

Barristers Animal Welfare Panel

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APIA Certification Trade Mark Application

Introduction

1. The ACCC seeks public comment on an application by the Australian Poultry Industries Association for Inghams Enterprises Pty Ltd, Baiada Poultry Pty Ltd, Turi Foods Pty Ltd, Cordina Chicken Farms Pty Ltd, Golden Cockerel Pty Ltd, Hazeldene's Chicken Farms Pty Ltd and Red Lea Chickens Pty Ltd to register a proposed certification trademark for chicken and turkey meat.

Summary

2. For the reasons developed below, it is contended that more than sufficient grounds exist for the ACCC to not certify the APIA CTM because:
 - (a) the APIA CTM is likely to mislead consumers about the nature of the products labelled with the APIA CTM in breach of the unfair practices portion of the trade practices test;
 - (b) the APIA CTM will cause public detriment, most notably with respect to consumer protection and animal welfare; and
 - (c) the technical requirements of the rules set out in s 173(2), *Trade Marks Act* 1995 are not satisfied by the rules associated with the APIA CTM.

The APIA CTM application

3. The APIA application is in two parts:

- (a) first, an introductory overview of the proposed free range certification scheme and some rules relating to the use of the APIA CTM; and
- (b) second, the standards by which chicken and turkey meat will be produced under the APIA CTM.

Certification Trade Marks

4. Section 169, *Trade Marks Act* 1995 (Cth) defines a “certification trade mark” as “a sign used, or intended to be used to distinguish goods or services” certified “in relation to quality, accuracy or some other characteristic, including (in the case of goods) origin, material or mode of manufacture” .
5. Importantly, in the words of the ACCC itself, “a certification trade mark indicates to consumers that a product or services meets a particular standard.”¹
6. Sections 171 and 172, *Trade Marks Act* 1995 provide that the registered owner of a certification trade mark, and any person allowed to use the certification trade mark by the registered owner (“approved user”), must use the certification trade mark only in accordance with the rules governing the use of the certification trade mark.
7. Section 173(2) outlines the matters that the rules must specify. They are:
 - (a) the requirements (“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;

¹ Australian Competition and Consumer Commission, *Certification Trade Marks – The Role of the ACCC* (2011) 4.

- (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;
 - (d) the requirements that a person who owns the certification trade mark or an approved user must meet to use the certification trade mark in relation to goods and/or services;
 - (e) the other requirements about the use of the certification trade mark by a person who owns the certification trade mark or an approved user;
 - (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.
8. Section 175(2) provides that the ACCC must give a certificate approving of the application for a certification trade mark 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 goods and/or services meet the certification requirements; and
 - (b) the rules:
 - (i) would not be to the detriment of the public; and
 - (ii) are satisfactory having regard to the criteria prescribed for the purposes of this section of the TM Act, being:
 - the principles relating to restrictive trade practices set out in Pt IV of the Competition and Consumer Act 2010;

- the principles relating to unconscionable conduct set out in Sch 2 Pt 2-2 of the Competition and Consumer Act 2010; and
 - the principles relating to unfair practices, product safety and product information set out in Sch 2 Pt 3-1 of the Competition and Consumer Act 2010.
9. The relevant provisions above of the *Competition and Consumer Act* 2010 include, among other provisions, a prohibition on:
- (a) a person, in trade or commerce, making a false or misleading representation that goods are of a particular standard, quality, value, grade or composition (Sch 2 Pt 3-1 s 29(1)(a)); or
 - (b) a person, in trade or commerce, engaging in conduct that is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for of purpose or the quantity of any goods (Sch 2 Pt 3-1 s 33).

