



Committee Secretary
Community Affairs Legislation Committee
Department of the Senate
PO Box 6100
Parliament House
CANBERRA ACT 2600
Email: community.affairs.sen@aph.gov.au

Dear Madam/Sir

Accord is pleased to provide this submission to the Senate Community Affairs Legislation Committee Inquiry into the *Industrial Chemicals Bill 2017* and related Bills.

Executive Summary of Accord's position on the Bills:

- Accord supports the government's approach of introducing high-level, principles-based legislation to establish the new chemical reform framework and to subsequently define the technical/scientific assessment rules in subsidiary regulations.
- Having now had an opportunity to review the *Industrial Chemicals Bill 2017* and its related Bills, Accord commends the drafting team for the Bills' plain English, legal clarity and policy consistency.
- The new Act, if passed as per the drafted Bill, will be a vast improvement on the previous outmoded *ICNA Act 1989*.
- The Bills, as drafted, appropriately deal with significant issues such as animal testing and early actions to streamline assessment of low-risk polymer ingredients. Additionally, no substantive concerns regarding governance arrangements or agency powers are apparent in the Bills.
- Accord therefore recommends that the Parliament pass the Bills as written.
- Industry will remain vigilant on issues related to the subsequent regulations to ensure that they are workable, aligned where possible with international approaches, and do not compromise commitments given by the government to reduce red tape and cost, and thereby boost innovation.
- Accord would welcome further consultation with the Senate when the final regulations are tabled as disallowable instruments.
- And finally, Accord acknowledges these Bills are the product of a long policy development process which formally commenced with the 2008 Productivity Commission *Study on Chemicals and Plastics Regulation* and that this reform process has proceeded under both Coalition and Labor governments.

About us:

Accord is the national industry association representing manufacturers and marketers of formulated hygiene, cosmetic and specialty products, their raw material suppliers, and service providers. A list of our members is provided as Attachment 1.

By way of further background, Accord member companies make and/or market fast-moving consumer and commercial business-to-business goods including hygiene, cosmetic and specialty products, sunscreens, food contact sanitisers, industrial and agricultural sanitisers, household pesticides, disinfectants and specialty commercial products. A summary of the benefits of our industry's products is provided as Attachment 2.

Member companies include large global consumer product manufacturers as well as small, dynamic Australian-owned businesses. Fifty-two percent of member firms are SMEs (i.e. <200 employees). Collectively, Accord member companies contribute more than 15,000 full-time equivalent jobs, and on a combined basis across Australia they operate more than 180 offices and 60 manufacturing sites.

Accord Australasia Limited ACN 117 659 168 ABN 83 205 141 267
Fusion C4.02, 22 – 36 Mountain Street, Ultimo NSW 2007
PO Box 290 BROADWAY NSW 2007

Tel: 61 2 9281 2322 Fax: 61 2 9281 0366 Website: www.accord.asn.au

Products for healthy living and a quality lifestyle



Additional to Accord's role as an industry advocate, we promote sustainability and product safety via community education websites like *Hygiene for Health* (hygieneforhealth.org.au), *Washwise* (www.washwise.org.au), and *Sunsible®* (www.sunsible.org.au), our newest public education website with tips on sun protection and more effective sunscreen use.

Our cosmetics industry charity, *Look Good Feel Better* (www.lgfb.org.au), continues to improve the wellbeing and confidence of Australians undergoing cancer treatment, reaching close to 8,000 people nationally in 2016.

Accord's comments to the Committee:-

- Introductory comments

Noting the very short timeframe for providing our submission and comments, we have tried to do justice to the complexities in as brief as possible manner to aid the Committee's consideration. Fortunately, this has been helped by the fact that the Bills, as drafted, have been clearly written with a consistent and considered policy focus.

Having finally gained access to the details of these Bills has enabled Accord to now present the Parliament with more considered comments on these proposals.

Prior to sighting the Bills, Accord had produced and circulated two position papers – Accord's *Position Paper on NICNAS Reform Package* and Accord factsheet on *A Workable, Practical, Evidence-based Approach to Animal Test Ban Legislation* – and these are provided as background for the Committee in Attachment 3.

While the policy principles outlined by Accord in these documents are still highly relevant, being now able to consider the details of the Bills has meant that we have been able to confirm that the Bills are indeed broadly consistent with workable policy approaches which could be supported by industry.

However, it needs to be acknowledged that there will be further policy and technical debate in the process of the promised consultation which is still to occur for the subsequent regulations.

- Bills in the reform package for which Accord has **no** substantive comments/concerns

Accord notes that the following Bills simply provide a legislative mechanism to allow the chemicals assessment agency to levy fees and charges against industry (consistent with the cost-recovery policy of the Australian government):

- *Industrial Chemicals Charges (General) Bill 2017*,
- *Industrial Chemicals Charges (Customs) Bill 2017*; and
- *Industrial Chemicals Charges (Excise) Bill 2017*.

While Accord's general policy position is that Australia's unique 100 percent cost-recovery approach for regulatory agencies is flawed and warrants reform to rebalance funding arrangements so that 'public good' activities are funded by government, we have no substantive issues with these three Bills in terms of their consideration by the Senate for the purpose of finalising the chemical reforms.

- *Industrial Chemicals (Notification and Assessment) Amendment Bill 2017*



Accord notes that this Bill has the effect of introducing one of the agreed early reform measures. In this case a streamlining of assessment for low-risk polymer ingredients (a.k.a. polymers of low concern). Accord supports this Bill and recommends that the Senate pass it as written.

- *Industrial Chemicals (Consequential Amendments and Transitional Provisions) Amendment Bill 2017*

Accord notes that this Bill provides for the introduction of transitional arrangements to enable a seamless transition from the old law to the new law. In this regard, the Bill appears to provide a mechanism to achieve this. Accord notes that importantly the Bill includes a provision to enable the Minister to make rules to modify transitional arrangements to deal with unforeseen issues which may arise due to the complexity of the old law. Based on this, Accord supports this Bill and recommends that the Senate pass it as written.

- *Industrial Chemicals Bill 2017*

Accord notes this Bill is the framework legislation for the new chemical assessment regime and that this new framework is intended to reform the old National Industrial Chemical Notification and Assessment Scheme to introduce a more risk-proportionate approach for chemicals assessment.

From Accord's viewpoint, just how well this new framework streamlines chemical assessment will depend heavily on the details outlined in the subsequent technical regulations.

Industry's success measures for the final operation of the new Australian Industrial Chemicals Introduction Scheme (AICIS) will be whether it results in practical and meaningful reduction in red tape and cost.

On the question of cost, Accord notes that when the government announced its reform approach back in 2015, the then minister responsible stated that: "*The NICNAS will move to a more proportionate risk-based framework to assess chemicals including chemicals imported into Australia. Simplifying this process is expected to save business around \$23 million a year and benefit all sorts of companies – from cosmetics manufacturers to producers making household products.*"

Accord supports the government's approach of introducing high-level, principles-based legislation to establish the new framework and to subsequently define the technical/scientific assessment rules in subsidiary regulations. However, a proper assessment of cost savings is not possible until the final form of the regulations and technical rules are known. In this regard, industry will not be able to judge the likely performance of the new framework from a red tape and cost saving perspective for some time.

That said, having now had an opportunity to review the *Industrial Chemicals Bill 2017* (and its related Bills), Accord commends the drafting team for this Bill's plain English, legal clarity and policy consistency. Our reading is that the new Act, if passed as per the drafted Bill, will be a vast improvement on the previous outmoded, and often confusing, ICNA Act 1989.

In reviewing this Bill, Accord was alert to any alarm bells that may have been triggered by the regulator being granted new discretionary powers which were not appropriately balanced with appeals mechanisms and administrative law provisions. Our conclusion is that the Bill avoids



any pitfalls on such matters. Likewise, Accord also notes the overall soundness of the governance model outlined by the Bill.

As the representative body of the personal care and cosmetics products industry in Australia, Accord notes that the Bill cements in place Australia's approach of regulating personal care product ingredients as industrial chemicals.

While Accord has in past years proposed detailed options for regulation more aligned to international approaches, we acknowledge that the government has instead opted for cosmetics and personal care products to stay within the industrial chemicals framework, and that this is most likely a bipartisan position.

We also note the *Industrial Chemicals Bill 2017* enacts an animal test ban for cosmetics and that the provisions to achieve this have been carefully drafted in a manner which makes them consistent with the government's considered policy approach. For details on Accord's position regarding what would constitute a workable approach to fully implementing an animal test data ban for cosmetics via the associated regulations, please refer to our two-page factsheet included in Attachment 3.

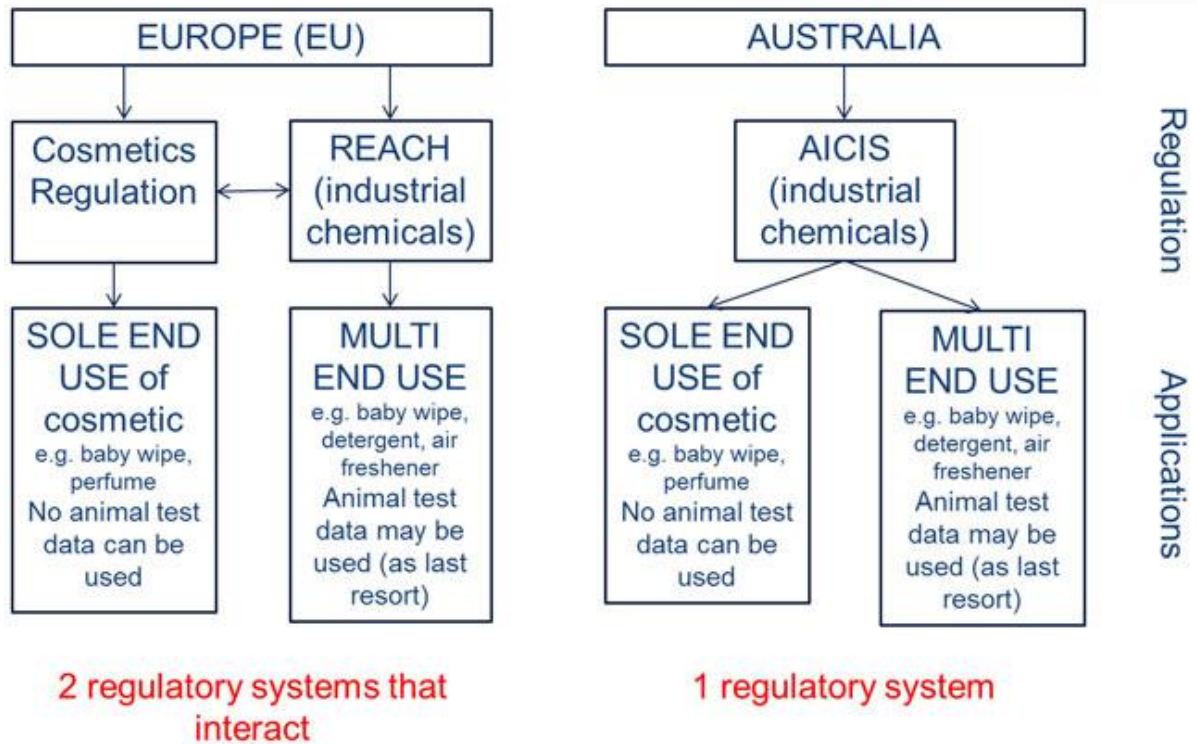
Critical to the workability and success of any such ban provisions is that they do not adversely impact on global trade and that they do this by aligning with, rather than diverging from or exceeding, the approaches of Australia's major trading partners. The benchmark in this regard would be the European Union and Accord notes that the government's policy approach, which has been informed by extensive stakeholder consultation, newly commissioned public opinion research and expert advice from Health Department officials, aligns well with the EU approach as it applies at an operational level across the European market.

As a major global trading zone, the EU has been careful to ensure that its animal test data ban approach does not constitute an import ban. Import bans can have a serious impact on a nation's trade status and international relations, transgressing WTO trade rules and risking retaliatory actions from impacted trading partners. Late last year Accord commissioned an expert report from trade law and policy consultancy, ITS Global, on the trade implications of some previously stated animal test ban positions. This expert report is provided as background in Attachment 4, though it needs to be noted that the negative trade policy scenarios it reported are not believed to be triggered by the Bill's provisions, as drafted.

Accord therefore suggests the Committee notes that the Bill, as part of the government's overall policy approach to the animal test issue, has the desired effect of establishing the framework needed to align Australia with the state-of-the-art animal testing rules of the EU. It is therefore recommended that the Bill as drafted in its entirety be passed unamended by the Senate.

Accord also suggests that Senators interested in more specifics about bringing to Australia an animal test ban aligned with that of the EU, review the informative and helpful explanatory material outlined by Health Department experts in the March 2017 Consultation Paper (which we have provided a copy of as Attachment 5) and also on the Department's website at <http://www.health.gov.au/internet/main/publishing.nsf/Content/ban-cosmetic-testing-animals>.

The Health Department has recently published the following helpful graphic to show the alignment between the EU approach and the new Australian system, which this Bill will implement:



Graphic copied from <http://www.health.gov.au/internet/main/publishing.nsf/Content/ban-cosmetic-testing-animals>

A further informative element of the Health Department's policy consultation on the animal testing ban implementation, was their approach of seeking opinions and perspectives from the general public, rather than just relying on freely vocalised opinions from either industry or animal welfare campaigners. Accord understands that this research was commissioned from Hall & Partners Open Mind and included telephoning polling as well as 1.5-hour qualitative consumer panel sessions.

As noted in our Factsheet a key public consultation finding from this research and referenced by the Health Department in the March Consultation Paper is as follows: "Consumers expressed that they do not want to disadvantage businesses importing cosmetics or exporting Australian products to overseas markets. Consumers have an expectation that government ensure that the broader economic impacts are minimised when implementing the ban."

Conclusion and recommendation:

Accord recommends that the Parliament pass the Bills as written.

