FEDERAL COURT OF AUSTRALIA

Australian Competition and Consumer Commission v Turi Foods Pty Ltd (No 4) [2013] FCA 665

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| Citation: | Australian Competition and Consumer Commission v Turi Foods Pty Ltd (No 4) [2013] FCA 665 |
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| Parties: | **AUSTRALIAN COMPETITION AND CONSUMER COMMISSION v TURI FOODS PTY LTD (ACN 057 142 971), BAIADA POULTRY PTY LTD (ACN 002 925 948), BARTTER ENTERPRISES PTY LIMITED (ACN 000 451 374) and AUSTRALIAN CHICKEN MEAT FEDERATION INC (ABN 24 077 883 026)** |
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| File number: |  |
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| Judge: |  |
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| Date of judgment: | 8 July 2013 |
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| Catchwords: | **CONSUMER LAW** – Allegations that respondents engaged in misleading or deceptive conduct, made false representations and engaged in conduct liable to mislead the public in connection with the use of the phrase “free to roam” and variants of it on packaging, in advertising and in publications – consideration of procedural matters – consideration of applicable legal principles – whether generally and in the context of packaging, print advertising and website publication the phrase “free to roam” was apt to mislead or deceive or was false – whether use of the phrase “free to roam” was liable to mislead public as to nature and characteristics of product – whether fourth respondent able to rely on “media safe harbour defence”  |
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| Legislation: | *Australian Consumer Law* – ss 18, 29, 33*Evidence Act 1995* (Cth)*Trade Practices Act 1974* (Cth) – ss 52, 53, 55, 65A*Statute Law (Miscellaneous Provisions) Act (No 2) 1984* (Cth)  |
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| Cases cited: | *Australian Competition and Consumer Commission v Apple Pty Ltd* [2012] FCA 646 – considered *Australian Competition and Consumer Commission v Turi Foods Pty Ltd (No 2)* [2012] FCA 19 – cited *Australian Securities and Investments Commission v Healey* (2011) 196 FCR 291 – cited *Berry v Federal Commissioner of Taxation* (1953) 89 CLR 653 – cited *Bond v Barry* (2008) 173 FCR 106 – cited *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592 – referred to *Cahill v Construction, Forestry, Mining and Energy Union (No 2)* (2008) 170 FCR 357 – considered *Compaq Computer Australia Pty Ltd v Merry* (1998) 157 ALR 1 – cited *CPA Australia Ltd v Dunn* (2007) 74 IPR 495 – considered *Deputy Commissioner of Taxation (Cth) v Rotary Offset Press Pty Ltd* (1971) 45 ALJR 518 – cited *Given v CV Holland (Holdings) Pty Ltd* (1977) 29 FLR 212 – cited *Google Inc v Australian Competition and Consumer Commission* (2013) 294 ALR 404 – considered, applied*Our Town FM Pty Ltd v Australian Broadcasting Tribunal* (1987) 16 FCR 465 – cited *Protean (Holdings) Ltd v American Home Assurance Company* [1985] VR 187 – cited *Rasomen Pty Ltd v Shell Company of Australia Limited* (1997) 75 FCR 216 – cited*Re Ross*; *ex parte Attorney General (NT)* (1980) 54 ALJR 145 – cited *Rothmans of Pall Mall (Australia) Ltd v Australian Broadcasting Tribunal* (1985) 5 FCR 330 – considered, applied *Spunwill Pty Ltd v Bab Pty Ltd* (1994) 36 NSWLR 290 – cited *Sykes v Reserve Bank of Australia* (1997) 151 ALR 579 – cited *Taco Co, supra; Henderson v Pioneer Homes Pty Ltd (No 3)* (1980) 43 FLR 276 – cited *Temperley v Playground Supplies Pty Ltd* (1980) 3 TPR 506 – cited *Trade Practices Commission v Glo Juice Company Pty Ltd* (1987) 73 ALR 407 – cited *Trade Practices Commission v J & R Enterprises Pty Ltd* (1991) 99 ALR 325 – cited *Tru Floor Service Pty Ltd v Jenkins(No 2)* (2006) 232 ALR 532 – cited Westpac Banking Corporation v Northern Metals Pty Ltd (1989) 14 IPR 499 – cited  |
|  |  |
| Date of hearing: | 13, 14 & 22 March, 2, 3, 13 & 16 April 2012 |
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| Place: |  |
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| Division: |  |
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| Category: | Catchwords |
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| Number of paragraphs: | 156 |
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| Counsel for the Applicant: | Mr C Golvan SC and Ms R Orr |
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| Solicitor for the Applicant: | Corrs Chambers Westgarth |
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| Counsel for the Second and Third Applicants: | Mr P Gray SC and Mr L Merrick |
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| Solicitor for the Second and Third Applicants: | Henry Davis York |
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| Counsel for the Fourth Applicant: | Mr C Archibald |
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| Solicitor for the Fourth Applicant: | Norton Rose Australia |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| VICTORIA DISTRICT REGISTRY |  |
| GENERAL DIVISION | VID 974 of 2011 |

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| BETWEEN: | AUSTRALIAN COMPETITION AND CONSUMER COMMISSIONApplicant |
| AND: | TURI FOODS PTY LTD (ACN 057 142 971)First RespondentBAIADA POULTRY PTY LTD (ACN 002 925 948)Second RespondentBARTTER ENTERPRISES PTY LIMITED (ACN 000 451 374)Third RespondentAUSTRALIAN CHICKEN MEAT FEDERATION INC (ABN 24 077 883 026)Fourth Respondent |

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| JUDGE: | TRACEY J |
| DATE OF ORDER: | 8 July 2013 |
| WHERE MADE: | MELBOURNE |

THE COURT ORDERS THAT:

1. The proceeding be listed for mention on 12 July 2013 at 10:30 am.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
|  DISTRICT REGISTRY |  |
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| BETWEEN: | AUSTRALIAN COMPETITION AND CONSUMER COMMISSIONApplicant |
| AND: | TURI FOODS PTY LTD (ACN 057 142 971)First RespondentBAIADA POULTRY PTY LTD (ACN 002 925 948)Second RespondentBARTTER ENTERPRISES PTY LIMITED (ACN 000 451 374)Third RespondentAUSTRALIAN CHICKEN MEAT FEDERATION INC (ABN 24 077 883 026)Fourth Respondent |
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| : |  |
| DATE: | 8 July 2013 |
| PLACE: |  |

**REASONS FOR JUDGMENT**

1. This case is concerned with the accuracy of representations made by producers and their industry association about the conditions under which chickens destined for human consumption are raised. The applicant (the “ACCC”) maintains that the use of the phrase “free to roam” and variants of it appearing on packaging, in advertising and in publications, is misleading or deceptive. The second and third respondents (respectively, “Baiada” and “Bartter”) and the fourth respondent (“the Association”) deny that this is so.
2. Baiada and Bartter breed, grow, process and supply meat chickens under brand names including “Steggles”. These companies enjoy a significant market share in the Australian chicken meat market. The precise extent of their market share is a matter of commercial confidence.
3. The Association is made up of participants in the chicken meat industry including Baiada and Bartter. It is the peak national Association for the chicken meat industry. Its member associations include the Australian Poultry Industries Association (“the APIA”), the Australian Chicken Growers Council and five State industry associations. Baiada and Bartter are members of the APIA. The objects of the Association include the promotion and development of Australian agricultural resources and the promotion and protection of the interests of the chicken meat industry. It represents both growers and processors.
4. The first respondent (“Turi Foods”), which had also used the phrase “free to roam” on its packaging and publications, had earlier settled its dispute with the ACCC on terms which included the making of declarations and consent orders: see *Australian Competition and Consumer Commission v Turi Foods Pty Ltd (No 2)* [2012] FCA 19.
5. The trial of the proceeding occupied 7 days. It included a day spent in and around the town of Griffith in Southern New South Wales during which the Court, support staff, legal representatives of the parties and employees of the parties undertook a view of seven sheds in which chickens destined to be processed by Baiada and Bartter were raised.
6. The view was conducted pursuant to an agreed protocol. The terms of the protocol were consistent with the provisions of ss 53 and 54 of the *Evidence Act 1995* (Cth) (“the Evidence Act”).
7. The ACCC relied on evidence called from two of its senior officers and expert evidence from a veterinarian and the general manager of a major research organisation.
8. The respondents called evidence from the Chairman of the Board of Directors of the Baiada Group, the National Live Stock Manger for Baiada, the Executive Director of the Association and expert evidence from another veterinarian.

