



# Food Law Bulletin

September, 2014

**In this edition:** we look at the ACCC's current enforcement activities on credence claims in food labelling; the development of a national information standard for the contentious area of 'free-range' eggs in light of the industry's failure to self-regulate; a Federal Court decision that provides some welcome clarification on the issue of certification trade marks; and an ACCC cartel proceeding that highlights the potential dangers of the relationship between producers and the industry bodies that represent them.



# Food labelling: credence claims

**In brief:** Partner Richard Hamer and Lawyer Annie Zheng report on Australian Competition and Consumer Commission enforcement activities in relation to product labelling concerning credence claims, and comment on the importance of making accurate and substantiated representations.

## How does it affect you?

- ‘Credence claims’ or ‘premium claims’ are claims suggesting that a product, or one of a product’s attributes, has some kind of added benefit when compared with similar products.
- Credence claims that cannot be substantiated are likely to be found misleading and deceptive, in breach of the Australian Consumer Law. In August 2014, the Australian Competition and Consumer Commission (the **ACCC**) reiterated its focus on prosecuting false credence claims in the food and beverage industry as a ‘priority enforcement area for the ACCC’.
- Consequences for failing to substantiate credence claims can have far-reaching financial and reputational effects.

## Credence claims – benefits and risks

Credence claims can be used to justify higher prices for a product that offers the consumer some kind of added benefit, such as a moral, social or environmental benefit that contributes to the integrity of the product, or is of a certain level of quality.

Unsubstantiated credence claims, however, have the potential to create an unfair advantage in the market. The ACCC considers that consumers, who cannot verify for themselves the accuracy of the claim, are likely to pay more for products that they perceive to be of a particular quality or integrity.

Companies should be aware that the ACCC has the power to issue infringement notices for each instance of misrepresentation in relation to the same product, which can cumulatively result in a large pecuniary penalty. Terms of court-enforceable undertakings sought by the ACCC can be very wide and can include onerous obligations on the manufacturer or supplier, from the publication of corrective notices in retail stores or trade publications, implementing verification testing procedures, undertaking review of compliance systems and, in some cases, ensuring that its directors or staff attend trade practices compliance training.

In the past few months, the ACCC has been particularly active in the area of place of origin and composition labelling. Below are some examples of the types of credence claims investigated by the ACCC.

### Place of origin labelling

Place of origin labelling refers to statements made on product labels about where the food or beverage has been made, produced, manufactured or grown. A product represented as being a product of a particular country, or a particular region within a country, can offer a competitive advantage over other similar products if the product is promoted as being of a perceived quality due to its origin.

Below are three recent examples where unsubstantiated place of origin claims have been made.

#### Maggie Beer Products

In August 2014, Maggie Beer Products Pty Ltd provided a court-enforceable undertaking to the ACCC acknowledging that its representations about the place of origin of certain food products was likely to have been misleading and in breach of the Australian Consumer Law.<sup>1</sup>

The ACCC considered that representations made on the labelling of four products – Maggie Beer branded ice cream (all flavours), extra virgin olive oil, rosemary and verjuice biscuits and aged red wine vinegar (together, the **Products**) – were likely to mislead consumers in relation in the place of manufacture.

Since at least 2011, the labels on the Products contained text and images including:

- the ‘Maggie Beer’ logo, which depicts a pheasant with the words ‘Maggie Beer A Barossa Food Tradition’ directly beneath the depiction;
- the words ‘Made in Australia’ or ‘Product of Australia’; and
- the words ‘Maggie Beer Products: 2 Keith Street Tanunda South Australia 5352’.

These descriptions were placed in close proximity to each other on the label.

The ACCC considered that a reasonable consumer would have gained the overall impression that each of these Products were manufactured in Tanunda, the Barossa Valley and/or South Australia due to the proximity of the representations on the labels, when in fact the Products had been manufactured outside of South Australia.

