance 'is raised when there is evidence that core best practice is not being observed.' No meaning is ascribed to 'core'.

The final category is 'Category 2.' Category 2 non-compliance "is raised where best practice has not been fully complied with but where departure from best practice will not immediately compromise the operation of the Egg Quality

Assurance Scheme”. This test is so vague as to defy certainty of breach or enforcement.

70. A 'Critical' non-compliance may lead to suspension of the participating producer in the scheme, although the participant can reapply.

Category 1 non-compliance will lead to a producer committing in writing to taking corrective action within “a maximum 1 month period (or as otherwise specified by the auditor)”.

Category 2 non-compliance is similar to Category 1, save that the period is 3 months or as otherwise specified by the auditor.

71. Only an applicant or a participant may make a complaint with regard to the audit, or the operation of the scheme. No public complaint is provided for.
72. A couple of examples are taken from the Requirements which may inform the ACCC as to the seriousness of the AECL assertion about addressing animal welfare and protecting the welfare of the flock. Paragraph 3.19(e) of the Requirements (as to provision for free range birds to have access to an outdoor range) is only stipulated to be a Category 1 compliance issue rather than Critical. The stocking density of 30 kilogram live weight per square metre of usable space within the shed for a free range production system is only Category 1 and not Critical. The same applies for the same stocking density for barn laid production.
73. The cage height stipulated for caged production systems in paragraph 3.1.7(f) is only Category 1.

The provision of a 'feed trough' which may be used without restriction in paragraph 3.1.7(h) for caged production systems is only Category 1.

74. It will be recalled that the AECL asserts that the Scheme will provide public benefits by way of assisting egg businesses to “minimise the likelihood and impact of disease outbreaks.” Yet by paragraph 3.12(i) weekly monitoring and maintenance of water sanitation systems is only a Category 1 compliance issue.

According to paragraph 3.12(m), water consumption is to be monitored at a minimum twice daily in shed inspections. One wonders how this may be audited. However, non-compliance with such monitoring is a Category 1 issue only. Indeed, paragraph 3.4 concerning 'Hygiene, Disease Control' are all Category 1 issues only. The full hygiene program in paragraph 3.9 only provides for Category 1. The same applies in respect of paragraph 3.10 entitled 'Flock Welfare'.

The Trade Practices test

75. It is contended that the Scheme and the CTM will give rise to breaches of Part 3.1 of the Australian Consumer Law and specifically sections 29 and 33 of the ACL. Section 29 of the ACL prohibits, relevantly, false or misleading representations that goods are of a particular standard, quality, value, grade, composition, style or model or have had a particular history or particular previous use. Section 33 of the ACL provides that a person must not in trade or commerce engage in conduct that is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose or the quantity of any goods.
76. In *Australian Competition and Consumer Commission v C.I. & Co Pty Ltd [2010] FCA 1511* (23 December 2010), the respondents were found to have labelled eggs as free range when the fact a large proportion of the eggs were not free range

eggs. They were found to have engaged in conduct that was misleading or deceptive, falsely represented that goods were of a particular standard or quality, and misled the public as to the nature or characteristics of goods.

North J observed:

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... (at 16).

Further, the conduct 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 (at 31).

77. The Panel contends that consumers are unlikely to appreciate that by purchasing eggs affixed with the ESA certification mark that they are actually contributing to a decline in animal welfare.
78. Further, there are no clear rules and hence identifiable qualities for eggs carrying the CTM. Rather, as stated above, it appears that the meaning behind the CTM is only apparent once coupled with the identification of the production process as stamped on the egg packaging. Further, given that a variety of production processes are supported by the CTM, it follows that consumers seeing the CTM alone cannot help but be confused as to exactly what qualities, standards or origins eggs possess which bear the CTM.
79. Accordingly, the CTM should also not be certified for failing the Trade Practices test.

Monday 9 July 2012