# THE FACTS

1. For the most part, the basic facts are not in dispute.
2. The growing cycle for chickens raised by Baiada and Bartter commences when day old chickens are placed in sheds. The full growing cycle lasts between 53 and 56 days. Some chickens are, however, removed from the sheds as early as the 28th day. There may be as many as three of these “thin outs” before the final “clear out” of chickens occurs.
3. Some of the sheds are operated by the companies and some by farmers contracted to them.
4. The sheds vary in size from about 1,000 square metres to 3,000 square metres. At any one time the sheds hold an average of 30,000 to 40,000 chickens.
5. In each shed there are long metal trays or feeding pans which are suspended above ground level. These trays run in parallel lines the full length of the shed. Water lines are also provided. Food and water are supplied to the chickens by these means.
6. Male and female chickens are usually segregated within the sheds by a partition erected across the sheds.
7. The chickens grow rapidly. As they grow they each occupy more space within a shed. A good deal of evidence was called about stocking densities in the sheds at various times during the growing cycle. Necessarily the evidence related to average stocking densities. It is necessary to refer, in some detail, to the evidence given about stocking densities.
8. Despite stocking densities in sheds being a relevant issue in the proceeding, the ACCC did not suggest that these densities gave rise to animal welfare issues. Baiada and Bartter both strictly observed the industry standards and ensured that stocking levels were kept below the maxima prescribed by those standards.

# STOCKING DENSITIES

1. In the course of its investigation which led to the commencement of the proceeding, the ACCC obtained from Baiada and Bartter statistical information relating to stocking densities for Steggles chickens. The information was relied on by the ACCC when it prepared its amended fast track statement. The average densities pleaded were calculated at two points in the growing cycle. The first was the time at which the chickens were first placed in the barns. The second calculation was made at a point between the first “thin out” and the final “thin out”. At the time at which the chickens were first placed in the sheds the average density was 18-21 chickens per square metre. The average density at the later point between the first and final thin outs was 17 chickens per square metre.
2. At trial, Mr Michael Leahy, the National Livestock Manager for Baiada, gave evidence about density levels at further points in the growing cycle. These were average densities drawn from the full range of Steggles production activities. They disclosed the following densities:
* at 28 days, the average live weight of the chickens is 1.61kg and the stocking density is 31.7kg per square metres or 19.6 chickens per square metre;
* at 33 days, the average, live weight of the chickens is 1.9kg and the stocking density is 33.07kg per square metre or 17.4 chickens per square metre;
* at 42 days, the average live weight of the chickens is 2.75kg and the stocking density is 29.77kg per square metre or 10.8 chickens per square metre; and
* at 49 days, the average live weight of chickens is 3.28kg and the stocking density is 33.22kg per square metre or 10.1 chickens per square metre.
1. Based on these figures the ACCC calculated that the “average amount of space available to each [Steggles] meat chicken” at the four stages of the growth cycle was:
* 28 days – 510 square centimetres;
* 33 days – 574 square centimetres;
* 42 days – 926 square centimetres; and
* 49 days – 990 square centimetres.

It compared these dimensions with the 623.7 square centimetres of an A4 sheet of paper.

1. In the course of the trial additional evidence was given about the stocking densities in five of the sheds which were observed in the course of the view. These sheds had the following densities:
* at 12 days, 19.36 chickens per square metre;
* at 33 days, 18.74 chickens per square metre;
* at 33 days, 19.08 chickens per square metre;
* at 54 days, 8.15 chickens per square metre; and
* at 56 days, 8.06 chickens per square metre.
1. The ACCC sought further to bolster its case by calling evidence as to the actual dimensions of what were said to be average size chickens at each of the four points in the growth cycle to which Mr Leahy’s evidence related. Mr Benjamin Wells, a veterinarian with a specialist avian consultancy practice, was asked to measure the dimensions of a number of chicken carcasses immediately after the birds had been slaughtered. He measured birds of approximately the same average live weights which Mr Leahy had attributed to birds at the 28, 33, 42 and 49 day stages of their growth cycle. Mr Wells deposed that he had selected the chickens which he had measured at random. When measuring the carcasses he had placed them in the kind of posture that reflected the way they would have presented in the shed and had not sought to stretch them to achieve higher measurements. Mr Wells found that the chickens with the average weight found by Mr Leahy at each of the four points of the growth cycle had the corresponding widths and lengths as disclosed in the following table:

|  |  |  |  |
| --- | --- | --- | --- |
| Day | Weight (in kg) | Width with wings tucked in (in mm) | Length (in mm) |
| 28 | 1.57 | 135 | 250 |
| 33 | 1.92 | 140 | 310 |
| 42 | 2.75 | 190 | 360 |
| 49 | 3.19 | 180 | 360 |

1. The ACCC then calculated what it said was the size, in square centimetres, of the average chicken at each of the four stages. It made the calculation by multiplying the width by the length of the average birds which had been measured by Mr Wells. Whilst it acknowledged that chickens were not static rectangular objects, it said that its calculations showed that chickens of the weight shown in the following table had a size (in square centimetres) appearing opposite the respective weights in the following table:

|  |  |  |
| --- | --- | --- |
| Day | Weight (in kg) | Size (in square cm) |
| 28 | 1.57 | 337.5 |
| 33 | 1.92 | 434 |
| 42 | 2.75 | 684 |
| 49 | 3.19 | 648 |

1. This led the ACCC to perform further calculations based on the stocking densities in which the chickens were found at each of the four stages of the growth cycle. It estimated that the average space available to each chicken of a particular size and weight was that set out above at [18].

# PROFESSOR HEMSWORTH’s expert evidence

1. Professor Paul Hemsworth is the Director of the Animal Welfare Science Centre at the University of Melbourne. He is an expert in the behaviour and welfare of farm and companion animals.
2. Professor Hemsworth prepared a report at the request of Baiada and Bartter. He was invited to express opinions about a range of matters relating to the mobility of chickens being raised in a shed system. Professor Hemsworth was advised of approximate average stocking densities in sheds in which chickens were grown for Baiada and Bartter. Those densities ranged from 19.2 chickens per square metre at placement to 10.66 chickens per square metre during the 39 to 56 day period of the growth cycle. He was asked to provide his opinion as to whether they had “space to move freely around the sheds in which they are raised over the various stages of their life cycle.”
3. Professor Hemsworth had not personally conducted any research on this matter. He proceeded, however, to answer the questions asked of him on the basis of the published results of studies appearing in the academic literature. Some of the articles on which he relied had been peer reviewed; others had not. Some of the studies related to chickens of a genre different from those raised by Baiada and Bartter. Most of the studies related to the raising of chickens in Europe. This was not a matter of concern to Professor Hemsworth because, he said, “in general, the management systems internationally are very similar whether they are in Europe, the USA, in Australia [or] elsewhere.” The European studies could, therefore, be regarded as relevant to Baiada and Bartter’s practices in Australia.
4. Baiada and Bartter placed particular reliance on two aspects of Professor Hemsworth’s report. The first related to the range of factors which he had identified as impinging upon the ability of, and the extent to which, chickens raised in a shed system move around. Professor Hemsworth reported that those factors included:

“… the location and availability of resources, including feed, water and suitable micro-thermal environment, resting and lying locations; the bird’s physical condition and injury, especially leg disorders and associated pain, which may in turn be affected by factors including genetics, diet, age and litter, etc.; general disease which may lead to sickness behaviour, such as social isolation and reduced activity; the bird’s age; frolicking (play) behaviour; and stock density, which may act as a physical barrier or social pressure to individuals attempting to move (see reviews by Bessei, 2006; Estevez, 2007). Enclosure size, particularly small enclosures, may also affect movement (Newberry and Hall, 1990).”

1. Baiada and Bartter also emphasised Professor Hemsworth’s conclusion that stocking densities in sheds at the levels employed by them was but one factor which influenced the degree of movement of chickens in and around the sheds. Professor Hemsworth had concluded that:

“The scientific literature on stocking density indicates that stocking densities up to 38kg/m² do not affect the spatial distribution of broiler chickens, the time spent walking, the distances travelled by commercial broiler chickens or walking ability as assessed by gait score. … Details received from …Baiada/Barter (sic) indicate that the average maximum stocking densities of broiler chickens raised on behalf of …Baiada/Barter (sic) … [is] considerably less than 38kg/m²: the average maximum stocking densities of broiler chickens raised on behalf of … Baiada/Barter (sic) … [is] 32.0kgm/² … Therefore on this basis, I would not expect stocking density *per se* in the units in which meat chickens are raised on behalf of Baiada/Barter (sic) to adversely affect the spacial distribution, the time spent walking, the distances travelled or walking ability of these broiler chickens.”