In addition to re-labelling the Products and undertaking to review its consumer law compliance procedures, Maggie Beer Products has undertaken to publish an educative article in a trade magazine. The company has issued a video apology on its website.

#### Basfoods

In June 2014, the ACCC issued three infringement notices totalling \$30,600 to Mediterranean and Turkish food supplier Basfoods (Aust) Pty Ltd for misrepresentations in relation to its ‘Victoria Honey’ food product.<sup>2</sup>

One of the infringement notices was issued in relation to a country of origin misrepresentation. The ACCC considered that the labelling of ‘Victoria Honey’ on its product and on the website was misleading, as it represented that the product was made in Victoria, Australia. In reality, ‘Victoria Honey’ is a product of Turkey.

### Barossa Farm Produce

Also in June 2014, the ACCC accepted a court enforceable undertaking from Barossa Farm Produce Pty Ltd for making false or misleading representations about the pork used in its 'The Black-Pig' smallgoods product.<sup>3</sup>

Barossa Farm Produce represented on its product labelling, website and social media that 'we know the origin of every animal that makes its way onto the plate'. This was considered misleading by the ACCC, as Barossa Farm Produce did not in fact know the origin of every animal used in those products.

### Composition labelling

Composition labelling refers to statements made on product labels about the ingredients in the food or beverage. A product represented as containing a certain ingredient or ingredients can offer a competitive advantage over other similar products, if the product is promoted as being of a perceived quality because it contains that ingredient or ingredients. Below are some recent examples where unsubstantiated claims have been made in relation to the ingredients in a product.

### Basfoods

In addition to the penalty issued for misrepresenting place of origin, two infringement notices were issued in relation to misrepresentations about the ingredients in Basfoods' 'Victoria Honey'. The ACCC considered that, on the product label and website, Basfoods misrepresented that 'Victoria Honey' was composed of real honey produced by honey bees. In fact, 'Victoria Honey' is a product mainly constituted of sugars derived from sugar cane and corn.

Basfoods paid the penalties and provided an enforceable undertaking to the ACCC acknowledging that it engaged in misleading and deceptive conduct. Basfoods has undertaken to publish corrective notices. As a result of the undertaking, Basfoods has ceased supply of 'Victoria Honey' and has undertaken to only sell products as honey products if entirely produced by honey bees, to regularly test its products and to implement a trade practices compliance program.

### Barossa Farm Produce

In addition to its place of origin misrepresentation, Barossa Farm Produce made various representations on the product label, website, social media and in person by its director, that the pork used in its smallgoods was derived from heritage Berkshire pigs, heritage black pig breeds, and/or free range pigs. In fact, some of the pork used was derived from white pigs.

As black pigs, especially Berkshire black pigs, are a heritage breed known to provide a premium quality meat product, the ACCC considered that Barossa Farm Produce had misrepresented the quality and composition of 'The Black-Pig' smallgoods.

Barossa Farm Produce provided an enforceable undertaking to the ACCC not to make any representations about the breed or type of pig used in 'The Black-Pig'-labelled products, or about the origin of every animal used in those products, in circumstances where it does not in fact know the breed, type or origin.

## Conclusion

In the past few months, the ACCC has been fairly active in pursuing this 'priority area' of enforcement in the food and beverage industry.

These examples illustrate that the consequences of an adverse ACCC finding can extend beyond financial penalties. Serious reputational costs can flow from a finding that a claim is likely to mislead and deceive consumers, as well as incurring additional costs for implementing and reviewing verification testing procedures, compliance systems and trade practices compliance training.

Companies should therefore take steps to ensure that any claim made on a product label – particularly claims that suggest the product has an added benefit when compared to similar products – can be substantiated by the facts.

<sup>1</sup> Australian Competition and Consumer Commission, 'Maggie Beer Products acknowledges labelling likely to be misleading' (19 August 2014) (Media Release).

<sup>2</sup> Australian Competition and Consumer Commission, 'ACCC acts on "Victoria Honey" misrepresentations' (23 June 2014) (Media Release).