9 June 2017

Accord contacts in relation to this submission:

Mr Craig Brock, Policy & Public Affairs Director
Phone – 02 9281 2322
Mobile - 0422 363 646
Email – cbrock@accord.asn.au

ATTACHMENT 1

Members

Consumer, Cosmetic and Personal Care

Advanced Skin Technology Pty Ltd
Amway of Australia Pty Ltd
AVON Products Pty Limited
Beiersdorf Australia Ltd
Chanel Australia
Clarins Group/Trimex Pty Ltd
Clorox Australia Pty Ltd
Colgate-Palmolive Pty Ltd
Combe Asia-Pacific Pty Ltd
Cosimer Pty Ltd
Coty Australia Pty Limited
De Lorenzo Hair & Cosmetic Research Pty Ltd
Edgewell Personal Care
Elizabeth Arden Australia
Emeis Cosmetics Pty Ltd
Estée Lauder Australia
Frostbland Pty Ltd
GlaxoSmithKline Consumer Healthcare
Hairjamm Pty Ltd
Helios Health & Beauty Pty Ltd
Henkel Australia Pty Ltd
Inglot Cosmetics Pty Ltd
Integria Healthcare (Aus) Pty Ltd
International Hair Cosmetics Group Pty Ltd
Johnson & Johnson Pacific
KAO Australia Pty Ltd
Keune Australia
Kimberly-Clark Australia
La Biosthetique Australia
La Prairie Group
L'OCCITANE Australia Pty Ltd
L'Oréal Australia Pty Ltd
LVMH Perfumes and Cosmetics
Mary Kay Cosmetics Pty Ltd
Muk Haircare Pty Ltd
Natural Australian Kulture Pty Ltd
Nutrimetics Australia
NYX Pty Ltd
Pacific SMM Pty Ltd
Panamex Group
Pierre Fabre Australia Pty Ltd
Procter & Gamble Australia Pty Ltd
PZ Cussons Australia Pty Ltd
Reckitt Benckiser
Revlon Australia
SC Johnson & Son Pty Ltd
Scental Pacific Pty Ltd
Shiseido Asia Pacific Pte Ltd
Skin Health Pty Ltd
Syndet Works Pty Ltd
The Heat Group Pty Ltd
Ultraceuticals
Unilever Australasia
Vitafive
Weleda Australia Pty Ltd

Commercial/Hygiene & Specialty Products

A S Harrison & Co Pty Ltd
Albright & Wilson (Aust) Ltd
BP Castrol Australia Pty Ltd
Brenntag Australia Pty Ltd
Castle Chemicals Pty Ltd
Clariant (Australia) Pty Ltd
Crisp Solutions
Deb Australia Pty Ltd
Dominant (Australia) Pty Ltd
Dow Chemical (Australia) Pty Ltd
Ecolab Pty Limited
E.D. Oates Pty Ltd
Huntsman Corporation Australia Pty Ltd
Hypred SAS
Ingredients Plus
Lab 6 Pty Ltd
Novozymes Australia Pty Ltd
Nowra Chemical Manufacturers Pty Ltd
Peerless JAL Pty Ltd
Recochem Inc
Schulke Australia Pty Ltd
Solvay Interlox Pty Ltd
Sopura Australia Pty Ltd
Symbio Australia Pty Ltd
Tasman Chemicals Pty Ltd
Thor Specialties Pty Limited
True Blue Chemicals Pty Ltd
Whiteley Corporation Pty Ltd

Associate Members

Corporate Travel Services

Platinum Travel Corporation

Graphic Design and Creative

Ident Pty Ltd

Legal and Business Management

FCB Lawyers

K&L Gates

KPMG

TressCox Lawyers

Recruitment

On Q Recruitment

Logistics

Chylis Pty Ltd

Regulatory and Technical Consultants

Clare Martin & Associates Pty Ltd

Competitive Advantage

Davoren Environmental Pty Ltd

Engel, Hellyer & Partners Pty Ltd

RFA Regulatory Affairs Pty Ltd

Seren Consulting Pty Ltd

Sue Akeroyd & Associates

Tudor Chem Pty Ltd

UL International Australia Pty Ltd

Specialist Laboratories and Testing

Dermatest Pty Ltd

D.Lab Solutions Pty Ltd

Eurofins ams Laboratories Pty Ltd

June 2017

ATTACHMENT 2



Benefits of the products Accord members make and market

Our sector's products play a vital role in:

- Safeguarding public health: Maintaining essential standards of hygiene and sanitation in institutions, hospitality, manufacturing, agriculture and at home.
- Promoting personal well-being: Helping people keep clean, healthy and shielded from harmful effects of the environment.
- Maintaining comfortable homes: Enabling people to keep their everyday surroundings clean and inviting.
- Enhancing quality of life: Giving people greater personal freedom through time- and effort-saving technologies.
- Boosting confidence and emotional wellbeing: Providing opportunities for self-expression, individuality and pampering.
- Keeping the wheels of commerce and industry turning: Fulfilling specialised uses in industry, institutions and agriculture

This includes the following important products: *adhesives, aftershave, air-care products, antiperspirants, automatic dishwasher detergents, baby-care products, bar soaps, bath additives, body treatments, car-care products, carpet cleaners, cleaning solvents, cosmetics, dairy & poultry sanitisers, dishwashing detergents, deodorants, depilatories, fabric care products, fabric softeners, floor cleaners, furniture care products, gel cleaners, hard-surface cleaners, hair conditioner, hair colour treatments, hospital disinfectants, household insect sprays, hygiene products, industrial cleaners, industrial specialities, liquid bleach, liquid soaps, make-up, moisturisers, mouthwash, mould remover, nail-care products, oven cleaners, personal insect repellents, sanitising scrubs, sealants, shampoo, shoe-care products, shower & bath cleaners, skin-care products, sunscreens, toilet cleaners, toothpaste, water treatment agents, window cleaners.*

ATTACHMENT 3

ACCORD'S POSITION PAPER ON NICNAS REFORM PACKAGE

New chemical reforms must result in practical and meaningful reduction in red tape and cost



What is proposed?

- The Federal Government will soon table legislation to reform the regulation of industrial chemicals currently undertaken by the National Industrial Chemicals Notification and Assessment Scheme (NICNAS).
- Unlike many other advanced economies, the Australian hygiene, cosmetic and specialty products industry is regulated under industrial chemicals regulation, as well as ACCC consumer product safety provisions, the Health Department's Chemical Scheduling system and a myriad of additional State and Territory legislation.
- The Government has previously promised that these reforms will reduce red tape and costs for industry, with then-Minister Senator Fiona Nash stating in 2015 that: "The NICNAS will move to a more proportionate risk-based framework to assess industrial chemicals, including chemicals imported into Australia. **Simplifying this process is expected to save business around \$23 million a year** and benefit all sorts of companies – from cosmetics manufacturers to producers making household cleaning products."
- Chemical regulation reform has been a slow and complex process since the Productivity Commission set out a reform blueprint in its 2008 report Chemicals and Plastics Regulation. Since then, there have been multiple promises of streamlining regulation to boost innovation, yet little has happened.
- Industry funds all industrial chemicals regulation in Australia under the Government's cost-recovery policy arrangements – again contrary to the approach of other advanced economies.

The Australian hygiene, cosmetics and specialty products industry supports the government's decision to:

- Introduce new principles-based legislation for the regulator's operating framework, and then establish in regulations the vital technical rules for how chemicals are assessed.
- Make changes to the existing NICNAS legislation to support early 'reform' in agreed areas.

The industry needs timely access to new ingredients through a better and more contemporary regulatory system to stay competitive and meet consumer demand.

Industry also supports the Government's policy intent of streamlined and proportionate regulation to boost innovation while efficiently and effectively protecting safety and the environment.

However, several important issues and concerns remain unclear or unanswered:

- The Government's approach should not delay consideration of legitimate industry questions on key technical elements.
- Some proposals may be unworkable and not aligned with overseas regulations, potentially putting Australia out of step with key trading partners.
- The type and extent of regulatory controls which will be invoked is unclear, and hence how these relate to common ingredients and products.
- Key governance and administrative law issues, including the powers of the new regulator's Executive Director, are not yet resolved.

MORE CONSULTATION IS NEEDED

As the associated regulations have not yet been fully developed or shared with industry, it is important that all parties consult widely with industry when these regulations are introduced to Parliament.

If the regulations do not implement the Government's commitment to reduce red tape and costs in a practical and meaningful way, MPs and Senators should consider moving their disallowance.

ACCORD'S POSITION PAPER ON NICNAS REFORM PACKAGE

ABOUT ACCORD

Accord represents Australian manufacturers and suppliers of hygiene, cosmetic and specialty products used by Australian families and businesses – our industry spans the full range of formulated products: cleaning and hygiene, disinfectants, personal care products such as toothpastes, deodorant, mouthwash, antibacterial hand washes, cosmetics, sunscreens, perfumes and fragrances, adhesives, sealants and protectants. Our members alone directly employ over 15,000 people, with more than 250,000 downstream jobs depending on health, agricultural, food manufacturing, hospitality, building and other industries which use our members' products. Australian exports of locally-made hygiene, cosmetic and cleaning products are worth about \$860 million per year. The industry is committed to safety, sustainability and innovation.

**Please contact Accord if
you have any questions or
seek further information:**

Craig Brock
Director, Policy and Public Affairs

T 02 9281 2322

M 0422 363 646

E cbrock@accord.asn.au

www.accord.asn.au

A workable, practical, evidence-based approach to animal test ban legislation

What is proposed by the government?

Legislation to enable a national ban on the use of new animal test data to support new chemicals used exclusively as cosmetic ingredients will be introduced into Parliament later this year as part of broader reforms to industrial chemicals regulation. Implementation of the ban will start on 1 July 2018 to provide industry with a transition period and align with broader industrial chemical reforms.

The legislation implements a Coalition commitment during the 2016 election to introduce a ban on cosmetic testing on animals from 1 July 2017 to harmonise Australian practice with international approaches to the use of animal test data.

Animal testing of cosmetic products is not conducted in Australia, and has not been conducted for several decades.

What products will be affected by the ban?

Cosmetics in Australia include many essential hygiene products used by Australian families including toothpaste, deodorant, mouthwash, antibacterial handwash, baby care products and a range of makeup and beauty products.

What do consumers want?

Extensive consumer research including focus group discussions and an online survey conducted by the Commonwealth Department of Health in November-December 2016 found that Australians have the following views in relation to the proposed ban:

This is not a high-profile issue for consumers, who seek education and clarity regarding animal testing practices in Australia:

“Animal testing practices and the potential effect of a ban on animal testing of cosmetics were not high-profile issues for these consumers. **Around 35% of consumers did not know whether the ingredients or products currently available in Australia were tested on animals.** Few consumers were aware that animal testing of cosmetic ingredients or products does not occur in Australia.”



An assurance that any ban won't adversely impact on industry or consumers:

“Consumers expressed that they do not want to disadvantage businesses importing cosmetics or exporting Australian products to overseas markets. Consumers have an expectation that government ensure that the broader economic impacts are minimised when implementing the ban.”

The Australian cosmetics industry seeks the support of all MPs and Senators to develop a workable, practical, evidence-based approach which is consistent with the policy approach outlined by the government.

A realistic adjustment period for industry:

“Consumers noted that the introduction of a ban was complex and appreciate the scale of adjustment required from industry. Because of this, consumers expected that the ban will be phased in gradually to provide organisations time to comply and innovate, and to allow consumers time to adjust. Consumers typically estimate the phase-in period for a ban will be between 1-5 years.”

Source – *Ban on the Testing of Cosmetics on Animals: Consultation Paper March 2017, Department of Health*



A workable, practical, evidence-based approach to animal test ban legislation

What does Accord support?

The Australian cosmetics industry – which directly employs 18,000 people – is committed to animal welfare and safety for consumers, workers and the environment.

The industry supports a **workable, practical, evidence-based approach** which is supported by the following elements as proposed by the Federal Government:

- **A ban on the use of new animal test data** to support new chemicals used exclusively as cosmetic ingredients
- **Amendment of the National Health and Medical Research Council (NHMRC) Australian Code** for the Care and Use of Animals for Scientific Purposes to ban cosmetic testing on animals
- The NHMRC to work with States and Territories to **adopt the amended Code into State and Territory laws**
- The Government to work with the cosmetics industry to develop a **voluntary industry code of conduct** on animal testing of cosmetic products
- An information and communications approach to **provide clarity for consumers and industry** around promotional claims that can and cannot be made on cosmetic products

It is also important that the following exemptions from the ban as outlined by the Government are implemented in full:

- The use of data from animal testing undertaken before the implementation of the ban.
- Cosmetic products and ingredients which are already on sale in Australia before the implementation of the ban, as any animal testing has already been undertaken.

- Chemical substances used for a different purpose (e.g. a therapeutic or pesticide).
- Repurposing a chemical substance (and any associated animal test data) used initially for a different purpose, for subsequent use in a cosmetic product.
- Animal testing for a different purpose e.g. biomedical research, drug development, or occupational health and safety and environmental protection.

What does a workable approach look like?

Support for the principles and exemptions outlined above will ensure a workable approach which meets the following criteria:

- **A realistic transition timeframe** for businesses and the regulatory system
- **No disruption to critical medical research** and/or other industry sectors
- **No retrospective reach**, recognising most chemical/botanical substances have been animal tested in the past
- **No extraterritorial reach** via a direct/indirect import ban, which would breach World Trade Organisation rules and Free Trade Agreement provisions
- **Alignment with Australia's major trading partners**
- **Exceptions which recognise that ingredients used in other products can continue to be used in cosmetics**
- **Exceptions allowing for environmental protection and Occupational Health and Safety testing** (as occurs in the European Union)

The Australian cosmetics industry seeks the support of all MPs and Senators to develop a workable, practical, evidence-based approach which is consistent with the policy approach outlined by the government.

Please contact Accord if you have any questions or seek further information:

Craig Brock
Director, Policy and Public Affairs

T 02 9281 2322

M 0422 363 646

E cbrock@accord.asn.au

www.accord.asn.au



ATTACHMENT 4

TRADE LAW AND POLICY ADVICE BRIEF: Proposed 'bans' on animal tested cosmetic products and cosmetic ingredients

Report prepared for Accord Australasia
October 2016



CONSULTANTS ON GLOBAL ISSUES

ABOUT ITS GLOBAL

ITS Global specialises in public policy in the Asia Pacific region. Its expertise encompasses international trade and economics, direct foreign investment, environment and sustainability, international aid and economic development: and corporate social responsibility and management of strategic risks.

The firm's public sector clients have included the Australian Department of Foreign Affairs and Trade (DFAT), the Australian Agency for International Development (AusAID), the US Agency for International Development (USAID), the UK Department for International Development (DfID), the Ministry of Economy Trade and Industry of Japan (METI), the Organisation for Economic Co-operation and Development (OECD), the Asian Development Bank (ADB), the United Nations Development Program (UNDP), the ASEAN Secretariat, and the APEC Secretariat.

ITS Global
Level 1, 34 Queen Street,
Melbourne VIC 3000
AUSTRALIA
Tel: (61) 3 9620 3400
Fax: (61) 3 9614 8322
www.itsglobal.net

Executive Summary

The Government has committed to amend legislation regulating the use of chemicals by imposing restrictions on imports of cosmetics which have been developed after testing on live animals. The policy rationale is concern for animal welfare.¹

Accord sought advice on the consistency of such a measure with Australia's international trade obligations under the World Trade Organization (WTO) and Free Trade Agreements (FTAs).

The proposed measure appears to conflict with WTO rules which, in summary, require equal treatment of products from all trading partners who are members of the WTO. In this case the measure would restrict imports of cosmetics from countries where cosmetics are tested on animals as required by law, but not from economies where this is not the practice. It would amount to a ban on some trade.

The proposed import ban also raises issues of conflict with Australia's trade obligations in free trade agreements with the United States, China, Japan, Korea and ASEAN (covering Thailand and Singapore) as well as the Trans Pacific Partnership agreement (TPP) (covering the United States, Japan, Canada and Singapore), which incorporates the core WTO provisions.

Banning imports from important trading partners would risk exposing Australia to accusations of breaching commitments to open markets in the WTO and as a party to its bilateral and regional agreements. Such action is patently not in Australia's national or trade interests.

There are alternative strategies for addressing consumer and public concern about animal welfare that are more effective and less trade-disruptive than a blunt instrument such as a trade ban.

ITS Global recommends that Accord advise senior trade officials in the Department of Foreign Affairs and Trade (DFAT) of the implications of the pre-election commitment by the Coalition to ban imports of cosmetics that have been tested on animals, and the risk that such an action may cause problems with trading partners. It should be pointed out to the Trade Minister that there is already a process in place to alter how cosmetic products and ingredients should be regulated and that action to address animal testing should be deferred until this process is completed.

¹ As cited in <http://nationals.org.au/the-coalition-will-ban-cosmetics-tested-on-animals/>. The previous Labor private members' *Ethical Cosmetics Bill* does not refer to animal welfare.