1. The ACCC sought to downplay the weight to be accorded to Professor Hemsworth’s report. It drew attention to the limitations to which I have already referred, stressing that his opinions were not based on any study conducted by him. In the end, however, the ACCC did not seek to dispute that chickens raised by Baiada and Bartter had some freedom of movement in the sheds during their growing cycle. What was at issue was whether the extent of the freedom enjoyed by the chickens was sufficient to justify the assertion that they were “free to roam” in the sheds.
2. For reasons which I will later explain, I found Professor Hemsworth’s evidence (even if it were to be accepted without qualification) to be of limited assistance in resolving the issues in dispute in this proceeding.

# FILMING IN SHEDS

1. In preparation for trial Baiada and Bartter installed video cameras in four sheds which were operated by sub-contractors. Filming took place in the various sheds during January 2012. In total the footage ran for approximately three hours. The films were exhibited to an affidavit of Mr John Howard which Baiada and Bartter proposed to tender. The ACCC objected to this evidence. Baiada and Bartter elected not to read the affidavit.
2. When Mr Leahy gave evidence he was shown a two minute clip from film taken in one of the sheds. He was then asked a series of questions.
3. Mr Leahy said that the shed in which the film had been taken was a typical refurbished tunnel-ventilated shed with mini-vents and feeder and drinker lines.
4. Mr Leahy’s attention was drawn to a general lack of movement within the shed. He said that this was not surprising given that the clip had been filmed at about 8:40 pm. The lights were down and the birds had “settled in” for the evening.
5. In re-examination Mr Leahy was shown additional extracts from the footage which were taken at other times of the day. He pointed to what he said was typical behaviour of chickens which was depicted on these other extracts. This behaviour included feeding, drinking, scratching around, wandering, flapping their wings, fighting and running for short distances.
6. The ACCC sought to argue that the extract which it had shown to Mr Leahy supported its arguments relating to limited movement within the sheds. Baiada and Bartter relied on the additional extracts to support their case that the birds were free to move around the sheds.
7. The extracts from the film footage which were shown in Court were carefully selected in order to support the competing arguments. The footage provided no more than snapshots of selected sheds for a short period on selected days. I did not find these extracts or the evidence given about them to be helpful in resolving the competing submissions of the parties.

# THE PAINTED CHICKENS

1. On the day before the view Baiada and Bartter arranged for 50 male and 50 female chickens in four of the seven sheds to be painted with fluorescent pink paint. In a fifth shed 50 male chickens were painted. In four of the five sheds the painted chickens were released from a central location. In the fifth they were released approximately two thirds of the way down the shed.
2. The intended purpose of the painting and release of these chickens was to demonstrate that the chickens would, in the period intervening before the view, disperse around the respective sheds.
3. The ACCC objected to any reliance being placed on any observations being made of the positioning of the painted chickens around the various sheds at the time of the view. It objected that there had been no independent oversight of the separation, handling, painting and release of the chickens. It also raised the possibility that the paint on the chosen chickens may have rubbed off on other chickens. The painted chickens, in any event, only represented about 2% of the chickens in each of the sheds. This, it was said, was an insufficient number to create any useful impression of the general movement of the birds around the shed.

# OBSERVATIONS ON THE VIEW

1. As already noted seven sheds were inspected in the course of the view. Five had been chosen by Baiada and Bartter. They were chosen because each was said to provide a representative example of the true situation within sheds at particular levels of the chickens’ development. The other two sheds were chosen by the ACCC.
2. The age of the chickens in each shed, their average weight, the number in the shed and the density represented by chickens per square metre and kilograms per square metre appears in the following table:

|  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- |
| **SHED** | **FARM** | **SHED** | **AGE** | **AVERAGE WEIGHT** | **NUMBER OF CHICKENS** | **DENSITY (chickens per square metre)** | **DENSITY (per kg square metre)** |
| A | 65 | 5 | 12 | 0.314 kg | Male: 14,734Female: 14,764 29.498 | 19.36 | 6.09 |
| B | 63 | 1 | 22 | 0.906 kg | Male: 14,662Female: 14,712 29,374 | 19.27 | 17.47 |
| C | 61 | 24 | 33 | 1.89 kg | Male: 20,971Female: 21,002 41,973 | 18.74 | 35.41 |
| D | 61 | 25 | 33 | 1.79 kg | Male & 35,792Female | 19.08 | 34.15 |
| E | 60 | 2 | 35 | 1.79 kg | Male: 18,414Female: 13,027 31,441 | 15.53 | 8.15 |
| F | 67 | 5 | 54 | 3.98 kg | Male: 23,844 | 8.15 | 32.46 |
| G | 67 | 3 | 56 | 3.66 kg | Male: 23,563 | 8.06 | 29.49 |

1. The process adopted at each shed was similar. The inspecting party donned protective clothing and disinfected that clothing at foot level. Entry was effected through a closed door. The lighting inside the sheds was dim. At the time of entering chickens were congregated across the entrances and throughout the sheds. In sheds B, C, D, and E the picture at ground level was one of a continuous sea of colour. As the party entered, the sea parted so that the group (in each case about 10 persons) could move into and around the shed without treading on any birds. As a path opened in front of the group it closed behind it. Apart from the area in which the inspecting party was located the impression of a continuous wall to wall sea of birds remained. With few exceptions each bird was in physical contact with one or more other birds. They were, however, able to and did move as a group. They were able to and did move under and around the feeding bins and water outlets.
2. Evidence was given about the phenomenon of “clustering”. Chickens were said to have a natural inclination to congregate in closely knit groups and to remain in physical contact with other birds. This phenomenon was in evidence in these sheds. When the chickens moved to open a path for the inspecting group they moved as one maintaining close physical contact with each other in front and behind the group.
3. The scenes in sheds F and G, in which there had been a series of thin outs and in which only 54 and 56 day old chickens remained, and shed A, which contained 12 day old chickens, were noticeably different. The birds in sheds F and G were much larger. Most were seated and showed little inclination to move even when the inspection party was in close proximity to them. The birds were scattered around the shed. Few were in physical contact with any other bird. Areas of floor space were clearly visible. If any bird had an inclination to move around (and some did) it was possible to do so without coming into contact with any other bird. The younger chickens in shed A together occupied far less individual space than did the older chickens in sheds B to E. They were able to disperse far more widely when the inspection party entered but many were observed to be closely gathered in more distant parts of the shed.
4. In five of the sheds painted birds were observed. They had, to some extent, dispersed around the shed. Some single painted birds were seen isolated from all others. For the most part, however, they were seen to be situated in general proximity one to the other although, with few exceptions, not side by side. Significantly, the painted birds were not isolated. They were in physical contact with a number of other birds and the paint drew attention to them in what would otherwise have been a sea of the same colour.

# THE REPRESENTATIONS

1. The packaging in which Baiada’s processed chicken products are marketed contain a statement that:

“ALL STEGGLES CHICKENS ARE GRAIN FED, FREE TO ROAM IN LARGE BARNS, AND ARE 100% FREE OF ANY ADDED HORMONES OR STEROIDS.”

1. The packaging of Bartter’s whole chicken products contains the statements that:

“Barn Raised Without Cages” and “Steggles chickens are free to roam in large barns without cages.”

1. as a result of customer surveys Baiada and Bartter became aware, during 2010, that there was a perception in the community that meat chickens were raised in cages. As a result they commissioned an advertising campaign which was designed to dispel this notion. A print advertisement was prepared. It carried a picture of an egg. On the egg was written “THIS IS THE ONLY TIME A STEGGLES CHICKEN IS KEPT IN A CONFINED SPACE”. Under the picture of the egg the following text appeared:

“Steggles chickens are free to roam around in large barns. They’re kept at the temperature they like best (not too hot, not too cold). They enjoy a constant supply of good food and fresh water. And our dedicated Steggles nutritionist supervises their diet. But then you’d expect no less from a Steggler.”