The importance of “free range”

10. We turn to the manner in which the application by APIA would deal with purported ‘free range’ production of meat chickens and turkeys.
11. First, as an important preliminary observation, it should be noted that consumers are exercising their right to make *informed* food choices. Animal-derived food products, such as poultry meat and eggs, are groups of food products in which this trend is particularly apparent, with consumers more aware than ever of the impact that different production systems have on animal welfare.²

² For example, one survey revealed that 63% of interviewees would be more likely to buy free-range pig products after becoming aware of the conditions in factory farms. When it comes to eggs, a 2005 ACT survey revealed that 84% of interviewees considered cage egg farms cruel and 73% of them supported a ban on such cage systems: Bidda Jones, ‘The Role of Animal Welfare Agencies in Improving Animal Welfare’, *Department of Agriculture, Fisheries and Forestry* (2008), 18 <http://www.daff.gov.au/__data/assets/pdf_file/0018/1046331/03-bidda-jones.pdf>; Humane Society International, ‘Method of Production’ Labelling of Animal-Derived Food Products: A National Approach (2008), 1 <http://www.hsi.org.au/editor/assets/admin/Labelling_policy_Aug08.pdf>.

12. Indeed, a 2012 CHOICE survey of 900 respondents points up the importance to consumers of chicken and poultry products , concluding that:
 - (a) 93% of respondents had chosen free range products in the preceding 12 months;
 - (b) respondents said that for a number of products the fact the products were free range was important. The highest number of participants (60%) categorised buying free range eggs as “essential when choosing”. Thirty four percent of participants categorised buying free range poultry as “essential” and 41% of participants categorised buying free range poultry as “important”; and
 - (c) eighty five percent of respondents cited greater animal welfare issues as a motivation for choosing free range products.
13. In response to questions about how those consumers select “free range” eggs, 43% said they rely solely on seeing the words “free range” on the product packaging, 39% said they want to see the logo of a free range certification body and 28% said they on seeing both the words “free range” and the logo of a free range certification body.
14. These results suggest that the average purchasing consumer with no direct insight into food production methods places heavy reliance on information on food packaging, including any logos or words describing the product. It is contended that this linkage between the information presented to consumers about a product at the point of sale, and a consumer’s ultimate product decision, is relevant in assessing the APIA CTM.
15. It is submitted that APIA’s description of chicken and turkey meat products as reared “free range”, is misleading.

Section 175(2)(b) – Consumer Protection Concerns

16. The ACCC states:

“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.”³ [emphasis added]

17. In other words, a certification trade mark is an assurance to consumers that the products corresponding to the certified mark have a particular characteristic.

18. An approved user of the APIA CTM will be entitled to apply a logo to their chicken and turkey meat products stating that the meat is “APIA Accredited Free Range”. Once the APIA CTM is applied to such a product, consumers will be entitled to assume that the product has been produced in accordance with animal welfare standards that correspond to the phrase “free range”, denoting a higher standard of animal welfare than might apply in a production method that is not free range.

19. For many years now the *only* instrument of legal standing, and which governs and prescribes stocking densities, is the Code of Practice for Domestic Poultry, 4th edition. It is an instrument compliance with which confers a complete defence under State animal protection statutes to a cruelty offence arising from say the intensive manner of confinement of the bird by a producer. The code is drawn at the behest of industry by federal and state departments of agriculture, which view themselves as the ‘friend of industry’: see further paragraph 28 below. All these many years then, the code has amply suited the requirements of industry. Indeed, federal and state departments refused point blank to review the code in 2010, as promised by the code’s own provisions, despite the urging of animal societies to do so.

20. In respect of ‘free range’, the code provides for an outdoors stocking density of 1,500 birds per hectare. Admittedly, there is a qualification or proviso in the case

³ ACCC document [emphasis added].

of meat chickens for a “higher bird density” to be “acceptable”. This is because of the phrase “a proportionately higher stocking density *than for* layers may be used” [emphasis added]: see paragraph A2.1.4 at p.28 of the Code. This paragraph notes that “any higher bird density is acceptable only where regular rotations of birds on to fresh range areas occurs and close management is undertaken which provides some continuing fodder cover”. It is further noted that this may only be considered when meat chickens use “only some weeks of the 10 week cycle on pasture (e.g. 4 weeks)...”. Suffice to say, any such “proportionately higher stocking density” from a base of 1,500 cannot exceed 3,000 birds per hectare, as the increase can only be proportionately higher than the base of 1,500.