Contents

Executive Summary	3
I. The proposed measure	5
i. Trade measures proposed	5
ii. Products at issue	6
iii. Trade affected	6
II. The adverse trade effects of the measure	9
i. Global benefits created by international trade rules	9
ii. The consistency of the measure with international trade obligations	9
Consistency with the GATT	9
Consistency with the TBT Agreement	11
Consistency with Australia's FTAs	11
iii. Impacts of the measure	11
Implications for the international trading system	11
Impact on relations with trading partners	12
IV. Lessons from previous experience –trade and animal welfare	13
V. The economic inefficiency of using trade measures to regulate domestic activity	14
VI. Alternative strategies and recommended action	15
i. Alternative strategies	15
Non regulated options	15
Regulated options	15
ii. Recommended action for Accord	17
Annex 1. Consistency of the proposed measure with international trade obligations	18
Annex 2. Relevant legal provisions in GATT/WTO and Australia's FTAs	28

I. The proposed measure

i. Trade measures proposed

There are three trade measures proposed:

1. A ban on the conduct of animal testing in Australia;
2. A ban on the manufacture in Australia of products and ingredients which have been/are tested on animals (in Australia or anywhere in the world);
3. A ban on the importation of products and ingredients that have been tested on animals (in Australia or anywhere in the world);

The measures arise as a result of proposed legislative changes to the *Industrial Chemicals Notification and Assessment Act 1989* (ICNA Act), set out in the now lapsed Labor *Ethical Cosmetics Bill 2015* (the Bill), and affirmed by a Coalition announcement in June 2016 (hereafter 'the Announcement').

The Bill amends the ICNA Act to create new and additional offences for live animal testing. Under Section 81B it will be illegal to manufacture or import cosmetic products and cosmetic ingredients that have been tested on animals. Breach of the provisions is an offence, punishable by monetary penalties. Section 81B applies to testing carried out from the time of effect of the legislative changes. Section 81E states that these changes are 'subject to Australia's international obligations.'

The Coalition has announced that it '*will ban cosmetics tested on animals*' - presumably through an approach similar to the Bill - and that '*the ban will take effect on 1 July 2017*'. The policy is to ban: the testing of finished cosmetic products on animals in Australia; the testing of cosmetic ingredients in Australia, and; the sale of cosmetic products and ingredients that have been tested on animals outside of Australia.² This is consistent with the Bill, but it also contains a ban on the *sale* of products in Australia.

There are no further details of how the Coalition would give effect to this policy, only that there would be some 'exceptions' for "*responsible animal testing for medicinal clinical trials, medicinal drug development or medicinal studies.*"

The policy justification given by the government for the proposed measures is one of animal welfare - to '*make sure testing is used only in 'ethically justifiable circumstances'* given that, '*testing on animals is unethical, unnecessary and of highly questionable value and should stop.*'

This paper focuses principally on the third measure – an import ban on cosmetic products and cosmetic ingredients if they have been tested on animals.

² <http://nationals.org.au/the-coalition-will-ban-cosmetics-tested-on-animals/>

ii. Products at issue

The term 'Cosmetic products' captures a wide range of personal care and household products, such as soap, shampoo, deodorant, and toothpaste, as well as luxury beauty items, including perfumes and makeup.³ They are defined as any 'substance that is designed to be used on any external part of the human body—or inside the mouth—to change its odours, change its appearance, cleanse it, keep it in good condition, perfume it or protect it.'⁴

Cosmetic ingredients include chemicals that are widely used in personal care and household products (e.g.: the surfactant sodium lauryl sulphate, and glycerol) as well as ingredients that may be used in other types of products, such as food preparations (e.g.: derivatives of palm oil or palm kernel oil are used as skin conditioning agents.) These ingredients are not captured by statistics for 'cosmetic ingredients'. They may be imported for uses other than in cosmetic ingredients (e.g.: agricultural oils such as palm oil are used in food preparations as well as cosmetics).

Cosmetic products typically contain many different ingredients marketed under a single brand.

In Australia, 'cosmetics' and 'cosmetic ingredients' include the wide range of chemicals which are regulated under the ICNA Act.⁵

iii. Trade affected

Imports of cosmetic products into Australia are important, supplying the majority of the local market,⁶ predominantly through foreign owned global companies (e.g.: German-based Beiersdorf - Nivea, French-based L'Oreal, Chanel etc. or US-based, Estee Lauder, Revlon etc). The domestic manufacturing industry is small and focused on larger volume, everyday use cosmetic products like shampoo, as well as soap and cleaning products.

The United States (US) and Europe (France and the United Kingdom) are major suppliers of finished cosmetic products, mainly perfumes and luxury beauty and skin- and hair-care products. China and Thailand are growing sources of imports. Other markets in Asia (Korea and Japan) as well as Canada also export to Australia.

Raw material ingredients for cosmetic products are mainly imported from the US, Europe and Asia. Suppliers of raw cosmetic materials into Australia are distinct from suppliers of finished cosmetic products.

The indicative value of Australia's imports⁷ of perfumery and cosmetics (TRIEC 553) and soap and cleansers (TRIEC 554) by source are noted in Table 1 below.

³ They include, for example: perfumes and toilet waters; beauty and skin care products including make-up preparations, manicure and pedicure preparations; hair care products such as shampoos and conditioners, hair lacquers and dyes, preparations for permanent waving or straightening; oral care products such as mouthwash, dental floss, shaving preparations, personal deodorants and antiperspirants, bath preparations; sunscreens and suntan preparations; and soaps and cleansers.

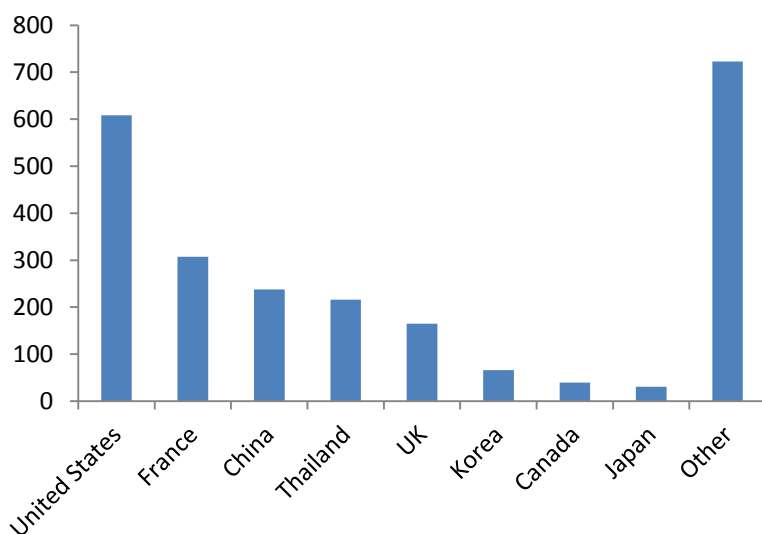
⁴ <https://www.nicnas.gov.au/chemical-information/cosmetics-and-soaps/cosmetics-and-therapeutic-goods#cosmetic>, accessed September 2016.

⁵ Cosmetic' is defined under Article 5(1) as 'a substance or preparation intended for placement in contact with any external part of the human body, including: (i) the mucous membranes of the oral cavity; and (ii) the teeth; with a view to: (iii) altering the odours of the body; or (iv) changing its appearance; (v) cleansing it; (vi) maintaining it in good condition; or (vii) perfuming it; or (viii) protecting it; or (b) a substance or preparation prescribed by regulations made for the purposes of this paragraph.'

⁶ Accord estimates 70% of products are imported and 30% made locally.

⁷ Statistics are indicative of major markets only as they do not capture all product categories of cosmetic products nor include imports of cosmetic ingredients.

Table 1. Indicative imports of cosmetic products into Australia, million \$AUD, 2014-15



Source: DFAT Country and Commodity Pivot Table 2014-15 'Australia's Merchandise Imports and Exports' accessed at www.dfat.gov.au

Live animal testing is not conducted on cosmetic products which have been manufactured in the European Union (EU). *EU Regulation 1223/2009* (the Regulation) bans the manufacture and sale (in the EU) of cosmetic products and ingredients that have been tested on animals, with some exceptions.⁸

The European Court of Justice (ECJ) ruled in September 2016⁹, that the Regulation effectively requires cosmetic products to be tested (to verify their safety) using methods alternative to animal testing in order to be sold on the EU market - cosmetics which have been tested on animals to verify their safety are in breach of Regulation. It does not prevent companies from marketing products in the EU which have been tested on animals in other countries, so long as these tests are not used to demonstrate product safety in the EU. The ECJ ruling clarifies the legal scope of the EU regulation as it applies under EU law; it does not interpret the consistency of the EU regulation under WTO law.¹⁰

In the US there is no mandated ban on animal testing for cosmetics. It is up to the manufacturer to verify if a cosmetic placed on the market is safe, using tests on animals or alternative methods, otherwise the cosmetic must bear the statement 'the safety of this product has not been

⁸ *EU Regulation 1223/2009 (Cosmetics Regulation)* makes it illegal to market or sell cosmetics in the EU where the finished product or ingredients have been tested on animals. There are exceptions where animal testing is permitted: (i) tests to assess the risks to workers (those involved with the production or handling of the substance on an industrial site) exposed to the substance; (ii) tests for environmental reasons when there is no other way (eg: to determine the safety of a chemical in biological organisms and across ecosystems).

⁹ See Judgement of the Court (First Chamber) 21 September 2016, Case C-592/14 *European Federation for Cosmetic Ingredients v Secretary of State for Business, Innovation and Skills*. <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-592/14&td=ALL>

¹⁰ There are differences between the content and implementation of the EU Regulation and the measures proposed in the *Ethical Cosmetics Bill*. The consistency of the EU Regulation under WTO law requires a separate analysis. While no WTO disputes action has been initiated by EU trading partners over the Regulation to date, it is notable that the European Commission raised concerns about its WTO consistency to the European Parliament in 2000 during the development of the Cosmetics Directive. See (2000) *Proposal for a Directive of the European Parliament and of the Council amending for the seventh time Directive 76/768/EEC of 27 July 1976 on the approximation of the laws of Member States relating to cosmetic products*. COM (2000) 189 final, 5 April 2000., accessed at http://aei.pitt.edu/32912/1/COM_2000_189_final.pdf

determined'. New active ingredients in over-the-counter products¹¹ must generally prove their safety on the basis of animal studies and clinical trials.¹²

In China in contrast, animal testing is required by law for cosmetic products as a condition of sale. Finished cosmetics require a hygiene license or record-keeping certificate from the Health Administrative Department of the State Council which can only be obtained by the submission of animal data.

In Japan a toxicological dossier is required for some cosmetic products and ingredients,¹³ which includes animal tests when there are no alternatives available.

Animal testing is not generally conducted in Australia as most of the cosmetic products which are manufactured locally are not 'new' –existing safety assessments (animal tests or alternative methods) are relied upon and do not have to be repeated. Cosmetic ingredients are regulated as 'industrial chemicals' by the Australian regulator, the National Industrial Chemicals Notification and Assessment Scheme (NICNAS), and are therefore subject to the toxicology animal test data requirements outlined in Schedule Part C of the ICNA Act.

¹¹ Such as anti-acne, anti caries/anti-plaque, anti-hair loss, anti-dandruff, anti-perspirant products, skin whiteners, sun protection products.

¹² See <http://www.understandinganimalresearch.org.uk/policy/cosmetics/>, accessed September 2016.

¹³ For example: hair dyes and decolourants, anti-hair loss products, hair permanents/straighteners, depilatories, anti-perspirant, deodorant, anti-acne, skin whiteners, bath treatment products, and medicinal cosmetics such as anti-dandruff shampoos. Refer footnote above.

II. The adverse trade effects of the measure

i. Global benefits created by international trade rules

The rules of the General Agreement on Tariffs and Trade (GATT), the primary instrument of the set of rules managed by the World Trade Organization (WTO), achieve their primary purpose – the common reduction of barriers to trade among parties by: (i) regulating tariffs at the border; (ii) requiring all parties to adopt the same measures, and; (iii) making a legally-binding commitment not to alter that commitment or to restrict trade in goods between parties, except in a few exceptional cases. This set of rules has been very effective in opening global markets and raising living standards.

There is a limited set of exceptions to these rules which include measures to protect human and animal health and safety. Strict conditions regulate the use of those exceptions. For example, quarantine controls on imports can only be justified if there is scientific evidence which demonstrates that the measures address adverse impacts.

The fundamental principle is that the rules of the GATT are designed principally to remove barriers to trade and not to achieve other objectives, such as improving animal welfare.

Such measures also cannot be used arbitrarily in ways which would impede trade with one or more parties to the WTO, but not others.

ii. The consistency of the measure with international trade obligations

The proposed measure is likely to be inconsistent with Australia's treaty obligations in:

- The WTO, including the General Agreement on Tariffs and Trade 1994 (GATT) and The WTO Agreement on Technical Barriers to Trade (TBT Agreement);
- Free Trade Agreements (FTAs) with trading partners affected by the ban: Australia/US Free Trade Agreement (AUSFTA); the China/Australia Free Trade Agreement (CHAFTA); the Japan/Australia Economic Partnership Agreement (JAEPA); the Korea Australia Free Trade Agreement (KAFTA); the ASEAN Australia New Zealand Free Trade Agreement (AANZFTA - covering Thailand and Singapore) and potentially the Trans Pacific Partnership agreement (TPP - covering the US, Canada, Japan and Singapore).

ITS Global's conclusions are set out below. A more detailed analysis of each of the legal provisions is in Annex 1.

Consistency with the GATT

There is a strong case to be made that the ban, as proposed in the Bill (and the scope of the Announcement):

- Breaches the obligation to accord 'most favoured nation treatment' in Article I.1 of the GATT. It discriminates between countries because it permits imports of cosmetic products and ingredients from some countries, but not others, on the basis of whether or not these products have been tested on animals. Particular cosmetic products may be legally imported from country A (where they have not been tested on animals, for example, the EU) but illegal when imported from country B (where they may have been tested on animals, for example, the US or Asia);

- Is inconsistent with the prohibition on quantitative restrictions in Article XI of the GATT. Even though there is not a direct ban or quota, the penalties set out in the Bill are a prohibition or restriction on importation because the penalty is imposed for importing particular products. Furthermore, the Bill may limit imports of products that have not been tested on animals as well as those that have because it may cause importers to avoid importing products where they consider that there is a substantial risk that the products may have been tested on animals or contain ingredients that have been tested on animals;
- May be inconsistent with the 'national treatment obligation' in Article III:4 of the GATT. The import ban may 'modify the conditions of competition' in the Australian market in favour of domestic production by disadvantaging foreign exporters of cosmetic products and ingredients that test their products on animals (for example, where it is required by law), *vis a vis* domestic manufacturers which rarely conduct animal testing, or are not required to by law.

It is unlikely, but less clear whether the ban could be 'justified' under the 'exceptions' to these rules in Article XX of the GATT, either as a measure necessary to protect public morals, or to protect animal health. This may depend on how much weight the WTO would give to animal health concerns versus possible health and safety concerns. Even if the ban was 'provisionally justified' under either of these grounds, it would still need to meet the requirements of the chapeau in Article XX of the GATT.

Provided it can be established that the same conditions prevail among the various countries exporting to Australia, it is likely the ban contained in the Bill amounts to 'unjustifiable and arbitrary discrimination' and fails the requirements of the chapeau in Article XX because of the way it is designed and applied. The discrimination arising as a result of the ban is arbitrary because it:

- imposes one rigid standard for all cosmetic products, with no exceptions, regardless of the actual impact on animals of various testing methods that are applied;
- may inadvertently ban products which have not been tested on animals because importers do not know whether or not the products or ingredients they are importing have been tested on animals somewhere along the supply chain;
- bans imports of chemicals which have been tested on animals for use in cosmetic products (cosmetic ingredients) but does not ban similar imports of these chemicals for use in other products (such as food or industrial application) which may also have been tested on animals- 'dual use' ingredients;
- does not make the sale of cosmetic products that have been tested on animals in Australia an offence – offences apply to the manufacturers and importers only.