1. This print advertisement was placed in various publications between May and September 2011. The publications included the “Super Food Idea”, the “Recipes Plus”, the “Australian Good Food”, the “Good Health”, the “Retail World” and the “Australian Retailer” magazines. These magazines had a wide circulation. Research undertaken by the Roy Morgan Research Limited organisation established that the average number of people who read each monthly or bi-monthly issue of four of these magazines in which the print advertisement was published during the year of publication was:
* Super Food Ideas – 880,000;
* Recipes + – 370,000;
* Australian Good Food – 281,000; and
* Good Health – 287,000.
1. The other two magazines were trade publications which were read by retailers and retail buyers. The evidence did not disclose their circulation levels.
2. Baiada and Bartter spent approximately $4-5 million dollars on their advertising campaign.
3. The ACCC also complained about a number of statements which appeared, from time to time, on the Association’s website. The various statements about which complaint is made and the dates between which those statements appeared on the Association’s website are:
* From May 2008 until 14 September 2011 a media release entitled “Chicken: Loaded With Nutrition Not Saturated Fat” appeared. Under a sub-heading “Summary: Chicken Facts” the media release stated:

“No cages are used in the chicken meat industry, chickens roam freely on the floor of large barns”.

* Between October 2010 and 14 September 2011 another media release appeared entitled “Chicken Comes Out on Top, Aussies Love Their Chicken – And For Good Reason”. The release contained the following statement:

“Just about all chicken meat available for purchase in Australia is locally grown, and all chickens are free to roam on the floor of large sheds.”

* Between September 2010 and 14 September 2011 a brochure appeared entitled “The truth about how meat chicken are farmed in Australia”. The brochure contained the following statement:

“Did you know that Australian meat chickens are never kept in cages? They are raised in large carefully ventilated barns with comfortable bedding material covering the floor, where they are free to roam and have easy access to food and water.”

* Between December 2010 and 14 September 2011 a brochure appeared entitled “Are You Chicken When It Comes to Nutrition”. The brochure contained a statement that:

“No cages are used in the chicken meat industry – birds are free to roam in custom-built well-ventilated barns with easy access to food and water.”

* Between March 2011 and 14 September 2011 an entry headed “General Questions” appeared. It contained the following statement:

“Australian meat chickens are not kept in cages. They are raised in large sheds that are environmentally controlled and in which they are free to roam around.”

* Between March 2011 and 14 September 2011 a brochure appeared entitled “Facts About Australian Chicken”. The brochure contained the following statement:

“The chickens are able to roam through the whole shed with easy access to food and water.”

The common feature of these statements was that they asserted that chickens raised in barns or sheds were either able to “roam freely”, were “free to roam” or “able to roam”.

# THE ALLEGED CONTRAVENTIONs BY BAIADA AND BARTTER

1. The ACCC alleged that the representations that the chickens which are raised in sheds operated by Baiada and Bartter are “free to roam around in large barns” and “free to roam in barns” constitute representations that the chickens “… have substantial space available allowing them to roam around freely” during the growing cycle. This, it was contended, was contrary to the fact because the chickens were “… subjected to such stocking densities that they do not, as a practical matter, have substantial space available to roam around freely.”
2. The ACCC alleged that, by reason of these matters, Baiada and Bartter had:
* Engaged in misleading or deceptive conduct, or conduct which is likely to mislead or deceive, in contravention of s 52 of the *Trade Practices Act 1974* (Cth) (“the Act”) in respect of conduct up to 31 December 2010 and s 18 of the *Australian Consumer Law* (“the ACL”) in respect of conduct on and after 1 January 2011;
* Made false representations in contravention of s 53(a) of the Act in respect of conduct up to 31 December 2010 and s 29(1)(a) of the ACL in respect of conduct on and after 1 January 2011; and
* Engaged in conduct which is liable to mislead the public as to the nature and/or characteristics of the meat chickens raised on their behalf in contravention of s 55 of the Act in respect of conduct up to 31 December 2010 and s 33 of the ACL in respect of conduct on and after 1 January 2011.
1. It was common ground that the relevant conduct of Baiada and Bartter was undertaken in trade or commerce for the purposes of ss 52, 53(a) and 55 of the Act. There was also agreement that each of the impugned statements related to the history of Steggles chickens and them being goods supplied to consumers within the meaning of 53(a) of the Act.
2. These respondents, however, disputed the ACCC’s assertion that s 55 applied in the circumstances because, they contended, the ACCC had not adduced any evidence to demonstrate that the nature or characteristics of Steggles chickens were in any way affected by the stocking densities in which they were raised.
3. Baiada and Bartter both denied all of the allegations levelled against them.

# THE ALLEGED CONTRAVENTIONS BY THE ASSOCIATION

1. The ACCC contended that the Association had also contravened ss 52, 53(a) and 55 of the Act because the statements made on its website:
* Were misleading and deceptive and likely to mislead and deceive;
* Falsely represented that chickens raised or grown in barns in Australia have had a particular history; and
* Were liable to mislead the public as to the nature and characteristics of chickens raised or grown in barns in Australia.
1. The Association denied each of these allegations. It further pleaded that, if it had contravened one of those provisions, it had a good defence pursuant to s 65A(1) of the Act.

# PROCEDURAL MATTERS

## A Split Trial

1. It was agreed that questions of liability should be determined first and separately from consideration of the remedies being sought by the ACCC.

## “No Case” Submissions

1. When the ACCC closed its evidentiary case each of the respondents foreshadowed the making of a “no case” submission but, before doing so, sought to be relieved of the need to make an election not to go into evidence before pursuing the no case submissions. I ruled that, in the circumstances, the respondents had not satisfied me that it would be appropriate to relieve them from the need to make an election. Upon being so advised the respondents each declined to persist with a no case submission. I indicated that I would give my reasons for my ruling in due course. Those reasons follow.
2. Although the Court enjoys a broad discretionary power the general rule is that “a decision will not be given on a submission of no case to answer unless the moving party elects to call no evidence”: see *Rasomen Pty Ltd v Shell Company of Australia Ltd* (1997) 75 FCR 216 at 223. This general rule may be departed from in circumstances in which the interests of justice or convenience so require: see *Protean (Holdings) Ltd v American Home Assurance Company* [1985] VR 187 at 238.
3. As Kenny J said in *Cahill v Construction, Forestry, Mining and Energy Union (No 2)* (2008) 170 FCR 357 at 368, there must, generally speaking, “be some unusual circumstance to justify the respondents making a no-case submission without being required to elect to call no evidence.” Such circumstances have been found to exist where allegations of fraud or dishonesty have been made against a respondent (see, for example, *Tru Floor Service Pty Ltd v Jenkins(No 2)* (2006) 232 ALR 532 at 540-1), where the applicant’s case appears to be weak and where there is a likelihood that significant savings of hearing time will be achieved if the no-case submission were to be successful (see, for example, *Compaq Computer Australia Pty Ltd v Merry* (1998) 157 ALR 1 at 7-9). See also: *Australian Securities and Investments Commission v Healey* (2011) 196 FCR 291 at 420-1 (Middleton J).
4. The respondents contended that the ACCC’s case was weak and that, as a result, there was a strong prospect of a “no case” submission being successful thereby bringing the proceeding to a just, quick and convenient conclusion. Whilst acknowledging that the ACCC was not alleging fraudulent conduct by them, the respondents stressed that the ACCC was advancing a case based on the less serious, but nonetheless significant, allegations that they had made misleading or deceptive or false statements.
5. The general rule gives effect to sensible case management principles. It avoids the significant risk, which will be present in most cases, of hearing times being substantially extended because of the need, in the event that the no case submission is unsuccessful, for the Court to deal twice with the evidence. I formed the view (confirmed with hindsight) that such a risk existed in this proceeding. The ACCC’s case was undoubtedly arguable and could not be dismissed as being fatally flawed.
6. Although it was alleged that the respondents had made misleading or deceptive or false statements, the ACCC did not contend that they had intended to make statements of this character. None of the respondents’ witnesses were to be confronted with allegations that they had deliberately sought to mislead consumers. Nor did it appear that the credit of any of the witnesses, on either side, was to be called into question.
7. It was in these circumstances that I determined that the respondents had failed to establish that a departure from the normal rules was justified. On the contrary, I considered that the interests of justice required that the normal rule apply.

# THE LEGISLATION

1. The terms of s 52 of the Act are well known. It provided that:

“A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.”

1. Section 53(a) provided that:

“A corporation shall not, in trade or commerce, in connextion with the supply or possible supply of goods or services or in connextion with the promotion by any means of the supply or use of goods or services;

(a) falsely represent that goods … have had a particular history …”

1. Section 55 of the Act provided that:

“A person shall not, in trade or commerce, engage in conduct that is liable to mislead the public as to the nature … [and] characteristics … of any goods.”

