

Senate Economics Legislation Committee
ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

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Department/Agency: ACCC
Question: BET 105-115
Topic: Free Range Eggs
Reference: written - 10 June 2015
Senator: Williams, John

Question:

105. The ACCC has a number of options available to it and it is not required to pursue enforcement action to every complaint it receives. In regards to each of the cases where the ACCC has taken action against duck and eggs businesses, why were these alternatives not considered?
106. In relation to a) above, what has been achieved by pursuing court action that could not have been achieved by using other options available to the ACCC?
107. ACCC has a guiding Principle of Consistency. Given the Court noted the Pirovic case “should not be seen as a resolution of what constitutes free range in the abstract “, how has the ACCC’s activities given business certainty about its actions?
108. ACCC has a guiding Principle of Fairness – the ACCC seeks to strike the right balance between voluntary compliance and enforcement while responding to many competing interests. How did the ACCC determine that its guiding Principle of Fairness was better achieved by Court enforcement action rather than seeking voluntary compliance in regard to each duck and egg business actions undertaken by the ACCC?
109. The current Model Code for poultry describes free-range systems as “birds in free-range are housed in sheds and have access to an outdoor range”. This definition is used in determining the mandatory component of egg labels. Other aspects of the Code which have not been enacted in law or regulation remain voluntary. It would appear the ACCC’s actions and comments suggest that consumers can expect that all farmers implement and comply with all aspects of the Code, thereby effectively making a voluntary code mandatory.
Does the ACCC believe that consumers can reasonably believe that any business covered by a voluntary Code will abide by that Code and that voluntary Codes are now effectively mandatory and enforceable by the ACCC?
110. Humane Society International claims that the ACCC enforcement actions have resulted from one of their formal complaints.
How does the ACCC ensure that complaints reflect real consumer concerns rather than a campaign by activist organisations with other agendas?
111. Can the ACCC outline what involvement organisations such as Humane Society International, Humane Choice, the Barristers Animal Welfare Panel, Animal Justice Party and Animal Liberation had in the complaint and investigation process?
112. The ACCC believes that consumers expect free-range means to mean that most birds are ranging on most days.
How has the ACCC arrived at that description?
113. In relation Q8, was the decision based on any research, and if so, is that research available publicly?

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114. Free-range hens are most likely to range when the environment inside the shed is not to their liking and their welfare is compromised. Therefore having most birds ranging on most days may indicate poor bird welfare rather than good welfare and husbandry practices.

As consumer expectations are unlikely to be that hen welfare will be compromised by farmers, how does the ACCC standard of “most hens ranging on most days” reflect consumers’ expectations and provide clear guidance to farmers when this guidance may be effectively asking farmers to treat their hens badly?

115. What processes are in place to ensure confidential information provided to the ACCC is kept confidential?

Answer:

105. The ACCC’s Compliance and Enforcement Policy provides the principles adopted by it to achieve compliance with the law, and outlines the ACCC’s enforcement powers, functions, priorities, strategies and regime. It notes that legal action might be taken above other forms of resolution where, having regard to all the circumstances, the ACCC considers litigation is the most appropriate way to achieve its enforcement and compliance objectives. It notes that the ACCC is more likely to proceed to litigation in circumstances where the conduct is particularly egregious (having regard to the priority factors), where there is reason to be concerned about future behaviour or where the party involved is unwilling to provide a satisfactory resolution.

In relation to earlier matters involving poultry, the ACCC did resolve various issues through non-court means but pursued a number of matters through litigation.

In relation to the more recent cases involving allegations of misleading free range egg representations, the ACCC considered the extent of the alleged conduct within industry and by individual traders; the significance of the matters within a priority area identified within the Compliance and Enforcement policy; and the impact conduct was having on consumer choice and those within industry operating without the same degree of alleged misrepresentation (and therefore at a competitive disadvantage, noting that approximately 40 per cent of eggs sold are labelled free range), that court based interventions were required to address the conduct of individual traders and more broadly.

106. When seeking to address particularly problematic conduct within an industry, while also seeking to change broader industry behaviour, court proceedings and sanctions imposed can be proportionate to the seriousness of the matters; provide both specific and general deterrence; and have the capacity to provide greater certainty as to the application of the law to facilitate appropriate changes in industry practice.
107. The question takes out of context the comments from the court. The comment was made as the Court was discussing the principle that declarations should disclose the basis on which a contravention was being found. In that context, the Court stated:

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“In the present proceeding, the form of declaratory relief that was initially the subject of consent between the parties was further revised during the course of the hearing. The revision to the form of the declaratory relief proposed by the Court was an attempt to give content to the constraints imposed upon the laying hens in the present case such that they could not move freely on an open range. Although it was quite properly submitted on behalf of Pirovic Enterprises that the present case should not be seen as a resolution of what constitutes “free range” eggs in the abstract, the revision suggested gave content to the facts of the present case which led to the admission made on behalf of Pirovic Enterprises as to contraventions of the Australian Consumer Law. The revision suggested was consented to by the parties.”