It is unsettled in WTO law whether there is an extra territorial limitation on measures falling under the exceptions provisions of the GATT. Notwithstanding this, the extraterritorial reach of the import ban at least raises further potential grounds of inconsistency under the chapeau to Article XX.

The ban as proposed in the Bill is not - in ITS Global's view - justified under Article XX and is therefore inconsistent with Australia's obligations under the GATT.

Consistency with the TBT Agreement

The Bill in its present form is not a technical regulation falling within the scope of the TBT Agreement as it does not lay down physical characteristics for cosmetic products or ingredients which are imported. It may be subject to the Agreement in the event the legislation sets out product identification requirements to demonstrate compliance.

If the Bill falls within the TBT Agreement, it is likely to be inconsistent with TBT disciplines because it is discriminatory (as per the GATT analysis) and more trade restrictive than necessary to achieve its objectives. There are alternative, less trade restrictive measures that could be put in place to protect animal health other than a blanket import ban (see Part III Alternative measures).

Consistency with Australia's FTAs

The import ban is likely to be inconsistent with Australia's trade obligations under bilateral free trade agreements with the US, China, Japan, Korea as well as the trade agreement with ASEAN (covering Thailand, Singapore) and the TPP agreement (covering the US, Japan, Canada and Singapore), which incorporate the core provisions of the GATT. The import ban:

- is inconsistent with Article 2.9 of AUSFTA; Article 2.6 of KAFTA; Article 2.8 of JAEPA; Article 2.7 of CHAFTA; Article 7, Chapter 2 of AANZFTA, and; Article 2.10 of TPP (as a quantitative restriction on trade);
- may be inconsistent with Article 2.2 of AUSFTA; Article 2.2 of KAFTA; Article 2.3 of JAEPA; Article 2.3 of CHAFTA; Article 4, Chapter 2 of AANZFTA, and; Article 2.3 of TPP (breaching the national treatment principle) and;
- is likely not justified under Article 22.1 of AUSFTA; Article 22.1 of KAFTA; Article 1.9 of JAEPA; Article 16.2 of CHAFTA; Article 1, Chapter 15 of AANZFTA, and; Article 29.1 of TPP (as a general exception).

There may also be grounds for the US to challenge breaches of TBT obligations under the AUSFTA.

The import ban potentially also raises issues of inconsistency with Australia's investment obligations in FTAs with the US, Korea, Japan, China and also the TPP. The TPP, KAFTA and CHAFTA agreements all include rights for investors (as opposed to governments) to challenge breaches of investment obligations where their investments are affected..

iii. Impacts of the measure

Implications for the international trading system

There has been a growing inclination among activist groups based in industrialised economies to seek to constrain trade in certain products as a means of curbing activities in other jurisdictions to which the activists object. Animal welfare, illegal logging and so-called "conflict minerals" are some examples of issues that have been addressed in this way.

These groups are driven by two main motivations. First, they recognize that other countries may not be inclined to take direct action to address the issues that concern the activist groups. It is not unusual for developing countries, whose primary international concern is to raise living standards and reduce poverty, not to attribute the same weight to these issues of social concern as do higher income industrialized economies. Second, some activists oppose free trade as matter of principle and readily support activities which aim to hinder the operation of free international markets. Frequently there is little broad international support for such action.

The capacity of the international trading system to raise living standards and reduce poverty will be impeded if its authority to fulfil its primary purpose – maintaining free and open international markets - is diminished.

Impact on relations with trading partners

The specific proposal under consideration risks generating friction with economies such as US and China, two of Australia’s most important trading partners. That in itself is reason enough not to pursue the course of action being proposed when other measures to address the measure are available.

IV. Lessons from previous experience –trade and animal welfare

Australian industry has had several other experiences where interest groups have sought to impede trade as a tool to advance non-trade issues. The results have been mixed.

Mulesing

PETA (People for the Ethical Treatment of Animals), an animal activist organisation, ran a campaign in the US a few years ago attacking Australian merino wool products because of the practice of mulesing (this is the removal of skin on the hind quarters of sheep to reduce the incidence of insect infection). PETA made allegations against Australian merino wool in a public marketing campaign in US fashion capitals.

PETA did not seek to block trade but instead sought to pressure buyers to avoid Australian merino wool. The industry had programs in place to phase the practice out, but PETA maintained the campaign. The Australian merino industry responded to this and other protests by setting a deadline for the phasing out of the practice of mulesing.

Live cattle exports

Animal activists mounted an animal welfare campaign against the live cattle export industry in Australia which led the Australian government to temporarily halt cattle exports to Indonesia. Indonesia complained that Australia was in breach of its international trade obligations. It did not take the matter up in the WTO, as it was entitled to do.

Instead the decision to block the trade left graziers stuck with stock en route to the shipping points without the capacity to feed them. The costs were significant, and graziers launched a class action against the government claiming damages of as much as one billion dollars.

Sow Stalls

Campaigns have been run by animal activists to make it a legal requirement that sows be housed in large pens, rather than small stalls as a more humane method of management. This is a costlier approach to pig farming than standard practices. Australian producers sought advice on the implications of seeking to restrict (lower priced) pork imports by securing regulations that all pork sold in Australia be “sow stall free”. It was not clear that this would be consistent with WTO rules, and in the end the initiative was not pursued.

The pork industry instead set about marketing Australian pork as humanely raised. The differentiation provided by this appears to be winning consumer support.

As some of the foregoing demonstrates, there are alternative strategies for addressing consumer or public concern about animal welfare instead of the complications of trying to use a blunt instrument such as a trade ban.

V. The economic inefficiency of using trade measures to regulate domestic activity

Trade restrictions designed to alter economic incentives are generally an inefficient and costly way to address non-economic problems, such as animal welfare.

According to economists¹⁴, economic efficiency ought to be one of the major criteria for evaluating proposed environmental, health, and safety regulations. Efficiency in resource allocation, or *Pareto optimality*, requires the equating of marginal social cost and marginal social benefit.

When an externality exists¹⁵, such as global harm to animals from testing, the prices in a particular market do not reflect the true marginal costs and/or marginal benefits associated with the goods and services. A competitive economy will not achieve a Pareto optimum in the presence of externalities. Thus, some form of policy is required to equate benefits and costs. A cost-effective policy should aim to regulate until the incremental benefits from regulation are just offset by the incremental costs.

Economic theory prescribes the use of 'market-based' instruments rather than 'command-and-control' instruments to achieve this.¹⁶ Command and control regulation, such as banning an activity (e.g.: imports of cosmetics that have been tested on animals) tends to be politically popular as it has a moral appeal.¹⁷ The main disadvantages of command and control instruments are that they are highly interventionist and allow relatively little flexibility in the means of achieving the desired goals. They may require the establishment of a large bureaucracy to administer the program and can discourage the adoption of new technologies. They are generally not cost-effective.

Market-based instruments are often described as 'harnessing market forces' by encouraging behaviour through market signals rather than through explicit directives. They are preferred as being more flexible and less interventionist, have less unintended effects, and are more effective in encouraging the adoption of new technologies.

Another explanation is that a ban in Australia may simply lead to trade in animal tested products being diverted to alternative markets. Then, the world as a whole might continue consuming animal tested products, leading to an inefficient outcome where the externality is not addressed.

¹⁴ See Mäler, Karl-Göran and Vincent, Jeffrey R. (2003) *Handbook of environmental economics*, accessed at <http://www.knowledge-leader.net/> and U.S. Office of Technology Assessment (1992) *Trade and the environment: Conflicts and opportunities*. Report no. OTA-BP-ITE-94. Washington, D.C.: Government Printing Office, accessed at <http://www.ciesin.org/docs/008-067/chpt3.html#fn24>

¹⁵ Externalities arise when certain actions of economic agents have unintended external effects on others. Negative externalities are costs not borne by their creators but placed on third parties and society as a whole.

¹⁶ Zilberman, David (1999) *Externalities, Market Failure, and Government Policy*, Department of Agricultural and Resource Economics, University of California at Berkeley, accessed at <http://are.berkeley.edu/~zilber11/EEP101/Detail%20Notes%20PDF/Cha03,%20Externalities.pdf>

¹⁷ Autor, David (2010) *Externalities, the Coase Theorem and Market Remedies*, Massachusetts Institute of Technology, accessed at http://ocw.mit.edu/courses/economics/14-03-microeconomic-theory-and-public-policy-fall-2010/lecture-notes/MIT14_03F10_lec13.pdf

VI. Alternative strategies and recommended action

i. Alternative strategies

There are alternative options for policy consideration which could be pursued to achieve the objectives behind the government's Announcement regarding improving animal welfare outcomes in the manufacture and sale of cosmetic products. Both regulated and non-regulated approaches can be advanced by the industry and put to government - in lieu of the proposed import ban - that have less potential to adversely impact trade. ITS Global suggests consideration of the approaches below.

Non regulated options

Non-regulated (voluntary) measures are developed by the private sector or non-government organisations (NGOs), and are not enforced as a matter of law. Compliance is not mandatory and tends to be market driven by either consumers or retailers. As campaigns by groups such as PETA demonstrate, these measures can be effective. International trade rules do not govern the actions of private parties.

Develop private welfare standards supported by labeling

The least trade restrictive way to phase out animal testing is campaigning by private groups to persuade consumers to avoid products developed with animal testing. Such methods have been effective in the past. Private welfare standards supported by voluntary product labelling for cosmetic products (e.g.: 'cruelty free' or 'not tested on animals') facilitate consumer awareness and informed choices. They avoid conflict with international trade rules. Voluntary standards can be applied equally to domestic and imported products for sale in the Australian market provided the label or product mark complies with the Trade Practices Act and other requirements under domestic law.

Support contractual arrangements with retailers to source only 'cruelty free' cosmetics

Large retailers can conclude agreements with their suppliers for the supply of products that meet animal welfare or other standards. These requirements may be formalised through contractual arrangements or may form part of the retailer's procurement policy. The applicable 'standards' and the process by which they are certified varies. Some retailers use private labels, such as 'cruelty free'. Various global cosmetics companies have already committed to the sourcing of cosmetics which have not been tested animals in their domestic and global operations.

Consumer demand and commercial viability (for both the retailer and the supplier) are important drivers of these measures. They may not benefit manufacturers not supplying major retailers. Compliance with domestic competition laws is also a consideration.

Regulated options

Regulatory approaches require government action, either through international forums, or the enactment of domestic legislation or regulations. Government regulations relating to trade are subject to international trade rules.

Recognition agreements for 'ethical' cosmetics imports

Australia could unilaterally 'recognise' cosmetic products and ingredients which are exported from other countries which as a matter of law do not conduct animal testing, such as the EU, the UK and New Zealand. Imports from these countries would be 'recognised' as meeting animal welfare standards that are equivalent to that sought through the trade ban and legally permitted to be imported to Australia based on home country regulation.

Recognition could also be applied to cosmetics from similarly regulated import markets to permit trade on the basis of welfare and safety 'equivalent' cosmetic approval processes (e.g.: the US). Recognition could be accorded through changes to domestic law or regulation - New Zealand for example, adopts a 'deemed to comply' approach for products in safe, approved use overseas – or bilaterally through mechanisms in existing FTAs.

Most of Australia's FTAs have provisions which encourage regulatory recognition and have 'built in' frameworks for bringing regulators of the parties together to cooperate on regulatory issues of concern (e.g.: various committees and working groups). The AUSFTA for example, designates an agency 'Coordinator' in each country which is bound to consider any sector specific proposal for cooperation or recognition brought to it by the other party.¹⁸

Recognition agreements would need to be based on objective criteria and open to other countries in order to avoid operating in a discriminatory way (thereby falling foul of WTO rules, and some FTAs), particularly if agreements were constructed as an exception to, rather than in place of, the trade ban.

Negotiate bilateral agreements to address animal testing in cosmetic products

Bilateral agreements regulating trade in cosmetic products more broadly could be sought with affected trading partners, particularly those for which recognition is less feasible (e.g.: Thailand, China). Agreements could include provisions to facilitate greater regulatory alignment in testing methods and practices without the use of trade measures.

Agreements could be negotiated pursuant to or in addition to existing FTAs. For example:

- The TPP Annex on Cosmetic Products (not yet in force) sets out procedures and guidelines for technical regulations, standards, testing procedures and marketing authorisation requirements. It prohibits parties from requiring animal testing for cosmetic products except where there is no validated alternative method available, and permits the consideration of animal testing results for reasons of safety;¹⁹
- The Trade and Investment Partnership Agreement (TTIP) currently being negotiated between the US and the EU²⁰ envisages an Annex dealing with regulation of cosmetics. According to the EU proposal, not yet endorsed by the US, the Annex seeks to promote, among other things, the convergence of technical requirements and relevant standards; the use of validated alternative methods to animal testing; and multilateral and bilateral regulatory cooperation on matters of common interest.²¹ The proposal includes provisions to encourage parties to support the research, development, validation and regulatory acceptance of alternative methods to animal testing, and requires parties to accept test results generated from validated alternative methods. Parties are prohibited from requiring animal testing for safety purposes, except in some circumstances.²²

¹⁸ Article 8.9 AUSFTA

¹⁹ See Annex 8-D Cosmetic Products to the TPP.

²⁰ As of September 2016 negotiations were on hold due to the decision of the UK to leave the EU.

²¹ TTIP EU Proposal for an Annex on Cosmetics, July 2016, accessed September 2016 at http://trade.ec.europa.eu/doclib/docs/2016/july/tradoc_154796.pdf

²² The proposal states that where there are 'exceptional circumstances, where serious concerns arise as regards the safety of an existing cosmetic ingredient' animal testing may be used where 'the ingredient is in wide use and cannot be replaced by another ingredient capable of performing a similar function, or the specific human health problem is substantiated and the need to conduct animal test is justified and is supported by a detailed research protocol proposed as the basis for the evaluation.'

Agreements could also create commitments to abide by model codes of best practice in conducting animal testing practices and set out voluntary standards with which producers could comply, based on internationally agreed criteria (see below).

Negotiations, however, would take time and would depend on the willingness of regulatory authorities in foreign markets to address these issues.

Negotiate an international agreement on animal welfare standards for cosmetic products

It is open to any party to promote an international agreement that sets out animal welfare standards applied to cosmetic products and which includes a ban on animal testing. Such an agreement would apply among signatory countries. Measures which are aligned with or based on international standards are a priori consistent with TBT rules.

There are currently no international agreements that set out animal welfare standards for use in cosmetic products, and none that envisage the use of trade controls for their enforcement. There are as yet no alternative testing methods and results for products and ingredients that are universally accepted as meeting health and safety standards, though the EU and the US have embarked on a joint project to develop harmonized, alternative, non-animal testing methods to be submitted to the OECD process for international validation.²³

There is little likelihood of such an agreement being negotiated multilaterally, based on the current lack of international consensus on welfare standards and how they should be regulated. The likelihood of securing agreement among trading partners within a short time period is low.

That however does not provide a justification to use trade restrictions to advance animal welfare goals. The primary function of trade agreements is to facilitate, not restrict trade. The WTO agreements are carefully structured so that restrictions for non-trade purposes are confined to carefully designed 'exceptions'.

Notwithstanding this, development of internationally agreed alternative testing methods should remain a longer term goal for government and the industry, alongside the implementation of other (regulated or non-regulated) measures.

ii. Recommended action for Accord

ITS Global recommends that Accord:

1. Advise senior trade officials in DFAT of:
 - the implications of the pre-election commitments by the Coalition to ban imports of cosmetics produced using animal testing, and;
 - the risk that this may cause problems in trade relations with major trading partners.
2. Request the officials arrange a meeting for Accord with the Trade Minister so they can point out:
 - there is already a process in place to alter how cosmetic products and components should be regulated, which these amendments will overturn;
 - action should be deferred until the process of re-regulation of chemicals is completed.