1. Section 65A(1) of the Act relevantly provided that:

“(1) Nothing in section 52, 53, 53A, 55, 55A or 59 applies to a prescribed publication of matter by a prescribed information provider, other than:

(a) a publication of matter in connection with:

(i) the supply or possible supply of goods or services;

(ii) … ;

1. the promotion by any means of the supply or use of goods or services; or
2. … ;

where:

1. the goods or services were relevant goods or services, … in relation to the prescribed information provider; or
2. the publication was made on behalf of, or pursuant to a contract, arrangement or understanding with:
	1. a person who supplies goods or services of that kind, …; or
	2. a body corporate that is related to a body corporate that supplies goods or services of that kind, …; or
3. a publication of an advertisement.

(2) For the purposes of this section, a publication by a prescribed information provider is a prescribed publication if:

(a) in any case – the publication was made by the prescribed information provider in the course of carrying on a business of providing information; or

(b) in the case of a person who is a prescribed information provider by virtue of paragraph (a), (b) or (c) of the definition of ***prescribed information provider*** in subsection (3) (whether or not the person is also a prescribed information provider by virtue of another operation of that definition) – the publication was by way of a radio or television broadcast by the prescribed information provider.”

1. The term “prescribed information provider” was defined, in s 65A(3), to mean:

“…a person who carries on a business of providing information and, without limiting the generality of the foregoing, includes:

(a) the holder of a licence granted under the *Broadcasting Services Act 1992*; and

(aa) a person who is the provider of a broadcasting service under a class licence under that Act; and

(ab) the holder of a licence continued in force by subsection 5(1) of the *Broadcasting Services (Transitional Provisions and Consequential Amendments) Act 1992*; and

(b) the Australian Broadcasting Corporation; and

(c) the Special Broadcasting Service Corporation.”

1. There are no material differences between these provisions and their respective equivalents in the ACL.

# THE APPLICABLE LEGAL PRINCIPLES

1. The principles which govern the application of s 52 of the TP Act are now well established. Relevantly they were conveniently summarised by Weinberg J in *CPA Australia Ltd v Dunn* (2007) 74 IPR 495 at 500-1 as follows:

“[26] … When determining whether particular conduct was, or is, likely to mislead or deceive it is unnecessary to prove that anyone was actually misled or deceived: *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191 at 198; 42 ALR 1 at 7; 1A IPR 684 at 691. However, evidence that particular individuals have been misled or deceived is admissible, and may be persuasive: *Global Sportsman Pty Ltd v Mirror Newspapers Pty Ltd* (1984) 2 FCR 82 at 87; 55 ALR 25 at 30 (*Global Sportsman*). The test is objective, and the court must determine the question for itself: *Taco Co Australia Inc v Taco Bell Pty Ltd* (1982) 42 ALR 177 at 202. Finally, conduct is likely to mislead or deceive if there is a real and not remote possibility that it will do so. It is not necessary to establish that the degree of likelihood exceeds 50%: *Global Sportsman* at CLR (sic) 87; ALR 30.

[27] It is clear that regard must be had to the relevant conduct as a whole, and in context. See generally *Campomar Sociedad Limitada v Nike International Ltd* (2000) 202 CLR 45; 169 ALR 677; 45 IPR 481; [2000] HCA 12. The question whether a representation made by a person to the public, or a section of it, would be likely to mislead or deceive must be answered without regard to whether that person intends to mislead or deceive. It is not a question of whether, if the person makes these representations, he or she would be acting honestly and reasonably. It is simply a question of whether potential members of the class to whom the representations are to be addressed (which include the astute and the gullible, the intelligent and the not so intelligent, and the well educated and the poorly educated) are at serious risk of being misled or deceived: see *.au Domain Administration Ltd v Domain Names Australia Pty Ltd* (2004) 207 ALR 521; 61 IPR 81; [2004] FCA 424 at [12]-[15] and *National Exchange Pty Ltd v Australian Securities and Investments Commission* (2004) 61 IPR 420; 49 ACSR 369; [2004] FCAFC 90 (*National Exchange*).

[28] Statements that are capable of more than one meaning may be misleading or deceptive provided that the meaning for which the applicant contends is one that would be reasonably open, and might be drawn by a significant number of those to whom the representation is made. In the same way, a statement may contain a representation that is implied, rather than express. That is why a statement that is literally true can be misleading or deceptive: *National Exchange* at [48]-[52].”

1. In *Google Inc v Australian Competition and Consumer Commission* (2013) 294 ALR 404 at 425, Hayne J recently restated the fundamental proposition that a contravention of s 52 can occur notwithstanding the absence of any intention to mislead or deceive on the part of the person who makes a representation in the public domain. He expressly endorsed the statement of McHugh J in *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592 at 634 to the effect that s 52 “looks at the conduct of a corporation and is concerned only with whether the conduct misled or was likely to mislead a consumer. It is not concerned with the mental state of the corporation.”
2. Where the relevant conduct is the making of a representation these principles require a court to form a judgment about what the representation would convey to those to whom it is made and then to consider whether that which is conveyed corresponds with the true factual position. The true factual position will often be easy to establish. A measurement will, for example, quickly determine whether a statement that a container holds a certain quantity of liquid is or is not correct. Cases such as the present are more difficult: the meaning conveyed may be susceptible to different constructions and the true factual position may not be ascertainable with mathematical precision.
3. A similar approach has been taken to the construction and application of s 53(a). This paragraph will be contravened if “a representation is in fact not correct … even if it is not false to the knowledge of the person making the representation”: see *Given v CV Holland (Holdings) Pty Ltd* (1977) 29 FLR 212 at 217. As is the case in relation to s 52, the question of whether a particular statement is misleading is one of fact which is to be determined having regard to the context in which the statement is made and all of the surrounding circumstances. The Court must determine what a reasonable person who is a member of the class to which the representation was directed would reasonably understand it to convey: see*Taco Co, supra; Henderson v Pioneer Homes Pty Ltd (No 3)* (1980) 43 FLR 276 at 288. Any false representation must be made “in connection with the supply or possible supply of goods or services”. An immediate causal nexus is not required: see *Our Town FM Pty Ltd v Australian Broadcasting Tribunal* (1987) 16 FCR 465 at 479-80. Rather, there needs to be “a substantial relation, in a practical business sense” between the representation and, relevantly, the supply of goods: cf *Berry v Federal Commissioner of Taxation* (1953) 89 CLR 653 at 658-9.
4. The phrase “liable to mislead” in s 55 has been held to apply to a narrower range of conduct than that comprehended by the phrase “likely to mislead or deceive” appearing in s 52: see *Westpac Banking Corporation v Northern Metals Pty Ltd* (1989) 14 IPR 499 at 502; *Trade Practices Commission v J & R Enterprises Pty Ltd* (1991) 99 ALR 325 at 338-9. A contravention of s 55 will not be made out unless “there was an actual probability that the public would be misled” by the impugned conduct: *J & R Enterprises* at 339. The difference in approach is explained in part by the different language employed in the two sections and in part by the consequences of a contravention. A person who contravenes s 55 is liable to a pecuniary penalty. This is not the case with a contravention of s 52.
5. The words “nature” and “characteristics” are not defined.

# “Free to Roam”

1. The central phrase (or variants of it) which appeared on the packaging, in the advertisements and in the on-line brochures was that the chickens were “*free to roam*” in large barns or sheds.
2. It was this representation that the ACCC alleged was misleading or deceptive or likely to mislead or deceive within the meaning of s 52, constituted a false representation for the purposes of s 53(a) and was liable to mislead the public as to the nature and characteristics of the processed chickens for the purposes of s 55 of the Act.
3. It is necessary for the Court to determine how this statement would reasonably be understood by a significant number of those persons to whom it was directed and, in particular, whether the phrase would have conveyed, as the ACCC contended, the assertion that the chickens had “substantial space available allowing them to roam around freely” in the sheds.
4. When dealing with this issue all parties directed attention to dictionary definitions which were said to assist in understanding how the words would normally be understood by the members of the public to whom they were directed.
5. The ACCC referred to some of the meanings of the word “free” as defined in the Macquarie Dictionary. They were:

“*Adjective* **16**. Unimpeded, as motion or movements; easy, firm, or swift in movement; a free step

*Adverb***30**. in a free manner; freely

*Verb (t) (freed, freeing)* **33.** Make free; set at liberty; release from bondage; imprisonment, or restraint.”

