

Commerce Commission Guidance on Free Range Egg and Poultry Meat Claims During an Avian Influenza Outbreak

Highly Pathogenic Avian Influenza (Avian Flu) outbreaks may occur in New Zealand from time to time. New Zealand is currently preparing for the potential arrival of the influenza type H5N1 variant which is circulating globally. Depending on the Avian Flu variant, an outbreak can be expected to impact the wild bird population and poultry industry. If an outbreak occurred, the government may advise or order (under the Biosecurity Act 1993), free range egg and poultry meat producers to keep animals indoors regionally or more extensively. It is also possible some poultry producers may voluntarily elect to house birds close to an impacted region to further limit risk to their own business without advice or a government order.

Misleading customers is illegal

The Fair Trading Act 1986 prohibits misleading or deceptive conduct and certain representations which are false or misleading. When customers are buying goods, they must be able to rely on the information that traders provide. Therefore, the labelling of eggs and poultry meat must be accurate and able to be substantiated in order to comply with the law.

In normal circumstances, it would be a breach of the Fair Trading Act for an egg or poultry meat producer to label their product as 'free range' if the animals do not have access to outside space.

Steps taken by free range egg and poultry producers in an Avian Flu outbreak

During an Avian Flu outbreak, the government may advise or order free range egg and poultry producers to house their animals indoors. Producers might also take proactive voluntary steps to protect their animals in anticipation of government orders or advice, or to mitigate business risk.

Commerce Commission guidance on enforcement discretion

The Fair Trading Act does not allow the Commission to issue an exemption to egg and poultry producers in relation to 'free range' claims, even in the event of an Avian Flu outbreak.

However, the Commission is able to exercise discretion in deciding whether to investigate or take enforcement action in individual cases and will consider all relevant circumstances in taking such a decision. This document is intended to provide guidance to egg and poultry meat producers in relation to the exercise of that discretion.

If following an Avian Flu outbreak a specific **housing order** was put in place by the government, or **government advise** producers to hold their animals indoors, or producers **voluntarily house** their animals due to their proximity to restricted areas in which housing

orders were in force, then the Commission would exercise its discretion not to take enforcement action against affected egg and poultry meat businesses (and retailers) selling produce labelled as 'free range' during an initial emergency period (for example 2 months).

Contingency options during an extended outbreak period

The Commission would expect all affected producers and retailers making free range claims about eggs or poultry meat to consider contingency options if housing orders, government advice, or voluntary housing were in place for an extended period.

Examples of contingency options include:

- a) conducting a public awareness campaign so the consumers understand why poultry cannot be free range for animal health reasons;
- b) organising contingency labelling arrangements, such as temporary packaging without free range claims, or placing stickers on the free range labels;
- c) working with retailers to have signs in stores.

Contingency labelling is particularly important as consumers rely on the accuracy of 'free-range' claims, and in many cases pay a premium for free range products.

The Commission's continued exercise of enforcement discretion during an extended period would depend on producers and retailers being able to demonstrate consideration and implementation of proportionate contingency options. The longer that a claim cannot be substantiated for, the higher the expectation for mitigations to be in place.

Please note that the Commission's guidance does not bind or represent the approach that may be taken by other parties.