

7 The regulatory environment

7.1 System for formulating and coordinating technical regulations

A generic model for a national technical regulation system would consist of the following :

- **The regulator:** This entity should carry the mandate of government to enable it to adopt regulations, assign conformity assessment responsibilities and enforce sanctions. Therefore the regulator must be part of government or an entity authorised through government.
- **The conformity assessment requirements:** In principle, the conformity assessment regime should be one that provides open and contestable processes, rather than the narrow specification of compliance standards and conformity assessment providers. In such a regime :
 - Technical regulations should specify outcomes, rather than processes for demonstrating conformity.
 - Conformity assessment requirements should provide assurance of the desired outcomes but allow for a variety of routes, for example, compliance with an international or national standard.
 - Conformity assessment providers could be drawn from a range of service providers that meet criteria for their performance, for example, accreditation as a testing or certification body.
- **Enforcement:** Effective enforcement of technical regulations requires an inspection regime that is resourced adequately to provide a reasonable chance that defaulters will be detected, and sanctions that are sufficient to act as a deterrent to offences.

The current status of each of these components in the South African infrastructure is described below.

7.1.1 The administrative procedures and structures:

a) The regulator

The regulator is the organisation responsible for the implementation and administration of mandatory technical regulations, including the group of such regulations called “compulsory specifications”. In South Africa various Government Departments are the primary regulators of the technical requirements of products and services, in order to ensure the health, safety and protection of the population in the face of technological and market failures, unfair trade practices and environmental threats. In some specific areas, for example electrical, automotive and some food products, the Government has assigned regulatory responsibility to the SABS, to act on its behalf. This process is enabled through the provisions of the current Standards Act, where the Minister of the DTI, in consultation with other Ministries, may determine “compulsory specifications”.

b) The conformity assessment requirements

Conformity assessment requirements specify how compliance with the requirements of technical regulations will be assessed. The conformity assessment requirements are determined and adherence assessed by the SABS in the case of compulsory specifications. The conformance assessment of standards referred to in legislation is done by a variety of bodies, including the SABS, various Government Departments and NOSA for standards referred to in the Occupational, Health, and Safety Act (OHSA). In the case of technical regulations contained in legislation, the conformance regime is often unknown.

c) Sanctions

Sanctions are normally applied in the case of failure to conform to the essential requirements for the regulations. Currently in South Africa in the case of technical regulations contained in legislation, the sanctions are often not specified. Sanctions relevant to the trade metrology system are specified but currently are not at appropriate levels to deter abuses, and the inspectorate to determine compliance and to administer sanctions is totally inadequate as reported in the trade metrology section of this report.

7.1.2 The product characteristics for compliance

Technical regulations specify the minimum requirements that need to be met in order to comply with the regulations. Labelling and marking on the product or its associated packaging are additional prescriptive requirements for indicating compliance with some technical regulations.

Technical regulations can be contained in any of the legislative mechanisms, including Government Regulations, Statutory Acts and even local government bylaws. In South Africa these regulations can either be based on standards or be contained directly in legislation, as follows:

a) Compulsory Specifications under the Standards Act

The Minister of Trade and Industry, in terms of the current Standards Act, can declare a national standard compulsory i.e. any product of the type covered by the standard must comply before being brought into circulation. Currently 56 standards have been declared as compulsory specifications. Those specifications based on national standards are, in general, harmonised with international standards. There is currently no regulatory mark for compulsory specifications. (See the separate discussion on compulsory marks elsewhere in this report, as well as Recommendations 1 and 2 which propose that a new Standards Act cover only standards development, and a separate Act, the Technical Regulations Act be established to coordinate compulsory specifications in South Africa).