It is contended that the qualification or proviso has been created to suit industry convenience rather than the animals’ welfare. There is no designation of what constitutes “regular” rotation. Nor is there any criteria for what constitutes “close” management, or “some” continuing fodder cover. Taken together, it is all highly unsatisfactory.

21. In contrast to the Code provision for an outdoors stocking density of 1,500 birds per hectare, the APIA Meat Chicken Standards by paragraph 2.3 provide that:

“The total available range area must be:

- *at least 1.5 times the size of the total shed floor area in the case of any new sheds built after 1 July 2011 and existing sheds where the available range area is not limited by the overall farm footprint;*
- *at least 1 times the size of the total shed floor area for existing sheds where the available range area is limited by the overall farm footprint.”*

The same description of outdoor stocking density applies for turkeys under the APIA’s Turkey Standards: see paragraph 2.3.

22. It can thus reasonably be concluded that most sheds will be existing sheds in terms of the definition, that is to say, built before 1 July 2011. Accordingly, the total available range area for most chickens and turkeys will be only one times the

size of the existing shed floor area. It must follow then that whatever may be the stocking density for chickens or turkeys inside the shed, it stands to be substantially replicated in the outdoor area, subject to the number of birds which access the outdoor area.

23. In paragraph 2.4 of the Chicken and Turkey Standards, it is provided that: “*The range must be maintained and managed so as to encourage chickens to make full use of the area. The range area should carry palatable vegetation including pasture at all times.*”

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.

24. It is quite unsatisfactory that a ‘free range’ outdoor area should be defined by reference to the area of the shed where birds are kept in a stocking density akin to factory farm conditions. Plainly, this is directed to producer convenience rather than the animals’ welfare. Rather, the stocking density for the outdoor area should be defined according to a number of birds per hectare. What the APIA submission seeks to do is to invert this by adopting a given area without reference to the permissible density of birds that may occupy it.

25. The APIA Application in describing the ‘Reason for New Free Range Certification Program’, asserts that “[t]he chicken and turkey meat industries felt that *current arrangements did not provide a sufficiently robust and animal welfare focused set of standards specific to chicken and turkey broilers...*” [emphasis added]

Yet the “current arrangements” for outdoors free range stocking density are reposed in the Model Code of Practice for Poultry, 4th edition. It is noted above, this is 1,500 birds per hectare (save for the qualification or proviso referred to in paragraph 20 above).

26. Turning to the fourth paragraph of the APIA ‘Reason for New Free Range Certification Program’, it will be seen that it is asserted that the proposed APIA “*new standard is a significant improvement in terms of transparency and animal welfare*

outcomes". This assertion is made by reference to FREPA Standards, yet the FREPA Standards provide no stocking density for outdoor areas. In addition, the National Animal Welfare Standards for the Meat Chicken Industry and the biosecurity Manual referred to in paragraph 1.3 of the APIA's 'The Standards-Chicken' are no more than industry generated documents: see the Australian Chicken Meat Federation Inc website at www.chicken.org.au The *only* applicable standard of legal consequence is the Model Code of Practice, as stated above in paragraph 19.

27. On the basis of the Model Code, the APIA "new standard" is a very significant backward step for transparency and animal welfare outcomes. Put simply, the outdoor stocking density under the APIA Standard does not even remotely reflect the standard prescribed by the Code of Practice. It is contended that it will cause public detriment on that ground alone. But it will cause public detriment on the further ground that it does not remotely correspond with the notion of 'free range'. Accordingly, it can be reasonably contended that consumers who purchase meat chicken and turkey products in reliance on the APIA certified trademark will contribute to a very substantial diminishment in the welfare of these animals. Further, they will do so by not making an *informed* choice. This is because they will not appreciate that the outdoor free range stocking density presently required (under the Model Code) has been so vanquished by the APIA Standard. Indeed, the APIA Standard turns any plausible notion of outdoor free range on its head.
28. In this respect, it should be noted that the 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.

