

THE ROLE OF REGULATORY IMPACT ANALYSIS (RIA) IN POLICY-MAKING

“We do not want to have rules that frustrate, but instead to facilitate the growth of businesses and trades in the country”

Malaysia Productivity Corporation Director-General Dato' Abdul Latif bin Haji Abu Seman

On 15 July 2013, the Chief Secretary to the Government issued a General Circular No.1/2013 in relation to the National Policy on the Development and Implementation of Regulations to promote Good Regulatory Practice. The cornerstone of this policy is the introduction of the regulatory management process called Regulatory Impact Analysis or better known as “RIA”. Seven years on, our Partner and Head of the Corporate & Government Advisory Practice, Mohamad Izahar Mohamad Izham will explore the extent of RIA adoption and implementation in our legislative development process, and the expected changes to come.

MAY 2020



BACKGROUND

It is a common misnomer that for any issue faced by the Government, the most effective solution is to enact new laws. Government intervention needs to commensurate with policy objectives, which does not necessarily have to involve a change in law. Unfortunately, regulatory bias has resulted in many policy makers commonly overlooking other potential solutions that could be non-regulatory in nature or simply, maintaining the status quo.

Such approach in the rule-making process has resulted in regulatory proposals failing due to regulatory design and delivery, among others. What this means is twofold; first, having solutions which fail to achieve intended outcomes and second, more often than not, having solutions which achieve unintended outcomes. The common pitfalls are what

we typically see in flip-flop initiatives, lack of evidence-based decision-making, and implementation failure as some examples.

RIA aims to safeguard the rule-making process by providing a systematic and transparent approach to creating effective and efficient regulations. Fundamentally, a proper application of RIA would protect from '*decisions made overnight*', where not only are the objectives hypothetically theorised but also satisfactorily tested. According to the Organisation for Economic Co-operation and Development ("OECD"), RIA's most important contribution to the quality of decisions is "*not the precision of the calculations used, but the action of analysing – questioning, understanding real-world impacts and exploring assumptions*".

HISTORY OF RIA

The United States has been one of the early proponents of RIA in the form of Inflation Impact Assessments that were required before the introduction of any costly new regulation. On the international front, organisations such as the OECD have continuously promoted RIA through the adoption of the Recommendation on Improving the Quality of Government Regulation and the Report on Regulatory Reform in the mid-90s. The World Bank has also been driving RIA initiatives by providing a Global Indicator of Regulatory Governance in analysing RIA implementation worldwide, highlighting best practices, and identifying areas for improvement. It is recognised that some form of RIA has now been adopted by all OECD members but successful implementation of RIA administratively and technically has admittedly been challenging.

The ASEAN countries with formal RIA Regulatory Frameworks are as follows.

Country	RIA Regulatory Framework
 CAMBODIA	<ul style="list-style-type: none"> ✓ About Regulatory Impact Assessment in Cambodia
 INDONESIA	<ul style="list-style-type: none"> ✓ National Strategy for Regulatory Reform 2015-2019 (<i>Strategi Nasional Reformasi Regulasi 2015-2019</i>)
 LAOS	<ul style="list-style-type: none"> ✓ Regulatory Impact Assessment (RIA) Guidelines ✓ Decision on the Impact Assessment of Draft Legislation
 MALAYSIA	<ul style="list-style-type: none"> ✓ Best Practice Regulation Handbook ✓ Quick Reference Best Practice Regulation Handbook ✓ Guideline on Public Consultation Procedures ✓ National Policy on the Development and Implementation of Regulations
 PHILLIPINES	<ul style="list-style-type: none"> ✓ Draft Regulatory Impact Assessment (RIA) Guidelines
 THAILAND	<ul style="list-style-type: none"> ✓ Regulatory Impact Analysis Guidelines for the Thailand Government ✓ Regulatory Compliance Cost Measurement Framework ✓ Public Consultation Guidelines ✓ Regulatory Impact Analysis Course Curriculum for the Thailand Government
 VIETNAM	<ul style="list-style-type: none"> ✓ Handbook on implementation impact assessment of legal documents ✓ DECREE Amending and supplementing a number of articles of the Decrees concerning control of administrative procedures ✓ Law on the Promulgation of Legal Documents

NATIONAL POLICY ON THE DEVELOPMENT AND IMPLEMENTATION OF REGULATIONS

On 15 July 2013, the Government introduced the National Policy on the Development and Implementation of Regulations ("NPDIR") through General Circular No.1/2013 issued by the Chief Secretary to the Government of Malaysia. The Circular appoints Malaysia Productivity Corporation ("MPC") as the agency in charge of implementing the NPDIR. In support of this initiative, MPC has issued reference materials such as the Best Practice Regulation Handbook (July 2013), Quick Reference Best Practice Regulation Handbook (July 2013), and the Guideline on Public Consultation Procedures (October 2014).