²³ The project involved cooperation between the U.S. Interagency Coordinating Committee on the Validation of Alternative Methods and the European Center for the Validation of Alternative Methods (ECVAM). It is unclear how far this process has progressed. See USTR, National Trade Estimates Report of Foreign Trade Barriers 2009, accessed at https://ustr.gov/sites/default/files/uploads/reports/2009/NTE/asset_upload_file348_15473.pdf

Annex 1. Consistency of the proposed measure with international trade obligations²⁴

i. Applicable trade law

The issue is whether the proposed measure (the import ban as set out in the Bill, hereafter ‘the ban’) conflicts with Australia’s treaty obligations in the WTO and FTAs.

- Relevant WTO law includes the General Agreement on Tariffs and Trade 1994 (GATT) and the Agreement on Technical Barriers to Trade (TBT Agreement).
- FTAs with trading partners affected by the ban include the Australia/US Free Trade Agreement (AUSFTA); the China/Australia Free Trade Agreement (CHAFTA); the Japan/Australia Economic Partnership Agreement (JAEPA); the Korea Australia Free Trade Agreement (KAFTA); the ASEAN Australia New Zealand Free Trade Agreement (AANZFTA – covering Thailand and Singapore) and potentially the Trans Pacific Partnership Agreement (TPP – covering US, Japan, Singapore and Canada).

The consistency of the proposed ban under each of these agreements is considered below.

ii. Consistency with the GATT 1994

There are two main questions:

- i. Is the ban consistent with GATT ‘non-discrimination’ obligations (most-favoured-nation treatment, national treatment) and disciplines on quantitative restrictions in Articles I:1, III and XI:1 respectively of the GATT 1994?
- ii. Are any general exceptions to these rules available to justify the ban under Article XX of the GATT 1994?

Consistency with GATT disciplines

Most favoured nation treatment

Article I:1 of the GATT provides that where a WTO member grants ‘any advantage, favour, privilege or immunity’ to any product in international trade, the Member must also grant it to any other ‘like product’ originating in or destined for the territories of all other Members. This obligation precludes discrimination between ‘like products’ in international trade and applies to ‘all rules and formalities in connection with importation’, thus covering the import prohibition in the Bill. The MFN principle will be breached where particular products that are ‘like’ are treated differently.

The elements of a contravention of Article I:1 are:

- That the measure at issue creates an ‘advantage’; and
- That the advantage is not accorded to all ‘like products’ in international trade.

²⁴ The description and analysis of GATT and TBT provisions in this Annex draws on ‘*The Consistency of Australia’s Illegal Logging Prohibition Bill with International Trade Rules*’ by Andrew Mitchell and Glyn Ayres, commissioned by ITS Global in 2012. It does not constitute legal advice.

Does the Bill Confer an 'Advantage'?

'Advantage' has a broad meaning in Article I:1, covering any form of competitive advantage conferred on any product. An advantage may either be conferred 'directly', as a result of positive treatment of the product in question, or 'indirectly', as a result of negative treatment of other products with which the product in question is in competition.

The criterion in the Bill for determining whether a cosmetic product may be imported is whether it has been tested on animals, either in the exporting country or a third country. This creates a strong possibility of discrimination because it means that particular cosmetic products may be legally imported from country A (where they have not been tested on animals, but by an alternative method, say in EU) but illegal when imported from country B (where they may have been tested on animals, say in US or Asia), thus creating an 'indirect' advantage for products from country A. In some countries non animal testing methods may be too expensive or not available. As a result, while the vast majority of cosmetic products from some countries (e.g.; EU) may be legally imported into Australia, those from other countries may not.

Are cosmetic products tested on animals 'like' cosmetic products that are not tested on animals?

In WTO law, the meaning of 'like products' varies according to its context. The WTO Appellate Body, the final arbiter of WTO disputes, has determined that 'likeness' is 'fundamentally ... about the nature and extent of a competitive relationship between and among products.' Four factors are relevant to whether two products are 'like': (1) physical similarities; (2) the end uses of the products; (3) consumer perceptions; and (4) tariff classification.

Particular cosmetic products (or groups of products, such as perfumes, shampoos, lip sticks, mouth wash, etc) which have been tested on animals are physically identical to the same cosmetic products which have not – for example, a particular perfume tested on animals and a particular perfume tested by an alternative method. The end uses of the product are the same – to be applied as cosmetics. The tariff classification is the same. They are directly competitive in the marketplace and are highly substitutable. The only factor which could differentiate the products could be consumer perceptions distinguishing products deemed to be 'welfare friendly' in the market from those that are not, such that they are not directly competitive or substitutable. Presumably this would be limited to products for which the consumer had some form of information by which to differentiate the products, such as a 'cruelty free' label or similar marketing. Perceptions would vary among the different types of cosmetic products. Consumer tastes and habits would be a less relevant factor for cosmetic ingredients which are not marketed at the retail level.

It is a matter of debate as to whether the processes and production methods by which products are produced are also relevant to 'likeness' when those methods do not otherwise relate to the products themselves (e.g. by affecting their physical properties). It is therefore unclear as to whether the WTO would consider the method and type of testing of cosmetic products as a factor in the consideration of likeness (e.g. whether a cosmetic product tested on animals is 'like' a cosmetic product tested by other means).

The balance of consideration of the four factors of 'likeness' supports a finding that cosmetic ingredients tested on animals are 'like' cosmetic products that are not tested on animals. There may be a case to argue that animal tested particular cosmetic products are not 'like' non animal tested products on the basis of consumer perception, or process and production methods, though this is more contentious. A determination of 'likeness' by the WTO would require a more detailed analysis by product given the wide range of products and chemical ingredients considered to be 'cosmetic products' (e.g.: perfume, make up, sunscreen, shampoos, hair dyes).

There is a strong case to be made that the ban discriminates between like cosmetic products (and ingredients) and that it is inconsistent with Article I:1 because it would confer indirect 'advantages' on cosmetic ingredients and products from some countries without according them to all 'like products' originating from all WTO Members.

National treatment

Article III:1 of the GATT 1994 sets out the general principle that internal measures should not be applied to imported or domestic products 'so as to afford protection' to domestic production. Preventing such protection is the primary purpose of Article III. Paragraph 4 of Article provides that Members must accord imported products 'treatment no less favourable' than that accorded to 'like products' of national origin. This obligation applies to 'all laws, regulations and requirements affecting [the] internal sale, offering for sale, purchase, transportation, distribution or use' of such products. It applies only to 'internal' measures. The national treatment obligation will be breached where imported products are treated less favourably than 'like' domestic products.

The issues under Article III:4 are:

- Whether the Bill accords 'less favourable treatment' to 'like' imported products; and
- Whether the Bill is an 'internal' measure.

Does the Bill Accord 'Less Favourable Treatment' to 'Like' Imported Products?

On its face, the Bill does not treat imported products less favourably than domestic products – it makes it illegal to import, and also to manufacture domestically, a cosmetic product or ingredient that is tested on animals. However, the WTO Appellate Body has held that 'less favourable treatment' in Article III:4 can exist where the measure at issue 'modifies the conditions of competition' in favour of domestic production. Domestic manufacture of cosmetics in Australia rarely involves animal testing – most products are not 'new' and have already been tested in third markets. Ingredients are sourced primarily from countries where animal testing is not undertaken (e.g.: EU). Thus, a ban on domestic testing would not disadvantage domestic manufacturers of cosmetic products. The import ban however, could disadvantage manufacturers in foreign markets which do test their products on animals, (for example, where it is required by law) by precluding them from exporting to Australia as final products or as ingredients for domestic manufacture. This could constitute discrimination under Article III:4 (provided imported and domestically manufactured products are 'like').

Is the Bill an Internal Measure?

Article III applies to 'internal' measures only and not to border measures, which are dealt with under Article XI. However, the Note *Ad* Article III clarifies that if a product is barred at the border because it fails a requirement that is also applied to like domestic products, Article III applies to the border measure. The Bill contains internal measures, by prohibiting animal testing in Australia, and also the manufacture of products in Australia that have been tested on animals. The Coalition Announcement goes further and also mentions a prohibition on the sale of those products in Australia. The import ban applies the same criteria and thus bars products on the basis that they fail requirements that also apply to like domestic products. The ban therefore could be considered an internal measure which falls within Article III.4.

The ban as proposed in the Bill (and the scope of the Announcement) may be inconsistent with Article III.4 where it modifies the conditions of competition' in the Australian market in favour of domestic production.

Quantitative restrictions

Article XI:1 of the GATT 1994 prohibits the imposition of quantitative restrictions, specifically ‘prohibitions or restrictions’ of any kind, other than duties, taxes or other charges, on ‘the importation of any product’. Measures that impose a penalty for importing a particular product are considered to be ‘prohibitions or restrictions’ on importation. Any measure that has the *de facto* effect of limiting imports is a ‘prohibition or restriction’, notwithstanding that there may be no *de jure* limitation.

The Bill does not actually directly ban the importation of, or impose a quota on, cosmetic products or ingredients that have been tested on animals. Instead, it makes it an offence for those who import such products where the importer has the requisite degree of knowledge (or fault element in the ICNA Act). The focus is on the *act* of importing such products, rather than on the products themselves. Even though there is not a direct ban or quota, the penalties set out in the Bill are still a ‘prohibition or restriction’ on importation contrary to Article XI:1 because the penalty is imposed for importing particular products.

The Bill will also likely have the further *de facto* effect of limiting imports because it may cause importers to avoid importing products where they consider that there is a substantial risk the products may have been tested on animals or contain ingredients that have been tested on animals. Thus, the Bill may limit imports of products that have not been tested on animals as well as those that have. That this would be a choice made by importers in response to the Bill, rather than the result of a *de jure* ban on such products would not relieve Australia of responsibility for the restrictive effects of the Bill.

For these reasons, there is a strong case that the importation offence in the Bill is a restriction on importation and is inconsistent with Article XI:1.

Application of ‘exceptions’ to GATT disciplines

Measures that are inconsistent with provisions of the GATT may be justified under the ‘general exceptions’ found in Article XX. To justify a measure under Article XX, a member must show:

- First, that it is provisionally justified under one of the sub paragraphs of the Article, and;
- Secondly, that it complies with the chapeau of the Article.

The sub paragraphs that Australia might invoke to justify the Bill cover measures: (a) necessary to protect public morals’, and; (b) necessary to protect human, animal or plant life or health’.

In addition, Australia would also need to demonstrate that the measure also complies with the chapeau, in that it is ‘not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade’.

Necessity test

To be provisionally justified under sub paragraphs (a) or (b) the measure must meet the legal test of ‘necessity.’ It must be shown that the Bill pursues the objective set out in the paragraph, and also that the measures in the Bill are ‘necessary’ to achieve that objective. Under WTO law a determination of ‘necessary’ involves weighing and balancing the contribution the measure makes to the objective with the extent to which the measure restricts international trade, and considering whether a less trade restrictive measure exists to achieve the objective.

Is the Bill 'necessary' to protect public morals?

The first question is whether the Bill pursues the objective of protecting public morals. Under WTO law this can be determined on the basis of 'all available evidence, including texts of statutes, legislative history and other evidence regarding the structure and operation of the measure at issue.'

While the Bill clearly sets out requirements for animal testing, the Explanatory Memorandum to the Bill does not refer to the protection of public morals or even to animal welfare. It simply states that its objectives are to 'propose four new offences (to the INCA Act) regarding live animal testing in addition to existing offences regarding the approval and assessment of an industrial chemical.' The objectives of the INCA Act are to support human health and safety and the environment in relation to the use of and importation of chemicals ('to provide for a national system of notification and assessment of industrial chemicals for the purposes of aiding in the protection of the Australian people and the environment by finding out the risks to occupational health and safety, to public health and to the environment that could be associated with the importation, manufacture or use of the chemicals; importers and manufacturers of the chemicals.') In relation to cosmetic products, the objective of ICNA is to provide 'national standards for cosmetics imported into, or manufactured in, Australia and the enforcement of those standards'. On its face the Bill therefore appears not to have the objective of protecting public morals.

If significant weighting were given to other material relating to the Bill which referred specifically to animal welfare or ethical concerns as the reason for the amendments (such as media statements), it is possible that animal welfare could be raised as an objective of the Bill. Whether animal welfare would be considered an issue of public morals however, is controversial.

Provided the objective of the Bill was to protect public morals, the Bill's contribution to the achievement of this objective would need to be weighed against its trade restrictive effects. The degree to which the ban would contribute to improved animal welfare outcomes is not clear. It is possible that rather than reducing the incidence of animal testing, animal tested products would simply be diverted to other markets. The trade restrictive effects of the ban, including the potential costs of compliance on importers, could be potentially high. This is difficult to determine in the absence of research. A further consideration is whether animal welfare outcomes could be improved through less restrictive means, for example, a labelling requirement, or standards for testing, as opposed to an import ban. Unless it can be demonstrated that the Bill will at least make a material contribution to the protection of public morals, it will not fall within the scope of Article XX(a).

There has been only one WTO case in which the 'public morals exception' in Article XX (a) has been provisionally justified. That case concerned a ban by the EU on imports of seal pelts of seals that had been inhumanely clubbed to death (the 'Seals case'). The WTO disputes body held that animal welfare is an ethical responsibility for society in general, and in the EU. Taking into account the evidence presented in the case (including clear language in the law and its history that its aim was to address animal welfare), the WTO found the EU measure did address EU moral concerns regarding seal welfare. This decision potentially provides for some WTO members to establish a need for animal welfare related measures on moral grounds. However, the prevention of inhumane killing is not identical to the promotion of animal welfare in animal testing for cosmetic products, and the 'moral concerns' related to this. It is unclear the extent to which the findings in the Seals case can be extrapolated to the current measure.

Is the Bill 'necessary' to protect human, animal or plant life or health?

A similar analysis to that undertaken for para (a) of Article XX would be required to determine whether the measure is 'necessary to protect human, animal or plant life or health.' As previously noted it is debatable whether the objective of the Bill is to protect animal health. Although the ICNA Act is concerned with human health, it could be argued that the Bill does not protect human health, and could in fact place humans in danger of adverse effects arising from the use of alternative (non animal) testing methods which are not fully developed in all countries for all products.

Similar to the 'public morals' exception, should the objective be established however, its contribution to improving animal health would need to be weighed against the trade restrictive effects of the ban. In this case the WTO would need to weigh the benefits to animal safety against human health concerns. Relevant considerations would be the extent to which alternative testing methods are available. The Bill, for example, does not permit testing on animals even in the event that there is no alternative method available to assess safety.

It is unlikely, but far from clear whether the ban would be provisionally justified as an 'exception' to GATT rules, either as a measure necessary to protect public morals, or to protect animal health. Whether the ban can be provisionally justified under either of these grounds or not, it would still need to meet the requirements of the chapeau in Article XX of the GATT.

The chapeau

Once a measure has been shown to satisfy the requirements of the sub paragraphs of Article XX, the country maintaining the measure must show that it corresponds with the chapeau. The central requirement of the chapeau is that the measure not constitute 'a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail.' The WTO has interpreted this to mean discrimination that is 'not rationally connected to the objective or that would go against the objective.'

As demonstrated above, the Bill discriminates between countries because it permits imports of cosmetic products and ingredients from some countries, but not others, on the basis of whether these products have been tested on animals, as opposed to other methods.

The discrimination is arbitrary as it imposes one rigid standard for all cosmetic products, with no exceptions, regardless of the actual impact on animals of various testing methods that are applied. As it is often not possible for importers to know with certainty whether the products or ingredients they are importing have been tested on animals somewhere along the supply chain it may have the effect of banning products which have in fact not been tested on animals. Countries in which animal testing is mandated may divert trade to other markets where animal testing methods and welfare outcomes are worse. The Bill also prevents imports of chemicals which have been tested on animals that are for use in cosmetic products (cosmetic ingredients) but does not ban similar imports of these chemicals for use in other products (such as food or industrial application) which may also have been tested on animals. Furthermore, the Bill does not make the sale of cosmetic products that have been tested on animals in Australia an offence – offences apply to the manufacturers and importers only.