29. Just as the Australian Egg Corporation Limited sought to contort the prescribed stocking density for outdoor areas for layer hens of 1,500 birds per hectare to be instead a code which allowed “unlimited outdoor stocking densities” and “in practice, no maximum density or cap”, the APIA now seeks to suggest that its proposed standard is a significant improvement in “transparency and animal welfare concerns”. (The reasons the AECL’s claim is wrong, as a matter of construction of the Code, are set out in paragraphs 28 – 35 of the Panel’s submission to the ACCC dated 9 July 2102). It will be remembered that the AECL proposed a new standard under its certified trade mark application of 20,000 birds per hectare. Similarly, the APIA in its application seeks to create a stocking density for an outdoor area incompatible with the notion of ‘free range’.
30. The schema of the Domestic Poultry Code, 4th edition, may be summarised as follows:
- (a) First, the introduction to the Model Poultry Code describes as “minimum standards” the “standards outlined in this Code”;
 - (b) Clauses 2.2.5 and 3.3 of the Model Poultry Code provide that maximum acceptable stocking densities are contained in Appendices 1 and 2.
 - (c) Clause 3.3 further provides that those maximum stocking densities apply only to birds housed under good management with optimal temperatures and ventilation conditions.
 - (d) In turn, the appendices state that the maximum stocking density for free range meat chickens while inside a housing shed should be between 28kg/m² to 40 kg/m² depending on the type of ventilation in the housing shed. Density is measured against bird weight.
 - (e) Importantly, the free range stocking densities for meat chickens in the outdoors range is stated to be a maximum of 1,500 birds per

hectare, with a proportionately higher stocking density only permitted where:

- i. the chickens use only some of the 10 week production cycle on pasture;
- ii. there is regular rotation of birds onto fresh range areas; and
- iii. there is close management undertaken to ensure continuing fodder cover.

(f) Any increase above the 1,500/hectare outdoor stocking density, therefore, is only allowed under the Model Poultry Code where certain conditions are met and, even then, only “proportionately”. This means that 3,000 chickens per hectare is the maximum in outdoor stocking density even if those three conditions are satisfied.

31. The position is different for turkeys. For turkeys, the Model Poultry Code imposes a maximum indoors stocking density of 46kg/m², whereas outdoors stocking density is limited from 1.5kg/m² to 2.5kg/m² depending on the stage of the turkey’s growth.

In respect of the outdoor stocking density for turkeys, the Panel contends there should be consistency. An outdoor free range stocking density should be 1,500 birds per hectare, whether meat chickens or turkeys. In this respect, it is assumed that the average weight per meat chicken at relative maturity is some 2kg per bird. Accordingly, assuming that a turkey at relative maturity is some 5 – 6 kg per bird, it would be thought that 1,500 turkeys per hectare is entirely reasonable.

32. Notwithstanding that it was more focused on eggs than poultry meat, the CHOICE survey is a compelling indication of consumers’ expectations about the meaning of “free range”. In essence:

- (a) most survey respondents indicated that free range meant to them that birds have room to move around and easy access to an outdoor area –

69% of participants indicated that free range means that birds are never confined in cages; 66% that birds have more outdoor space; and 65% that birds have easy access to pasture;

- (b) sixty-five percent of respondents said that they did not know what a reasonable stocking density for free range egg-laying hens should be. However, only 0.6% thought that a stocking density of 20,000 birds per hectare was reasonable for free range standards. Of those surveyed, 4% thought that 10,000 birds per hectare was a reasonable stocking density for free range hens, 16% thought 1500 birds per hectare is reasonable, and 12% thought that 750 birds per hectare is reasonable.