1. The ACCC also identified certain meaning of the word “roam” in both the Shorter Oxford and Macquarie Dictionaries. These were:
* Shorter Oxford Dictionary:

“**1.** *verb intrans* wander, rove, ramble; move about aimlessly or unsystematically, esp over a wide area.

**2.** *verb intrans* wander or move aimlessly or unsystematically, through or about (a place).”

* Macquarie Dictionary:

“*verb (i)* **1.** to walk, go, or travel about without fixed purpose or direction; ramble; wander; rove –

*verb (t)* **2.** to wander over or through: *to roam the bush. –noun* ***3.***the act of roaming; a ramble.”

1. The ACCC submitted that, when the words “free” and “roam” are used in conjunction in the contexts in which they appeared, they invoke “the impression to consumers that Steggles meat chickens are largely uninhibited in their ability to move and patterns of movement by reason of the space available to them …”
2. Baiada and Bartter cautioned that care must be exercised in using dictionary definitions. They nonetheless directed attention to particular meanings of the words “free to” and “roam” appearing in the Shorter Oxford English Dictionary and the Macquarie Dictionary.
3. They disputed the ACCC’s reliance on usage 16 of the word “free” in the Macquarie Dictionary. They contended that the more apt usage was that numbered 6, namely, “at liberty, permitted, or able at will (to do something); free to choose.” They also directed attention to certain meanings attributed to the word “free” in the Shorter Oxford English Dictionary:

“*Adjective*: **16**. Not impeded, restrained or restricted in actions, activity, or movement; unhampered, unfettered. At liberty, allowed or permitted to do something;

1. At liberty; able to move about or range at will …;
2. Allowable or allowed (to or for a person to do something); open or permitted to …”
3. Baiada and Bartter also relied on two meanings attributed to the word “roam” in the Shorter Oxford English Dictionary namely, “[w]ander, rove, ramble; move about aimlessly or unsystematically, esp over a wide area” and “[w]ander or move aimlessly or unsystematically over, through or about (a place).”
4. These dictionary meanings were said to be supportive of Baiada and Bartter’s contention that a person reading the impugned statements would understand them to be asserting that the chickens had the “ability to move at will” or were “able to move or wander around.”
5. All parties recognised that the words “free to roam” (or variants of them) had to be read in context, including the identification of where the roaming was said to occur: in“large” or “big” barns. The ACCC submitted that the statement that the chickens were free to roam around in “large barns” or “big barns” conveyed the “impression of a significant (or substantial) degree of space being available” to the chickens in that environment. Baiada and Bartter, on the other hand, attributed to an ordinary or reasonable consumer the understanding that the barns referred to in the statements were commercial production facilities in which large commercial flocks of chickens were housed and that the capacity of the chickens to roam would be understood to refer to movement within the confines of such a barn and not, for example, in an open range area.

# CONSIDERATION

## “Free to Roam” - Generally

1. It will be necessary, in due course, to consider separately the various allegations made against the respondents and the statutory defence pleaded by the Association. Before doing so, however, it will be convenient to deal with the semantic issue which is common to all complaints. That issue relates to the meaning to be accorded the phrase “free to roam” (and the variants of it). I will deal with this issue, initially, at a general level and then return to it in the context of each of the impugned statements.
2. A number of preliminary observations should be made. The first is that the central question, in each case, is whether the meaning, contended for by the ACCC might reasonably be drawn by a significant number of the persons to whom the representation was directed. This formulation admits the possibility that more than one meaning might reasonably be open. So long as one of those meanings is the one contended for by the ACCC it will have made good this part of its case.
3. What has just been said also draws attention to the limited assistance provided by dictionaries in discerning the meaning of words and phrases. This limitation is particularly apparent when the words or phrases concerned have many alternative usages and the words may be susceptible to contextual nuances. Some meanings may be obscure and rarely be used in common parlance. Resort to dictionary meanings may, therefore, be of assistance but will rarely be determinative when deciding whether or not the making of a statement is misleading or deceptive or is likely to mislead or deceive.
4. In normal usage a person will be regarded as being “free to” do something if the person determines to do so and is able to act in accordance with his or her wishes. A choice to take or not take particular action is implied. Also implicit is the idea that the person will not be prevented from exercising the choice by the actions of another person or limitations imposed by physical surroundings or circumstances. These notions are transferable to the activities of animals including chickens.
5. Human (and animal) movement may take many forms. It covers a full spectrum of activity ranging from a minor twitch of a single body part through to exercise at full pace along an unobstructed path involving multiple body parts.
6. “Roaming” falls somewhere towards the middle of the spectrum. It involves movement of the whole body but not at any great speed. The word “roam” suggests wandering around with no fixed purpose or direction. The actor’s scope for movement need not be unimpeded. A person or animal who is, for example, wandering around the countryside may have to change direction to avoid rocks or trees. A significant degree of physical obstruction may, however, prevent or limit movement to such an extent that the person could not be said to be roaming. A bushwalker confronted by sheer cliffs may be restricted to retracing his or her steps.
7. A closer analogy may be provided by contrasting the activities of a visitor to a quiet country town and a visitor to a thriving metropolis. The visitor to the country town might well be said to be roaming whilst wandering around the town. The occasional pedestrian coming the other way or the occasional vehicle coming down the road may provide slight impediments to movement but otherwise the visitor will be able to move around public areas at will. The same visitor in a busy city would not be said to be roaming because movement would be constantly impeded by pedestrian and vehicular traffic.
8. In my view an ordinary and natural meaning of the phrase “free to roam” when applied to chickens, is, as the ACCC contended, the largely uninhibited ability of the chickens to move around at will in an aimless manner. The phrase would be so understood by a significant number of the hypothetical consumers to whom the labels, advertising or the websites on which the phrase appeared, were directed.

## “Free to Roam” – Baiada and Bartters’ Packaging and Print Advertising

1. The packaging used by both Baiada and Bartter had written on it the statement that the chickens “were free to roam in large barns”. The Bartter packaging added “without cages” to this statement.
2. Their joint print advertising contained the statement that: “Steggles’ chickens are free to roam around in large barns.”
3. The phrase “free to roam” was thus placed in a context: any roaming undertaken by the chickens occurred in large barns. Bartter’s packaging made clear that the chickens had not been caged whilst in the barns. Beyond that, however, the statements on the packaging and in the print advertisements said nothing about conditions in the large barns and, in particular, how many other chickens were in a barn at the same time as the packaged chicken at various stages of the growth cycle. That number varied as thin outs occurred between the 28th and 56th days. Another variable was the size of the chickens as they got older.
4. The class of persons to whom the labelling was directed was comprised of members of the public who attended shops and other retail outlets where the packaged chickens were on sale. The print advertisements were directed to a wider group of persons who were sufficiently interested in the quality of food, nutrition and maintaining good health to purchase or read the specialist publications in which the advertisements were placed.
5. I do not accept the respondents’ contention that the reference to large barns would convey to the reader of the packaging or the advertisements a sufficient, if any, understanding of the number and size of the chickens in the barns at any given time such as to assist the reader to have any or any accurate understanding of these variables on the capacity of the chickens to move around the barn. That capacity depended on the amount of space available to each chicken within the barn at a particular time.
6. The evidence and the observations made on the view do not permit relevant conclusions to be reached in respect of each day of the growth cycle. It is, however, possible for judgments to be formed in relation to chickens in sheds at the 12th, 28th, 33rd, 42nd, 49th, 54th and 56th days of the cycle.
7. At all stages of the growth cycle scope existed for any chicken which wished to do so to move. Until the very late stages of the cycle at least they did so if only to obtain access to the food and water outlets. The expert evidence of Professor Hemsworth to this effect was not, in the event, contentious. There was, as has already been noted, room for the chickens to move to create a path for the inspecting party during the view. Birds were seen to extend their wings and run for short distances. During the view the painted chickens were observed to have moved from the point at which they had been released the previous day albeit, in most cases, not over great distances. What is at issue is whether the degree of movement at any given time was sufficiently free from impediment from other birds that it could be said that they were able to “roam”, in the sense explained above at [100], if they chose to do so.
8. There are a number of relevant factors which inform the necessary judgment. The first is the tendency of chickens, particularly in a shed environment, to cluster. Thus, if, in a large barn, there were so few chickens that they could, if they wished, remain metres apart one from the other, they could be said to be free to roam whether or not they chose to move around individually or as a clustered group. On the other hand, if the numbers were such that any movement could not be undertaken without a chicken being in constant contact with one or more other birds its movement could not be said to occur in a largely unimpeded or a purposeless or directionless manner.
9. The statistics relating to stocking densities, weight and size of the chickens at various stages of their development are also of assistance. They disclose some material differences over time. Allowance must also be made for the effect (albeit tempered by the ongoing growth of the remaining chickens) of the periodic thin outs after day 28.
10. The statistics also disclose a fairly constant density of between 17.4 and 19.6 chickens per square metre between the 12th and 33rd days of the growth cycle. Thereafter, as a result of thinning out, a marked decrease occurred with the number of chickens per square metre falling to 10.8 at the 42 day stage and dropping from there to 8.06 at 56 days. This decrease occurred at some point after the 33rd and before the 42nd day.
11. These statistics are consistent with the observations made during the view. Until the 54nd day there were, in each shed, thousands of chickens in such close proximity, one to another, that, apart from the immediate vicinity of the viewing party, very little, if any, of the floor surface could be seen. By days 54 and 56 large areas of floor space were visible.
12. Until the levels dropped at some point between the 33rd and 42nd days of the growth cycle chickens could not, in my judgment, be said to be free to move around the sheds at will and with a sufficient degree of unimpeded movement to justify the assertion that they were free to roam. They could not move more than a metre or so (at most) without having their further movement obstructed by a barrier of clustered birds. Continued movement could only occur if a bird pushed into the group or encountered a small space between other birds.
13. Thereafter, in my view, the position changed as a result of the thinning out process such that the chickens could fairly be said to be “free to roam”. By this time a bird which wished to move around the barn could weave its way across the floor through gaps between other birds or around smaller clustered groups.
14. It follows that I accept the ACCC’s submissions that Baiada and Bartter contravened ss 52 and 53(a) of the Act to the extent that the representation that the chickens were “free to roam” in large barns prior to day 42 of their growth cycle was likely to mislead or deceive consumers as to the circumstances in which the processed chickens had been raised or grown and by falsely representing that the chickens had a particular history of being raised or grown in barns in which they were “free to roam”.

