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**SOMETHING IN THE AIR BUT NOT ON THE LABEL:
A CALL FOR INCREASED REGULATORY INGREDIENT
DISCLOSURE FOR FRAGRANCED CONSUMER PRODUCTS**

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I INTRODUCTION

Between time devoted to the workplace and the home, Australians spend more than 90 per cent of their time indoors.¹ Various legal instruments exist for the purpose of regulating the air we breathe when outdoors.² However, the majority of exposure to hazardous air pollutants occurs indoors – and a main source of exposure is through common, fragranced consumer products such as cleaning products, laundry supplies, air fresheners, cosmetics, and personal care products.³ Fragranced products such as these are ubiquitous on supermarket

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1 State of the Environment 2011 Committee, ‘Australia State of the Environment Report’ (Report, Department of Sustainability, Environment, Water, Population and Communities, 2011) 142.

2 See, eg, *Protection of the Environment Operations Act 1997* (NSW); *Protection of the Environment Operations (Clean Air) Regulation 2010* (NSW).

3 See, eg, Anne C Steinemann, ‘Fragranced Consumer Products and Undisclosed Ingredients’ (2009) 29 *Environmental Impact Assessment Review* 32; William W Nazaroff and Charles J Weschler, ‘Cleaning Products and Air Fresheners: Exposure to Primary and Secondary Air Pollutants’ (2004) 38 *Atmospheric Environment* 2841.

shelves and in homes. However, recent research indicates that one-third of Australians report experiencing adverse effects such as respiratory problems, asthma attacks, migraine headaches and dermatological problems as a result of exposure to fragranced consumer products.⁴ These effects can be severe, resulting in significant losses in productivity as a result of adverse health effects.⁵ This is particularly concerning given that an estimated 98.5 per cent of the Australian population is exposed to fragranced consumer products on at least a weekly basis, either through their own use, others' use or both.⁶ Indeed, evidence suggests that more than two-thirds of Australians are unaware that fragranced products can emit hazardous air pollutants.⁷ Though some consumers might seek to ensure the safety of the products they buy by looking for fragranced products labelled as 'natural' or 'organic', research shows that emissions from these products pose similar health risks.⁸

A single 'fragrance' in a product is a mixture of several dozen to several hundred ingredients⁹ – and several thousand potential ingredients are used to create fragrance mixtures.¹⁰ A recent analysis of a range of fragranced consumer products found over 150 different volatile organic compounds ('VOCs') emitted from 37 products, with an average of 15 VOCs per product.¹¹ Nearly one-third of these VOCs can be classified as potentially hazardous chemicals under various laws.¹² Even so-called 'green', 'organic', and 'natural' fragranced products were

4 Anne Steinemann, 'Health and Societal Effects from Exposure to Fragranced Consumer Products' (2017) 5 *Preventive Medicine Reports* 45, 46. In a similar study, 34.7 per cent of Americans reported adverse effects to common fragranced consumer products: see Anne Steinemann, 'Fragranced Consumer Products: Exposures and Effects from Emissions' (2016) 9 *Air Quality, Atmosphere & Health* 861, 863.

5 Ibid.

6 Steinemann, 'Health and Societal Effects', above n 4, 46.

7 Ibid. Similarly, 67.3 per cent of Americans were not aware that fragranced products can emit hazardous air pollutants: Steinemann, 'Fragranced Consumer Products: Exposures and Effects from Emissions', above n 4, 864.

8 Anne Steinemann, 'Volatile Emissions from Common Consumer Products' (2015) 8 *Air Quality, Atmosphere & Health* 273, 276–9.

9 A 'fragrance ingredient' is a single chemical compound. A 'fragrance' or a 'parfum', as listed on a product label, is a complex mixture of numerous fragrance ingredients. Steinemann, 'Fragranced Consumer Products and Undisclosed Ingredients', above n 3, 33.

10 Ibid.

11 Steinemann, 'Volatile Emissions from Common Consumer Products', above n 8, 273.

12 Ibid 276. It should be noted that there is no exhaustive list of chemicals considered 'hazardous' under Australian laws (in contrast to the United States: see *ibid* 277). This is unsurprising, considering the way the definition of 'hazardous chemical' is given in regulation 5 of the *Work Health and Safety Regulations 2011* (Cth), which classifies a material as hazardous if it satisfies criteria set out in the Globally Harmonised System of Classification and Labelling of Chemicals ('GHS'). There are some Australian modifications to the GHS set out in schedule 6 to the *Work Health and Safety Regulations 2011* (Cth). Defining 'hazardous chemical' in this way ensures that the definition can remain adaptable to scientific developments. Safe Work Australia maintains a Hazardous Chemical Information System ('HCIS'), in which the hazard classification of individual chemicals can be determined. The authors consulted the HCIS to confirm that the VOCs in question were classified as hazardous chemicals. See further: Safe Work Australia, *Hazardous Chemical Information System (HCIS): Search Hazardous Chemicals* <<http://hcis.safeworkaustralia.gov.au/HazardousChemical>>. For further discussion of the impact of the *Work Health and Safety Regulations 2011* (Cth) in this area, see Part II(B)(2) of this article, below.

found to emit hazardous pollutants similar to conventionally labelled products.¹³ However, fewer than one per cent of all ingredients of the products surveyed were actually disclosed to the public in the form of labelling.¹⁴ Further, over two-thirds of the products surveyed, other than cosmetics, did not disclose that the product contained a fragrance at all.¹⁵

An effective way of lessening potential adverse effects from fragranced consumer products is to reduce or avoid exposure. However, despite growing evidence linking fragranced consumer products with various kinds of harm, there are currently no Australian laws in place that require a cleaning product to disclose that it contains a fragrance, or that require any product to disclose its fragrance ingredients. Indeed, there is also a lack of debate on this issue from a regulatory perspective.

This article – the first to discuss fragrance disclosure requirements for consumer products in Australia – argues that the current regulatory framework for ingredients disclosure for fragranced products is insufficient to protect the interests of consumers and allow them to make informed choices. In 1991, ingredient disclosure regulations were introduced in the cosmetics industry for the purpose of addressing a ‘market failure’, in which consumers were faced with insufficient information to avoid and mitigate various adverse reactions caused by the products they were using.¹⁶ Almost two decades on, the very same problems are continuing to occur.

This article begins by briefly outlining the scope of the research, motivated by studies indicating a link between fragranced consumer products and adverse effects for consumers and society at large. It then goes on to consider the regulatory structures in place mandating ingredients disclosure aimed at consumers in the context of specific products. In this regard, a wide conceptualisation of what constitutes regulation is adopted, and both legislative and industry-based initiatives are considered. After concluding that the existing frameworks provide little scope for consumers to protect themselves from potential harm, the article discusses various opportunities for legal reform. A range of regulatory responses could be considered for addressing the current market failure to prevent consumers experiencing adverse effects from fragranced consumer products. Conceptually, these opportunities can be broadly grouped into three categories – full ingredient disclosure, disclosure of ingredients meeting certain characteristics, and disclosure of fragrances. The article considers the efficacy of each approach in meeting the regulatory objective of preventing consumer harm, concluding that there are various

13 Steinemann, ‘Volatile Emissions from Common Consumer Products’, above n 8, 276–9. See also Ursula Klaschka, ‘Natural Personal Care Products – Analysis of Ingredient Lists and Legal Situation’ (2016) 28(8) *Environmental Sciences Europe* 1.

14 Steinemann, ‘Volatile Emissions from Common Consumer Products’, above n 8, 279.

15 Ibid 280 n 5.

16 Product Safety Compliance Section, Australian Competition and Consumer Commission, ‘Regulation Impact Statement: Review of *Trade Practices (Consumer Product Information Standards) (Cosmetics) Regulations 1991* (Cosmetic Regulations)’ (February 2008) 2 (‘Cosmetic Regulations Regulation Impact Statement’).

opportunities to build on the existing frameworks, which should be given serious consideration by Australian regulators into the future.

Although the problem of insufficient disclosure is recognised internationally,¹⁷ based on the authors' review of national legislation, no jurisdiction in the world requires full disclosure of all ingredients contained in a fragrance mixture.¹⁸ In addition, for many consumer products, there is no law requiring that the presence of added fragrance be disclosed whatsoever. The goal of this article is to initiate broader Australian discussion of this problem by outlining the gaps in the current Australian regulatory framework, and providing a framework of options for reform. Although a range of research is available outlining the problems caused by fragranced consumer products,¹⁹ there has been little action taken by governments to date to address the issue. This poses a key opportunity for Australian regulators to become international leaders in this area, by introducing a suite of reforms aimed at tackling this widespread problem.

A Scope of this Project

To the knowledge of the authors, there is currently no regulatory definition of 'consumer product' in Australia that encompasses all of the products contemplated in this article. Although the problem of undisclosed and potentially hazardous chemicals in consumer products is wide-reaching, the scope of our inquiry will be restricted to the various ingredients disclosure requirements pertaining firstly to cosmetics (including personal care products), and secondly to cleaning products (including laundry supplies and air fresheners). We focus on requirements to disclose ingredients, rather than bans on hazardous ingredients. Requiring disclosure represents an important and practical step, acknowledging

17 See, eg, Ursula Klaschka, 'The Hazard Communication of Fragrance Allergens Must Be Improved' (2013) 9 *Integrated Environmental Assessment and Management* 358; Rajiv Shah and Kelly E Taylor, 'Concealing Danger: How the Regulation of Cosmetics in the United States Puts Consumers at Risk' (2011) 23 *Fordham Environmental Law Review* 203; Taylor L Kraus, 'Caring about Personal Care Products: Regulation in the United States, the European Union, and China in the Age of Global Consumption' (2015) 33 *Wisconsin International Law Journal* 167; Caroline M Reebbs, 'Fragrant or Foul? Regulation of the Global Perfume Industry and the Implications for American Sovereignty' (2011) 34 *Hastings International and Comparative Law Review* 223; Ursula Klaschka and Hanna-Andrea Rother, "'Read This and Be Safe!'" Comparison of Regulatory Processes for Communicating Risks of Personal Care Products to European and South African Consumers' (2013) 25(30) *Environmental Sciences Europe* 1.