33. As stated above, 43% of participants in the CHOICE survey indicated that they rely solely on seeing the words “free range” on the product packaging when choosing free range products, whilst 39% indicated they want to see the logo of a free range certification body (with 28% of those relying on seeing both the words “free range” and the logo of a free range certification body). Given that consumers expect the words “free range” or a “free range” accreditation logo to mean that they are buying products produced in accordance with genuine free range standards, there is more than a likely risk that consumers will believe the APIA certified poultry meat comes from birds that have been treated to relatively higher animal welfare standards, including reasonable stocking densities which allow them to move around and express other natural behaviours.

Inside the Sheds

34. The APIA Standards state that the maximum stocking density of chickens inside sheds for a ‘free range system’ is:

- (a) 28kg per m² of available floor area for naturally ventilated sheds; and
- (b) 30kg per m² of available floor area for mechanically ventilated sheds.

Based on an average chicken weight of 2kg, this stocking density equates to approximately 140,000 to 150,000 chickens per hectare. The Domestic Poultry Code, 4th edition (at pages 27 – 28), prescribes 30kg/m² for meat chicken breeders. For other meat chickens, it prescribes 28kg/m² for tunnel ventilated sheds. For mechanically ventilated sheds, the Code suggests a maximum sticking density for 40kgs/m² during the winter and 36kgs/m² in summer.

35. For turkeys, the APIA Standards state that the maximum stocking density of turkeys inside sheds is:

- (a) 28kg per m² of available floor area for naturally ventilated sheds (birds below 5kg);
- (b) 30kg per m² of available floor area for mechanically ventilated sheds (birds below 5kg); and
- (c) 36kg per m² of available floor space for mechanically ventilated sheds (birds over 5kg).

This equates to approximate stocking densities of 50,000 to 60,000 turkeys per hectare. The Domestic Poultry Code, 4th edition, sets out in Appendix 3 (at page 30) the stocking densities for turkeys. The stocking density for breeders is 30kg/m². The stocking density for intensive production of turkeys is 46kg/m².

36. The Model Code of Practice in respect of both meat chickens and turkeys, at page 27, 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.”

Suffice to say, the stocking densities posed by the APIA Standards are broadly commensurate with those prescribed by the Model Code of Practice for intensive production of meat chickens and turkeys. How can it be reasonably suggested

that stocking densities inside the shed commensurate with that prescribed by the Code for *intensive* production are somehow to be contorted as apt for a trademark for free range production?

The public detriment test

37. 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...*”

38. The threshold point for ACCC to consider in determining questions of public detriment is whether existing *intensive* standards for housing of meat chickens and turkeys, such as those described in the Code of Practice for Domestic Poultry, 4th edition, or proposed by the APIA, are sufficient to serve the public interest as part of a purported ‘free range’ trademark. 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 human treatment of animals?

It is contended that each of the code of practice *intensive* standards, and the APIA standards for inside the sheds, causes public detriment. For example, to keep an animal in a state of chronic floor area confinement commensurate with that sanctioned by the code of practice or the proposed APIA standards would, but for the code of practice, stand to constitute an animal 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.

39. Against this background, it is noted that the ACCC filed proceedings in the Federal Court against a number of companies who are party to the APIA application, doing so on the basis that the stocking densities of the meat chickens did not allow them to be “free to roam”. In an Agreed Statement of Facts, Turi Foods itself agreed that a stocking density of 18.19 meat chickens per square metre with a target weight of the meat chickens being 1.7kg and of 12.12 meat chickens per square metre with a target weight of 2.3kg to 2.4kg), does not

provide meat chickens with “substantial space available to roam around freely”.⁴ On its own admission, the density levels proposed in the APIA CTM are defective.

Simply put, such standards prescribed by the code, or as proposed by the APIA, defy the public interest and should not be followed. The stocking densities inside the shed are incompatible with the notion of ‘free range’. In terms of consumer protection, it is important that the consumer’s wish to exercise an *informed* choice in products they purchase should be preserved and not diminished.