It is unsettled in WTO law whether there is an extra territorial limitation on measures falling under Article XX (b) of the GATT. There is precedent under GATT law that (when invoking Article XX (b)) one country cannot unilaterally determine the policies other countries must abide by. However, more recent WTO law has held measures with extra territorial reach to be provisionally justified under Article XX (g) (though falling short of the requirements of the chapeau in the particular case). The WTO Appellate Body did not rule on this issue in the Seals case regarding sub

paragraph (a). Notwithstanding this, the extraterritorial reach of the import ban at least raises a further potential ground for challenge.

Provided it can be established that the same conditions prevail among the various countries exporting to Australia, it is likely the ban contained in the Bill amounts to unjustifiable and arbitrary discrimination and fail the test under the chapeau. It would therefore not be justified under Article XX and would be inconsistent with Australia's obligations under the GATT.

iii. Consistency with the TBT Agreement

A further question is whether the import ban is inconsistent with the TBT Agreement, specifically:

- i. Does the Bill fall within the TBT Agreement?
- ii. Is it consistent with its disciplines?

Applicability of the Agreement

A threshold question is whether the TBT Agreement applies to the measure. The Agreement applies to 'technical regulations'. 'Technical regulations' are defined in an Annex to the Agreement as documents that lay down 'product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory.'

'Product characteristics' clearly include the physical properties of products. However, the WTO Appellate Body has noted that 'related' characteristics that are not physical also fall within the definition. Product characteristics can include not only features and qualities intrinsic to the product itself, but also related "characteristics", such as the means of identification, the presentation and the appearance of a product.

The definition also explicitly includes 'processes and production methods' that are 'related' to product characteristics. It is a subject of debate as to whether this might also include 'unrelated' processes and production methods, i.e.: those that do not affect the final characteristics of a product.

The Bill does not lay down physical characteristics for cosmetic products or ingredients. The question is whether, in prohibiting a certain type of testing, it lays down a 'related' non-physical characteristic of the cosmetic product or ingredient (and with which compliance is mandatory).

Whether a product or ingredient has been tested on animals in itself does not have a bearing on 'the means of identification, the presentation or the appearance' of the ingredient or product which is for sale in the market (as opposed to the same product that has been tested using other methods or not tested at all), and as such the measure does not set out processes or production methods that relate to product characteristics. In this case, the Bill does not lay down 'technical regulations' and the TBT Agreement does not apply to it.

A caveat to this conclusion would be a finding by the WTO that the definition of a technical regulation extends to process and production methods that are 'unrelated' to product characteristics, i.e.: those related to the type of testing method used to evaluate the effects of the product. While there has been no WTO ruling upholding such an interpretation as yet, it is a subject of debate among scholars.

A further caveat is where once prescribed, the legislation sets out labelling or other identification requirements for animal testing that importers would be required to comply with (it does set out requirements for applications for new industrial chemicals for use in cosmetic ingredients which are tested on animals). If such requirements are related to physical characteristics or processes and production methods they would constitute 'technical regulations' under TBT Annex 1.1 and thus come within the scope of the TBT Agreement.

The Bill in its present form is not a technical regulation falling within the scope of the TBT Agreement as it does not lay down physical characteristics for cosmetic products or ingredients which are imported. It may be subject to the Agreement in the event the legislation sets out product identification requirements to demonstrate compliance.

Consistency with TBT disciplines

Non discrimination

If, in the alternative, the TBT Agreement does apply to the Bill, it would likely amount to discrimination under Article 2.1 of the Agreement. Article 2.1 broadly incorporates the non-discrimination disciplines in the GATT. Measures will be held to be discriminatory where they 'modify the conditions of competition to the detriment of imported products *vis a vis* like products of domestic origin or originating from any other party' and where the measure is 'applied in a manner that constitutes arbitrary or unjustifiable discrimination.' As noted above, the import ban discriminates between WTO member countries (GATT Article I) and may also discriminate between domestic and imported products (GATT Article III). It may constitute arbitrary discrimination because it is not 'even handed' in its application for the same reasons it fails the test of the chapeau (to GATT Article XX).

'Necessity' and 'trade restrictiveness' test

Article 2.2 of the TBT Agreement relevantly provides that technical regulations must not have 'the effect of creating unnecessary obstacles to international trade' and 'shall not be more trade-restrictive than necessary to fulfil a legitimate objective.' 'Legitimate objectives' include 'the prevention of deceptive practices' and 'protection of human health or safety, animal or plant life or health, or the environment.' Whether measures are more trade restrictive than necessary turns on whether there are less trade-restrictive alternatives that would achieve the same level of protection.

As noted under the GATT analysis above, it can be argued that the import ban in the Bill is not 'necessary' for the protection of 'animal...life or health' and may even be inconsistent with the protection of human health and the environment. There are alternative, less trade restrictive measures that could be put in place to protect animal health other than a blanket import ban, such as labelling requirements. Thus, the Bill would be more trade-restrictive than 'necessary' to achieve its objectives for the same reasons.

If the Bill falls within the TBT Agreement, it is likely to be inconsistent with TBT disciplines because it is discriminatory, and more trade restrictive than necessary to achieve its objectives.

iv. Consistency with Australia's FTAs

Given the potential trade affected by the import ban proposed in the Bill, Australia's FTAs with the US and Asian countries may raise further grounds for challenge.

Non discrimination obligations

Most of Australia's FTAs incorporate GATT national treatment obligations (Article III); prohibitions on quantitative restrictions (Article XI) and general exceptions (Article XX). This includes: the AUSFTA; the KAFTA; the JAEPA; the CHAFTA; and the AANZFTA. None of these FTAs incorporate or have analogous most favoured nation (Article I) obligations.

The TPP, though not yet in force, also incorporates GATT obligations.

The analysis above with respect to the noted GATT provisions applies to the incorporating provisions in AUSFTA, KAFTA, JAEPA, CHAFTA, AANZFTA and TPP. Thus, the import ban:

- is inconsistent with Article 2.9 of AUSFTA; Article 2.6 of KAFTA; Article 2.8 of JAEPA; Article 2.7 of CHAFTA; Article 7, Chapter 2 of AANZFTA, and; Article 2.10 of TPP (as a quantitative restriction on trade);
- may be inconsistent with Article 2.2 of AUSFTA; Article 2.2 of KAFTA; Article 2.3 of JAEPA; Article 2.3 of CHAFTA; Article 4, Chapter 2 of AANZFTA, and; Article 2.3 of TPP (breaching the national treatment principle) and;
- is likely not justified under Article 22.1 of AUSFTA; Article 22.1 of KAFTA; Article 1.9 of JAEPA; Article 16.2 of CHAFTA; Article 1, Chapter 15 of AANZFTA, and; Article 29.1 of TPP (as a general exception).

All of these agreements affirm the rights and obligations of the TBT Agreement, however only in AUSFTA are rights under TBT enforceable. TBT obligations (Articles 2.1 and 2.2 analysed above) are not subject to the dispute settlement provisions in the other FTAs. Therefore, grounds for challenge of the proposed measure under the TBT non discrimination provisions are only available for the US.

The import ban is likely to be inconsistent with Australia's trade obligations under free trade agreements with the US, China, Japan, Korea and ASEAN which incorporate the core provisions of the GATT, as well as the TPP Agreement. There may be grounds for the US to challenge breaches of TBT obligations under the Australia/US FTA.

Investment provisions

Australia's free trade agreements contain disciplines on investment (which are not directly covered by WTO Agreements). This includes national treatment obligations analogous to GATT Article III, subject to general exceptions analogous to GATT Article XX. AUSFTA, KAFTA, CHAFTA and TPP include a most favoured nation obligation analogous to GATT Article 1. Some agreements (AANZFTA, KAFTA, CHAFTA and TPP but not AUSFTA or JAEPA) also provide for investor state dispute settlement, where an investor of a disputing party (as opposed to the disputing party itself) may bring claims of inconsistency in respect of certain obligations.

Where it can be established that there is an 'investment' at issue (such as property rights, as defined in the relevant agreement) there may be a case for investors in China and Korea, or in TPP countries (eg: Canada, Singapore, US, Japan) to argue a breach of the national treatment

obligation, similar to the arguments put forward above in relation to the GATT.²⁵ The US, Korea, China or TPP countries (but not an investor) could also argue a breach of the MFN obligation.

Further analysis would be required to determine whether there is an ‘investor’ or an affected ‘investment’ under each of the relevant FTAs, and whether discriminatory treatment is ‘justified.’ The TPP for example, includes provisions which appear to build on GATT Article XX exceptions and which permit measures considered ‘appropriate to ensure that investment activityis undertaken in a manner sensitive to environmental, health or other regulatory objective.”

The import ban thus potentially also raises issues of inconsistency with the investment obligations of FTAs with the US, Korea, Japan, China and TPP countries. There are rights in FTAs with China and Korea and in the TPP for investors (as opposed to governments) to challenge breaches of the agreement.

TPP Cosmetic Annex

While not yet in force, there are specific provisions in the TPP for cosmetic products that should be considered for consistency with the proposed measure. The Annex on Cosmetics (Annex 8-D) to the TBT Chapter of the TPP (Chapter 8) is mainly concerned with the regulation of marketing authorisations for cosmetic products, but does require each party to ‘apply a risk based approach to the regulation of cosmetic products’. It prevents parties from requiring animal testing of cosmetic products, but provides an exception where ‘there is no validated alternative method available to assess safety.’

The *Ethical Cosmetics Bill* does not purport to regulate the marketing of cosmetics in Australia, though the Coalition announcement does refer to a ban on ‘sale’ (with no further details provided).

²⁵ The national treatment obligation for investment in AANZFTA is subject to completion of negotiations on the investment chapter, and as such is not currently enforceable under ISDS.

Annex 2. Relevant legal provisions in GATT/WTO and Australia's FTAs

GATT/WTO

WTO law examined in this report includes the General Agreement on Tariffs and Trade 1994 (GATT) and the Agreement on Technical Barriers to Trade (TBT Agreement).

Provisions in the GATT include:

- non discrimination obligations, including between products from different WTO members (Most Favoured Nation treatment - MFN) and between domestic and imported products (national treatment);
- a prohibition on the imposition of quantitative restrictions in trade;
- general exceptions to the above obligations, where trade restrictive measures may be imposed for certain public policy reasons.

Provisions in the TBT Agreement include:

- Non discrimination obligations, similar to GATT provisions, and;
- The obligation to ensure technical regulations do not create unnecessary obstacles to international trade, and are not more trade restrictive than necessary.

Relevant text is extracted below.

Provisions in GATT 1947

Article	Text
Non discrimination (MFN) Article I.1	With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III,* any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.
Non discrimination (National treatment) Article III.4, Ad Article III	The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.
Prohibition on quantitative restrictions Article XI.1	No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.
General exceptions Article XX (a) and (b)	Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: (a) necessary to protect public morals; (b) necessary to protect human, animal or plant life or health;

Provisions in the TBT Agreement

Article	Text
Non discrimination Article 2.1	Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country.
Unnecessary obstacles to international trade Article 2.2	Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, <i>inter alia</i> : national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, <i>inter alia</i> : available scientific and technical information, related processing technology or intended end-uses of products.

Australia's Free Trade Agreements

Australia's FTAs with the United States, Korea, China, Japan and ASEAN incorporate GATT national treatment obligations (Article III); prohibitions on quantitative restrictions (Article XI) and general exceptions (Article XX), but do not incorporate or have analogous most favoured nation (Article I) obligations. The TPP, though not yet in force, also incorporates GATT obligations. Relevant provisions are extracted below:

Provisions incorporating GATT Article XI –prohibition on quantitative restrictions on trade

FTA/Article	Text
AUSFTA Article 2.9.1	Except as otherwise provided in this Agreement, neither Party may adopt or maintain any prohibition or restriction on the importation of any good of the other Party or on the exportation or sale for export of any good destined for the territory of the other Party, except in accordance with Article XI of GATT 1994, including its interpretative notes, and to this end Article XI of GATT 1994, including its interpretative notes, is incorporated into and made a part of this Agreement.
KAFTA Article 2.6.1	Unless otherwise provided in this Agreement, neither Party shall adopt or maintain any prohibition or restriction on the importation of any good of the other Party or on the exportation or sale for export of any good destined for the territory of the other Party, except in accordance with Article XI of GATT 1994, including its interpretive notes, and to this end Article XI of GATT 1994, including its interpretive notes, is incorporated into and made part of this Agreement, <i>mutatis mutandis</i> .
JAEPA Article 2.8.1	Neither Party shall adopt or maintain any non-tariff measures, including quantitative restrictions, on the importation of any good of the other Party or on the exportation or sale for export of any good destined for the other Party, except in accordance with its rights and obligations under the WTO Agreement or as otherwise provided for in this Agreement.
CHAFTA Article 2.7.1	Unless otherwise provided in this Agreement, neither Party shall adopt or maintain any prohibition or restriction or measure having equivalent effect, including quantitative restrictions, on the importation of a good originating in the territory of the other Party, or on the exportation or sale for export of a good destined for the territory of the other Party, except in accordance with Article XI of GATT 1994. To this end, Article XI of GATT 1994 is incorporated into and made part of this Agreement, <i>mutatis mutandis</i> .
AANZFTA Article 7.1 Chapter 2	No Party shall adopt or maintain any prohibition or quantitative restriction on the importation of any good of any other Party or on the exportation of any good destined for the territory of any other Party, except in accordance with its WTO rights and obligations or this Agreement. To this end, Article XI of GATT 1994 shall be incorporated into and shall form part of this Agreement, <i>mutatis mutandis</i> .
TPP Article 2.10.1	Unless otherwise provided in this Agreement, no Party shall adopt or maintain any prohibition or restriction on the importation of any good of another Party or on the exportation or sale for export of any good destined for the territory of another Party, except in accordance with Article XI of GATT 1994 and its interpretative notes, and to this end Article XI of GATT 1994 and its interpretative notes are incorporated into and made part of this Agreement, <i>mutatis mutandis</i> .

Provisions incorporating GATT Article III - the national treatment principle

FTA/Article	Text
AUSFTA Article 2.2	Each Party shall accord national treatment to the goods of the other Party in accordance with Article III of GATT 1994, including its interpretative notes. To this end, Article III of GATT 1994 and its interpretative notes are incorporated into and made a part of this Agreement, subject to Annex2-A (exempts actions by Australia authorized by the Dispute Settlement Body of the WTO).
KAFTA Article 2.2	Each Party shall accord national treatment to the goods of the other Party in accordance with Article III of GATT 1994, including its interpretative notes, and to this end Article III of GATT 1994, including its interpretative notes, is incorporated into and made part of this Agreement, <i>mutatis mutandis</i> .
JAEPa Article 2.3	Each Party shall accord national treatment to the goods of the other Party in accordance with Article III of the GATT 1994. To this end, Article III of the GATT 1994 is incorporated into and made a part of this Agreement, <i>mutatis mutandis</i>
CHAFTA Article 2.3	Each Party shall accord national treatment to the goods of the other Party in accordance with Article III of GATT 1994. To this end, Article III of GATT 1994 is incorporated into and made part of this Agreement, <i>mutatis mutandis</i> .
AANZFTA, Article 4, Chapter 2	Each Party shall accord national treatment to the goods of the other Parties in accordance with Article III of GATT 1994. To this end, Article III of GATT 1994 shall be incorporated into and shall form part of this Agreement, <i>mutatis mutandis</i> .
TPP Article 2.3.1	Each Party shall accord national treatment to the goods of the other Parties in accordance with Article III of GATT 1994, including its interpretative notes, and to this end, Article III of GATT 1994 and its interpretative notes are incorporated into and made part of this Agreement, <i>mutatis mutandis</i> .