<sup>3</sup> Australian Competition and Consumer Commission, 'Saskia Beer's Barossa Farm Produce gives undertaking to ACCC for misrepresenting "Black Pig" products' (16 June 2014) (Media Release).

# Fowl Play: Is ‘free-range’ labelling misleading egg consumers?

**In brief:** In the ever-controversial area of free-range egg labelling, a national information standard is now being drafted to assist consumers. Partner Andrew Wiseman and Lawyer Julia Kovarsky report.

## How does it affect you?

- Concerns surrounding the potential for consumer confusion have motivated the drafting of a National Information Standard on free-range eggs.
- This is a prime example where industry self-regulation has not provided a certain standard, and a standard will therefore be imposed by legislation.

## National Information Standard

Almost a year after consumer advocacy group Choice lodged a super-complaint on free-range egg claims in NSW with NSW Fair Trading,<sup>1</sup> the issue is finally gaining some political traction. On 13 June 2014, the Federal, state and territory consumer affairs ministers resolved that NSW Fair Trading would take the lead in developing a draft National Information Standard on free-range eggs, including a definition of ‘free-range’ and minimum labelling requirements for product packaging.<sup>2</sup> The draft would be provided to the Ministers at their next meeting in early 2015. The move was prompted by NSW Fair Trading, which expressed concern that ‘an information standard was needed to respond to growing consumer demand in the face of confusing and potentially false and misleading claims in the market’.<sup>3</sup> The need for a relevant standard was acknowledged in NSW Fair Trading’s response to Choice’s super-complaint, which addressed the fact that there is currently no national enforceable standard providing guidelines for egg labelling.<sup>4</sup> According to Choice, this means consumers are forced to rely heavily on ‘free-range’ claims made on packaging when making purchasing decisions. But can consumers really trust that producers will not mislabel cage eggs as free-range? Sadly, as discussed below, some egg producers are not always honest. It is also impossible for consumers to know the differences between conditions on various ‘free-range’ farms in order to determine just how ‘free’ their ‘free-range’ chickens really are.

## The current regulatory landscape

Nationally, the poultry industry is regulated by the *Model Code of Practice for the Welfare of Animals: Domestic Poultry* (the **Code**),<sup>5</sup> which provides that a free-range system requires birds to have access to a suitable outdoor range for a minimum of eight hours per day, with a maximum stocking density of 1500 birds per hectare.

That’s equivalent to 150 birds roaming a quarter-acre block. The Code has formed the basis of various certification standards set up by industry bodies and animal welfare organisations such as the Australian Egg Corporation Limited (**AECL**), Australian Certified Organic Ltd, Free Range Farmers Association Inc., Free Range Egg and Poultry Australia Limited, Humane Choice, and the RSPCA.<sup>6</sup> Compliance with certification standards is voluntary, with different standards set by different regulators. Even these standards, however, do not always provide consumers much comfort. When the AECL applied for a Certification Trade Mark in 2012, the Australian Competition and Consumer Commission (the **ACCC**) declined to approve the registration because it considered that the proposed standards ‘do not accord with consumer expectations about the free range production of eggs’.<sup>7</sup> There are several factors to be taken into consideration when determining the meaning of ‘free-range’, including stocking densities, proportion of birds accessing open areas, amount of time birds are allowed access to open areas, whether beak trimming is practised, and whether birds have access to perches, litters or nests. The standard proposed by the AECL provided for much higher stocking densities compared to those in other existing standards, only a very small proportion of birds actually venturing onto the range at any one time; and the practice of beak trimming. The combined effect of this meant the ACCC did not consider that the proposed standard accorded with ‘what an ordinary or reasonable egg buying consumer is likely to understand by the term “free range”’<sup>8</sup> and could mislead consumers.

This highlights the fact that without a national or legally enforceable definition of ‘free-range’, consumers may be confused or misled about just what a ‘free-range’ claim on their egg carton really means. Choice is particularly concerned about the differences in stocking densities that are permitted under the range of certification standards, which significantly alter the degree to which a free-range chicken is ‘free’.<sup>9</sup> Where consumers’ and producers’ understandings of ‘free-range’ are at odds, consumers may be misled, even where producers have complied with the relevant accreditation standards.