The SABS is at present charged with the implementation and administration of all aspects of compulsory specifications. These include approvals, inspections, market surveillance and instigation of sanctions. The Act also defines the sanctions. At the moment the SABS, in consultation with stakeholders, decides on the conformity assessment regime based on the risks involved. While there is no legal backing for this, the SABS nevertheless believes that it can defend the selection of the various approaches used, as they are based on international best practice for similar needs.

b) Referenced Standards/ Technical Regulations based on National Standards

The current Standards Act allows Government Departments to reference National Standards and so create technical regulations. There are approximately 250 cases where such national standards are referenced in legislation. When such national standards form the basis for technical regulations, the SABS has the responsibility to develop new standards and to ensure the revision of existing standards. In some instances the SABS has been given the responsibility to provide conformity assessment services to enable Government departments to fulfil their regulatory obligations.

When National Standards form the basis of technical regulations, the SABS has to inform the WTO/TBT secretariat regarding the current standard development programmes and their implementation. They also need to inform the secretariat on the equivalence or otherwise with

respect to international standards. The SABS is therefore the designated WTO/TBT information point for South Africa.

c) Technical regulations contained in legislation

Many Government Departments collapse technical regulations into legislation. In many cases the regulator is not identified, the conformity assessment regime is not defined and there are no sanctions defined. It is not known how many Acts of Parliament or regulatory instruments do this, nor is it known if the regulator or the conformity assessment process is identified, or whether sanctions exist.

7.1.3 Conclusions

It is recognised that all of the components described must be in place for the regulatory regime to be effective.

The system in South Africa for formulating and implementing the current 56 compulsory specifications in the main worked well historically, but there is a potential for confusion of the various roles of SABS, and there is consensus that the system for demonstrating compliance with these and future compulsory specifications should be opened up to accredited conformity assessment service providers. This reinforces the need for separating the standards development functions of the SABS into an Act dedicated to that purpose alone and the establishment of a separate Act for overall administration of compulsory specifications regulated on behalf of the Minister for Trade and Industry.

There are also significant problems with the South African system for management and control over technical regulations contained in legislation. This is, however, not a unique problem. The need for better co-ordination of formulation and review of technical regulations was identified, as part of this review, as a common need internationally. In South Africa the problem is one of a system that is fragmented (multiple sources that generate regulations), a lack of knowledge of the existence of regulations, and regulations that are drafted and included in legislation without ensuring that all the elements of good regulatory practice are present.

The shortcomings of the current practice of collapsing technical regulations has significant implications:

- South Africa's ability to meet international obligations under the WTO Agreement on Technical Barriers to Trade is compromised.

- The absence of a clear and accessible source of information on Technical Regulations can give rise to some practical problems in negotiating international trade agreements.
- The lack of transparency in technical regulations could serve to hamper local trade and stifle entrepreneurship, especially in the SMME sector, and could become a TBT.
- The effectiveness of technical regulations contained in legislation is unknown.
- It is a difficult and cumbersome process to access technical regulations contained in legislation, therefore a great deal of time and money will be spent unproductively by both government and industry. Confusion and duplication of effort will continue to eat into productive time.
- Technical regulations deal mainly with issues relating to health, safety and environmental protection. To a lesser extent they may deal with the quality of products and the prevention of deceptive practices. While the general public can be regarded as a major stakeholder, in practice they have been sidelined through a lack of accessible information and ineffectiveness of enforcement. All the inefficiencies in the current system will ultimately impact on the consumer as the final link in the economic chain.

To overcome the above mentioned problems will require immediate action aimed at rectifying the current situation as well as ensuring that similar situations do not arise. Two key recommendations (Recommendations 8 and 10), in addition to the recommendation for the creation of an Act for overall administration of compulsory specifications (Recommendation 2), are proposed.

Recommendation 8: An Office for Regulatory Reform should be established. The purpose of the proposed Office of Regulatory Reform is to: (i) review existing approaches for formulation of technical regulations contained in legislation and legislative instruments, and develop a best practice approach for technical regulation formulation; (ii) conduct a comprehensive review of existing technical regulations contained in legislation, including legislation relevant to trade and legal metrology; (iii) require that regulatory impact assessments be compulsory for all future formulation of technical regulations; and (iv) establish the principles for any regulatory marks used in South Africa and (v) monitor any potential abuses of such regulatory marks and conformity assessment marks in both the voluntary and mandatory sectors.