The NPDIR promotes the concept of Good Regulatory Practice or "GRP" with the aim of achieving better regulations through a sound analysis, informed decision-making, and transparency. The NPDIR is applicable to all Federal Government agencies including Ministries, Departments, Statutory Bodies, and Regulatory Commissions. State Governments and Local Authorities are encouraged to adopt the NPDIR in which the expansion of the policy to the States were reinforced through the 11th Malaysia Plan.

THE RIA PROCESS

The NPDIR defines RIA as the "*process of examining the likely impact of a proposed regulation and a range of alternative options which could meet the Government's policy objectives*". It is an evidence based approach used in an ex-ante evaluation by systematically identifying and assessing the impacts of regulatory proposals. Through the RIA process, regulators are able to identify the best solution in addressing a problem by weighing who is likely to benefit from a regulation and who will bear the costs.

The first step in RIA is that the regulator must notify MPC at an early stage in the decision making process. According to the NPDIR, this should occur once an administrative decision has been made that regulation may be necessary, but before a final decision on whether or not to regulate is made. This is done by submitting a Regulatory Notification Form ("RNF") with preliminary information in order for MPC to determine whether the proposal is '*likely to have a regulatory impact*'.

The NPDIR provides guidance on what does not amount to '*likely to have a regulatory impact*' as follows:

- If the impact is minor and does not substantially alter existing arrangements (for example very small initial one-off cost to businesses with no ongoing costs). This includes amendments to existing regulations and regulatory initiatives implemented by way of administrative circulars by any part of the Government that requires mandatory compliance.
- Exemptions from RIA namely regulations relating to national security and sovereignty, administrative circulars relating to the public administration, and exceptional circumstances when there are urgent matters which require immediate action. In such cases, MPC should be informed by the regulator and be provided with reasons for the decision.

In the event that MPC determines that there is little or no regulatory impact, then RIA does not have to be undertaken and the regulator

Key features of the NPDIR include among others:

- to appoint Regulatory Coordinators for all Federal Government agencies in order to implement the NPDIR;
- to develop the regulatory management system known as RIA;
- to ensure that any proposed amendment to existing regulations or introduction of new regulations relating to business, investment, and trade would be subject to RIA;
- to review regulations every five years; and
- to submit an annual regulatory review plan in the month of January of each year.

Note:

Regulations include measures of general application in various forms that are undertaken by Ministries/Departments/Agencies for which compliance is mandatory. These include measures alternatively termed as regulations, rules, by-laws, orders and guidelines.

may proceed to implement the proposal after approval by the relevant authorities in accordance with the law.

If MPC decides that there is a significant regulatory impact, the regulator must then undertake RIA and prepare a Regulatory Impact Statement ("RIS") in accordance with the seven elements. The level of analysis in the RIA will have to commensurate with the likely impact of the proposal. If the proposal is likely to have a significant impact, a detailed analysis of those impacts will be required while if the impacts are likely to be less significant, then a less detailed analysis will be sufficient.

The seven elements of RIA are as follows.



PROBLEM STATEMENT

RIA should clearly identify the problem(s) that need to be addressed.



OBJECTIVES

The "objectives" element should state the intent of the proposed regulatory action in concrete terms and relate this to the broader policy of the agency and government.



OPTIONS

This element describes the range of regulatory and non-regulatory options to be considered in addressing the issue or risk identified including the proposed regulatory action and the key differences between the options.



IMPACT ANALYSIS

To conduct a comprehensive assessment of the expected impact (costs and benefits) of each feasible option.



CONSULTATION

Any proposed new regulation or changes to regulation, will involve consultation with relevant stakeholders, including the main parties affected by the proposal: Business, Non-Government Organisations (NGOs), the community, regulators and other government agencies.



CONCLUSION & RECOMMENDATION

Should include a clear statement identifying the preferred option based on the impact analysis. The recommendation for the selection of this option must be supported by the preceding analysis and a comparison with other options provided.