State and territory legislation in this space has not been harmonised. Queensland and the ACT are the only jurisdictions that presently have labelling standards for free-range eggs, while Tasmania is proposing to legislate egg labelling requirements and South Australia is considering a voluntary industry code.<sup>10</sup> Attempts by the NSW Greens to legislate labelling standards under the Truth in Labelling (Free-range Eggs) Bill 2011 (NSW) were thwarted by the majority Coalition MP’s in the Lower House in August 2013.<sup>11</sup>

## Enforcement

In 2013, the ACCC identified credence claims, particularly those in the food industry with the potential to have a significant impact on consumers or the competitive process, as a focus in its Compliance & Enforcement Policy. This focus has continued into 2014, with credence claims remaining a high priority item for the ACCC. Claims such as 'free-range eggs', which cannot be tested by consumers, are among the types of credence claims the ACCC is concerned about. ACCC Commissioner Sarah Court was quoted as saying the 'ACCC is concerned about the redefinition of what is meant by free range by industry to suit itself, and the fact that the redefinition has the very real potential of misleading consumers'.<sup>12</sup>

As a result, the majority of mislabelling enforcement actions have been driven by the ACCC under the Australian Consumer Law. Past actions have included two egg substitution cases, where the Federal Court found that companies were misleading consumers by labelling their eggs as 'free-range' when a significant portion of those eggs were from cage-egg production.<sup>13</sup> Two further actions were commenced in December 2013 against WA egg producer Snowdale Holdings Pty Ltd and NSW egg producer Pirovic Enterprises Pty Ltd, both of which are said to have made false, misleading or deceptive representations by the images and wording on their egg cartons and websites to the effect that the eggs supplied and labelled as 'free-range' were produced by hens who could move about freely on an open paddock.<sup>14</sup> The WA action is currently in the process of mediation,<sup>15</sup> with the NSW proceedings set down for partial hearing in September 2014.<sup>16</sup>

## The issue abroad

Far from being an issue confined to Australia, egg labelling has been in the spotlight around the world – near and far. Close to home, a New Zealand farmer, John Garnett, was sentenced to 12 months' home detention and 200 hours' community service by the Whangarei District Court on 5 August 2014 for mislabelling eggs as free-range when they were in fact cage-produced.<sup>17</sup> As in Australia, in New Zealand there is no legislated definition of free-range, and consumers must rely on farmers to honestly and correctly label their products. Mislabelling of eggs, albeit relating to their freshness as opposed to their production, resulted in an Iowa company, Quality Egg LLC, receiving a whopping fine as part of a plea deal in a US federal court.<sup>18</sup> The European Union (EU) already has regulations in place for method of production labelling for eggs, with the focus now shifted to similar labelling requirements for poultry meat. In an effort to raise awareness of the issue, a UK farmer is touring the EU in a chicken suit as part of the Labelling Matters campaign run by Compassion In World Farming, RSPCA, Soil Association, and World Animal Protection.<sup>19</sup>

1 CHOICE, *Super-complaint on free-range egg claims in NSW*, 29 August 2013.

2 NSW Fair Trading, *Media Release: NSW to lead work on egg labelling*, 13 June 2014.

3 NSW Fair Trading, *Media Release: NSW to lead work on egg labelling*, 13 June 2014.

4 NSW Fair Trading, *Response to CHOICE Super Complaint on Free-Range Egg Claims in NSW*, 7 December 2013.

5 Primary Industries Standing Committee, *Model Code of Practice for the Welfare of Animals: Domestic Poultry*, 4th Edition, 2002.

6 NSW Food Authority, *Labelling: Egg Production Systems*, <http://www.foodauthority.nsw.gov.au/consumers/food-labels/labelling-and-the-law/egg-labelling/#.UGR5dR-70>.