In light of the dire need for reform of the technical regulation system, it is considered necessary that such an Office of Regulatory Reform is established as a permanent function within

Government, as opposed to being a “temporary task team“. The establishment thereof should be sanctioned through a Cabinet decision and enabled through a “Regulatory Reform Act“. In terms of its positioning within Government, international practice indicates that such an office can be positioned either within the Department of Justice, or within the Office of the President. It would need to be at arm’s length from the Department of Trade and Industry due to the Minister’s role in proclaiming compulsory specifications.

The responsibilities of such a body would include, but not be limited to the following:

- To promote the Government’s objective of effective and efficient legislation and regulations, and to do so from an economy-wide perspective.
- To advise the Government, Government Departments, regulatory agencies and statutory authorities on appropriate quality control mechanisms for the development of regulatory proposals and for the review of existing regulations.
- To examine Regulation Impact Statements (RISs) prepared by Government Departments and agencies and advise on whether they meet the Government’s requirements and whether they provide an adequate level of analysis.
- To provide training and guidance to officials to assist them in meeting the requirements to justify regulatory proposals.
- To report annually on compliance with any Government Regulation Impact Statement guidelines, and on regulatory reform developments more generally.
- To provide advice to Government and national standard setting bodies when such bodies make regulations.
- To lodge submissions and publish reports on regulatory issues having significant economic implications.
- To monitor regulatory reform developments at Provincial level.
- To work alongside the Small Business Development Directorate of the DTI so that the impact of proposed regulations on SMMEs is adequately considered.
- To gather, analyse and disseminate information regarding technical regulations within the SADC context as and when necessary.

- To monitor and act on any abuses of certification marks including any regulatory marks used in South Africa.

South Africa should align itself with the emerging WTO approach whereby only the essential safety, health and environment requirements or desired outcome are contained within the regulations, as opposed to detailed prescriptive regulations. Cross-referencing to suitable standards could then be used to provide “deemed to comply” solutions for such essential requirements.

It is therefore necessary to develop a best practice model that can be used in the evaluation of existing technical regulations and formulation of new technical regulations. This should be done by the proposed Office of Regulatory Reform, in consultation with all stakeholders.

It is proposed that a comprehensive review of existing technical regulations in legislation be conducted by the proposed Office of Regulatory Reform. The objective of the review would be to assess technical regulations contained in legislation against the best practice model, which should, as a minimum, include the following assessment criteria:

- The current relevance of legislation, including its costs to industry and cost to implement.
- Whether the regulator is clearly defined.
- Whether the conformity assessment practices required to demonstrate compliance are fully specified.
- Whether the sanctions are specified, at appropriate levels, and supported by effective inspection functions.

It is internationally recognised that government MRAs in regulatory sectors should be negotiated selectively, for them to have maximum positive benefit. Good practice is considered to be to prioritise such MRA developments at an industry sectoral level, based on trade impact. It is therefore also necessary to align the review of technical regulations, as proposed, with MRA development priorities. (See Recommendation 12 for a priority based approach to MRA development, supported by an overarching strategy for such government to government MRAs)

The use of information technology to make information regarding technical regulations more accessible to stakeholders, as well as for the management of such regulations, is considered essential, and such requirements should be considered as part of the review, as recommended.

A priority of the proposed Office of Regulatory Reform would be to design, in consultation with stakeholders, a policy framework whereby the use of regulatory impact assessments is made compulsory for all regulatory authorities.

The seven key elements that constitute a regulatory impact assessment within the Australian framework could be considered as a starting point for the development of a South African framework. They include:

- Identification of the problem or issues that give rise to the need for action.
- The desired objectives.
- The options (regulatory and/or non-regulatory) that may constitute viable means for achieving the desired objective.
- An assessment of the impact on consumers, business, government and the community of each option.
- A consultation statement.
- A recommended option.
- A strategy to implement and review the preferred option.

7.1.4 Technical regulations and their relationship to legal metrology

Legal metrology is defined by the International Organisation of Legal Metrology (OIML) as “the legislative, administrative and technical procedures established by, or by reference to, public authorities, and implemented on their behalf in order to specify and to ensure, in a regulatory or contractual manner, the appropriate quality and credibility of measurements related to official controls, trade, health, safety and the environment”.