18 Though laws differ between jurisdictions, see, eg, *Cosmetic Labelling – Designation of Ingredients*, 21 CFR § 701.3(a) (2017); *Consumer Product Safety Act*, 15 USC § 2063; *Federal Hazardous Substances Act*, 15 USC §§ 1261–78; *Canada Consumer Product Safety Act*, SC 2010, c 21, s 67; *Consumer Chemicals and Containers Regulations*, RS 2001, c 24; New Zealand Environmental Risk Management Authority, *Cosmetic Products Group Standard 2006* (NZ), HSR 2006/002552, 1 July 2006; *Regulation (EC) No 1223/2009 of the European Parliament and of the Council of 30 November 2009 on Cosmetic Products* [2009] OJ L 342/59 ('EU Regulations') in the European Union. The European Union regime is arguably the most advanced, and is further discussed at Part III of this article, below.

19 See, eg, Steinemann, 'Fragranced Consumer Products and Undisclosed Ingredients', above n 3; Nazarov and Weschler, above n 3; Steinemann, 'Health and Societal Effects', above n 4; Steinemann, 'Fragranced Consumer Products: Exposures and Effects from Emissions', above n 4; Steinemann, 'Volatile Emissions from Common Consumer Products', above n 8; Klaschka, 'The Hazard Communication', above n 17.

the difficulty of conclusively demonstrating that a particular ingredient should be classified as hazardous or likely to cause harm.

This article will use the term ‘cosmetics’ in keeping with the use of this term in the existing regulatory framework. The legal definition of ‘cosmetics’, which includes a broader range of products than merely make-up products, can be taken to include ‘personal care products’.²⁰ Under the regulations governing the labelling requirements for disclosure of ingredients in cosmetic products, a ‘cosmetic’ or ‘cosmetic product’ is defined as ‘a substance or preparation intended for placement in contact with any external part of the human body ... with a view to altering the odours of the body’, ‘changing its appearance’, ‘cleansing it’, ‘maintaining it in good condition’, ‘perfuming it’ or ‘protecting it’.²¹ Products considered to be cosmetics under this regulatory definition include deodorant, soap, shampoo, moisturiser, shaving products, and perfume,²² although this list is by no means exhaustive. Labelling requirements for products used principally for therapeutic purposes, such as medicinal and primary sunscreen products, are regulated differently to cosmetics.²³ These types of products are outside the ambit of this article.

There is no relevant regulatory definition for cleaning products, laundry supplies, and air fresheners, which we will henceforth refer to collectively as ‘cleaning products’. Instead, the content of the definition of ‘cleaning products’ is determined by reference to the relatively broad range of products it covers. Products that we consider to be cleaning products for the purpose of this article include laundry products (including liquid and powder washing detergents, dryer sheets, and fabric softeners), household and industrial products used to remove dirt, dust, stains or odours from surfaces or objects (including all-purpose cleaners, oven cleaners, dish detergents, toilet cleaners and tile cleaners), and air fresheners (including deodorisers). These products have been chosen for our inquiry due to the existing research that confirms the prevalence of their use by consumers,²⁴ as well as the potential health risks associated with such products.²⁵

20 As referred to in the literature: see, eg, Steinemann, ‘Fragranced Consumer Products and Undisclosed Ingredients’, above n 3; Steinemann, ‘Health and Societal Effects’, above n 4; Steinemann, ‘Fragranced Consumer Products: Exposures and Effects from Emissions’, above n 4; Steinemann, ‘Volatile Emissions from Common Consumer Products’, above n 8.

21 *Industrial Chemicals (Notification and Assessment) Act 1989* (Cth) s 5 (definition of ‘cosmetic’ para (a)); *Trade Practices (Consumer Product Information Standards) (Cosmetics) Regulations 1991* (Cth) s 3 (definition of ‘cosmetic product’).

22 An indicative list of cosmetic products is available from the National Industrial Chemicals Notification and Assessment Scheme website: see Department of Health, Commonwealth Government, *Cosmetics and Therapeutic Goods* (12 September 2017) National Industrial Chemicals and Notification Scheme <<https://www.nicnas.gov.au/chemical-information/cosmetics-and-soaps/cosmetics-and-therapeutic-goods>>.

23 These types of products are regulated by the Therapeutic Goods Administration: see Department of Health, Commonwealth Government, *Regulation Basics* (2016) Therapeutic Goods Administration <<https://www.tga.gov.au/regulation-basics>>.

24 Steinemann, ‘Volatile Emissions from Common Consumer Products’, above n 8.

25 Nazaroff and Weschler, above n 3; Steinemann, ‘Health and Societal Effects’, above n 4; Steinemann, ‘Fragranced Consumer Products: Exposures and Effects from Emissions’, above n 4.

The focus of this project is on protecting consumers by providing information, which they may use to reduce their exposure to fragrance. Regulations relating to ingredient testing or disclosure at the manufacturing level, and laws relating to liability for harm suffered, are mentioned only briefly, for completeness.

II THE REGULATORY FRAMEWORK

Government-led, legally enforceable frameworks such as legislation and associated instruments are only one way of regulating behaviour. At its broadest definition, regulation can be conceived of as ‘mechanisms of social control’, of which legal forms are but one variety.²⁶ Indeed, the regulatory forms applying to the cosmetics and consumer products industries are various, spanning a broad spectrum from legislative intervention, to voluntary, industry-based forms of self-regulation. This section begins by describing the regulatory structures in place mandating disclosure of ingredients, both legal and non-legal, before describing the broader options for redress available to consumers who have suffered harm.

A Cosmetic Products

1 *Legislation and Regulation Mandating Disclosure of Ingredients*

The existing labelling disclosure requirements for cosmetic products are contained in the *Trade Practices (Consumer Product Information Standards) (Cosmetics) Regulations 1991* (Cth) (*‘Cosmetics Regulations’*), issued pursuant to section 104 of the *Australian Consumer Law* (*‘ACL’*).²⁷ The purpose of introducing the *Cosmetics Regulations* was ‘to address a previous market failure whereby consumers did not have sufficient information about cosmetic ingredients to avoid ... or obtain treatment for, adverse reactions caused by some cosmetics’.²⁸ The market failure which prompted the introduction of the *Cosmetics Regulations* was described by the regulator as a lack of ‘necessary information about cosmetic ingredients’ available to consumers.²⁹ This resulted in dermatologists treating adverse reactions to cosmetics having to obtain information on ingredients directly from manufacturers, delaying treatment and identification of harm.³⁰ Notably, this failure ‘resulted in increased cost to governments, as a result of claims on health care and pharmaceutical benefit schemes and increased costs to consumers in terms of pain and suffering and medical costs’.³¹ We use this regulatory purpose of addressing market failure, and

26 Trischa Mann and Audrey Blunden (eds), *Australian Law Dictionary* (Oxford University Press, 1st ed, 2010) 493–4 (definition of ‘regulation’).

27 *Competition and Consumer Act 2010* (Cth) sch 2. Previously, the *Cosmetics Regulations* were issued pursuant to section 65D of the *Trade Practices Act 1974* (Cth).

28 *Cosmetic Regulations Regulation Impact Statement*, above n 16, 2.

29 *Ibid* 11.

30 *Ibid*.

31 *Ibid*.

the array of harms it aimed to prevent, as the benchmark for evaluating the adequacy of the current regulatory framework.

To address this perceived regulatory shortfall, the *Cosmetics Regulations* broadly require that all ingredients in a cosmetic product be available to consumers at the point of sale, by being listed on either the container or the product itself.³² Ingredients must be listed in descending order by mass or volume,³³ although it is not required that the precise quantity of each ingredient contained in a product be included. The Australian Competition and Consumer Commission (‘ACCC’), which administers the *Cosmetics Regulations*, does not require testing to establish whether the substance or quantity of ingredients contained on a label are correct.³⁴

Under regulation 5(8) of the *Cosmetics Regulations*, any fragrance mixture contained in a cosmetic product must be shown by either listing the ingredients contained in the fragrance mixture,³⁵ or including any of the words ‘fragrance’, ‘fragrances’, ‘parfum’ or ‘parfums’ in the list of ingredients contained on the product.³⁶ The practical implication of this provision is that cosmetic producers are given an option to either list all the ingredients contained in a fragrance mixture, or include just one word to indicate the presence of a fragrance mixture. Unsurprisingly, though perhaps concerningly, research indicates that industry practice is generally to do the latter.³⁷ A single fragrance mixture in a product can contain dozens to hundreds of individual chemicals, which alone or combined could cause adverse reactions in consumers.³⁸ The current form of the *Cosmetics Regulations* does not require that any specific chemical ingredient be listed on a label if it is used ‘solely to impart an odour’.³⁹ Similar exceptions to full disclosure are made for flavours⁴⁰ and incidental ingredients⁴¹ contained in cosmetic products. While there are some known hazardous air pollutants and allergens contained in fragrance mixtures, the full extent to which particular chemicals (or mixtures of chemicals) are responsible for particular health problems is still unknown.