7 Australian Competition and Consumer Commission, *Media Release: ACCC not satisfied with proposed free range egg standards*, 2 November 2012.

8 Australian Competition and Consumer Commission, *Initial assessment of Certification Trade Mark application CTM1390450 filed by the Australian Egg Corporation Limited*, 2 November 2012.

9 CHOICE, *Super-complaint on free-range egg claims in NSW*, 29 August 2013.

10 *Eggs (Labelling and Sale) Act 2001 (ACT)*; *Food Safety Scheme for Eggs and Egg Products (Egg Scheme) 2005 (Qld)*; *Egg Labelling and Sale Bill 2013 (Tas)*; *Industry code for growing Free Range Eggs in South Australia*.

11 *Negatived* 29 August 2013.

12 *The Age*, '10,000 hens to a hectare is no free range: ACCC', 5 March 2013.

13 *Australian Competition and Consumer Commission v C.I. & Co Pty Ltd* [2010] FCA 1511; *Australian Competition and Consumer Commission v Bruhn* [2012] FCA 959.

14 ACCC, *Media Release: ACCC institutes proceedings against free range egg producers*, 10 December 2013.

15 *Australian Competition & Consumer Commission v Snowdale Holdings Pty Ltd* WAD462/2013.

16 *Australian Competition and Consumer Commission v Pirovic Enterprises Pty Ltd* NSD2486/2013.

17 *The New Zealand Herald*, 'The free-range egg scam: 2.47m eggs really from caged hens', 6 August 2014.

18 The United States Department of Justice, *Media Release: Iowa Company and Top Executives Plead Guilty in Connection with Distribution of Adulterated Eggs*, 3 June 2014.

19 *Western Daily Press*, 'Devon farmer Tasmin French, 23, to visit 23 countries dressed as a chicken', 29 July 2014.

# Federal Court gives certification mark the stamp of approval

**In brief:** Senior Associate Mark Williams reports on the recent Federal Court decision in *Halal Certification Authority Pty Limited v Scadilone Pty Limited* and discusses competitive advantages that certification trade marks can confer on food and beverage products.

## How does it affect you?

- Choosing the right trade mark type can be crucial in ensuring the defensibility of your trade mark registration
- Certification trade marks (**CTMs**) can provide a vital tool to businesses in separating their goods or services from those of their competitors.
- CTMs can also provide a valuable revenue stream to their owners if the credibility or gravitas of the mark is such that other traders identify the benefits of being certified to use the trade mark.

## Background

The recent Federal Court decision in *Halal Certification Authority Pty Limited v Scadilone Pty Limited*<sup>1</sup> provides a timely reminder to those in the food and beverage industry about the existence and advantages of certification trade marks.

The Halal Certification Authority (**HCA**) brought proceedings against two kebab shops (Scadilone and White Heaven) and a kebab wholesaler (Quality Kebabs) for trade mark infringement and misleading or deceptive conduct. Scadilone and White Heaven displayed a certificate, created by Quality Kebabs (not issued by HCA), certifying that their products were halal (slaughtered in accordance with the relevant Islamic rites) and bearing HCA's seal, which is registered trade mark no. 1005647:



As well as infringing HCA's trade mark, it was argued that the certificate falsely claimed the products of Scadilone, White Heaven and Quality Kebabs were certified as halal by HCA when in fact they were not. HCA was successful in its actions, and secured damages from each of the parties. Most notably, the judge awarded \$91,015 damages against Quality Kebabs, utilising the new additional damages provisions of the *Trade Marks Act 1995*.

