

Article Information

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Free range' egg claims on the boil

On 14 September 2015, the Federal Court found RL Adams Pty Ltd (trading as Darling Downs Fresh Eggs) guilty of engaging in misleading conduct and making misleading representations by marketing its products as free range eggs when they were not.

The decision, which is one of the latest in a recent string of cases that the ACCC has successfully prosecuted against primary producers in an effort by the regulator to put a stop to the use of false credence claims in the Australian market place.

Background

From 31 December 2013 to 6 October 2014, RL Adams Pty Ltd (**RL Adams**) marketed eggs that it sold as 'free range' to consumers in Queensland, the Northern Territory and New South Wales. Its sales comprised 0.2% of the free range egg market share in Australia. The eggs were sold directly through the company's Mountain Range label and the Drakes Home Brand Free Range label as well as supplied to other egg producers that sought greater stock of free range eggs. The Mountain Range Eggs 600g Carton and the Mountain Range Eggs 700g Carton displayed the words 'free range' in three different places and had an image of a flat open range in front of a mountain range. The Drakes Eggs 700g Carton displayed the words 'free range eggs' in four different places and had two images of eggs resting outside in green grass. RL Adams also advertised and promoted eggs sold in the Mountain Range Cartons through the Mountain Range Eggs Website, which displayed an image of two hens outdoors and further free range claims and explanations.

In contrast to the above representations, the eggs contained in the cartons were produced by laying hens that were farmed in conditions that made them unable to move around freely on an open range on most days. The two barns that the hens were housed in over the relevant period had elevated openings to the open range below. However, there were no ramps installed so that the hens could not use these openings and the roller doors that covered them were found to have been shut at all times.

Result

Justice Edelman found that RL Adams committed the following contraventions of the *Australian Consumer Law (ACL)*:

1. Engaging in conduct in trade or commerce that was misleading or deceptive or likely to mislead or deceive in contravention of section 18
2. In connection with the supply or possible supply of eggs, and the promotion of the supply of the eggs, made misleading representations that the eggs were of a particular quality, or had a particular history in contravention of section 29(1)(a)
3. Engaged in conduct that was liable to mislead the public as to the nature or characteristics of the eggs, in contravention of section 33.

The following orders were made against RL Adams:

- A declaration that from 31 December 2013 to 6 October 2014 RL Adams breached section 18, section 29(1)(a) and section 33 of the ACL
- An order that RL Adams pay a pecuniary penalty in the sum of \$250,000
- An order that RL Adams publish at its own expense corrective notices on both its website and in major newspapers in locations where the eggs were sold
- An order that RL Adams establish at its own expense an ACL Compliance Program and maintain and administer it for a period of 3 years from that date

- An order that RL Adams pay the Australian Competition and Consumer Commission's (ACCC) costs of \$25,000.

The ACCC also requested a three year long injunction against RL Adams that would prevent the company from using the words 'free range' on its products when that is not the case. Justice Edelman declined to exercise his discretion to grant such an injunction because His Honour did not consider it likely that RL Adams would repeat its contraventions and any uncertainty in wording of the injunction could leave RL Adams exposed to a case for contempt rather than simply further ACL contraventions.

\$250,000 Pecuniary Penalty

Justice Edelman made two key points when setting the pecuniary penalty for the breaches by RL Adams of section 29(1)(a) and section 33 of the ACL at \$250,000. The statutory maximum under section 224 of the ACL for each single act or omission by companies is \$1.1 million.

First, there is no rule of law that a series of ACL contraventions involving different acts should be treated as a single course of conduct and subject to a single penalty. Although it has been the general practice of Courts to do so, the proper approach is for Courts to apply the totality principle. The totality principle requires that the total penalty for related offences should not exceed that which is proper for the contravening conduct. In the circumstances of this particular case, Justice Edelman found that there were significant mitigating factors present that stopped him making an order that the ACL breaches should be treated separately. Chief among these factors were RL Adams' early admission of responsibility, its very substantial cooperation with the ACCC and that these acts were its first contravention of the ACL. Further factors included the relatively small size of its operation compared to other producers, the profits of the relevant period only amounting to around \$100,000 and the non-deliberate nature of its conduct (RL Adams was able to satisfy the ACCC and the Court that it did not intend to breach the ACL and that its confinement of the hens was partly motivated by biosecurity concerns). His Honour stated that it should not be assumed that a series of related infringements will always be treated as a single contravention and that general deterrence is an important consideration in the imposition of pecuniary penalties. He continued on to say that 'it may be that these 'free range' cases illustrate that general deterrence is not having a sufficient effect.'

Second, his Honour stated that it is impermissible for respondents in civil cases to make submissions as to the amount of penalty that they would be prepared to submit to. In this case, RL Adams made a submission that it was willing to submit to a penalty of \$250,000. Justice Edelman stated that the submission should not have been made. His Honour drew a distinction between a submission that accepts the imposition of a substantial penalty and undertakes to pay it, which would be a sign of contrition, and one that nominates a penalty amount, which was against the current state of the law (but this has now been changed due to a recent High Court decision). His Honour had already reached a preliminary conclusion that \$250,000 was the most appropriate and reasonable penalty before reading RL Adams' submission and did not depart from it despite concerns that a layperson may interpret the amount as the Court either attempting to maximise the amount it ordered the company to pay despite judging the appropriate amount to be under \$250,000 or simply allowing RL Adams to pay the penalty that it considered to be the price of its infringing conduct.

Case Context

This case joins a number of other decisions that the ACCC has won against primary producers in an effort to curb the use of false credence claims. Credence claims are claims that are designed to attract consumers to purchase a product but that consumers cannot independently verify for themselves and must trust the seller about. They include claims like 'environmentally friendly', 'organic' and 'free range', and have consistently been targeted by the ACCC in order to protect both consumers and business. Consumers require protection from false credence claims because they are increasingly willing to pay a premium for such products but are not in a position to fact-check every credence claim that they encounter. Businesses require protection because false credence claims rob businesses that can legitimately make such claims of their competitive advantage and unique selling points.

On 6 October 2015, the ACCC released a guide to assist egg producers better understand their obligations and rights under the ACL before they make a credence claim and promote their eggs as 'free range'. The guide clarifies that primary producers will be considered to be making free range claims where they use the words 'free range', words with a similar meaning or pictures of hens ranging freely in their packaging or advertising. It highlights that the ACCC considers that the fundamental test of whether a 'free range' claim can be made is whether farming practices involve most hens moving around freely on an open range on most days. It also signals that the ACCC will use a common sense approach under which headcounts are not necessary and observations that the range is in regular use by significant proportion of hens each day is likely to be sufficient to substantiate a free range claim.

On 5 October 2015, the Minister for Small Business and Assistant Treasurer the Hon Kelly O'Dwyer MP released a consultation paper to enhance consumer confidence in free range egg claims. The consultation paper considers three

options: (1) the status quo; (2) an information standard for free range eggs; and (3) an information standard for all eggs. Written submissions were open until 2 November 2015 and the results of the exercise will feed into the preparation of a draft national standard on free range egg labelling that was requested on 12 June 2015 by Consumer Affairs Ministers from the Commonwealth, States and Territories.