A desire to protect trade secrets is one possible explanation for the regulatory omission of fragrance labelling requirements for cosmetics. However, this would appear unnecessary, since a specific regulatory procedure applies to protect such secrets. Where a company can satisfactorily demonstrate that revealing the name of an ingredient in a cosmetic product on a label would prejudice a trade secret,⁴²

32 *Cosmetics Regulations* reg 5(1).

33 *Cosmetics Regulations* reg 5(1).

34 Product Safety Australia, *Cosmetics Ingredients Labelling*, Australian Competition and Consumer Commission <<http://www.productsafety.gov.au/standards/cosmetics-ingredients-labelling>>.

35 *Cosmetics Regulations* reg 5(8)(b).

36 *Cosmetics Regulations* reg 5(8)(a).

37 Anne C Steinemann et al, ‘Fragranced Consumer Products: Chemicals Emitted, Ingredients Unlisted’ (2011) 31 *Environmental Impact Assessment Review* 328; Anne Steinemann, ‘Ten Questions Concerning Air Fresheners and Indoor Built Environments’ (2017) 111 *Building and Environment* 279.

38 Steinemann, ‘Ten Questions’, above n 37, 280–1.

39 *Cosmetics Regulations* reg 3 (definition of ‘fragrance’ in respect of cosmetic products).

40 *Cosmetic Regulations* reg 5(7).

41 *Cosmetic Regulations* reg 5(9).

42 *Cosmetic Regulations* reg 7(a).

and that inclusion of the ingredient in the product is unlikely to be harmful to a consumer,⁴³ the Minister for Small Business may allow for the ingredient to be listed as ‘other ingredient’ rather than by name and volume.⁴⁴ The *Cosmetics Regulations* do not contain a defined procedure for determining whether inclusion of an ingredient is likely to be harmful to a consumer. This raises the question of what degree of harm is necessary to outweigh any arguments in favour of granting confidentiality. It appears that no direct judicial guidance is available on this point. There are also no administrative guidelines available to regulators outlining the manner in which this determination should be approached.

2 Other Legislation Regulating Cosmetics

Not all of the legislation relating to the manufacture and sale of cosmetic products contains labelling disclosure requirements aimed at consumers. There are various other legislative instruments relating to the importation, manufacture and sale of cosmetics on the Australian market. The following pieces of legislation are, for the most part, ancillary to the issues raised by this article. Nonetheless, understanding the complexity of the entire regulatory framework relating to cosmetics is important. Further, the lack of attention to labelling disclosure requirements outside of those set out in the *Cosmetics Regulations* is indicative of the regulatory gaps in this area. As will be discussed in further detail below, various amendments could be made to existing regulations such as these with more ease than introducing entirely new legislation, which this article considers amongst the suite of viable reform options.

The *Industrial Chemicals (Notification and Assessment) Act 1989* (Cth) (*ICNA Act*) contains a similar definition of ‘cosmetic’ to that contained in the *Cosmetics Regulations*. The *ICNA Act* establishes the National Industrial Chemicals Notification and Assessment Scheme (‘NICNAS’), a statutory scheme regulating the importation and manufacture of chemicals for industrial use.⁴⁵ Relevantly, NICNAS is responsible for maintaining the Australian Inventory of Chemical Substances (‘AICS’), in which all chemical substances used in cosmetic products must be listed.⁴⁶ Although NICNAS does not keep a list of permitted or prohibited chemicals for use in cosmetic products (as distinct from those actually *used* in cosmetic products), it does impose conditions on the use of all industrial chemicals through its administration of the *ICNA Act* and the AICS.⁴⁷ Although the public section of the AICS contains a list of over 40 000

43 *Cosmetic Regulations* reg 7(b).

44 *Cosmetic Regulations* reg 7.

45 Department of Health, Commonwealth Government, *About Us* (17 August 2017) National Industrial Chemicals Notification and Assessment Scheme <<https://www.nicnas.gov.au/about-us>>.

46 Department of Health, Commonwealth Government, *Chemical Inventory (AICS)* (17 August 2017) National Industrial Chemicals Notification and Assessment Scheme <<https://www.nicnas.gov.au/chemical-inventory-AICS>>.

47 Department of Health, Commonwealth Government, *Cosmetics and Therapeutic Goods*, above n 22.

chemicals,⁴⁸ the database itself is clearly an insufficient measure for providing information to consumers, given that it is not specific to any particular product.

The *Cosmetics Standard 2007* (Cth) (*'Cosmetics Standard'*) is a standard issued pursuant to section 81(1) of the *ICNA Act*, which contains definitions and performance requirements for a specific selection of cosmetic products. Under the *Cosmetics Standard*, all cosmetics containing sunscreen must comply with relevant Australian or New Zealand Standards dealing with, inter alia, tested SPF levels.⁴⁹ The *Cosmetics Standard* also limits the kinds of credence statements that can be made about certain antibacterial and anti-acne skin care products, oral hygiene products, and anti-dandruff haircare products.⁵⁰ In this sense, the *Cosmetics Standard* does set out some labelling requirements with respect to these products. However, the standard is proscriptive only with respect to representations made as to the performance of the products, rather than addressing chemical content. At any rate, there is no mention of 'fragrance' contained in the current text of the *Cosmetics Standard*.

Pecuniary penalties can be imposed on those who do not comply with standards issued pursuant to section 81 of the *ICNA Act*,⁵¹ which includes the *Cosmetics Standard*. However, as the requirements set out in the *Cosmetics Standard* are highly specific and only pertain to certain types of products, arguably these enforcement measures are unlikely to be of use to as wide a range of consumers as is ultimately desirable.

3 Non-legal Instruments Mandating Disclosure of Ingredients in Cosmetic Products

To the knowledge of the authors, there are currently no voluntary, market-driven schemes mandating disclosure of ingredients for cosmetic products. This is presumably due to the industry's perception that the field is already covered by the legislative instruments discussed above, such as the *Cosmetics Regulations*. The peak industry body for the cosmetics industry, Accord, for example, specifically notes that cosmetic products are outside the scope of its other market-led ingredient disclosure initiatives because these products 'are already covered by ingredient disclosure requirements specified by the Australian Competition and Consumer Commission'.⁵² Accord's voluntary ingredients disclosure initiative for the cleaning products industry, for which it is also peak body, is discussed in detail below.

Arguably, the very purpose of the *Cosmetics Regulations* – that is, consumer protection through information provision – is not being achieved by the current regulatory framework. Regulatory intervention for the protection of consumers in the realm of cleaning products is even less developed, as will be discussed in the next section.

48 Department of Health, Commonwealth Government, *Chemical Inventory (AICS)*, above n 46.

49 *Cosmetics Standard* sch 1 items 1–2.

50 *Cosmetics Standard* sch 1 items 3–6.

51 *ICNA Act* s 81A.

52 Accord, *'What's in It?' Question and Answer* (2014) <<http://accord.asn.au/sustainability/whats-question-answer/>>.

B Cleaning Products

1 *Legislation and Regulation Mandating Disclosure of Ingredients*

In general, more formal regulatory structures exist around products manufactured and sold in the cosmetics industry than for the other consumer products considered in this article. There is currently no legislative labelling requirement to disclose ingredients of consumer products that are not cosmetics, other than some limited standards relating to the packaging and labelling of some specific types of disinfectant.⁵³ Indeed, there are no mandatory standards equivalent to the *Cosmetics Regulations* relating to disclosure of ingredients, or fragrance mixtures, in cleaning products.⁵⁴ Therefore, consumer products other than cosmetics fall outside the ambit of any legislative mandate for ingredient disclosure aimed at consumers.

The reason for this may be the perception that cosmetic products in their various forms are applied directly to the human body, and thereby pose more of a risk than other types of products. This is supported by the existing legal definition of ‘cosmetic’, which is limited in scope to those products ‘intended for placement *in contact with* any external part of the human body’.⁵⁵ However logical this rationale may appear on its face, it is tenuous to assume that exposure to harmful chemicals from cosmetic products will necessarily outweigh exposure from other consumer products. Exposure to pollutants occurs through multiple routes other than ingestion and epidermal exposure – including, most pertinently, inhalation.⁵⁶

2 *Other Legislation Regulating Cleaning Products*

Although not aimed at consumers, cleaning products used in the workplace may be subject to ingredient disclosure requirements arising from occupational health and safety legislation. In all Australian jurisdictions, information regarding the ingredients of hazardous chemicals used in the workplace must be provided in the form of Safety Data Sheets (‘SDS’).⁵⁷ Manufacturers, importers and

53 *Therapeutic Goods Order No 54 – Standard for Disinfectants and Sterilants* (Cth), made under section 10 of the *Therapeutic Goods Act 1989* (Cth), applies to household grade disinfectants, including skin disinfectants and antibacterial clothes preparations. As noted earlier, therapeutic goods are beyond the scope of this article.

54 A list of all mandatory standards currently administered by the ACCC is available online: see Product Safety Australia, *Mandatory Standards* (6 July 2016) Australian Competition and Consumer Commission <<https://www.productsafety.gov.au/product-safety-laws/safety-standards-bans/mandatory-standards>>.