## “Free to Roam” – The Association’s Website Publications

1. Each of the statements appearing on the Association’s website about which complaint is made said that chickens were able to “roam freely”, were “free to roam” or were “able to roam”. In most of the statements the roaming was said to occur either in “large barns” or “large sheds”. In two instances the adjective “large” did not appear.
2. A person who called up the Association’s website was taken immediately to a home page. That home page identified a range of material to which the reader could obtain access. This material included press releases issued by the Association and brochures produced by it. Access could also be obtained to video footage and photographs of chickens being raised in sheds. Direct links to this video footage and photographs were highlighted on every page of the website and could also be accessed under the heading “Production and Processing.”
3. The Association emphasised the wide range of information appearing on its website. In addition to husbandry issues information was provided relating to growing processes, differences between free range and organic farming, environmental, nutritional and trade information.
4. The Association stressed that the impugned statements formed but a small part of the total material available on its website. Furthermore, access to the press releases and brochures was not facilitated by means of the same number of direct links that facilitated access to the video footage and photographs.
5. A representation which is misleading or deceptive or apt to mislead or deceive or false remains so whether or not it stands alone or forms part of a much larger body of material. It may be that the context in which a statement appears may influence the tenor of that which is conveyed by it by modifying what might otherwise be an obvious meaning. A short statement in a much larger document may, for example, be contradicted or heavily qualified by other statements in the same document. This is not such a case.
6. The statements made on the Association’s website were said to relate to “Australian meat chickens” and the Australian “chicken meat industry”. They thus applied to the wider industry of which Baiada and Bartter were a significant part.
7. What I have said in relation to the efficacy of the “free to roam” representations made by Baiada and Bartter therefore has application to the use of the same phrase by the Association.
8. For the same reasons I consider that the impugned statements, made by the Association, were apt to mislead and deceive and were false insofar as they were made in respect of chickens in barns up to or shortly before the 42nd day of their growth cycle.
9. It also follows, for the reasons explained in relation to Baiada and Bartter, that the Association contravened ss 52 and 53(a) of the Act. The evidence before the Court was confined to the stocking densities in the sheds which were maintained by the three respondents other than the Association. The Association’s statements, about which the ACCC complained, applied generally to the industry. It may or may not be that the statements were correct or substantially correct in so far as they applied to other producers. The findings of contravention against the Association must, therefore, be confined to the statements to the extent that they relate to the practices of the other three respondents.

# LIABILITY OF THE RESPONDENTS UNDER S 55 OF THE ACT

1. The ACCC submitted that Baiada, Bartter and the Association had each contravened s 55 of the Act because their “free to roam” representation was liable to mislead the public as to the nature and characteristics of Steggles meat chickens.
2. The respondents contended that s 55 of the Act had no operation because the ACCC had not adduced any evidence to demonstrate that the nature or characteristics of Steggles chickens were in any way affected by the stocking densities at which they were raised or their capacity (or lack of it) to roam around the sheds.
3. The ACCC submitted that the word ‘nature’ should be accorded its ordinary and natural meaning as “the particular combination of qualities belonging to a thing by constitution; its inherent character”: cf *Spunwill Pty Ltd v Bab Pty Ltd* (1994) 36 NSWLR 290 at 302. It sought to rely on the Macquarie Dictionary definition of ‘characteristic’ as meaning “a distinguishing feature or quality.” It did not, however, identify with precision the nature or characteristics of the chickens on which the “free to roam” representations were said to impinge.
4. In the context of s 55 the nature and characteristics of goods are to be identified by reference to their internal constitution or utility rather than the manner of their creation. Section 55 will thus be contravened, for example, if it is represented that 35% of liquid in a container is fruit juice when the truth is that juice comprised only 17% of the contents: cf *Trade Practices Commission v Glo Juice Company Pty Ltd* (1987) 73 ALR 407. Similarly, a contravention will occur if a manufacturer advertises that children’s car seats conform in their structure with a particular Australian standard: cf *Temperley v Playground Supplies Pty Ltd* (1980) 3 TPR 506. A contravention will also occur if a false representation is made about the operational capacity of goods. Thus, in *Australian Competition and Consumer Commission v Apple Pty Ltd* [2012] FCA 646, it was conceded that s 33 of the ACL had been contravened when the manufacturer of an iPad advertised that its product could be connected to the 4G network in Australia when the contrary was true.
5. The “free to roam” representations did not relate to the inherent qualities of the chickens. They related to the circumstances in which the chickens were raised. There was, as the respondents submitted, no evidence to link those circumstances with any inherent quality such as taste or fat content of any processed chickens which were marketed by producers or processors.
6. No allegation of contravention of s 55 has been made out.