This review confirmed that South Africa has tended to concentrate historically on trade metrology rather than the broader remit of legal metrology. Trade metrology concentrates on the control of quantities such as mass, length and volume measurements to qualify products or commodities for sale and is an essential prerequisite for fair-trading. However, trade metrology is only a subset of the wider range of legal metrology that includes measurements for many regulatory purposes, for example, speed control, blood alcohol measurement, utility metering (e.g. water, gas and electricity metering), medical purposes (e.g. electrocardiograph measurements), occupational health and safety purposes (e.g. ionising radiation levels,

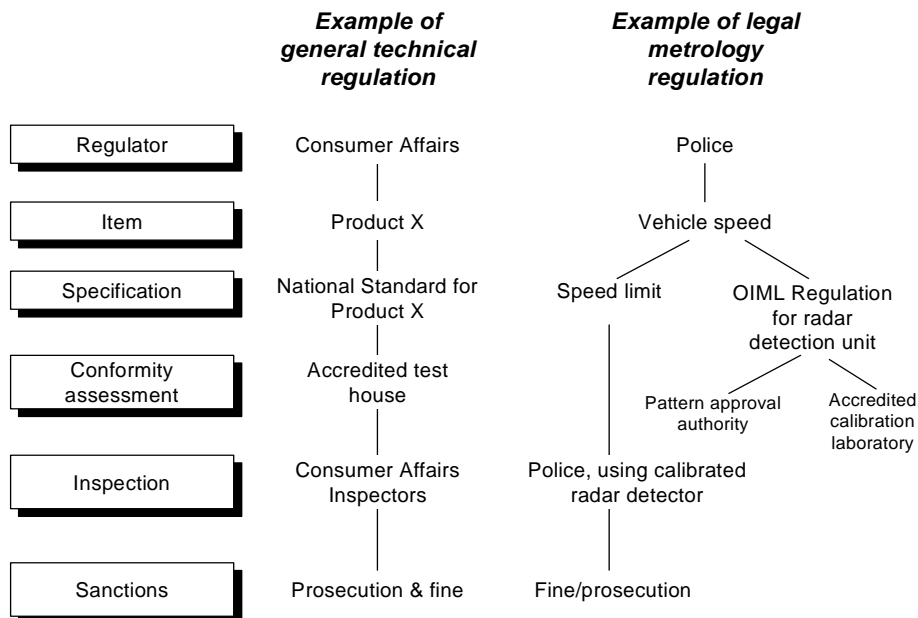
workplace noise levels) and environmental monitoring (e.g. air and water pollution levels, community noise monitoring).

Legal metrology is, in turn, a subset of technical regulations. As described earlier, technical regulatory processes require : (a) a regulation and regulator; (b) a specification for determining conformity; (c) a conformity assessment process; (d) an inspection mechanism to detect non-compliance and (e) sanctions for non-compliance. Legal metrology embodies these steps but, in addition, has specific processes to produce credible and legally verifiable measurements that determine whether or not a technical regulation has been complied with.

The parallels between general technical regulations and legal metrology are shown in a hypothetical case in Fig 6. In each case, a regulator is defined, as well as an item to be regulated and a specification for meeting the regulation. However, in the legal metrology strand, the measuring instrument (for example a radar detection unit) also undergoes conformity assessment. The instrument must meet pattern approval requirements, preferably those specified by the International Organisation for Legal Metrology (see section 13.1.3). The measuring instrument must also be calibrated periodically, and the calibration should be performed by an appropriately accredited laboratory to provide evidence of traceability to national measurement standards. Once these processes are in place, the instrument can be used in the inspection step to determine whether the technical regulation (i.e. the speed limit) is being met, and the measurements can be relied upon as evidence in the sanction step.

