

Submission to
The Treasury
on
Supporting business through improvements to mandatory standards
regulation under the Australian Consumer Law
Consultation Regulatory Impact Statement December 2021

Via Email

NATA thanks Treasury for the opportunity to comment on the proposed changes to mandatory standards regulation under the ACL.

The following comments relate to NATA's role in Australia's standards and conformance infrastructure¹ and recognition by the Commonwealth as the national authority for laboratory accreditation². In this role, NATA has no direct participation in product supply chains but rather in its role to facilitate a reliable testing and measurement infrastructure providing assurance that products claimed to comply with standards actually do so.

NATA's stakeholders include:

- all Australian Governments in regard to policy and regulation requiring conformity assessment;
- direct users of NATA accredited facilities such as manufacturers and importers; and
- the Australian public as consumers of products undergoing conformity assessment by NATA accredited facilities.

As such, NATA's inputs are from a perspective that may differ from many participants in the consultation process but one that provides broader context to the draft regulatory impact statement.

The structure of the submission follows the sequence of topics raised in the consultation paper but only addresses specific questions that relate to standards and conformance.

General

NATA is supportive of the intent of the consultation RIS to modernise the approach to mandatory standards used as the basis of protecting public safety by Australian Consumer Law but believes that it omits some standards and conformance related factors such as:

¹ The standards and conformance infrastructure consists of Standards Australia, the National Measurement Institute, the Joint Accreditation System of Australia and New Zealand (JAS-ANZ) and NATA.

² As described in the current version of the Memorandum of Understanding between the Commonwealth of Australia and NATA dated 29 August 2018.

- Regulatory relationship with the standards development process
- Practicality of determining the comparability of standards and/or equivalence of delivered outcomes
- Laboratory responsiveness and capacity – domestic and international
- Mechanisms for mutual recognition of conformity assessment
- Expertise of regulatory bodies

Not all of these factors are directly related to NATA's role or sphere of influence but they have clear visibility via our operations and stakeholder engagement.

The Problem

In short, NATA agrees that the current arrangements are not ideal.

Over many years, NATA has dealt with calls from frustrated suppliers trying to understand what is required of them to place products on the market including the types of evidence required and the source of such evidence. These are usually SMEs having limited experience and/or understanding of standards and conformity assessment.

It should also be noted that the problem can be exacerbated by other domestic regulations at State and Territory level. A past example related to motorcycle helmets that created significant trials for suppliers, consumers and both NATA and JAS-ANZ with regard to conformity assessment. In short, the mandatory standard called up a superseded version of the Australian standard and ignored the relevant ISO standard. NSW legislation required riders to wear only helmets that complied with current standards. This led to the situation where what was legal for sale in NSW was illegal to wear whilst riding and what was legal to wear as a rider was illegal to sell. The matter was finally resolved after many months of debate in 2015 and the mandatory standard was revoked.

Another factor warranting consideration is that differing and sometimes incompatible requirements of voluntary standards (usually Australian Standards) and corresponding mandatory standards also create difficulties for NATA accredited testing laboratories in terms of test equipment required – often difficult to source or having to be built from scratch - and the reporting of results. This has the practical effect of undermining the business case for maintaining the appropriate testing capability and, hence, the resulting lack of conformity infrastructure supporting suppliers. This lack of Australian testing infrastructure (accredited or not) is also a problem for regulators seeking to resolve product non-conformity issues.

Barriers to compliance with trusted overseas standards

Recognition of overseas standards that offer equivalent safety outcomes would clearly offer benefits to importers and potentially to consumers provided that two factors are considered.

Determining 'equivalence' of an overseas standard is a non-trivial exercise that needs to be supported by technical rigour and, where appropriate, a solid statistical basis in terms of negative consumer safety events by those countries that use the relevant standard(s). It is certainly more than a side-by-side comparison of two documents and a declaration that "they look pretty similar". If done well, however, recognition of such standards may be appropriate.

What is also essential to consider though is not solely the recognition of an overseas standard but also the conformity assessment and quality assurance processes applied to the product itself. Testing, inspection, certification and factory quality assurance are all considerations in ensuring that only safe products are available to Australian consumers. Even if an overseas standard is capable of delivering superior safety outcomes, inadequate or poorly performed conformity assessment may make this meaningless.

So as well as determining which overseas standards might be adopted as mandatory standards, regulators also need to be assured that there are reliable 'trusted' sources of

conformity assessment and evidence of ongoing conformity. Some product attributes are evident to an informed consumer. Others, however, can only be evaluated by testing using specialised equipment and measuring instruments. This can represent a significant information asymmetry between the manufacturer and the supplier if there is inadequate information about the conformity assessment processes and the resultant outcomes.

To facilitate the recognition of conformity assessment:

- NATA is a signatory to the International Laboratory Accreditation Cooperation (ILAC) Mutual Recognition Arrangement for its ISO/IEC 17025 based accreditation activities; and
- JAS-ANZ is a signatory to the International Accreditation Forum (IAF) Multilateral Arrangement for accreditation of management system certifiers and product certifiers.