40. Further, in 2000 a comprehensive international scientific review was carried out on meat chickens by the Scientific Committee on Animal Health and Welfare (“SCAHW”), a body appointed under the auspices of the European Parliament.⁵ The review found that restricting the natural behaviour of chickens (by, for example, imposing high stocking densities) leads to mobility issues, leg weakness, poor litter quality and the contraction of dermatitis. The review also concluded that high stocking densities increases the risk of breast blisters, chronic dermatitis and hockburn.⁶

41. Other scientific evidence in relation to the relationship between stocking density and poultry welfare reveals -

- (a) higher stocking densities mean less space in which birds can exercise causing greater weight gain, greater pressure on joints and more stress from confinement.⁷ Birds unable to walk or those suffering from painful joints due to rapid weight gain, or painful foot lesions may not have fair or equal access to outdoor areas, which is also contrary to consumers’ expectations that “free range” means easy access to an outdoor area;⁸

4 Paragraph 24 of the Agreed Statement of Facts, reproduced at paragraph 6 of the Reasons for Judgment in *ACCC v Turi Foods Pty Ltd (2)* [2012] FCA 19 (23 January 2012). It seems very odd that APIA, which includes Turi Foods, the first respondent in this case, would propose a stocking density that is viewed by the ACCC, and by Turi Foods itself, as inadequate.

⁵ See *infra*.

⁶ See http://ec.europa.eu/food/fs/sc/scaw/out39_en.pdf pp 105–107.

⁷ See RSPCA “Animal welfare in the meat chicken industry”.

⁸ See <http://www.plosone.org/article/info:doi/10.1371/journal.pone.0001545> and <http://www.worldpoultry.net/diseases/viral-arthritis-d19.html>.

- (b) high turkey stocking densities lead to deterioration in litter quality, which in turn is associated with leg problems and resulting difficulty in walking, and hip and foot-pad dermatitis;⁹ and
- (c) broods of young, wild turkeys spend up to 86–95% of the day foraging,¹⁰ and the prohibitive effects of industrial turkey production on such normal foraging behaviour leads to abnormal behaviour such as cannibalism.¹¹

Consumer expectations – other animal welfare concerns

42. In addition, the APIA Program purports to cover “the farming practices and related activities such as feed production, the slaughtering process, transport and traceability required to be implemented” in order for chicken and turkey meat to be sold with the APIA CTM. However, the APIA Program is so very deficient in details for all aspects of the meat production process, particularly with respect to:

- (a) slowing the growth rate of birds;
- (b) catching and handling birds;
- (c) over-crowding of birds during transportation;
- (d) effective slaughtering measures;
- (e) reducing the length of transportation;
- (f) the time between shackling and stunning birds; and
- (g) ensuring an effective stun and subsequent bleeding out.

The RSPCA guidelines give guidance on all of those aspects of the production chain, thereby ensuring that all inputs into the production process meet adequate animal welfare standards.

43. Consumer demand in relation to free range products focuses on an expectation that free range production system carries with it enhanced welfare for poultry.

⁹ Martrenchar A, Huonnic D, Cotte JP, Boilletot E, and Morisse JP. 1999. Influence of stocking density on Behavioural, health and productivity traits of turkeys in large flocks. *British Poultry Science* 40(3):323-31.

¹⁰ Healy WM. 1992. Behavior. In: Dickson JG (ed.), *The Wild Turkey: Biology and Management* (Harrisburg, PA: Stackpole Books).

¹¹ Sedlackova M, Bilcik B, and Kostal L. 2004. Feather pecking in laying hens: environmental and endogenous factors. *Acta Veterinaria Brno* 73(4):521-31; Hughes BO and Grigor PN. 1996. Behavioural time-budgets and beak related behaviour in floor-housed turkeys. *Animal Welfare* 5:189-98; Hughes BO and Duncan IJH. 1972. The influence of strain and environmental factors upon feather pecking and cannibalism in fowls. *British Poultry Science* 13(6):525-47.