Internationally, the economies surveyed for this study have either adopted a framework for legal metrology beyond the traditional trade metrology, or are seeking to do so. The legal metrology systems either used OIML Recommendations for control of measuring instruments, or are moving towards harmonisation with OIML Recommendations. South Africa may be disadvantaged in negotiating mutual recognition agreements in regulated sectors if it does not adopt the broader perspective of legal metrology.

Figure 6 : Component processes of legal metrology and general technical regulations



The legislation that covers legal metrology may be formulated in any of a variety of Government Departments (e.g. police, health, energy, environment, and consumer affairs or fair trading in the case of trade metrology). For this reason it is necessary to agree on a set of principles to be adopted across government, and to coordinate the approach to implementation.

Various approaches to coordination issues were illustrated in the international survey undertaken for this study. In the UK, a regional perspective has been adopted and the National Weights and Measures Laboratory has provided a great deal of support to the European Community to frame a Measuring Instruments Directive. The Directive makes extensive use of the technical specifications in the Recommendations of the International Organisation of Legal Metrology (OIML). Once promulgated, each European nation that wishes to regulate in an area of measurement covered by the Directive will have to adopt the requirements of the Directive, thus facilitating trade in regulated sectors. In Brazil, a “within-country” approach has been adopted with the legal metrology section (DIMEL) of INMETRO coordinating the formulation of technical directives for legal metrology. The majority of existing technical regulations have been harmonised with the OIML Recommendations and the remaining regulations are being reviewed with that intent. The writing of new legal metrology requirements by various government departments is coordinated in principle through the National System of Metrology (SINMETRO)

and this structure is being strengthened to ensure that the principles used by DIMEL are adopted across government.

In South Africa, a *de facto* legal metrology system already exists. Individual government departments or services can prescribe regulations of the type described in Figure 6, can develop processes (including measurements) to determine compliance with the regulation, and can inspect and prosecute offenders. However there is no overarching framework to ensure : (a) that these processes are consistent, and (b) that the processes embody the international best practices for legal metrology. To create a consistent legal metrology system in South Africa, it is possible to use the framework recommended for technical regulations (Recommendation 3 and 8) and incorporate into it an additional requirement for measuring instruments used for regulatory purposes. The additional requirement should specify that, wherever there is an OIML Recommendation relating to a class of measuring instruments that is to be used for regulatory purposes in South Africa, these measuring instruments should be of the pattern specified in the relevant OIML Recommendation and should be calibrated in accordance with any directives in the relevant OIML Recommendation.

In the South African context, it has been recommended that an Office of Regulatory Reform be established to overview the formulation of technical regulations in general. Therefore it would be appropriate for this Office to overview the formulation of a legal metrology framework, since it is essentially a subset of technical regulations. The process for giving effect to legal metrology in South Africa would then follow the model described below :

- The Office of Regulatory Reform would develop a framework for legal metrology that includes the requirement for measuring instruments to meet OIML Recommendations or national specifications that are harmonised with OIML Recommendations.
- Government departments would maintain the authority to initiate legal metrology requirements and the responsibility for having their proposed regulatory process reviewed by the Office of Regulatory Reform (as for other technical regulations).
- Pattern approval could be conducted by NML (consistent with Recommendation 49 in relation to pattern approval for trade metrology purposes).
- Measuring instruments could be calibrated by SANAS-accredited laboratories (consistent with Recommendation 49 in relation to calibration for trade metrology purposes).
- Government departments, or their appointed agencies, would implement the inspection and sanctions provisions.

Recommendation 9: A legal metrology framework embodying international practices for control of measurements be established by the proposed Office of Regulatory Reform as part of the general framework of technical regulations.

In South Africa, the general considerations associated with the formulation of technical regulations have been discussed earlier in this section, and these should be applied in a review of trade and legal metrology. In addition, it has been noted that the trade metrology legislation contains a further problem of a non-technical nature that could be addressed during a broader review. The fees for some trade metrology functions such as type approval are prescribed by the Minister but, according to the SABS, do not reflect cost-recovery pricing. Given the current under-funding of trade metrology (discussed later), it would seem prudent to aim for cost-recovery and to ensure that the legislative framework makes suitable allowance.