These arrangements allow for the recognition of conformity assessment activities – testing and certification - accredited by other signatories which include the majority of Australia's trading partners.

Failure to consider what constitutes acceptable conformity assessment processes may lead to problems with non-conforming products similar to those experienced in the construction industry for over a decade.

Inefficient regulatory architecture for updating mandatory standards

Standards include criteria the product must meet and often one or more test and/or inspection methods for verifying conformity. Methods may be contained in the product standard itself or reference other standards produced by the same standards writing body or those of another overseas body.

From the perspective of conformity assessment, changes to standards that result in changes to the methods may also necessitate new or modified test equipment.

The issue identified in the consultation RIS – that standards “are frozen at the point in time they are *made* or *declared*” even when amendments are issued or the standard is superseded - is a problem not only for Australian suppliers and manufacturers but also for conformity assessment bodies, particularly laboratories. For example, having to maintain testing capability for clients wishing to have a product tested to a current voluntary standard as well as capability for regulatory testing to a superseded standard can be a financial burden if differing requirements demand differing test equipment and methods.

From an accreditation perspective, there is an expectation that laboratories will maintain their competence and capability in accordance with current standards. Hence ‘frozen’ standards complicate the peer assessment process and testing capability in scopes of accreditation.

For overseas laboratories that might be asked to test for the Australian market, these same issues apply. Understanding the nuances of *declared* vs *made* standards and that superseded standards may form the criteria for product conformity is a challenge. As is the case for a NATA accredited laboratory in Australia, these complications to the conformity assessment requirements provide a strong disincentive to maintaining the required testing capacity. The source of the standard may be less an issue than comprehending the regulatory requirements.

While the nature of the problem for manufacturers, importers and suppliers is clearly evident, the problem also exists for the conformity assessment infrastructure both domestically and internationally.

Option 1: Status quo

The status quo is clearly not desirable from an industry and conformity assessment infrastructure perspective although the evidence suggests it is effective in protecting consumer safety.

Nonetheless, a question arises regarding the timing of updates to mandatory standards – at least in terms of where Australian Standards are applicable. Should reviews be periodic or real-time?

Proposed amendments and updates of Australian Standards are made public by Standards Australia's processes. Is it possible for regulators to both participate – either as members or observers - in committee deliberations and conduct their consultation processes in parallel with the work of the standards committee? It appears highly inefficient for regulatory consultation to be sequential to the standards development and public consultation processes.

It is recognised that regulatory agencies may not have personnel with specific and technical knowledge of all regulated products but this would be compensated for through collaboration with Standard Australia's network of experts – and those of the other standards and conformance bodies where appropriate.

Option 2: Amend the ACL to allow the Commonwealth Minister to more easily declare trusted overseas standards

From a conformity assessment perspective, the source of a standard is irrelevant. The key features are:

- the level of safety offered (as per dot point 4 under Alternative 2); and
- the clarity and rigour of the conformity assessment (CA) requirements.

Clarity and rigour of CA requirements means that the test and inspection methods described are:

- repeatable - within a laboratory;
- reproducible - between laboratories; and
- validated - they test or measure the actual parameters that provide safety.

If any of these three elements are not met, test results become meaningless. Thus, while the other features of a standard mentioned are worthy of consideration, NATA would not accredit a laboratory if the CA requirements of the standard did not meet the clarity and rigour expected. (On rare occasions, NATA has declined to accredit laboratories for testing to elements of Australian Standards for failure to meet one or more of these criteria.)

On this basis, NATA would only support either Alternative 1 or 2 if these factors were considered.

While not within NATA's purview, the other challenge for regulators in the adoption of overseas standards is the level of influence that can be exerted on the standards writing process. If such a standard is subject to amendment or to review and update, is that standard going to be maintained on 'the list' because of the standards body's 'trusted' status or will its acceptance have to be suspended whilst a regulatory impact assessment is undertaken?

Option 3: Amend the ACL to more easily allow businesses to comply with the latest versions of voluntary Australian and overseas standards

In general, NATA supports this option (Alternative 1) with the following caveats.

1. Conformity assessment requirements contained in any product standard or which are normative references from the product standard meet the expectations for repeatability, reproducibility and being appropriately validated.
2. Appropriate transition periods for new editions or amendments take into account the significance of the change:
 - Urgency of any safety issues being addressed;
 - Ability to retrofit existing product stocks to comply;

- Typical product development times (which vary from industry to industry and would need to be benchmarked); and
 - Any changes in the conformity assessment requirements (particularly testing) and the associated time for modification to/development of CA capacity – test equipment, expertise, measurement capability.
3. As part of the safeguard provisions, there is an ongoing regulatory cooperation with Standards Australia and the conformity assessment infrastructure.

NATA is happy to provide additional information should this be of assistance.

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