### Was HCA lucky?

There was no doubt that the reproduction of HCA's registered mark by Quality Kebabs constituted both trade mark infringement and misleading and deceptive conduct. Quality Kebabs (falsely) used the trade mark in respect of halal certification services. However, it is interesting to note that HCA's registration no. 1005647 is a standard trade mark registered in respect of:

**Class: 42** *Scientific and technical services; issuing halal certification to businesses and individuals for goods and services if religious and technical requirements are met*

**Class: 45** *Personal and social services rendered by others to meet the needs of individuals*

Accordingly, given that the trade mark is not registered in the respect of actual halal products, it raises the question: would it have constituted trade mark infringement if Quality Kebabs had sold pre-packed food bearing HCA's trade mark rather than issue a certificate? It could be argued that the use of the trade mark in relation to goods such as foodstuffs, is not closely related to *certification services*, and therefore would not constitute a *prima facie* trade mark infringement. Even if the use of the mark in relation to *foodstuffs* was considered closely related to *certification services*, section 120(2) of the *Trade Marks Act* provides a possible defence to an allegation of infringement if it can be demonstrated that using the mark as the person did was not likely to deceive or cause confusion.

One possible way for HCA to have avoided any such risk would have been to instead register its mark as a certification trade mark, in respect of all of the types of goods that may possibly be described as 'halal'.

## Certification trade marks – what are they?

A CTM is used to indicate to consumers that a product or service meets a particular standard. This is in contrast to a standard trade mark, which is used to distinguish one trader's goods and/or services from those of another trader.

The use of a CTM may confer a marketing advantage over other goods or services, as consumers may be more likely to purchase a product or service if they recognise that the product or service has been endorsed as being of a particular quality or standard.

Below are some examples of registered Australian CTMs.

|                       |                                                                                                                                               |                                                                                                                                                                                                             |
|-----------------------|-----------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Health attributes     | <br>(Reg. 498189)<br>National Heart Foundation of Australia | <br>(1322299)<br>Glycemic Index Limited                                                                                  |
| Method of manufacture | <br>(958378)<br>Free Range Egg & Poultry Australia Ltd     | <br>(1105837)<br>Crown in the Right of the Commonwealth of Australia as represented by the Australian Greenhouse Office |
| Quality               | <br>(547753)<br>Sri Lanka Tea Board                        | <br>(740927)<br>Meat & Livestock Australia Limited                                                                       |
| Geographic            | <br>(1166532)<br>Almond Board of Australia Inc.            | <br>(1432207)<br>California Milk Producers Advisory Board                                                               |



CTMs are not primarily filed by a person seeking a monopoly right to the exclusion of all others. It is usually the intention of the CTM owner to authorise third parties, often for value, to use the CTM in relation to their own goods and services.

As a result of the potential impact that a CTM may have on consumer behaviour, when filing an application for a CTM with IP Australia it is also necessary to file a set of rules that will govern the use of the CTM. The rules must set out:

- the requirements that goods/services must meet for the CTM to be applied to them;
- the process for determining whether the goods/services meet the requirements;
- the attributes a person must have to become a person approved to assess whether the goods/services meet the requirements; and
- the procedures for resolving disputes about whether or not the goods/services meet the requirements, or any other issue relating to the CTM.

The rules will be assessed by the Australian Competition and Consumer Commission (the **ACCC**) to ensure that:

- the attributes required of approved CTM assessors are sufficient to enable the person to competently assess whether goods and/or services meet the certification requirements; and
- the CTM rules would not be to the detriment of the public and are satisfactory having regard to the principles of competition, unconscionable conduct and consumer protection<sup>2</sup>.

On the assumption that the rules are approved by the ACCC (which may require the submission and assessment of amended rules), the application will then be examined by IP Australia and must meet the usual trade mark registrability requirements. Given the purpose of CTMs, trade marks containing descriptive or geographic references may more easily meet the requirements for protection of a CTM, in contrast to standard trade mark applications. Once registered, a CTM remains in force for 10 years, and is renewable for further periods of 10 years.

In addition, a CTM will never become vulnerable to removal for non-use, because the *Trade Marks Act* places no obligation on the CTM owner to use the mark. This is because it is not in the public interest to insist that a CTM be used where the certification body may have decided that none of the goods or services for which certification was sought met the certification standard<sup>3</sup>.