It is proposed in Recommendation 8 that the Office of Regulatory Reform include a review of existing legislation relevant to legal metrology within its broader review of technical regulations. In regard to legal metrology, the review should have the following terms of reference:

- To identify and recommend for repeal or amendment any outmoded existing legislation relating to legal (including trade) metrology.
- To develop legislation that provides a consistent national framework for legal metrology.
- To subsume the functions of the existing Trade Metrology Act within the legislation applying to legal metrology.
- To advise whether legislation for legal metrology should be complementary legislation to the proposed “Regulatory Reform Act”, or be subsumed under the new Act. If a separate “Legal Metrology Act” is established, its scope should be tied to the activities covered by OIML to allow suitable demarcation from any other technical regulations covered by the proposed “Regulatory Reform Act”.

In conducting the review, the Office of Regulatory Reform should have regard to:

- The need for legislative authority by the institutions that deliver the functions associated with legal metrology and, in particular, any changes in responsibilities for trade metrology functions.
- The future role of the Trade Measurement Advisory Committee, if any.

- Removal of any problems that have been created by the prescription in existing legislation of fees for services in trade metrology.

Regulatory marks and product labelling

7.2.1 The South African situation

A system for a regulatory mark is catered for in the Standards Act. It has not been used until recently when the Minister of Trade and Industry approved the use of such a mark for circuit breakers. However this decision has not been implemented.

The SABS mark is currently often referenced in regulations as a pre-requisite to product release.

Stakeholders are divided on the need for a compulsory regulatory mark and the establishment of such a mark should be carefully considered. For example, the industry survey conducted as part of this review indicated that 55% of respondents agreed that there is a need for such a mark, with 45% in disagreement. There are many factors that need to be considered:

- Despite the survey response, industry has expressed concern about the proliferation of product certification marks and indicated that they will resist an additional mark.
- The high profile of the SABS mark would possibly hinder the recognition of any new regulatory mark, particularly while SABS itself has statutory regulatory responsibilities. There is likely to be some public confusion about the respective significance of any compulsory mark and the SABS marks.
- There is a difference between a mark for use by regulators, and marks designed to convey information about products to consumers. The experience of the CE Mark, which was designed to be a regulatory label, but is perceived to be a consumer mark, should be considered.
- Due to high illiteracy in South Africa the implications of any mark scheme to the consumers should be carefully considered. There is anecdotal evidence that the consumer perceives the SABS mark to mean that products are meeting health and safety requirements, which are primary factors considered when deciding on the need for a regulatory mark.
- Ownership of such a mark could be contentious. Approximately 50% of industry respondents indicated that they believe such a mark should be publicly owned.

7.2.2 The international situation and practices

Australia: In Australia the most visible mandatory compliance marks are those used by the Australian Communications Authority (ACA) for compliance of radio-communications devices with the Radio-communications Act and for compliance of various products with the Telecommunications Act. For the latter, the mark is the “A-Tick” and for electromagnetic compatibility of electrical and electronic goods, the relevant mark is the “C-Tick” mark. Both these marks are owned by the regulator and form part of the post-market surveillance regime for these products in Australia.

There was considerable support in submissions to the Kean Inquiry (Australia 1995) for the concept of a single government owned mark, similar to the CE label used in the European Union. It was considered in Australia that this might increase consumer confidence and break the monopolistic use of proprietary marks by different regulators. It was considered that such a mark would help to distinguish between regulatory requirements for health and safety and those for meeting voluntary industry standards for performance or other features.

Brazil: In the regulated sector, the organisation certifying a product or service must carry certification by a certification body accredited by INMETRO. There are 28 compulsory marks that are used. In addition, there are some marks regulated by Ministries e.g. the meat inspection mark regulated by the Ministry of Agriculture.

There is some preliminary interest within MERCOSUL in the idea of an equivalent to the European CE label but no substantial progress in formulating the idea has been made.