55 *ICNA Act* s 5 (definition of ‘cosmetic’) (emphasis added); *Cosmetics Regulations* reg 3 (definition of ‘cosmetic product’) (emphasis added).

56 Nazaroff and Weschler, above n 3. See generally Wayne R Ott, Anne C Steinemann and Lance A Wallace (eds), *Exposure Analysis* (CRC Press, 2006).

57 See part 7.1 of the *Work Health and Safety Regulations 2011* (Cth) (‘*Model Work Health and Safety Regulations*’) made pursuant to section 276 and schedule 3 of the *Work Health and Safety Act 2011* (Cth). The *Model Work Health and Safety Regulations*, to which this article will refer henceforth as an indicative example of the regulations in place in this area nationally, have been adopted by all states and territories other than Victoria and Western Australia. In Victoria, obligations related to SDS are contained in part 4.1 of the *Occupational Health and Safety Regulations 2007* (Vic). In Western Australia, obligations related to SDS are contained in part 5 of the *Occupational Safety and Health Regulations 1996* (WA).

suppliers of hazardous chemicals must prepare and provide SDS,⁵⁸ as well as ensure that all hazardous chemicals provided for use in the workplace are correctly labelled.⁵⁹ Similar obligations apply to employers, who must ensure that all hazardous chemicals are correctly labelled,⁶⁰ and that SDS are available for access by all employees involved in using, handling or storing those chemicals.⁶¹ In addition to providing information about the composition of products, SDS outline procedures for safe handling, storage, use and disposal of hazardous chemicals.⁶²

The utility of SDS as a consumer information mechanism is limited, due to the scope of the regulations applying only to chemicals for use in workplaces. Indeed, the regulations exclude hazardous chemicals that will only be used in a workplace in a quantity and manner consistent with household use from having to comply with the broader regulations related to SDS,⁶³ although employers must ensure that sufficient information about the safe use, handling and storage of hazardous chemicals is readily accessible where SDS are not provided.⁶⁴ This suggests that the SDS regulations are intended only as a protection mechanism for employees, rather than consumers. Further, a review of the regulations in this area suggests that SDS do not explicitly require disclosure of the presence of a fragrance mixture at all, let alone the ingredients contained in a fragrance mixture. In this sense, employees who suffer adverse reactions from fragranced products cannot rely on the ingredients disclosure required under occupational health and safety laws to protect them.

3 *Non-legal Instruments Mandating Disclosure of Ingredients in Cleaning Products*

Outside of hazardous chemical disclosure requirements for SDS, there are currently no legislative mandates in place in Australia aimed at providing information about ingredients to consumers. Opportunely, peak bodies for the cleaning product industries around the world have recognised and, to some extent, responded to this legislative gap. As noted above, the representative industry body for both the cosmetic and cleaning product industries in Australia is Accord. ‘What’s in It?’ (‘WII’) is a voluntary ingredient disclosure initiative developed by Accord which applies to household cleaning products.⁶⁵ Accord lists over one hundred companies across various industries amongst its members,⁶⁶ though not all of those companies participate in the WII scheme. Indeed, only eight companies are currently listed by Accord as participants,⁶⁷

58 See, eg, *Model Work Health and Safety Regulations* regs 330, 339.

59 See, eg, *Model Work Health and Safety Regulations* regs 335(1), 338.

60 See, eg, *Model Work Health and Safety Regulations* regs 341, 342, 343.

61 See, eg, *Model Work Health and Safety Regulations* reg 344.

62 See, eg, *Model Work Health and Safety Regulations* sch 7 cl 1.

63 See, eg, *Model Work Health and Safety Regulations* regs 335(3)(c), 344(4)(c).

64 See, eg, *Model Work Health and Safety Regulations* reg 344(5).

65 Accord, ‘What’s in It?’ *Question and Answer*, above n 52.

66 Accord, *Members* (2014) <<http://accord.asn.au/about/members/>>.

67 At the time of writing, the eight participating companies were Amway, Colgate-Palmolive, Helios Health & Beauty, Kao Australia, PZ Cussons, Reckitt Benckiser, Unilever and Aware Environmental: see

though Accord estimates that due to the market share of these participants, approximately 79 per cent of all relevant products on the Australian market are covered by the WII initiative.⁶⁸ In justifying the initiative, Accord specifically notes the absence of any other regulatory ingredient disclosure requirements for these categories of product.⁶⁹

The WII initiative, which mirrors existing schemes in the United States and Canada, was introduced for the purpose of '[helping] Australians make more informed choices about the products they use in their households'.⁷⁰ The WII scheme applies to household cleaners, laundry products, household floor maintenance products, air-care products and automotive cleaners.⁷¹ The WII scheme requires that all intentionally added ingredients at concentrations greater than or equal to one per cent be listed in descending order of predominance, an approach which Accord notes 'mirrors ingredient disclosure for foods and cosmetics'.⁷² Ingredients present at less than one per cent concentration can then be listed in any order.⁷³ In a practical sense, the requirement for all ingredients at a concentration of greater than one per cent to be individually listed could require more by way of disclosure than those of the *Cosmetics Regulations* in the case of fragrance ingredients. This is because a disclosure of an ingredient with a concentration greater than one per cent appears to be required regardless of whether its presence is solely to impart an odour. One exception to disclosure under the WII initiative, similar to those surrounding confidentiality in the *Cosmetics Regulations*, is that participating companies are not required to disclose ingredients that they consider to be 'confidential business information'.⁷⁴ In this case, a proprietary ingredient may be listed by its chemical function or chemical class.⁷⁵ Thus, a fragrance ingredient or mixture may be listed as 'fragrance'.

Voluntary schemes can provide useful information to consumers and bridge the gap left by the lack of legislative intervention in a particular area. The WII initiative is an example of self-regulation, a form of regulation characterised by rules or codes created and enforced solely within industries.⁷⁶ In some cases, self-regulation can be an efficient alternative mechanism of achieving desired regulatory outcomes without the need for expensive and time-consuming government intervention.⁷⁷ This is because industry initiatives such as the WII scheme are 'not subject to the same procedural and due process hurdles or

Accord, *Participants in Ingredient Disclosure* (2014) <<http://accord.asn.au/sustainability/whats-question-answer/participants-ingredient-disclosure/>>.

68 Accord, *What's in It?* (2015) <<http://accord.asn.au/sustainability/whats/>>.

69 In contrast to cosmetics, pesticides and commercial cleaning products: see Accord, *'What's in It?' Question and Answer*, above n 52.

70 *Ibid.*

71 *Ibid.*

72 *Ibid.*; Email from Jennifer Semple of Accord to Anne Steinemann, 12 July 2017.

73 Accord, *What's in It?*, above n 68.

74 *Ibid.*

75 *Ibid.*

76 Department of the Prime Minister and Cabinet, 'The Australian Government Guide to Regulation' (Guide, Commonwealth Government, 2014) 28 ('Australian Government Guide to Regulation').

77 Arie Freiberg, *The Tools of Regulation* (Federation Press, 2010) 27.

political constraints' as government measures,⁷⁸ such as the passing of legislation. This can be useful in industries affected by scientific developments, as innovative approaches to new information can be implemented more quickly. Self-regulatory initiatives may also promote greater compliance through competition, as industry players may have a more vested interest in 'policing' one another than government enforcement agencies.⁷⁹

Nonetheless, although the initiative shown by the cleaning products industry in this regard is admirable, there are some deficiencies in the WII scheme. Firstly, the scheme is entirely voluntary, which can give rise to perceptions of under-enforcement and a lack of accountability.⁸⁰ As noted above, there are currently eight companies participating in the WII initiative. Although '[i]t is Accord's hope'⁸¹ that the participation of market-leading companies will lead to wider industry adoption of WII,⁸² the lack of legal mandate gives rise to questions of the ultimate effectiveness of the scheme. There is no mention by Accord of the potential sanctions faced by a member who does not comply with the initiative.⁸³ Indeed, there is no indication as to how the claims made by participants in the scheme will be independently verified, if at all. The lack of information available to consumers regarding, inter alia, the program's verification methods, may create perceptions of inherent bias. Secondly, companies participating in the WII scheme are not required to disclose ingredients on the product label. In the interest of flexibility, Accord has allowed for ingredient disclosure to be contained on the company's website, or delivered to consumers by some '[o]ther electronic or non-electronic means'.⁸⁴ These rather vague allowances can be contrasted with the stricter labelling requirements set out in the *Cosmetics Regulations*, which require that all ingredient information be available to consumers at the point of sale.⁸⁵ Lastly, schemes such as these may have misleading effects on consumers. Participating companies do not have to disclose all ingredients, though consumers may not be aware of this, and may think that they are being provided with a full list of ingredients, even if they are not.⁸⁶ The program also provides for general ingredient names to be disclosed rather than specific chemicals – even for chemicals other than fragrance mixtures – such as '[d]yes' or '[p]reservative'.⁸⁷

78 Ibid 29.

79 Ibid 30.

80 Ibid 30–1; Margot Priest, 'The Privatization of Regulation: Five Models of Self-Regulation' (1997) 29 *Ottawa Law Review* 233, 282.

81 Accord, 'What's in It?' *Question and Answer*, above n 52.

82 Ibid.

83 Ibid.

84 Ibid.

85 *Cosmetics Regulations* reg 5(1).