# THE ASSOCIATION’S DEFENCES

1. The Association relied on a defence under s 65A of the Act in respect of its alleged contraventions of ss 52, 53(a) and 55. Having found that the Association did not contravene s 55, it is only necessary now to determine whether the defence avails it in respect of its contraventions of ss 52 and 53(a).
2. The Association contended that it was a “prescribed information provider” which had undertaken a series of prescribed publications on its website relating to the husbandry of chickens destined to be processed for the food market. It was a “prescribed information provider” as defined in s 65A(3) because it met the description of a person who “carries on a business of providing information.” The impugned material had been published in the course of its carrying on that business. It was not subject to any of the qualifying provisions in the section.
3. The Association relied on the evidence of its Executive Director Dr Andreas Dubs about the content of the material appearing on the Association’s website and the purpose which it served. That purpose was said to be informative and educational. Dr Dubs denied that the impugned publications constituted advertisements. The Association itself did not supply any goods to the public and the publications did not relate to any particular product marketed by any direct or indirect members of the Association.
4. The ACCC submitted that the Association was not, at relevant times, carrying on the business of providing information and that the relevant publications had not occurred in the course of carrying on such a business. The ACCC further submitted that the Association was, in any event, caught by the exceptions in s 65A(1)(a) and (b) because the publications had occurred in connection with the promotion of the supply or use of goods and were made on behalf of or pursuant to an arrangement with a supplier of such goods and because the publications constituted an advertisement.
5. Section 65A of the Act was added in 1984: see *Statute Law (Miscellaneous Provisions) Act (No 2) 1984* (Cth). It became known as the “media safe harbour defence” because it was incorporated in the Act in response to concerns that, if news media published incorrect reports, the publisher might be liable for a contravention of s 52 of the Act: see *Bond v Barry* (2008) 173 FCR 106 at 113. In terms, however, the defence was more widely available because the definition of a “prescribed information provider” extends to all persons who carry on the business of providing information and is not confined to participants in the print and broadcast media who fall within one of the paragraphs in sub-section 65A(3): cf *Sykes v Reserve Bank of Australia* (1997) 151 ALR 579 at 593.
6. The first issue is whether the Association can be said to carry on the business of providing information. Its memorandum of association identifies a range of objects. One of these is the collection and circulation of “technical information and statistics and all other information relating to the industry which is or may be of assistance to members and to issue such publications as may be necessary.” The Association’s activities are funded by contributions from its members.
7. It may be accepted, as the ACCC contended, that the Association was principally concerned with the protection and promotion of the interests of participants in the chicken meat industry. It operated as a lobbyist for the industry.
8. In addition, however, as Dr Dubs deposed, the Association acts as a publicist for the industry in order to encourage consumers to purchase and consume chicken meat. Much of the information provided on the Association’s website, including the media releases and other publications about which complaint is made, were put up for this purpose.
9. To this extent, in my view, the Association may properly be regarded as a “prescribed information provider” because it carried on the business of providing information to the public. The various publications had been put up on the website in the course of carrying on that business. This activity was supported by its objects. The impugned material may be regarded as being of assistance to members by placing chicken husbandry in a good light in order to encourage chicken meat consumption in the community.
10. It is necessary, then, to turn to the two exemptions on which the ACCC relied. They were provided for in s 65A of the Act. The ACCC contended that the protection otherwise conferred by s 65A(1) did not apply to the relevant material on the Association’s website because the material was published in connection with the promotion of the use of chicken meat products by members of the Association and was made on behalf of the members or pursuant to an arrangement with Baiada and Bartter and other members who were suppliers of the chicken meat products referred to on the Association’s website.
11. The purposes served by the exemptions contained in s65A(1) of the Act were explained by the Minister for Communications in his Second Reading Speech on the Amending Bill:

“These provisions ensure that information providers are not exempt from the consumer protection provisions of the Trade Practices Act in respect of the provision of information where they have what might be regarded as a commercial interest in the content of the information. In such cases, information providers must take the same responsibility for the accuracy of information as any other person who publishes information in trade or commerce. This can occur, for example, where a newspaper has agreed to publish a ‘news’ item about a product in exchange for the product supplier taking out paid advertising in that publication.”

See Australia, House of Representatives, Parliamentary Debates (Hansard),13 September 1984, pp 1296-7.

1. The phrase “on behalf of” “bears no single and constant significance” and “may be used in conjunction with a wide range of relationships, all however, in some way concerned with the standing of one person as auxiliary to or representative of another person or thing”: see *Re Ross*; *ex parte Attorney General (NT)* (1980) 54 ALJR 145 at 149. The various publications about which complaint is made were made “on behalf of” the Association’s members in this sense.
2. The representations, made on the Association’s website, about chickens being free to roam in large barns were intended to promote the sale of chicken meat. That promotion was undertaken by the Association as the representative body of its members to advance the commercial interests of those members. As an information provider the Association was, like Baiada and Bartter, required to ensure that publication did not contravene ss 52 and 53(a) of the Act. This it failed to do.
3. As a result the exception provided for in s 65A(1)(a)(iii) and (vi)(A) applied. The consequence is that the Association is not able to claim the benefit of the “media safe harbour defence”.
4. The second exception, provided for in s 65A(1)(b) of the Act, was that an ‘advertisement’ was not to be treated as a “prescribed publication.”
5. Although it is not strictly necessary, in light of my findings in relation to the first of the claimed exceptions, I will also consider this second exception.
6. The ACCC contended and the Association denied that any of the relevant publications constituted an advertisement within the meaning of s 65A(1)(b).
7. The word “advertisement” is susceptible to a wide range of meanings. At its broadest it conveys the notion of making something generally or publicly known or giving the public notice of something: see *Deputy Commissioner of Taxation (Cth) v Rotary Offset Press Pty Ltd* (1971) 45 ALJR 518 at 521. The present context, supported by the Minister’s observations in the Second Reading Speech, suggest a narrower meaning which requires a business or commercial element to a publication before it answers the description of an “advertisement” in s 65A(1)(b).
8. In *Rothmans of Pall Mall (Australia) Ltd v Australian Broadcasting Tribunal* (1985) 5 FCR 330 at 338 the Full Court of this Court held that the word “advertisement”, standing alone, had a meaning which the Tribunal had attributed to it. That meaning was: “matter which draws the attention of the public, or a segment thereof, to a product, service, person, organisation or line of conduct in a manner calculated to promote or oppose, directly or indirectly, that product, service, person, organisation or line of conduct.” In that case the Court was concerned with what was said to be cigarette advertising. It said (at 339) that:

“That issue is to be objectively determined; the question being whether the material, on its face and without reference to the actual intentions of those concerned with its production or transmission, appears to be designed or calculated to draw public attention to, or to promote the sale or use of, cigarettes or to promote the practice of smoking. It does not matter that some part or parts of the total material do not, in itself or in themselves, answer the description of an advertisement for cigarettes or for smoking. The question is to be determined by reference to the nature of the material, considered as a whole. It is, of course, a common place of cinematic and television advertising that a significant proportion of the total footage is material free of any discernable commercial message, being designed primarily to attract and develop viewer interest. *The expressly commercial content is often a small proportion of the whole.*

As Gibbs J made clear [in *Rotary Offset*], material which otherwise answers the description of being ‘advertising material’ – or in the instant cases ‘an advertisement for, or for the smoking of, cigarettes or cigarette tobacco’ – *does not lose its character as such merely because it is calculated to serve other purposes as well. Advertisements are often designed to entertain or to amuse, sometimes to instruct. Material does not cease to be an advertisement of a relevant type simply because it is calculated to achieve such ends or because some viewers may value it more for these qualities than for its commercial message.* Similarly, many advertisements are calculated – and in a subjective sense intended – to enhance the general reputation or, to use the current jargon, ‘corporate image’ of the advertiser. The fact that a particular advertisement may have that propensity, or that it may be produced with that intention, does not preclude its characterisation – if it meets the test set out above – as an advertisement for a particular product or practice.” (Emphasis added).

1. The relevant publications were either media releases or brochures. All appeared on the Association’s website. The publications and their impugned contents are identified above at [53]. In one way or another each publication sought to promote the consumption of chicken meat in Australia. This was done, in part, by emphasising the nutritional value of chicken meat, rising consumption volumes and the quality of the husbandry of growing chickens. The “free to roam” representations were plainly directed to making chicken meat attractive to potential consumers who might have had ethical qualms about purchasing chicken products if the birds had been raised in cages or in other unpleasant circumstances.
2. The ACCC submitted that the statements did not constitute published information but were clearly advertisements because they contained statements that also appeared on product packaging. Unlike product packaging, however, the statements were not associated with a particular brand or manufacturers name or product. There is, nonetheless, an evident commercial purpose served by the press releases and brochures. It is, as I have already found, to promote the consumption of chicken products.
3. Even if it be accepted that the “free to roam” statements are informative in nature this does not, in the present contexts, mean that they cannot also be regarded as advertising material. The press releases and statements were directed to members of the public who were actual or potential consumers of chicken meat products. The publications as a whole and the impugned statements in particular, conveyed a favourable impression of both the process of raising chickens and the processed products which were sold in the market place. Although the material does not refer to specific brands or specific products it is cast in terms which clearly apply to all brands and products. The representations would be so understood by the reasonable reader of the Association’s website.
4. Each of the Association’s publications about which complaint is made is, in my opinion, an “advertisement” within the meaning of s 65A(1)(b) of the Act. Accordingly, the second exception on which the ACCC relied has been made out.
5. For this reason also the Association is not able to claim the benefit of the defence provided for in s 65A of the Act.

# DISPOSITION

1. My provisional view is that the ACCC is entitled to declarations in relation to the contraventions by the respondents. The parties should confer and, if possible, agree on the terms of declarations which reflect the findings recorded in these reasons.
2. In the event of there being any disagreement I will hear the parties about the terms of the declarations. I will also hear the parties on any further relief for which the ACCC presses in the light of these reasons.
3. The proceeding will be listed for mention once the parties have had the opportunity to consider these reasons so that directions can be given in relation to these outstanding matters.

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| I certify that the preceding one hundred and fifty-six (156) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Tracey. |

Associate:

Dated: 8 July 2013