There are a series of voluntary marks and certificates defined by ABNT, the Brazilian Standards body, but in some instances there are specific requirements that must be met before the mark can be affixed or certificate issued. The marks and certificates are:

- Quality system mark (ISO 9001).
- Conformity mark (product meets Brazilian, international or approved foreign standard specifications. The manufacturer must have a quality control system for testing of marked products).
- Safety mark (similar requirements as above).
- Environmental Quality Mark (product or process conforms with criteria for low environmental impact).

- Certificate of conformity (for products or services e.g. for products that can't carry a mark, or if needed for export).
- Certificates for Environmental Management Systems (ISO 14001).

Malaysia: Both regulatory and voluntary marks are in use in Malaysia.

The Communications and Multimedia Commission has appointed SIRIM Bhd as the certifying agent for telecommunications equipment used in Malaysia, and compliant products must bear a Communication Approval label prior to sale. The Department of Electrical and Gas Supply requires that electrical safety tests be conducted by accredited laboratories and electrical safety marks are attached to compliant appliances and devices. The Construction Industry Development Board also requires that cement and steel are tested by accredited laboratories, but no marking scheme is involved.

Voluntary marks are used in the food industry and in the tyre industry.

United Kingdom: The CE Mark is adopted throughout the European Community and subsumes any national regulatory marks for products covered by European Directives.

The CE Mark is a compliance label designed for regulators, not a consumer information mark, although it is often mistakenly used in the latter context. The process of demonstrating compliance with the requirements of a European Directive, and consequent labelling with a CE Mark, varies across a spectrum of risks associated with the product. For low risk products, self-assessment of compliance and attachment of the CE Mark by the manufacturer may be acceptable. For high risk products, third party assessment, usually by a designated body (a Notified Body), is required before the CE Mark can be attached.

There are several other types of marks in use in Europe (e.g. a mark for marine products, and sector-specific marks for environmental and food safety). Apart from the CE Mark, there were no other examples given of national UK regulatory marks during the international review visits.

7.2.3 International Confusion

For many years there has been considerable confusion in the marketplace about the true significance of marks. This has led to the establishment of a Working Group in ISO/CASCO (Working Group 12) to develop an International Standard on the use of marks for conformity assessment. This work is not yet completed, but the Working Group has prepared an information document - *Marks of conformity assessment-A brief report on current practices in*

the use of marks of conformity assessment, including marks of conformity and logos, First edition, 1999, ISO Geneva. The ISO Report notes that the major areas of misunderstanding and confusion include:

- The difference between use of marks for voluntary or mandatory (regulatory) needs.
- The particular characteristics of a product or service that are actually endorsed by a mark.
- Whether a mark endorses conformance with a management system (such as ISO 9001) or demonstrates the conformance of a product.
- Which organisation owns the mark, how transparent are the rules for applying the mark and who is responsible for liability if the mark gives misleading information?

7.2.4 Conclusions

There is no discernible “international best practice” with regards to the use of a regulatory mark, except that such use is generally regarded to be beneficial if properly developed and implemented. It could be in South Africa’s interest to implement a compulsory regulatory mark where *real needs* are identified by *specific* regulators. The one existing example in South Africa for adoption of a regulatory mark has taken a considerable time to develop and it is understood that it is not yet been implemented.

The current Standards Act provides for potential use of a regulatory mark {in Section 18 and, in particular for compulsory specifications, in Section 22 (6)(a)}. Such a regulatory mark could be applied by Ministerial determination after appropriate gazettal for the current group of 56 compulsory specifications.

There are a number of interdependent scenarios arising from various terms of reference for this SQAM Review that apply to the question of whether a regulatory mark should be adopted more broadly in South Africa.

The elements of these scenarios are:

- a) Should a new Standards Act be restricted to SABS standards development and standards accreditation writing activities only, and not include its previous roles in implementing and controlling compulsory specifications? (The Review has formed the view that a new Standards Act should be restricted to the standards activities only).