86 The effect of general consumer protection laws on this type of conduct, such as those contained in schedule 2 to the *Competition and Consumer Act 2010* (Cth), is discussed at Part II(C) of this article, below.

87 See, eg, ingredients disclosure for various products in the 'Fluffy' line of fabric care products prepared by Colgate-Palmolive, a participant in the WII initiative: Colgate Australia, *Product Ingredients: Fluffy* (2017) <<http://www.colgate.com.au/app/Colgate/AU/HC/Product-Ingredients/Fluffy.cvsp>>.

It should be accepted that not all industries are well-suited to self-regulation. This is particularly the case for industries in which the consequences associated with market failure are significant, such as protection of the public from some harm.⁸⁸ Self-regulation may be most appropriate where the market is able to ‘move towards an optimal outcome by itself’.⁸⁹ In this regard, the authors query the effectiveness of relying solely upon self-regulation in the context of ingredient disclosure due to the tension between commercial desires for confidentiality on the one hand, and the reports of consumer harm on the other. The Australian Government Guide to Regulation notes that self-regulation ‘may create public concern, where, for example, perceived conflicts of interest could threaten safety’.⁹⁰ Do our regulators consider that alerting consumers to potentially hazardous effects where people are largely unaware of these effects is a task best left entirely to companies whose goal it is to ensure consumers continue to purchase their products – or is this a case of setting the fox to guard the henhouse?⁹¹ This is exactly the risk present in the case of fragranced consumer products not subject to legislative disclosure requirements. However, the interaction of broader consumer protection laws ensures that there is not a complete lack of protection with respect to these products, as will be discussed in the next section.

C Beyond Ingredient Disclosure: Other Legal Mechanisms to Protect Consumers

The ACCC is the body responsible for prosecuting breaches of the *Cosmetics Regulations*.⁹² In addition to this specific role, the ACCC is responsible for overseeing consumer protection laws generally, including those contained in the *ACL*. In addition to providing an avenue for creating product safety standards imposing requirements on consumer goods, the *ACL* offers various avenues of redress for consumers who have been harmed or misled by a product. This section introduces these options, then discusses recent findings about the effectiveness of these rules, before reflecting on specific opportunities for reform.

1 Product Safety Standards

Section 104 of the *ACL* empowers the relevant Minister to issue safety standards for consumer goods. As noted above, the *Cosmetics Regulations* are an example of such a standard.⁹³ There is no equivalent standard for cleaning

88 Julia Black, ‘Decentering Regulation: Understanding the Role of Regulation and Self-Regulation in a “Post-regulatory” World’ (2001) 54 *Current Legal Problems* 103, 115.

89 Department of Industry, ‘Industry Officer’s Guide to Regulation Reform’ (Guide, Commonwealth Government, August 2014) 10.

90 Australian Government Guide to Regulation, above n 76, 28.

91 See, eg, Priest, above n 80, 271.

92 Product Safety Australia, *Cosmetics Ingredients Labelling*, above n 34.

93 The *Cosmetics Regulations* were published pursuant to section 65D of the *Trade Practices Act 1974* (Cth), the predecessor to the *ACL*.

products.⁹⁴ Standards issued pursuant to this section may set out product requirements that are necessary to prevent or reduce risk of injury,⁹⁵ including those in the form of ‘markings, warnings or instructions to accompany consumer goods of that kind’.⁹⁶ Pecuniary penalties may be enforced on those who, in trade or commerce, supply consumer goods that do not comply with safety standards issued pursuant to section 104 of the *ACL*.⁹⁷ In practice, failure to comply with the requirements set out in the *Cosmetics Regulations* has led to the ACCC recalling products, and accepting compliance undertakings from companies in breach.⁹⁸

2 Mandatory Reporting Provisions Related to the Supply of Unsafe Consumer Products

Under section 131 of the *ACL*, a supplier of goods who becomes aware of the serious injury or illness of any person, and considers that their product was the cause of the harm, must notify the Minister within two days of becoming so aware. Pecuniary penalties are associated with the contravention of this section.⁹⁹ ‘[S]erious injury or illness’ is defined in section 2 of the *ACL* as ‘an acute physical injury or illness that requires medical or surgical treatment’¹⁰⁰ but expressly excludes ‘an ailment, disorder, defect or morbid condition (whether of sudden onset or gradual development)’¹⁰¹ or ‘the recurrence, or aggravation’¹⁰² of any such affliction. As the definition appears to set a relatively high threshold for harm, it is unclear whether the common adverse reactions to fragranced consumer products would qualify.

Under sections 109–114 of the *ACL*, the ACCC may recall consumer products on either an interim or permanent basis if it appears that those products may cause injury to a person. Unlike the mandatory reporting scheme contained in section 131 of the *ACL*, product recalls are not limited to products causing ‘serious’ harm. Penalties can be imposed on a person who fails to comply with the terms of a statutory product ban.¹⁰³ It should be queried, however, whether this is a case of shutting the door after the horse has bolted. As our understanding of the potential dangers posed by fragranced products develops worldwide, regulation should favour prevention by equipping consumers with the relevant information upfront, rather than methods taken after an incident has occurred in order to prevent further harm, such as product recalls.

94 A list of all mandatory standards currently administered by the ACCC is available online: see Product Safety Australia, *Mandatory Standards*, above n 54.

95 *ACL* s 104(2).

96 *ACL* s 104(2)(c).

97 *ACL* s 106.

98 See, eg, Australian Competition and Consumer Commission, ‘ACCC Accepts Undertakings for Incorrect Labelling of Cosmetics Products’ (Media Release, MR 372/08, 23 December 2008) <<https://www.accc.gov.au/media-release/accc-accepts-undertakings-for-incorrect-labelling-of-cosmetics-products>>.

99 *ACL* s 131.

100 *ACL* s 2 (definition of ‘serious injury or illness’).

101 *ACL* s 2 (definition of ‘serious injury or illness’ para (a)).

102 *ACL* s 2 (definition of ‘serious injury or illness’ para (b)).

103 *ACL* s 118.

3 *Liability of Manufacturers for Goods with Safety Defects*

Under part 3-5 of the *ACL*, manufacturers are liable to compensate individuals who have suffered harm as a result of a ‘safety defect’ in a product supplied in trade or commerce.¹⁰⁴ The protections under this part are broad in scope, extending to persons who suffer loss or damage as a result of another person’s injuries.¹⁰⁵ Damage that occurs to other goods (including land, buildings or fixtures,¹⁰⁶ as well as domestic and household goods)¹⁰⁷ is also compensable under the provisions. The provisions, which impose strict liability with respect to injuries caused by unsafe and defective products, are in the style of a European directive dating back to 1985.¹⁰⁸

Unlike the product safety provisions discussed above, which are primarily enforced by the ACCC, the regime in part 3-5 of the *ACL* arms consumers with the ability to bring their own action in respect of injury caused by unsafe products. Under section 9(1) of the *ACL*, goods are considered to have a safety defect ‘if their safety is not such as persons generally are entitled to expect’. In determining the extent of safety in respect of goods, section 9(2) of the *ACL* provides that regard is to be given to all relevant circumstances. Relevantly, for the purposes of ingredient disclosure, this includes the manner in which they have been marketed,¹⁰⁹ their packaging,¹¹⁰ markings,¹¹¹ and any instructions for, or warnings with respect to the products.¹¹² The interplay between defectiveness and safety is interesting, as the two concepts are not mutually exclusive – goods might not necessarily be defective merely on the basis that they cause injury, if to do so is within their purpose.¹¹³ ‘Similarly, just because goods operate as intended, [it] does not mean that they are not defective if they cause personal injuries, for example, because of inadequate warnings or instructions for use’.¹¹⁴ Although there is no judicial guidance on this precise scenario, it is possible to imagine a consumer who has been adversely affected by fragranced consumer products bringing an action against a manufacturer for failure to disclose the presence of fragrance ingredients under these provisions.

The use of part 3-5 of the *ACL* as a consumer protection mechanism in the case of fragranced consumer products is not without its limitations. It has been

104 *ACL* s 138.

105 *ACL* s 139.

106 *ACL* s 141.

107 *ACL* s 140.

108 *Council Directive 85/374/EEC of 25 July 1985 on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Liability for Defective Products* [1993] OJ L/210/29.

109 *ACL* s 9(2)(a).

110 *ACL* s 9(2)(b).

111 *ACL* s 9(2)(c).

112 *ACL* s 9(2)(d).

113 ‘Certainly, a poison which was not toxic would not be fit for its intended purpose. However, it would not be unsafe per se’: Jocelyn Kellam, S Stuart Clark and Mikhail Glavac, ‘Theories of Product Liability and the Australian Consumer Law’ (2013) 21 *Competition & Consumer Law Journal* 1, 76 n 407. See also *Cook v Pasmenco Ltd* (2000) 99 FCR 548.

114 Kellam, Clark and Glavac, above n 113, 76, citing *ACCC v Glendale Chemical Products Pty Ltd* [1998] FCA 180.

suggested that the inquiry into whether a product contains a safety defect within the meaning of section 9(1) of the *ACL* ‘involves two elements: an expectation and an entitlement to a certain level of safety’.¹¹⁵ The test is objective and is based on the reactions or likely reactions of an ordinary member of the class to whom the product is marketed.¹¹⁶ Considering the highly individual response to fragranced consumer products, a purely objective assessment of safety may result in many consumers being outside the scope of these protections on the basis that their reaction is considered ‘extreme’.

