



## **Submission to the ACCC**

**Certification Trade Mark Application No 1635381**

**PROOF - Pasture Raised On Open Fields**

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### **NSW Farmers' Association Background**

The NSW Farmers' Association (the Association) is Australia's largest State farmer organisation representing the interests of its farmer members – ranging from broad acre, Livestock, wool and grain producers, to more specialised producers in the horticulture, dairy, egg, poultry, pork, oyster and goat industries.



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## **Executive Summary**

NSW Farmers Association thanks the Australian Competition and Consumer Commission (ACCC) for inviting comment on the proposed Certified Trademark Application No. 1635381.

NSW Farmers is Australia's largest state farming organisation representing the interests of the majority of commercial farm operations throughout the farming community in NSW.

NSW Farmers acknowledges the work undertaken by PROOF in ensuring the veracity of the trademark. In particular, NSW Farmers has no specific objections on whether this CTM passes the tests set out in section 173 of the *Trade Marks Act (1995)*.

However, this CTM application raises serious questions for the ACCC in the context of competition law and consumer protection.

In relation to promoting competition based on transparent market information, NSW Farmers would submit that the trademark infers that other free-range products are not in fact free range. We provide this submission with specific reference to the labels proposed on the CTM application which uses the terms '*Certified Free Range*' and '*Is it free range? Ask for PROOF.*' These terms directly imply that other products displaying the term free range are not in fact free range. To certify is literally to attest or confirm that a product is of a particular type. If the PROOF logo is indeed confirming or attesting it would be likely that a reasonable consumer would interpret that other products with the label of free range are not in fact free range.

This would appear to be contrary to the principles underpinning competition and consumer protection laws. The label serves to undermine the claims of other free range products which do not conform to the particular certification requirements determined by the proponents of the PROOF certification and in doing so adds to consumer confusion around a specific term.

NSW Farmers' reiterates that it has no objection to the certification requirements which have been thoroughly addressed in relation to a number of animal husbandry and workplace issues. Our central and sole objection is that the certification requirements which underpin this trademark are inconsistent with the broader use of the term free range. In addition, the use of the term '*proof*' is inappropriate as it infers that other free range systems are not in fact, free range.

That is demonstrably not the case.

NSW Farmers would raise no objections to this CTM if it were not for the use of the term free range.

NSW Farmers primary objections to this proposal are:

1. This trademark seeks to appropriate the term free range by attaching that term to a series of underpinning certification practices that are more prescriptive than what a reasonable consumer would consider to constitute “free range.” In doing so this trademark raises competition and consumer issues regarding other free range labels. Further, we would submit that any positive affirmation of this trademark prior to the meeting and finalisation of a free range national information standard by the Legislative and Governance Forum on Consumer Affairs (CAF) would be premature and inappropriate. That decision is scheduled for February 2016.
2. The use of the term “PROOF” is misleading.
  - a. Poultry and pigs are not “pasture raised” and this would clearly raise issues of misleading and deceptive conduct.
  - b. The use of the term “PROOF” in the context of the trademark’s claim of certifying free range makes an implicit claim that other free range labels are not in fact free range. To prove is to attest or confirm the substance of a claim. Should this CTM be approved it would erode consumer trust around other legitimate free range labels.

## **1. Free Range Poultry**

As the ACCC would be aware, the Legislative and Governance Forum on Consumer Affairs (CAF) met in Melbourne on Friday 12<sup>th</sup> June, 2015 to discuss the feasibility of developing a national standard on free range eggs.

As a result of this meeting, Ministers agreed on a process for the development of this national information standard; however, agreement on a standard was not arrived at.

Under Australian Consumer Law, a national information standard is designed to ensure consumers can make informed decisions about what they are purchasing.

The group agreed to request Consumer Affairs Australia New Zealand (CAANZ) working group to prepare a draft Australian national information standard on egg labelling for CAF Ministers to consider by the end of 2015 and for a decision meeting to be arranged for February 2016.

The draft standard will include a statement when the 'free range' label may be used. It should also include other potential "category" labels that producers could use.

NSW Farmers notes that the legislative arm of government has signalled to the public that a definition of free range is being worked on and will be defined through Australian Consumer Law by 2016. We would submit that the ACCC should recognise that this indication from governments calls for an appropriately timed consideration of what is and what is not free range.

Approving this CTM prior to the decision by CAF Ministers in relation to what will be a legally binding information standard of free range eggs would be an inappropriate and confusing signal to send to consumers.

NSW Farmers would further submit that the ACCC has a responsibility to recognise the broader legislative actions being undertaken and to assess the suitability of trademarks in a context of common sense. Approving this trademark prior to the finalisation of the CAF Ministers' work would be an avoidable error for one of the nation's most reputable regulators.

Free range egg farmers are still grappling with how to ensure they meet and exceed consumer expectations of free range. This is in spite of the vast majority of farmers meeting the industry definition that states:

*"Laying hens in free range farming systems are unconfined within a ventilated house. They have access to and are free to roam and forage on an outdoor range area during daylight hours in a managed environment."*

We would submit to the ACCC that consumers would be satisfied by this definition which is further underpinned by eight minimum standards to guarantee greater certainty and transparency on the use of the term. Should this trademark be certified, this rationale and consumer-minded definition of free range would be undermined and the consumer even further confused.

Perhaps most notably, many of the certification standards which underpin the PROOF trademark are already utilised in the certified organic egg trademark.

This application is attempting to appropriate the specifications of organic egg labelling and claim that these standards are 'proof' of free range.

NSW Farmers submits that this is not an appropriate categorisation of free range.

We further submit that the use of the word '*proof*' in the context of the use of the term free range would compound consumer confusion.

## **2. Free Range – sheep and cattle**

In line with the above, NSW Farmers would further submit that the use of the term free range for these production practices is unnecessary and somewhat bizarre. By their very nature grazing animals are free range. This is a misappropriation of the term and again raises consumer protection issues. If the certification requirements for sheep and cattle are to underpin a certified 'free range' standard, then we would submit that this label would fundamentally confuse consumers as to the production systems which underpin the rearing of grass-fed cattle and sheep.

Again here, we underline that we have no objections to the certification requirements of this label underpinning a trademark. However to use the term 'free range' as part of that trademark would be fundamentally misleading, historically inconsistent and confusing to consumers.

## **3. Conclusion**

We ask that the ACCC reject this trademark application on the basis that this application:

1. Seeks to appropriate the term free range to a suite of standards that are inconsistent with consumer expectations of free range and which would negatively affect legitimate free range label claim
2. Uses the term "PROOF" in two significant and misleading ways:

- a. By seeking to confirm or attest to the veracity of a free range label, this trademark creates increased consumer confusion by creating doubt about other legitimate free range claims.
- b. The use of the term “pasture raised” is inaccurate of the production systems which underpin poultry and pork farming practices.