- b) Will the system for demonstrating compliance with compulsory specifications, and any other technical requirements for which a regulatory mark might be used, be opened up to all suitably accredited conformity assessment bodies? (The Review has recommended that this should occur).
- c) If the SABS separates its certification activities into a separate commercial company, no longer covered under a new Standards Act, will it retain the “SABS” brand name and current certification marks using the “SABS” name? (The review has recommended such commercialisation/corporatisation, but has serious reservations about the continued use of the “SABS” name for both the standards development entity and the commercial subsidiary. If the “SABS” name is retained by both organisations there would be market confusion on the roles of the two bodies and likely claims of unfair competition while the certification body retained the same name as the publicly funded national interest standards body).
- d) Would any future regulatory mark be distinctly different to the current family of the SABS commercial marks, and would it be publicly owned (separate to SABS, which would have a conflict of interest in owning the regulatory mark in an open market for demonstrating compliance with the compulsory specifications)? The review has a recommendation below which gives clear principles for regulatory mark adoption which would avoid this problem.
- e) As part of the naming questions, would standards in South Africa continue to be called SABS Standards or would they, as this Review recommends, become “South African National Standards”?

Examining the above inter-related scenarios and the various recommendations on the questions above, the review has the following comments based on the following assumptions:

- a) That SABS certification activities are separated into a commercialised subsidiary.
- b) That demonstration of compliance with compulsory specifications (or others relevant to a regulatory mark) will be open to accredited conformity assessment bodies.
- c) That future administration of compulsory specifications will not be covered under a new Standards Act, but by the proposed “Compulsory Specifications Act”

- d) That in future the SABS standards will be renamed as “South African National Standards” and the South African government would wish to retain the value of its investment in the “SABS” brand name for its commercialised subsidiary.
- e) At least some technical regulations may have a compulsory regulatory mark associated with their administration and market surveillance.

Then the best scenario for use of a regulatory compliance mark in South Africa would be:

- a) The mark would be distinct from any existing commercial certification marks in South Africa.
- b) It would only apply to compliance with health, safety, environmental or other government requirements (such as network compatibility for telecommunications equipment).
- c) Other marks in addition to the regulatory marks could be applied to the same products. These other marks, such as the SABS marks, would not cover the same requirements as the regulatory mark (to avoid confusion of purpose) but could cover product characteristics such as performance, durability etc specified in South African National Standards, other national standards, ISO, IEC etc standards.
- d) All suitably accredited conformity assessment bodies should be able to refer to South African National Standards in conjunction with their own marks.
- e) The regulatory mark should be owned by the Government through the Ministries responsible for the proposed Office of Regulatory Reform and for the administration of the proposed “Regulatory Reform Act” recommended by this Review.

It should be noted that there are both administrative costs, as well as costs to industry in the application of regulatory marks. For industry, their costs include those associated with labelling, packaging and associated tooling costs for applying regulatory marks. For market surveillance the regulatory body responsible needs to be adequately resourced to undertake market inspections and application of sanctions for non-complying products. If the latter is not available, regulatory marks will fall into disrepute and be counterproductive.

On the issue of broad adoption of regulatory marks in South Africa the review has on analysis of the potential benefits and practical implications of their use within South Africa, developed the following recommendation:

Recommendation 10: The adoption of regulatory marks within South Africa be subject to strict control and only be adopted in accordance with the principles enunciated in this Review Report.

Principles:

- There is clear identification of a national need for a specific regulatory body to have available visible information in the marketplace of claims of compliance with defined characteristics of a product, service or process.
- Such a mark must be owned and controlled by a defined regulatory body.
- The responsible regulatory body must be fully resourced to disseminate the mark to complying organisations and to supervise its use in the marketplace, be empowered to apply sanctions for its misuse and to withdraw noncompliant products, services or processes from the market.
- The design and explanatory information about the mark clearly distinguish the difference between the regulatory mark and commercial marks, such as the commercial marks of SABS.
- The mark should not establish technical barriers to trade in conflict with the WTO/TBT Agreement.

It has been suggested that the “SABS” marks could be made available for use by other conformity assessment bodies and, thus, be used comprehensively as a regulatory mark. The Review does not accept that proposition. It would lead to greater confusion between the roles of proprietary certification marks and a regulatory mark and, also, it is considered that conformity assessment bodies in general would not want their own identity in the market to be diminished by their use of the SABS mark rather than their own.