Further, although the provisions in part 3-5 of the *ACL* are strict liability provisions, there are several defences available to manufacturers. Perhaps most relevantly in the case of fragranced consumer products, it is a defence to liability if the state of scientific or technical knowledge at the time when the goods were supplied by the manufacturer was not such as to enable the safety defect to be discovered.¹¹⁷ Considering that the harms associated with fragranced consumer products are a growing area of research, this defence may be open to many manufacturers who have included fragrances in their products.

4 General Prohibition on Misleading Representations

Division 1 of part 3-1 of the *ACL* contains several provisions broadly prohibiting misleading representations or conduct in the course of trade or commerce, including the sale of consumer products. It is an offence to make any false or misleading representations as to, inter alia, the composition of goods.¹¹⁸ It is also an offence to engage in conduct that is liable to mislead the public as to the nature, manufacturing process or characteristics of any goods.¹¹⁹ These provisions are strict liability offences, with the potential for those in breach to incur serious pecuniary penalties.¹²⁰

Although there has not been any judicial consideration of these provisions in the specific context of labelling disclosure requirements for the types of products considered in this article, the breadth of the provisions are likely to cover claims made about the ingredients contained in most common consumer products – or, indeed, ingredients *not* contained. The ACCC has specifically confirmed that representations relating to the absence of an ingredient (for example, claims that a product is ‘formaldehyde free’)¹²¹ or product safety (for example, that a product

115 Ibid.

116 Ibid 75 n 405, citing by analogy *Campomar Sociedad Limitada v Nike International Ltd* (2000) 202 CLR 45, in which the High Court noted that any extreme or fanciful reactions might be disregarded.

117 *ACL* s 142(c). This defence has been successfully relied upon in cases tried under the equivalent provisions of the *Trade Practices Act 1974* (Cth): see, eg, *Graham Barclay Oysters v Ryan* (2000) 102 FCR 307; *Merck Sharp & Dohme (Australia) Pty Ltd v Peterson* (2011) 196 FCR 145.

118 *ACL* s 151(1)(a).

119 *ACL* s 155(1).

120 *ACL* ss 151(1), (4), 155(1), (2). The maximum penalties associated with each offence are \$1 100 000 for a body corporate and \$220 000 for a natural person, respectively.

121 Australian Competition and Consumer Commission, ‘Brazilian Blowout “Formaldehyde-Free” Representations Likely to Mislead’ (Media Release, NR 155/11, 29 August 2011) <<https://www.accc.gov.au/media-release/brazilian-blowout-%E2%80%98formaldehyde-free%E2%80%99-representations-likely-to-mislead>>.

is ‘allergy tested’) can give rise to misleading and deceptive conduct claims if those representations are false.¹²² The significance of these provisions is particularly pertinent in light of the research suggesting that fragranced products labelled as ‘natural’ or ‘organic’ pose a significant health risk, despite many consumers assuming that these products are safer than regularly labelled products.¹²³

Further, the general prohibitions against misleading and deceptive conduct may give legal weight to voluntary, industry-based initiatives such as the WII scheme outlined above. Prima facie, opt-in endeavours such as the WII program do not carry legal implications for providing incomplete or inaccurate information regarding ingredients, as there are no legal mandates for providing that information in the first place. This is a common critique of self-regulation.¹²⁴ However, if a voluntarily provided list of ingredients that purports to contain a complete list of chemicals contained in a product omits to include a potentially harmful, reaction-causing substance, this could be the basis for a claim for breach of a provision of division 1 of part 3-1 of the *ACL*.¹²⁵ This option remains speculative, however, and in the absence of any prosecution in this specific area, of questionable effectiveness as a way to protect consumers.

The gaps, weaknesses and uncertainties identified here mirror and are arguably exacerbated by broader weaknesses in the *ACL* and its institutional framework. In March 2017, the Productivity Commission suggested that limited resources and a ‘risk-based’ regulatory approach could lead to insufficient enforcement of the *ACL*, at least as far as prosecutions and high-level enforcement action (as distinct from education for consumers and traders).¹²⁶ This approach may also lead regulators to prioritise matters that represent the highest, proven risks to consumers over those addressed here, which may pose substantial risks, but about which scientific and public understanding is still developing. A March 2017 review of the *ACL* by Consumer Affairs Australia and New Zealand (‘CAANZ’) further suggested that important terms, such as ‘serious injury or illness’ (which trigger the mandatory reporting provisions) were not sufficiently clear and would benefit from further guidance as to their interpretation.¹²⁷ Such guidance would help clarify whether harms associated with fragranced consumer products fall within the scope of the provision. Finally, although the *ACL* presents a viable option for consumer redress, this article must reiterate its earlier

122 See, eg, Delia Rickard, ‘Cosmetic Compliance and Safety and the Australian Consumer Law’ (Speech delivered at the Accord Cosmetic and Personal Care Conference, Sydney, 22 October 2014) <<https://www.accc.gov.au/speech/cosmetic-compliance-and-safety-and-the-australian-consumer-law>>.

123 Steinemann, ‘Volatile Emissions from Common Consumer Products’, above n 8, 276–7.

124 Freiberg, above n 77, 30.

125 Silence, or an omission to disclose, has been found to give rise to misleading and deceptive conduct in cases where it could be said that a ‘reasonable expectation’ to disclose existed: see, eg, *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31, 32, 41 (Gummow J). Whether such an expectation exists must be established on the facts. See also Frederika De Wilde, ‘The Less Said – the Worse: Silence as Misleading and Deceptive Conduct’ (2007) 15 *Trade Practices Law Journal* 7.

126 Productivity Commission, ‘Consumer Law Enforcement and Administration: Productivity Commission Research Report’ (Report, Australian Government, March 2017) 7–8, 87, 96–8.

127 Consumer Affairs Australia and New Zealand, ‘Australian Consumer Law Review: Final Report’ (Report, March 2017) 44.

sentiments that wherever possible, regulators should be aiming for preventative rather than mitigating measures.

This article has identified key regulatory gaps with respect to ingredients disclosure aimed at consumers in both the cosmetics and cleaning products industries. In the former, although a federal legal mandate to disclose certain ingredients exists in the form of the *Cosmetics Regulations* (and to a lesser extent, the *Cosmetics Standard*), for the reasons discussed above, this is arguably a weak substantive requirement in practice. For the cleaning products industry, there is no legal mandate for ingredients disclosure, with consumers forced to rely upon a voluntary industry measure or the will of individual companies to disclose ingredients. These approaches to disclosure of ingredients are insufficient to prevent the market failure of consumers experiencing adverse responses to cosmetics and cleaning products. Looking beyond ingredient disclosure requirements, the *ACL* rules in relation to product safety standards, mandatory reporting provisions, and strict liability for defective products appear practically insufficient to prevent or even reliably mitigate risks.

The Productivity Commission and CAANZ reviews of the *ACL* suggest some regulatory appetite for relevant reforms to the *ACL* and its institutions and associated guidance materials. Of particular relevance here, the CAANZ review suggested improving ‘pre-market’ safety arrangements, rather than relying strongly on ‘post-market’ arrangements that address risks to health and safety after a safety incident has occurred.¹²⁸ It noted the importance of ‘improving consumer access to and uptake of product safety information’.¹²⁹ It also proposed introducing a general safety provision ‘that would require traders to ensure the safety of a product before it enters the market’, with accompanying penalties.¹³⁰ This would mirror arrangements in place in some overseas jurisdictions, such as the United Kingdom and Canada, and would shift the burden of identifying risks from consumers to traders, who are in a better position to assess them.¹³¹ In this context, the review specifically notes common consumer problems with the quality or safety of a wide range of imported, ‘fast moving consumer goods’, including ‘cosmetics or other personal products’.¹³² Noting the usefulness of these suggested general reforms, the following section discusses key opportunities for reforms that could address the risks posed by fragranced consumer products through ingredient disclosure.

III OPPORTUNITIES FOR REFORM TO INGREDIENT DISCLOSURE REQUIREMENTS

Despite the existence of a range of different regulatory forms, research suggests that the current framework for both fragranced cosmetics and cleaning

128 Ibid 33–4.

129 Ibid 46, see also 95–6.

130 Ibid 5.

131 Ibid 35, 38–9.

132 Ibid 37.

products is insufficient to protect consumers from harm. Providing information to consumers through mandatory disclosure of fragrance mixtures on product labels is an essential step to reducing the myriad adverse effects associated with fragranced consumer products. The *Cosmetics Regulations* are a positive indication of regulatory intervention in this area – however, Australian regulators need to go further. In this Part, we discuss a suite of opportunities for specific reform arising from the current regulatory frameworks for ingredient disclosure. Though it is beyond the scope of this article to prescribe the ideal form such regulations should take, Australian regulators should consider the viability of the following approaches.

Conceptually, a range of regulatory responses could use ingredient disclosure requirements to address the market's failure to protect consumers from experiencing adverse effects from fragranced consumer products. The options can be broadly broken down into three categories – full ingredient disclosure, disclosure of ingredients meeting certain characteristics, and disclosure of fragrances. Each of the three categories are described below in descending order of complexity. Each approach builds upon existing regulatory frameworks for consumer protection, such as the *ACL*. In this sense, the following options are conceptually more feasible to implement than, for example, introducing entirely new primary legislation.