Provisions incorporating Article XX of the GATT - general exceptions

FTA/Article	Text
AUSFTA Article 22.1.1	For the purposes of Chapters Two through Eight (National Treatment and Market Access for Goods, Agriculture, Textiles, Rules of Origin, Customs Administration, Sanitary and Phytosanitary Measures, and Technical Barriers to Trade), GATT 1994 Article XX and its interpretive notes are incorporated into and made part of this Agreement, <i>mutatis mutandis</i> . The Parties understand that the measures referred to in GATT 1994 Article XX(b) include environmental measures necessary to protect human, animal, or plant life or health, and that GATT 1994 Article XX(g) applies to measures relating to the conservation of living and non-living exhaustible natural resources.
KAFTA Article 22.1.1	For the purposes of Chapters 2 (Trade in Goods), 3 (Rules of Origin and Origin Procedures), 4 (Customs Administration and Trade Facilitation), 5 (Technical Barriers to Trade and Sanitary and Phytosanitary Measures) and 16 (Cooperation), Article XX of GATT 1994, including its interpretive notes, is incorporated into and made part of this Agreement, <i>mutatis mutandis</i> . The Parties understand that the measures referred to in Article XX(b) of GATT 1994 include environmental measures to protect human, animal or plant life or health, and that Article XX(g) of GATT 1994 applies to measures relating to the conservation of living and non-living exhaustible natural resources.
JAEPa Article 1.9.1	For the purposes of Chapters 2 (Trade in Goods), 3 (Rules of Origin), 4 (Customs Procedures), 5 (Sanitary and Phytosanitary Cooperation), 6 (Technical Regulations, Standards and Conformity Assessment Procedures), 7 (Food Supply), 8 (Energy and Mineral Resources) and 13 (Electronic Commerce), Article XX of the GATT 1994 is incorporated into and forms part of this Agreement, <i>mutatis mutandis</i> .
CHAFTA Article 16.2.1	For the purposes of Chapters 2 (Trade in Goods), 3 (Rules of Origin and Implementation Procedures), 4 (Customs Procedures and Trade Facilitation), 5 (Sanitary and Phytosanitary Measures), 6 (Technical Barriers to Trade) and 12 (Electronic Commerce), Article XX of GATT 1994, including its interpretative notes, is incorporated into and made part of this Agreement, <i>mutatis mutandis</i> .
AANZFTA, Article 1.1, Chapter 15	For the purposes of Chapter 2 (Trade in Goods) Chapter 3 (Rules of Origin) Chapter 4 (Customs Procedures), Chapter 5 (Sanitary and Phytosanitary Measures) and Chapter 6 (Standards, Technical Regulations and Conformity Assessment Procedures), Article XX of GATT 1994 shall be incorporated into and shall form part of this Agreement, <i>mutatis mutandis</i> .
TPP Article 29.1.1	For the purposes of Chapter 2 (National Treatment and Market Access for Goods), Chapter 3 (Rules of Origin and Origin Procedures), Chapter 4 (Textile and Apparel Goods), Chapter 5 (Customs Administration and Trade Facilitation), Chapter 7 (Sanitary and Phytosanitary Measures), Chapter 8 (Technical Barriers to Trade) and Chapter 17 (State-Owned Enterprises and Designated Monopolies), Article XX of GATT 1994 and its interpretative notes are incorporated into and made part of this Agreement, <i>mutatis mutandis</i> .

ATTACHMENT 5



Australian Government
Department of Health

Ban on the testing of cosmetics on animals

Consultation Paper March 2017

Contents

Introduction	3
Background and Context.....	4
Findings from Consultations.....	9
Proposed Policy Framework	13
How can I be involved?.....	15
Appendix A: Demographics of representative sample for market research online survey.....	16

©Department of Health



Introduction

The Australian Government has announced its commitment to implement a ban on the testing of cosmetics on animals. This commitment recognises the strong view of many Australians on this issue, and brings Australia into line with similar bans implemented in other countries. In fulfilling this commitment the Australian Government will continue to maintain Australia's high standards in protecting public health, worker safety and the environment and ensure that any adverse impacts on business, trade and industry are taken into account and are minimised.

A public consultation process commenced in November 2016 with the release of the Background Paper. Initial consultations were conducted with stakeholders through a series of facilitated workshops and an online survey. Further consumer views were sought through independent market research. The feedback obtained from this process has provided a range of innovative ideas, insights, and concerns, and these have informed the development of policy options.

The purpose of this paper is to outline an option that would introduce a ban for Australia following the completion of the initial consultation process. The release of this paper aligns with the commencement of the second phase of the consultation process.

To help shape the implementation approach, stakeholders are invited to provide their feedback on the proposed policy framework and strategies outlined in this document.



Background and Context

Cosmetic products

Cosmetics products (and other personal care items) are chemical products that are designed to be repeatedly applied directly to the human body, or inside the mouth, to change its appearance, cleanse it, keep it in good condition, perfume it or protect it.

Cosmetic products include:

- Oral hygiene: mouthwash and toothpaste;
- Soaps and deodorants: antiperspirants, bath gels, body washes, antibacterial hand washes, shampoos and conditioners;
- Make up and beauty: nail polish, mascara, depilatory products, hair dyes and perfumes;
- Skin care: skin cleansing, acne washes, secondary sun protection products (with an SPF of 15 or below), lip care creams, anti-ageing creams, facial moisturisers, body lotions, hand/feet/skin emollients and shaving creams; and
- Some baby care and hygiene products.

Cosmetics products are used by consumers every day – estimates indicate each consumer uses at least seven different cosmetics per day and many of us use more¹. The chemicals (ingredients) used in cosmetic products are often used in many other consumer and industrial products, such as in pharmaceuticals, detergents, food, paints etc.

The Australian Cosmetic Industry

In 2015-16 Australian cosmetic and toiletry retail market sales were valued at \$3.7bn². The majority of cosmetic products sold in Australia are imported by multinational companies, principally from the United States, France, Thailand and China.

The Australian cosmetic, perfume and toiletries manufacturers industry was worth \$945 million in 2015-16³ and employed some 18,000 individuals⁴. This industry is globally focused, with exports making up over half the manufacturing revenue, accounting for \$535 million in 2015-16⁵.

¹ http://europa.eu/rapid/press-release_MEMO-13-188_en.htm

² IBIS World Industry report C1852 Cosmetics, Perfume and Toiletries, Manufacturing in Australia – June 2016

³ IBIS World Industry report C1852 Cosmetics, Perfume and Toiletries, Manufacturing in Australia – June 2016

⁴ IBIS World Industry report G4271B1852 Cosmetics and Toiletry Retailing in Australia – May 2016

⁵ IBIS World Industry report C1852 Cosmetics, Perfume and Toiletries, Manufacturing in Australia – June 2016



Regulation of cosmetics

In Australia, cosmetics are regulated at the Commonwealth, and state and territory level. These regulatory frameworks establish requirements which ensure the safety and efficiency of cosmetics sold in Australia.

Cosmetic Products

Cosmetics are a consumer good and are subject to the broad provisions of the Australian Consumer Law (ACL) (*Schedule 2 of the Competition and Consumer Act 2010*) which is administered by the Australian Competition and Consumer Commission. The ACL provides a range of statutory guarantees to consumers when they purchase goods and services to ensure they are safe and of acceptable quality. Separately, a specific information standard makes it illegal to supply [cosmetic products](#) that do not provide ingredient information to consumers at the point of sale⁶.

The *Cosmetics Standard 2007* and the *Standard for the Uniform Scheduling of Medicines and Poisons* place further restrictions on ingredients used in cosmetic products and set requirements for specified products to distinguish them from similar goods that are for therapeutic use.

Chemical ingredients used in cosmetics

The 'introduction' (import and/or manufacture) of cosmetic ingredients is subject to regulation under the National Industrial Chemicals Notification and Assessment Scheme (NICNAS), which is established by the *Industrial Chemicals (Notification and Assessment) Act 1989*.

Industrial chemicals are defined by exclusion (chemicals that are not therapeutic goods, agricultural or veterinary chemicals, food or food additives) and hence include cosmetic ingredients. There is no standalone legislation for cosmetics, and chemical ingredients used in cosmetics are often used in a broad range of other consumer and industrial products.

Chemical ingredients proposed for use in cosmetic products are required to be notified and (unless exempt from assessment) assessed for human health and environmental impacts. The extent of scientific information required for assessment depends on the category under which a chemical is notified.

⁶ For details see <https://www.productsafety.gov.au/standards/cosmetics-ingredients-labelling>



Animal testing of cosmetic ingredients and products

Testing of cosmetic ingredients and products is conducted to assist in developing a new product and to check the safety of new ingredients. Testing is used to determine whether the ingredient does what it is designed to do, and if there any side-effects. Safety testing may also be carried out in order to meet regulations required to sell new products or formulations in order to protect human and animal health and the environment.

For the investigation of possible human health effects, animal tests have historically been considered to be the most reliable, as they best represent the overall effect of a chemical on a living human. However, as technology has advanced, animal tests are expensive, time consuming to conduct and are questioned on both ethical and scientific grounds.

In recognition of the ethical concerns raised by animal testing (in cases where non-animal tests aren't available), the 'Three Rs' (replacement, reduction and refinement principles) are applied to testing regimes by international and domestic standard setting bodies.

Internationally, significant work has been undertaken to develop alternatives to animal testing. For example, the Organisation for Economic Cooperation and Development (OECD) offers guidelines on methods which avoid or replace the use of animals, minimise the number of animals used in a test, and set out methods which minimise suffering and improve animal welfare. However, non-animal tests are not yet available to assess all health effects, such as repeated exposure to a substance. This may be because alternatives have not yet been developed, or because they are still in the process of evaluation and validation.

The initial consultation process conducted by the Department of Health involved State and Territory governments in their roles as regulating the use of animals in research. Through this process jurisdictions advised that no applications were received to test cosmetics and/or their ingredients from 2013 to 2015. Both industry and animal welfare advocacy groups have similarly advised that animal testing for cosmetic purposes is no longer occurring in Australia. Similar to Australia, there is an international movement towards decreasing the use of animals in cosmetic testing.



International bans

Internationally, many countries have introduced bans to regulate cosmetic testing on animals, tailored to reflect jurisdictional and local laws and regulations.

As illustrated in Figure 1 below, a number of countries have followed the EU in introducing a ban on animal testing of cosmetics.

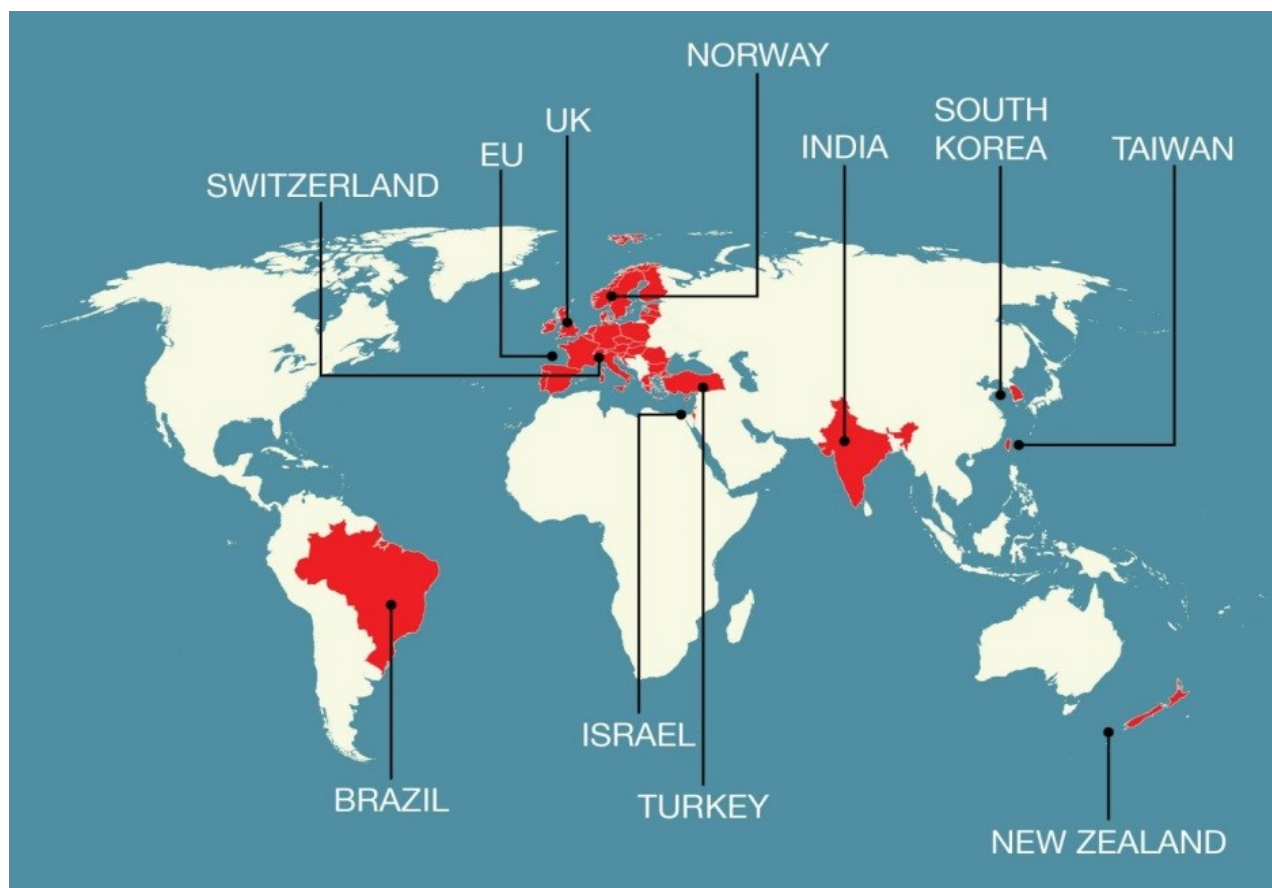


Figure 1: Bans (proposed and implemented) internationally

Between 2004 and 2013, the EU implemented a ban prohibiting the use of animal testing on cosmetic products and cosmetic ingredients. This ban includes an exception to allow animal testing should an alternative non-animal test be unavailable, for example, in order to protect public health, the environment, and/or worker safety.

This ban also prohibits the use of animal test data to meet the requirements of the cosmetics regulations. This ban however acknowledges that the majority of ingredients that go into cosmetics are ingredients that are also in use in many other consumer and industrial products, such as in pharmaceuticals, detergents, food, paints etc. Those ingredients are subject to animal testing requirements under the respective legal frameworks and this testing is not prohibited by the EU ban.



Fundamental to these arrangements is that when they came into effect they were prospective in application, that is, that products which already existed in the market were unaffected. In addition, the ban focused on new animal testing with data obtained from animal testing undertaken prior to the implementation date still able to be used to support the introduction of a new cosmetic ingredient.

In 2016, New Zealand introduced a ban on animal testing. This ban prohibits the use of an animal in any research, testing or teaching that is for the purpose of developing, making or testing a cosmetic or ingredient. The ban on ingredients however is limited to those ingredients that are intended exclusively for use in a cosmetic.

Contrary to these approaches, some countries continue to specifically require animal testing of cosmetic products prior to sale. Local and international companies continue to sell their cosmetic products in China, where it is understood that animal testing is required for imported cosmetics products. Through the consultation process to date it is understood that the EU ban does not prevent companies from undertaking this testing however data arising from this testing cannot be used to support the introduction of the cosmetic into the EU.