This is not a controversial concept and while Court decisions provide useful precedent and guidance for compliance with the law, each instance should be considered on its merits.

In relation to the concept of consistency, the ACCC has pursued the various matters investigated in a manner it considers to be consistent.

108. Please see response to question 106.

109. The ACCC’s position and actions do not suggest that farmers are required to implement and comply with aspects of the voluntary Code. We take the opportunity below to clearly identify the ACCC role and position on these matters.

The ACCC does not set or define standards for free range eggs.

The ACCC has been concerned only with conduct by egg producers that is likely to mislead or deceive consumers.

A significant recent consumer concern has been the marketing and sale of eggs labelled as ‘free range’, often accompanied by pictures or diagrams depicting hens outside on pasture, when those eggs are produced by hens that are kept wholly or largely indoors in sheds or barns.

The ACCC’s view is that for eggs to be labelled as ‘free range’, and not mislead consumers, the minimum requirement from a consumer perspective is that the hens spend time outdoors.

Recognising that there are occasions when free range hens will not be outdoors (for reasons of weather, predators etc), the ACCC, in recent cases, has submitted to the Court that use of the descriptor ‘free range’ requires, at least, that the hens are able to move about freely on an open range each day, and that most of the hens do so. This, in the ACCC view, seems uncontroversial. In a recent Court decision the Federal Court in Sydney made orders in similar terms.

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There have been recent suggestions that hens with access to a range may nonetheless 'choose' not to be outdoors. This may be a result of a range of factors. However, if this is the case, to describe eggs produced by such hens as 'free range' would, in the ACCC's view, mislead consumers.

Producers do not have to use the label 'free range'. Producers choose to describe their eggs as free range for the purpose only of promoting their products to consumers; consumers trust those promotions and pay a premium for free range eggs. The ACCC's concerns about representations made to describe eggs as free range when they are not are twofold: firstly, the consumer is deceived and has paid a premium for the product; and secondly, those producers with more costly systems that do allow hens to roam freely on the range are suffering a competitive disadvantage.

It is not an answer to say that consumers demand free range eggs and so the industry will supply them, when the approach to such supply is simply redefining the 'free range' descriptor to suit industry's existing production methods.

110. In the course of considering concerns arising in relation to the use of the phrase 'free range' in the context of its consideration of Certified Trade Marks and in considering the broader range of compliance and enforcement matters, the ACCC has received views and submissions from a large range of individuals and bodies including some consumer and animal welfare groups.

While the ACCC considers the approaches made to it by various parties, no particular approach has been influential in the ACCC's consideration or action. In these matters, having been aware of the variety of concerns and views, the ACCC undertook its own investigations, gathered information from a broad selection of producers, and formed its own view, assisted by relevant experts in forming views and determining the approach to take.

111. Please see response to question 110 above. We note further that, in each of the concluded cases where the ACCC has taken court action against duck and eggs businesses the ACCC has not relied upon any information provided by representative groups including those named in the question.
112. The ACCC's view is that consumers regard free range eggs as meaning that most of the hens are able to move around freely on an open range on an ordinary day, and do in fact do so on most days. We consider this to be an uncontroversial view and one which having considered, the Court has made declarations to that effect in recent proceedings.

That description is also supported by the additional words and images commonly used by egg producers to describe or portray the farming practices and conditions of the

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farms where the eggs are produced. Those words and images appear on egg cartons and in other promotional material.

113. The ACCC is aware of publically available research conducted by or on behalf of third parties relating to the use of the phrase free range.
114. The ACCC does not agree with the premise of the question.

The ACCC is unaware of any independent research that supports the proposition that free-range hens are most likely to range when the environment inside the shed is not to their liking and their welfare is compromised.

This proposition is inconsistent with the common industry use of words and images that depict hens ranging outdoors in order to promote the sale of free range eggs.

The ACCC does not accept any proposition that it is not possible to operate farming practices that see most chickens ranging on most days while maintaining good welfare and husbandry practices indoors.

115. The general policy of the ACCC's collection, use and disclosure of confidential information is set out in the guideline *ACCC & AER information policy: collection and disclosure of information*.