In a modern marketplace of health-conscious and socially minded consumers, certification trade marks can provide a vital tool to businesses in separating their goods or services from those of their competitors. They can also provide a valuable revenue stream to their owners if the credibility or gravitas of the mark is such that other traders identify the benefits of being certified to use the trade mark.

Please feel free to contact us if you have any questions about certification trade marks.

<sup>1</sup> [2014] FCA 614.

<sup>2</sup> Section 178 of the *Trade Marks Act 1995* and Regulations 16.8 -16.9 of the *Trade Mark Regulations 1995*.

<sup>3</sup> Part 35.3.8 *Examiner's Trade Marks Office Manual of Practice and Procedure*.



# Egg cartel case report

**In brief:** Australia's competition regulator has taken action against the industry body representing egg producers for attempting to induce egg producers to enter into a cartel arrangement by withholding eggs from the market to avoid oversupply, resulting in low prices. Partner Carolyn Oddie and Associate Louise Olsen report.

## How does it affect you?

- Industry associations should constantly be aware of competition issues when they bring competing firms together to deal with industry concerns.
- Companies should be cautious when dealing with industry associations and attending industry association events.
- Companies should be additionally cautious where a director also sits on the board of an industry body, as the director's conduct may be attributed to both bodies.
- Directors need to actively dissociate themselves and their companies from anti-competitive behaviour – staying silent is not enough.

## Background

In May 2014, the Australian Competition and Consumer Commission (the **ACCC**) commenced proceedings against the industry services body for egg producers, the Australian Egg Corporation Ltd (the **AEC**), alleging that it encouraged its members to cull hens and dispose of eggs to reduce the production and supply of eggs to consumers.<sup>1</sup>

The ACCC alleges that by encouraging its members to take this action, the AEC attempted to induce its members to enter into an arrangement or understanding with their competitors or likely competitors for the purpose of limiting the production or supply of goods, which is a cartel arrangement prohibited under the *Competition and Consumer Act 2010* (Cth) (the **CCA**).

The ACCC has also brought proceedings against three directors of the AEC, and against two egg producers for their involvement in the conduct. The egg producers against whom allegations have been made had directors who also sat on the board of the AEC.

This case is of interest because:

- the ACCC does not allege that the attempt was successful;
- it highlights the risk of anti-competitive arrangements between competitors seeking to deal with industry issues; and
- the penalties for cartel contraventions can be severe and include jail time for individuals.

## Alleged conduct

The AEC is the body responsible for providing marketing, research and development services for egg producers in Australia. During the relevant period, the AEC had between 100 and 150 members. Some of these members were in competition with each other in relation to the supply of eggs to wholesale or retail businesses.

The ACCC claims the AEC encouraged its members to reduce egg production in order to avoid oversupply by, broadly:

- communicating to its members through fortnightly email updates and monthly reports that egg inventory levels were high and action was required to reduce production in the short-term; and
- holding an 'Egg Oversupply Crisis Meeting' for egg producers in February 2012, where members were advised to take short-term action to avoid oversupply. Suggested measures included donating eggs to charities, 'dumping' or 'burying' eggs, and culling the number of laying hens.

The infringing conduct allegedly engaged in by the directors included convening the oversupply crisis meeting, preparing a presentation given at the meeting, attending board meetings where the relevant issues were discussed, and failing to disassociate themselves from or disavow the conduct. The conduct was allegedly engaged in within their authority as directors and therefore tainted them individually and the companies they represented.

## The ACCC's position

While cartel conduct is prohibited regardless of its effect on competition, the ACCC has highlighted that the alleged behaviour had the ability to impact on the prices of eggs, which are a staple product for Australian consumers.

The ACCC is seeking declarations, injunctions and pecuniary penalties, as well as orders disqualifying the individuals from acting as directors for a specified period.

The watchdog is using the proceedings to send a 'clear message' that attempts to coordinate anti-competitive behaviour by competitors will not be tolerated.

<sup>1</sup> SAD121 of 2014.

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