The consultation process further highlighted that a number of local and international companies have chosen not to sell their products in those countries where animal testing is mandated to maintain their cruelty-free status or to market their products as cruelty-free.



Findings from Consultations

To better understand and consider the viewpoints of all stakeholders, consultations were conducted to inform the development of the proposed policy framework to introduce a ban for Australia.

Commencing in November 2016, industry, animal welfare organisations and the general community were invited to provide their views on how the Government should approach a ban. Through face-to-face workshops and teleconferences, more than 50 individuals and/or organisations expressed an interest in providing detailed views on the proposed ban.

To supplement this research, Hall and Partners (Open Mind) undertook external consumer market research. This research explored the views of Australians (across a breadth of demographic categories) through 18 focus group discussions, as well as an online survey of a representative sample of some 2,000 members of the general public. The demographics associated with this group are at Appendix A.

Feedback was also obtained from interested parties via an open online survey. The online link was open for responses from 18 November to 16 December 2016 and around 25,000 individuals from the general public participated.

The key themes communicated by stakeholders are depicted in Figure 2.

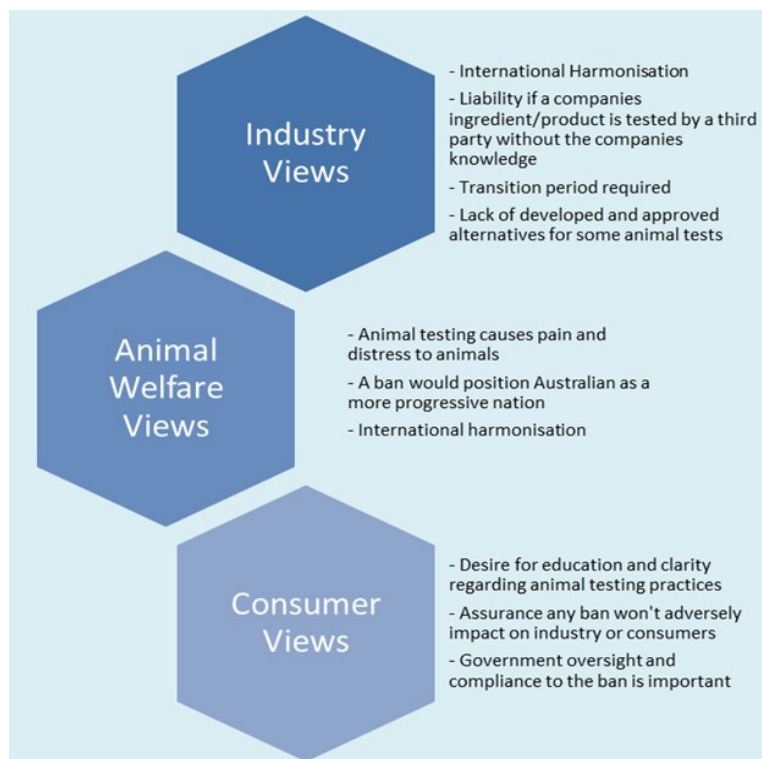


Figure 2: Key themes communicated by stakeholders



Figure 3: Awareness of current animal testing of cosmetic products available in Australia – Representative consumer survey



Both respondents to the open online survey and consumers felt that the introduction of a ban would bring Australia into alignment with comparable overseas countries. Similarly, industry views indicate support for a ban aligned with international approaches, however a transition period is required to ensure the impacts of the ban are understood. Animal welfare advocates have indicated strong support for the ban, stating that cosmetic testing on animals is unnecessary and noting that this commitment positions Australia as a progressive nation.

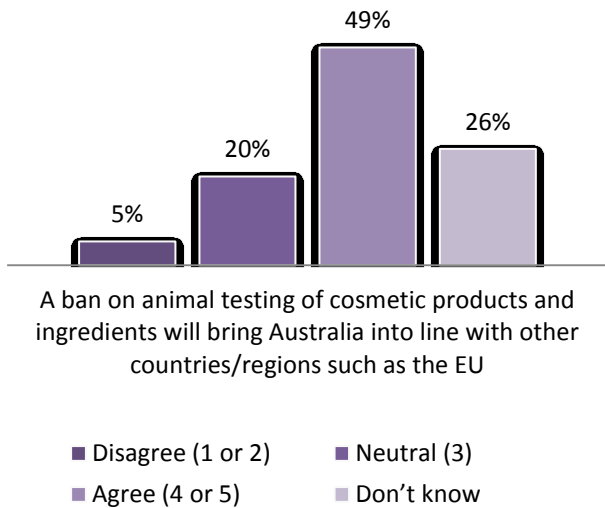
The consultation suggests that while animal testing is a high profile issue for those responding to the online survey, general consumers participating in the consumer market research were less engaged. Animal testing practices and the potential effect of a ban on animal testing of cosmetics were not high profile issues for these consumers. Figure 3 indicates that around 35% of consumers did not know whether the ingredients or products currently available in Australia were tested on animals. Few consumers were aware that animal testing of cosmetic ingredients or products does not occur in Australia.

Consumers considered there was a need for greater transparency and clarity around information that manufacturers provide on their products. They are unaware of where to find information regarding animal testing of cosmetics in Australia, and find claims that companies are allowed to make on their products potentially confusing. Some consumers are assuming that products are not being tested on animals on the basis of terms such as ‘low/no toxins’, ‘sustainably produced’, ‘ethical’, ‘locally made’, ‘home/handmade’ and ‘Australian made’.

Even when a clear claim is present on a package, only 46% of consumers feel confident that the product is definitely not tested on animals. 49% of consumers argue that products should have prominent labelling to ensure consumers are not misled around compliance with an animal testing ban.

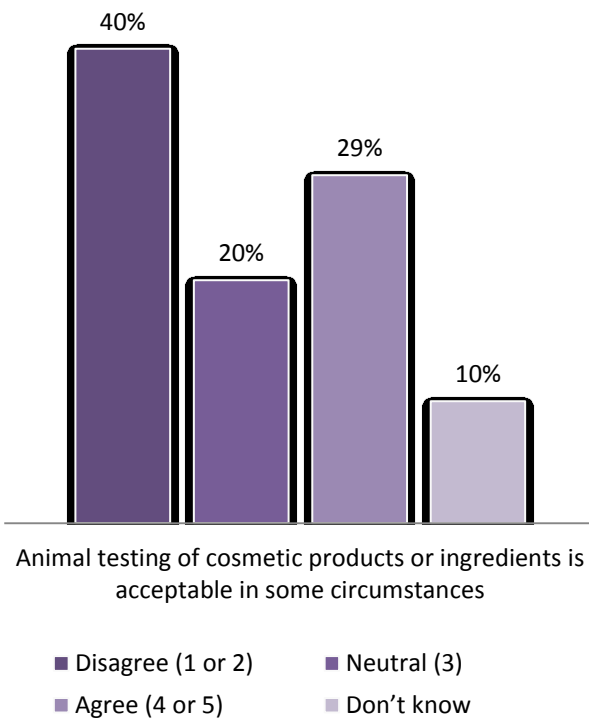


Figure 4: Attitudes towards ban on animal testing – Representative consumer survey



All stakeholders commented that the design of an Australian ban should take into consideration, and align as much as possible with, approaches in a number of countries that currently have animal testing bans in place. Some 68% of respondents to the open online survey, and 49% of consumers, (as indicated in Figure 4) felt that the introduction of a ban would bring Australia into alignment with comparable overseas countries. It was noted during consultations that the introduction of a ban could potentially promote innovation with both products and testing methods. Consumers argue that a major increase in costs or significant reduction in the consumer choice could drive individuals to purchase their cosmetic products from overseas countries which may or may not have bans in place.

Figure 5: Attitudes towards animal testing – Representative consumer survey

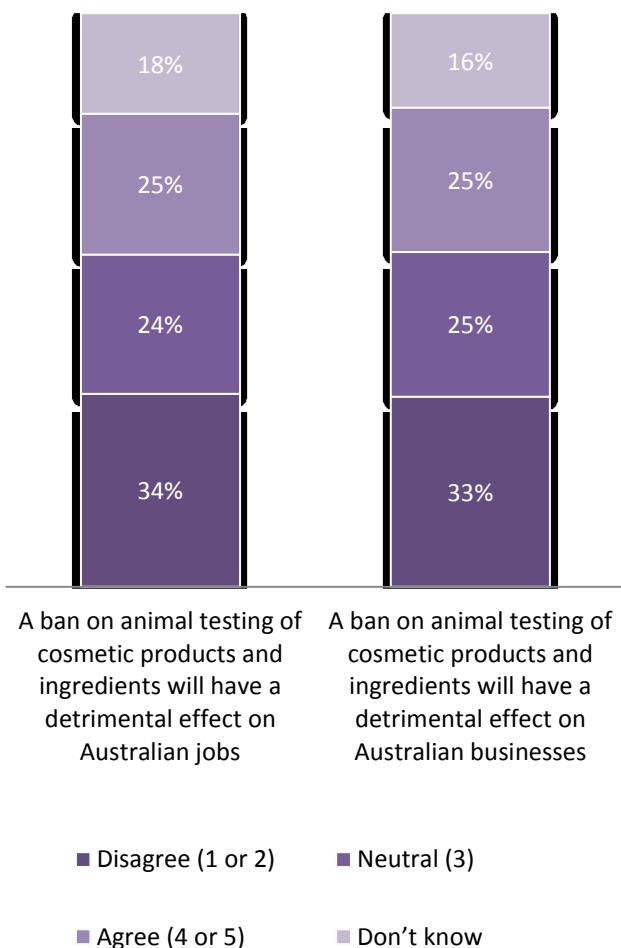


In certain circumstances, consumers considered that animal testing undertaken to determine the safety of a product or ingredient (for consumers, the environment and individuals working with the product) is necessary. Figure 5 shows some 49% of consumers indicated either an acceptance or neutral response to the question of animal testing in certain circumstances. For example, if the product is intended for use by a vulnerable group such as babies, or to protect the wellbeing of people or the environment.

When considering the impact of a ban, Figure 6 shows approximately 34% of consumers indicated that a ban would not have a detrimental effect on Australian jobs and businesses. Consumers expressed that they do not want to disadvantage Australian businesses importing cosmetics or exporting Australian products to overseas markets. Consumers have an expectation that government ensure that broader economic impacts are minimised when implementing the ban.



Figure 6: Perceived impact of ban on Australian businesses and jobs – Representative consumer survey



Survey participants were then asked to consider how industry would demonstrate compliance with a ban. Just over half of the consumers indicated that independent audits, monitoring or reviews were preferred compliance mechanism. Some 58% of survey participants support industry-supplied compliance data as part of the mechanisms put in place to ensure compliance.

Consultations indicate that consumers are likely to be more supportive of a prospective ban due to concerns as to how a retrospective approach could be implemented and enforced. Further, consumers question the point of applying the ban to existing products or ingredients, as the testing has already been undertaken and banning these products now will not lead to a reduction in animals harmed. Equally, a retrospective ban could potentially lead to large number of products disappearing from the shelves.

Industry stakeholders highlighted the potential significant challenges required to introduce and ensure compliance with an Australia ban. On this basis, industry contends that a longer period of transition than announced is required. Consumers noted that the introduction of a ban was complex and appreciate the scale of adjustment required from industry. Because of this, consumers expected that the ban will be phased in gradually to provide organisations time to comply and innovate, and to allow consumers time to adjust. Consumers typically estimate the phase-in period for a ban will be between 1-5 years.



Proposed Policy Framework

The proposed policy framework outlines an option that would introduce a ban for Australia which seeks to address animal welfare concerns while ensuring there are no unintended consequences for Australian consumers and the cosmetic industry. The following policy principles are the foundation for the proposed approach:

The Australian Government proposes to introduce a Ban on the Testing of Cosmetics on animals, which will seek to:

- ✓ *Maintain Australia's strong public health protection standards.*
- ✓ *Ensure the ethical use of animals used for test purposes.*
- ✓ *Provide a practical, cost-effective and proportional regulatory response to the problem.*
- ✓ *Be consistent with the Government's agreed reforms to regulation of industrial chemicals.*
- ✓ *Apply to data and testing where the sole purpose is to meet regulatory obligations for new cosmetic ingredients and products.*
- ✓ *Avoid negative consequences or spill over effects for other industry sectors.*
- ✓ *Harmonise Australian regulatory practices with our major trade partners.*
- ✓ *Support innovation in the cosmetic sector by allowing chemical substances tested prior to the start date of the ban to be used in future cosmetic products.*

Consistent with the EU approach, the proposed approach would allow for exceptions for animal testing for public health and safety, worker health and safety, and the environment, where no non-animal test method is available and the risk cannot otherwise be adequately assessed. Data obtained from animal testing undertaken before implementation of the ban would also be exempt. This approach would provide a certainty for the future ensuring cosmetic testing on animals does not occur.

To ensure compliance, the Government would work with industry to develop and implement a voluntary code of conduct. This would ensure industry and consumers are aware of the new obligations and provide increased consumer confidence that purchased products were not tested on animals in Australia.



The proposed approach would be phased in gradually to allow consumers time to adjust and industry time to comply. Industry and consumers would be kept informed by an extensive educational program providing information in relation to the changes and impacts following implementation.

Objectives:	Strategies:
<p>The Government would introduce the ban through the following objectives which combine both regulatory and non-regulatory approaches, and recognise the regulatory system already in place for chemicals:</p> <ol style="list-style-type: none"> 1. Establish the ban within Australia’s current regulatory arrangements for industrial chemicals. 2. Strengthen existing frameworks concerning the ethical use of animals in research. 3. Provide a means for industry to demonstrate commitment to the ban, with an adequate period of transition to move to new arrangements. 4. Provide mechanisms for consumers to understand whether the products they are purchasing adhere to the new Australian ban. 	<p>In order to achieve the Government’s policy objectives, it is proposed that:</p> <ul style="list-style-type: none"> • The new industrial chemicals legislation include provisions to ban the use of new animal test data to support the introduction of chemicals used exclusively as cosmetic ingredients. • The National Health and Medical Research Council’s (NHMRC) <i>Australian Code for the care and use of animals for scientific purposes</i> (the Animal Ethics Code) be amended to ban cosmetic testing on animals. • The NHMRC work with states and territories to ban cosmetic testing on animals by adopting the amended Animal Ethics Code into state and territory laws. • The Government work with the cosmetics industry to develop a voluntary code of conduct for industry on animal testing of cosmetic products. • An information and communications approach will be developed to provide clarity for consumers and industry around promotional claims that can or cannot be made on cosmetic products.

Table 1: Proposed framework for the implementation of a ban on the testing of cosmetics on animals



Exceptions

It is suggested that the design of the ban would allow for exceptions that exist in similar bans internationally including:

- the use of data from animal testing undertaken before the implementation of the ban;
- cosmetic products and ingredients which are already on sale in Australia before the implementation of the ban, as any animal testing has already been undertaken;
- chemical substances used for a different purpose (e.g. a therapeutic or pesticide);
- repurposing a chemical substance (and any associated animal test data) used initially for a different purpose, for subsequent use in a cosmetic product; and
- animal testing for a different purpose e.g. biomedical research, drug development, or occupational health and safety and environmental protection.

How can I be involved?

As outlined previously, this paper forms the second stage of a phased consultation process to help shape the Government's approach in implementing its commitment to ban the testing of cosmetics on animals. Stakeholder feedback is sought on the proposed policy approach set out in this paper. Information on how to contribute feedback can be found on Department of Health website: <http://www.health.gov.au/internet/main/publishing.nsf/Content/ban-cosmetic-testing-animals>



Appendix A: Demographics of representative sample for market research online survey