The very high stocking densities in the APIA Standards and their failure to address other animal welfare concerns significantly undermines any expectations that the words “free range” equate to greater animal welfare.

Section 175(2) – anti-competitive concerns

44. As noted in the ACCC’s guide to certification trade marks,¹² 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.

45. Free range chicken meat makes up approximately 10–15% of the chicken meat produced in Australia.¹³
46. In light of the stocking density and the other animal welfare concerns associated with the APIA Rules articulated above, it is contended that the APIA CTM is likely to have a detrimental impact on competition within the chicken and turkey meat markets by undermining legitimate free range certifications.
47. If the APIA CTM application is approved, APIA members will be enabled to represent their products as ‘free range’. They will obtain an unjustified competitive advantage to the detriment of chicken and turkey meat processors who are complying with genuine free range standards much more in line with consumer expectations of free range standards.

¹² ACCC, *Certification trade marks – the role of the ACCC*, 2011, p 4.

¹³ See Australian Chicken Meat Federation Inc at www.chickens.org; and see <http://www.rspca.org.au/how-you-can-help/campaigns/meat-chickens.html>.

48. This is of particular concern: APIA's biggest members are large integrated companies, including Inghams Enterprises Pty Ltd and Baiada Poultry Pty Ltd which together supply approximately 70% of meat chickens marketed in Australia.¹⁴ Indeed, Inghams Enterprises Pty Ltd was recently reported to have its business for sale: see <http://www.smh.com.au/business/chicken-feed-ingham-stands-to-make-16b-from-selling-the-family-farm-20120716-226jj.html>.
49. Further, in view of the substantial market domination enjoyed by these large integrated companies, the approval of the APIA standards will reduce the incentive of chicken and turkey meat processors to comply with genuine free range standards.
50. The approval of the APIA CTM is likely to exert substantial competitive pressure to reduce genuine free range products in the chicken and turkey meat industry.
51. The ability to certify chicken and turkey meat as being "free range" may also entitle producers to pass onto consumers an additional component of the price for the products in light of the research cited above.¹⁵ It may lead to consumers being misled into paying more for products that do not in fact meet their expectations of 'free range'.

Section 173(2)(a) (certification requirements)

52. It is noted above in paragraph 44, the ACCC Guide provides "[i]n 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."
53. It is submitted that the certification rules which accompany the APIA CTM do not comply with section 173(2)(a) of the Act. Set out below are the Panel's

¹⁴ Australian Government, Department of Agriculture, Fisheries and Forestry, *Chicken Meat* (15 June 2011), available at: http://www.daff.gov.au/agriculture-food/meat-wool-dairy/ilg/industries/chicken_meat.

¹⁵ For example, there is a growing number of consumers who are prepared to pay more for "free range" eggs over eggs produced from conventional cage systems: See, eg, Rhett Watson, 'Shopping Giant Woolworths Goes Free Range with Eggs', *The Daily Telegraph* (NSW), 14 August 2000, available at: <http://www.dailytelegraph.com.au/news/shopping-giant-woolworths-goes-free-range-with-eggs/story-e6freuy9-1225761152146>; Leon Gettler, *Issue of Free-Range Eggs Cracked at Woolworths* (2009) G magazine online, available at: <http://www.gmagazine.com.au/news/1523/issue-free-range-eggs-cracked-woolworths>.

contentions corresponding to the alphabetical sub-paragraphing of section 173(2).

(a) the requirements (“certification requirements”) that goods and/or services must meet for the certification trade mark to be applied to them;

54. Some of the certification requirements set out in the APIA Rules provide for standards which are so vague that it would be difficult to establish whether or not they were met. For example, standard 2.14 states that “temperature and humidity in sheds should at all times meet recommended values ...” and that “all practicable measures should be taken ... to minimise the impact of the birds’ welfare.” A further example is standard 2.16, which states that “[e]nvironmental enrichment devices ... should be provided.”