A Full Disclosure of Fragrance Ingredients

Fundamentally, consumers should have sufficient information to allow them to make informed choices and avoid unnecessary harm. In this regard, mandating the disclosure of all fragrance ingredients would provide consumers with full information on what they are being exposed to from their products. However, a long list of potentially hundreds of chemicals for each product may be difficult for consumers to assess. Indeed, this was one of the key reasons given during the 2008 review of the *Cosmetics Regulations* for rejecting consumer proposals to list all fragrance ingredients.¹³³ Even consumers who may be aware that they suffer adverse reactions from fragranced products may be unable to pinpoint the individual chemical or mixture of chemicals associated with their reactions. Further, analytic efforts to identify and list *all* ingredients, at any concentration, may be burdensome and likely infeasible. This is not to say that a full disclosure approach is not worthwhile. What is also needed, to support consumer awareness and choice, is a way to translate a long list of chemicals into potential risks that can be understood by the average consumer.

B Disclosure of Certain Fragrance Ingredients

A regulatory alternative to full disclosure is the listing of only those fragrance ingredients that meet certain characteristics, such as, for example, a link to adverse health effects. One example of this approach, which has been adopted by the European Union, is listing a selection of known fragrance allergen ingredients

¹³³ Cosmetic Regulations Regulation Impact Statement, above n 16, 18–19.

on warning labels directed at consumers. Under article 19(g) of the *EU Regulations*, similarly to regulation 5(8) of the *Cosmetics Regulations*, the ingredients contained in a fragrance mixture may be collectively referred to by use of the single word ‘parfum’ or ‘aroma’. However, regardless of whether their primary function is to impart an odour, the presence of any substances contained in Annex III of the *EU Regulations* must be separately indicated on the label in addition to the term ‘fragrance’ or ‘aroma’.¹³⁴ Annex III contains a list of substances that must not be contained in cosmetic products to be sold in the European Union, except subject to the specific restrictions laid out in respect of each product.¹³⁵ Adopting this approach may allow consumers who have narrowed the source of their reaction to particular chemicals contained in a fragrance mixture to avoid harm in a way not currently provided by the existing regulatory framework.

The European approach was considered, although ultimately not adopted, during the last review of the *Cosmetics Regulations*.¹³⁶ A similar approach has, however, been adopted by the Association of Southeast Asian Nations (‘ASEAN’) through the Agreement on the ASEAN Harmonized Cosmetics Regulatory Scheme,¹³⁷ which led to the development of the ASEAN Cosmetics Directive (‘ACD’).¹³⁸ The rationale for the ACD has been described as ‘[standardising] procedures and technical regulations as a means of increasing consumer safety and eliminating trade barriers’ in the ASEAN region.¹³⁹ The ACD closely follows the European approach, and includes a requirement to adopt the Cosmetics Ingredients Listings in *Council Directive 76/768/EEC of 27 July 1976 on the Approximation of the Laws of the Member States Relating to Cosmetic Products* [1976] OJ L 262/169 (the ‘*EU Directive*’), the precursor to the *EU Regulations*. Under the ACD, cosmetics comply with the ASEAN Cosmetic Labelling Requirements, with required information (including listing of known allergen ingredients) to be ‘easily legible, clearly comprehensible and indelible’.¹⁴⁰

134 *Regulation (EC) No 1223/2009 of the European Parliament and of the Council of 30 November 2009 on Cosmetic Products* [2009] OJ L 342/59, art 19(g) (‘*EU Regulations*’).

135 *EU Regulations* [2009] OJ L 342/59, annex III.

136 *Cosmetic Regulations Regulation Impact Statement*, above n 16, 9–10, 20. It should be noted that at the time of the last review of the *Cosmetics Regulations*, the *EU Regulations* in their current form had not been adopted. Instead, the review considered the *EU Directive*, which also contained the provisions relating to allergens.

137 Association of Southeast Asian Nations, ‘Agreement on the ASEAN Harmonized Cosmetic Regulatory Scheme’ (Intergovernmental Agreement, 2 September 2003) <<http://www.asean.org/wp-content/uploads/2012/10/20707.pdf>>.

138 See ASEAN Cosmetics Association, ‘ASEAN Definition of Cosmetics and Illustrative List by Category of Cosmetic Products’ (Technical Document) <<http://aseancosmetics.org/uploads/UserFiles/File/TECHNICAL%20DOCUMENTS/Technical%20Documents.pdf>>; Association of Southeast Asian Nations, ‘General Information Booklet on ASEAN Harmonized Cosmetic Regulatory Scheme’ (11 October 2012) <<http://asean.org/storage/images/archive/18354.pdf>>.

139 Z Zakaria, ‘Regulation of Cosmetics: What Has Malaysia Learnt from the European System?’ (2015) 38 *Journal of Consumer Policy* 39, 43.

140 ASEAN Cosmetics Association, ‘ASEAN Definition of Cosmetics and Illustrative List by Category of Cosmetic Products’ (Technical Document) app II part B para 3 <<http://aseancosmetics.org/uploads/UserFiles/File/TECHNICAL%20DOCUMENTS/Technical%20Documents.pdf>>.

The ACD regime has been heralded as ‘a surprising success story for regional regulatory harmonisation, effectively balancing free trade with consumer protection’.¹⁴¹ By 2013, all ASEAN member states had implemented the ACD.¹⁴² The scheme is also adaptable to consumer characteristics specific to the market in which it applies, as demonstrated by Malaysia’s adoption of additional labelling requirements alongside those in place under the ACD.¹⁴³ The cosmetics safety framework in Malaysia, for example, requires the specific labelling of children’s oral care containing fluoride, and cosmetics containing alpha hydroxyl acid, sunscreen or hydrogen peroxide, requirements which extend beyond those stipulated under the *EU Regulations*.¹⁴⁴ The purpose for the additional mandatory requirements adopted by Malaysia has been described as ‘to tighten safety, especially due to the fact that skin type among people in ASEAN countries is believed to be more sensitive and therefore such labelling helps consumers to get information so that they can exercise care when selecting products’.¹⁴⁵ A similar approach could be adopted by Australian regulators, which takes into account any conditions specific to Australian consumers.¹⁴⁶

It should be noted that the European and ASEAN approaches of listing known allergens are not without their criticisms, and may not necessarily represent the best course of action for Australian regulators. For one, compiling a list of ingredients that must be disclosed allows companies to replace regulated, fragrance allergen ingredients with potentially more harmful chemicals, in the interest of avoiding disclosure. Indeed, the 26 allergens chosen by the European Union do not cover the field of potentially harmful chemicals used in fragrance mixtures.¹⁴⁷ Further to this, scientific research indicates that ‘allergens’ do not cover all major health effects of concern associated with fragranced consumer products.¹⁴⁸ In practice, companies subject to the *EU Regulations* may resort to using other compounds that do not have to be labelled, but that are ‘less

141 ASEAN Secretariat, ‘Consumer Protection Digests and Case Studies: A Policy Guide’ (November 2015) vol 2, 107 <[www.asean.org/storage/2015/12/key_document/Consumer_Protection_Digests_and_Case_Studies-Volume_II_\(07122015\).pdf](http://www.asean.org/storage/2015/12/key_document/Consumer_Protection_Digests_and_Case_Studies-Volume_II_(07122015).pdf)>.

142 Ibid 102.

143 See Zakaria, above n 139, 52. In Malaysia, cosmetics are regulated under the *Sale of Drugs Act 1952* (Malaysia) and *Control of Drugs and Cosmetics Regulations 1984* (Malaysia). For an overview of the regime, see National Pharmaceutical Regulatory Agency, Malaysian Ministry of Health, *Guidelines for Control of Cosmetic Products in Malaysia* (First Revision, 1 February 2017) <https://npra.moh.gov.my/images/Guidelines_Central/Guidelines_on_Cosmetic/2017/feb2017/GUIDELINES_FOR_CONTROL_OF_COSMETIC_PRODUCTS_IN_MALAYSIA.pdf>.

144 Zakaria, above n 139, 52.

145 Ibid.

146 As noted above at Part II(A)(2), cosmetic products containing sunscreen are already subject to additional regulation under the *Cosmetics Standard*. This is indicative of Australian regulators’ willingness to adapt to the specific requirements of their market.

147 See, eg, Steinemann, ‘Fragranced Consumer Products and Undisclosed Ingredients’, above n 3; Ursula Klaschka, ‘Risk Management by Labelling 26 Fragrances? Evaluation of Article 10(1) of the Seventh Amendment (Guideline 2003/15/EC) of the Cosmetic Directive’ (2010) 213 *International Journal of Hygiene and Environmental Health* 308.