Words such as “should” do not provide clear guidance as to what standards are required to be met by approved users in order for their products to justify use of the APIA certification trade mark.

(b) the process for determining whether goods and/or services meet the certification requirements;

55. It is left to Licensees of the APIA certification trade mark assume to ensure that annual certification audits of all relevant operations (including the meat chicken farms supplying the birds) are undertaken.

56. It is left to each licensee to report, and then only annually, on all supplier broiler farms accredited under this scheme and each supplier processing plant used to process the birds for sale as APIA Accredited Free Range Poultry.

57. Moreover, the ACCC’s guide stipulates the process for determining whether goods meet the certification requirements “should be thoroughly documented in the CTM rules.”: Australian Competition and Consumer Commission, Certification Trade Marks – The Role of the ACCC (2011) 8 Yet the foregoing is

more consistent with a scheme for ‘hands off’ industry self-regulation than a proposal intended to honour the public interest.

58. The APIA Rules are notably brief in describing the auditing process, providing no guidance on the required content the annual reports or the form or level of detail the certification audits must take.
59. The ambiguity in the wording of the certification requirements (canvassed above) injects uncertainty into the process for determining whether the meat products meet the certification requirements. If a certification requirement is described as one that “should” as opposed to “must” be fulfilled by an approved user, how is an auditor to decide whether to apply that particular certification requirement or not? Alternatively, auditors would be left at their discretion to apply or not to apply certain certification requirements, which would increase the level of uncertainty as to the nature of the final product that reaches consumers.

(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;

60. “The ACCC must be satisfied that a person or organisation that is granted approved CTM assessor status (this may include the CTM owner) will have the necessary qualifications, skills or abilities to competently assess whether or not a good and/or service meets the CTM requirements or standards set out by the CTM rules”: Australian Competition and Consumer Commission, Certification Trade Marks – The Role of the ACCC (2011) 7.
61. Under the APIA Rules, it is left to an external auditor appointed by APIA whether systems are in place to ensure that only product produced according to the APIA Free Range Poultry Standards will be labelled, marketed, promoted or otherwise identified using the APIA certification trade mark. The qualities, skills or abilities of the external auditor to competently assess these vital requirements are not set out in the APIA Rules.

62. The APIA further states that it will appoint one or several auditors certified by the Registered Accreditation Board Quality Society of Australasia (or other suitable body) and train them in the APIA Free Range Poultry Standards.
63. It is difficult to see how being a member of the Registered Accreditation Board Quality Society of Australasia could be described as an “attribute” that would identify a person as being able to become an approved certifier. Furthermore, it is not immediately apparent that an auditor trained by the APIA would have the necessary qualifications, skills or abilities to competently inspect and assess the conditions at facilities which supply and raise chickens and turkeys for their meat. A number of the standards relate to the health of birds, assessment of which could only be carried out by qualified veterinarians or animal behaviourists.
64. No requirement exists in the APIA Rules that approved certifiers have relevant veterinary or animal behaviourist qualifications. Nor do the APIA Rules specify any minimum technical qualifications that must be possessed by approved certifiers.

(d) the requirements that a person who owns the certification trade mark or an approved user must meet to use the certification trade mark in relation to goods and/or services;

65. It is left to the licensees to themselves ensure that annual certification of all relevant operations (including the broiler farms supplying the birds) are undertaken.
66. The APIA Rules require only annual auditing, not regular monitoring or spot checks to ensure all-year-round compliance with the APIA Rules and standards.

(e) the other requirements about the use of the certification trade mark by a person who owns the certification trade mark or an approved user;

67. The application appears to be silent on the trade mark itself, including design, size, colours, shapes, and its permitted use.

Conclusion

68. The proposed APIA CTM should not be certified by the ACCC.

21 August 2012