148 For a broader discussion of the multitude of health effects associated with exposure to fragranced consumer products: see, eg, Steinemann, ‘Health and Societal Effects’, above n 4; Steinemann, ‘Fragranced Consumer Products: Exposures and Effects from Emissions’, above n 4.

well studied from a toxicological point of view ... [and] mostly unknown to dermatologists'.¹⁴⁹ In this sense, adopting the European approach risks exacerbating the very market failure the *Cosmetics Regulations* were originally introduced to address. Criticism of the requirement to list the 26 known allergens was one reason, along with the impracticality to suppliers of cosmetics, that an approach mirroring the *EU Regulations* was not adopted following the last review of the *Cosmetics Regulations*.¹⁵⁰

Despite its limitations, the European approach indicates the existence of a regulatory middle ground between disclosure of 'fragrance' and full ingredient disclosure, and may be a helpful reference point for Australian regulators in this regard. Another approach could be to list ingredients according to classified hazards, such as the GHS.¹⁵¹ In this approach, the product label could provide a pictogram (such as '!'), a signal word (such as 'warning'), and a hazard statement (such as 'may cause respiratory irritation'). A further variation might be to include a simple text warning (such as perhaps 'caution: contains fragrance that may cause adverse effects') in lieu of listing the particular harmful ingredients. An approach involving uncomplicated yet effective warning labels mirrors that already adopted with respect to many other consumer products regulated by the ACCC under mandatory standards issued pursuant to the *ACL*.¹⁵² The benefit of this approach is that it is not limited to an enumerated list of chemicals. As long as an effective measure was developed for determining whether a chemical could be deemed hazardous for the purposes of requiring a warning label, this approach could be a dynamic variation on the European approach which could take into account scientific developments in this area as they occur. It is beyond the scope of this article to determine whether such an approach is practically viable, but it is certainly an option for regulators to consider going forward.

149 Axel Schnuch et al, 'Sensitization to 26 Fragrances to be Labelled According to Current European Regulation' (2007) 57 *Contact Dermatitis* 1, 7.

150 Cosmetic Regulations Regulation Impact Statement, above n 16, 20.

151 *Globally Harmonized System of Classification and Labelling of Chemicals (GHS)*, UN Doc ST/SG/AC.10/30 Rev 6 (2015). For discussion of how the GHS standards are applied to cosmetic products, see, eg, Ursula Klaschka, 'Dangerous Cosmetics – Criteria for Classification, Labelling and Packaging (EC 1272/2008) Applied to Personal Care Products' (2012) 24(37) *Environmental Sciences Europe* 1. Under the *Model Work Health and Safety Regulations* (discussed above at Part II(B)(2)), chemicals must be classified as hazardous using the GHS Third Revised Edition: see Safe Work Australia, *Classifying Chemicals – The GHS* (28 August 2017) <<https://www.safeworkaustralia.gov.au/classifying-chemicals#the-ghs>>.

152 See, eg, *Trade Practices (Consumer Product Safety Standard) (Disposable Cigarette Lighters) Regulations 1997* (Cth) reg 12, which sets out mandatory warning label requirements for disposable cigarette lighters; *Trade Practices (Consumer Product Safety Standard) (Hot Water Bottles) Regulations 2008* (Cth) pt 5, which sets out mandatory warning label requirements for hot water bottles; *Trade Practices Act 1974 – Consumer Protection Notice No 3 of 2009 – Consumer Product Safety Standard for Swimming Aids and Flotation Aids for Water Familiarisation and Swimming Tuition* (Cth), which sets out the mandatory labelling requirements for swimming and flotation aids (by reference to Australian Standard AS 1900-2002 'Flotation Aids for Water Familiarization and Swimming Tuition'). For further information about the mandatory standards administered by the ACCC, see Product Safety Australia, *Mandatory Standards*, above n 54.

C Disclosure of the Use of Fragrance

A further, simpler alternative would be to require fragranced consumer products to disclose that they contain a fragrance. As noted above, regulation 5(8) of the *Cosmetics Regulations* takes this approach in relation to cosmetics, allowing for disclosure of all ingredients in a fragrance mixture to be satisfied by listing one word for ‘fragrance’. Similar regulations exist in many jurisdictions around the world with respect to fragrance mixtures.¹⁵³ This approach constitutes a trade-off between the complexity and potentially perverse consequences of requiring disclosure of all or particular ingredients, with the risk of allowing known reaction-causing chemicals to be legally omitted from ingredients disclosure requirements designed to arm consumers with the necessary information to make educated choices.

The existing labelling disclosure requirements in the *Cosmetics Regulations* provide a fertile ground for reform. As noted during the last review of the *Cosmetics Regulations*, which took place almost a decade ago, frequent evaluation of regulations is necessary to ensure that mandatory standards continue to address the problems that prompted their original introduction, as well as accommodate any new developments in the area.¹⁵⁴ Indeed, Commonwealth legislative instruments must be comprehensively reviewed to determine their effectiveness at least every ten years, before they ‘sunset’.¹⁵⁵ There is a clear gap between the regulatory aims of the *Cosmetics Regulations* and the protection of consumers in practice. Considering the wealth of research that has emerged since the last time the regulatory assessment was undertaken in 2008, the upcoming review of the *Cosmetics Regulations* poses a key opportunity to introduce amendments aimed at significantly reducing the prevalence and harm associated with exposure to fragrance.

As noted above, the WII initiative requires that all intentionally added ingredients, including fragrance, be disclosed. This mirrors the approach mandated for cosmetic products, and far exceeds that for cleaning products. Thus, the WII requirement may indicate that the industry is broadly accepting of a more rigorous approach to disclosure, and that in fact the legislative mandates are lagging behind in this regard. The disjoint between the mandatory, government-led schemes and voluntary, industry-based initiatives may serve as a cue for regulators to review the current minimum requirements.

An effective approach to ingredient disclosure should apply to all consumer products, rather than being restricted to cosmetics. Other than the *Cosmetics Regulations*, the current list of mandatory labelling standards issued under section 104 of the *ACL* pertain largely to the regulation of toys and other items to

153 See, eg, *Cosmetic Labelling – Designation of Ingredients*, 21 CFR § 701.3(a) (2017) in the United States; *Canada Consumer Product Safety Act*, SC 2010, c 21, s 67, which empowers the Minister to set labelling requirements for consumer products; *Cosmetics Regulations*, CRC 2007, c 869, s 21.4(3); *Cosmetic Products Group Standard 2006* (NZ), HSR 2006/002552.

154 *Cosmetic Regulations Regulation Impact Statement*, above n 16, 5.

155 *Legislation Act 2003* (Cth) s 50.

be used by or posing a risk to children.¹⁵⁶ The ACCC's work in conjunction with industry body Accord regarding the introduction of a scheme for laundry capsule labelling is indicative of a regulatory desire to protect at-risk members of society, as well as their desire to intervene in this specific area of consumer products.¹⁵⁷ This collaboration between regulator and industry in the pursuit of greater consumer protection is a promising development. However, children are not the only ones vulnerable to experiencing adverse reactions associated with the chemicals contained in consumer products.

As such, the ACCC should consider expanding its involvement in the industry by introducing a mandatory standard for cleaning products pursuant to section 104 of the *ACL*. The current *Cosmetics Regulations* provide an example of a mandatory standard which sets basic labelling requirements for disclosure of ingredients, including fragrance. Although these regulations are not without fault, the introduction of a standard for cleaning products modelled on the *Cosmetics Regulations* could be a key opportunity for Australian regulators to take the lead on consumer safety in this area. As considered above with respect to the *Cosmetics Regulations*, the proposed mandatory standards for cleaning products issued could require listing known fragrance allergens and hazardous ingredients separately from fragrance mixtures ('fragrance') in order to provide maximum information to consumers (as required by the European approach), including a warning label (in accordance with the approach under the GHS), or listing the presence of fragrance mixtures. Any of these suite of options would be a vast improvement on the current regulatory framework, in which producers of cleaning products have no mandate other than voluntary self-regulation to disclose ingredients to consumers.

IV CONCLUSION

Consumers assume that the ingredients contained in the products they are using every day are safe, and will not do them harm. Due to the knowledge imbalance between producers and consumers in the complex, scientific areas of cosmetics and cleaning products, many people rely on regulations to protect them from harm caused by the products they use. This is particularly the case for complex fragrance mixtures, which may contain dozens to hundreds of ingredients. However, the current regime in place in Australia does little to regulate disclosure of fragrance ingredients in common consumer products, beyond the weak substantive labelling requirements applicable to cosmetics

156 A list of all mandatory standards currently administered by the ACCC is available online: see Product Safety Australia, *Mandatory Standards*, above n 54.

157 Australian Competition and Consumer Commission, 'ACCC Warns Consumers about Liquid Laundry Detergent Capsule Injuries' (Media Release, NR 015/13, 6 February 2013) <<https://www.accc.gov.au/media-release/accc-warns-consumers-about-liquid-laundry-detergent-capsule-injuries>>; Accord, 'Australian Industry Guideline for Labelling & Packaging of Liquid Laundry Capsules' (June 2013) <<http://accord.asn.au/wp-content/uploads/2014/11/Industry-Guideline-for-Labelling-Packaging-of-Liquid-Laundry-Capsules-June-2013.pdf>>.

under the *Cosmetics Regulations*. Beyond cosmetic products, recent research indicates that over two-thirds of those fragranced products surveyed did not disclose that the product contained a fragrance at all.¹⁵⁸

The market failure that the *Cosmetics Regulations* was introduced to address – namely, insufficient provision of information to consumers in order for them to avoid harm – is continuing to occur. This article has discussed the current regulatory framework for consumer products in Australia and found that it provides insufficient protection from risks posed by fragranced cosmetics and cleaning products. In addressing this problem, a suite of options for reform was discussed, based around varying degrees of specificity of disclosure. Despite the scientific evidence indicating harms associated with fragrance mixtures, to date there has been little action taken internationally by governments to tackle this issue. Introducing stricter legislative mandates for disclosure of fragrance ingredients – and at the very least, disclosure of the presence of a fragrance mixture – is a key opportunity for Australia to lead in this growing area of concern.

158 Steinemann, 'Volatile Emissions from Common Consumer Products', above n 8, 280.