STRATEGY FOR IMPLEMENTATION

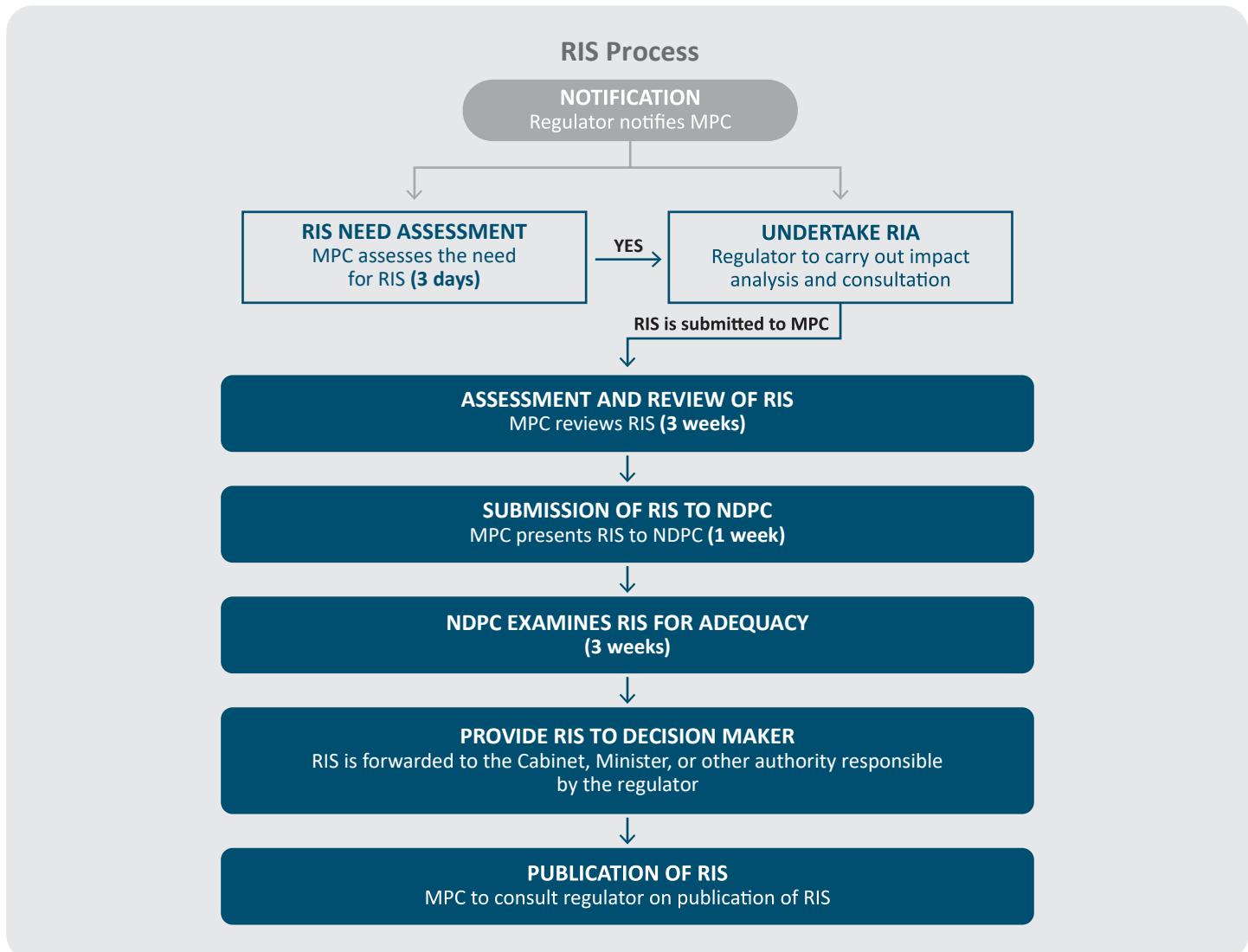
It is necessary to consider how the option will be implemented and enforced, and to establish a review strategy that will allow the option to be evaluated after it has been in place for sometime.

Once completed, the RIS will then be sent to MPC for it to be assessed for adequacy. If MPC is satisfied, MPC will approve the RIS and table the RIS at the National Development Planning Committee ("NDPC") for notification. Once RIS has been approved, the regulators should provide it to the decision makers in order to assist in the decision making process. Essentially the purpose of RIS is to ensure that the decision made by the decision makers are based on a balanced assessment of the best available information. The NPDIR requires MPC to publish the RIS after consultation with the regulator and maintain a publicly accessible register.

However in certain situations, a regulatory proposal may proceed without RIA being conducted. This could be in emergency situations or in situations where a RIA has been deemed as inadequate but yet the proposals have proceeded. In such cases, the regulations will be subject to a post implementation review otherwise known as an *ex-post* evaluation, typically commencing within one to two years from the regulation being implemented.

Source: Malaysia Productivity Corporation, Seven Elements of RIA, <http://www.mpc.gov.my/smart-regulation/#1463342946125-ebd326f2-9f62>

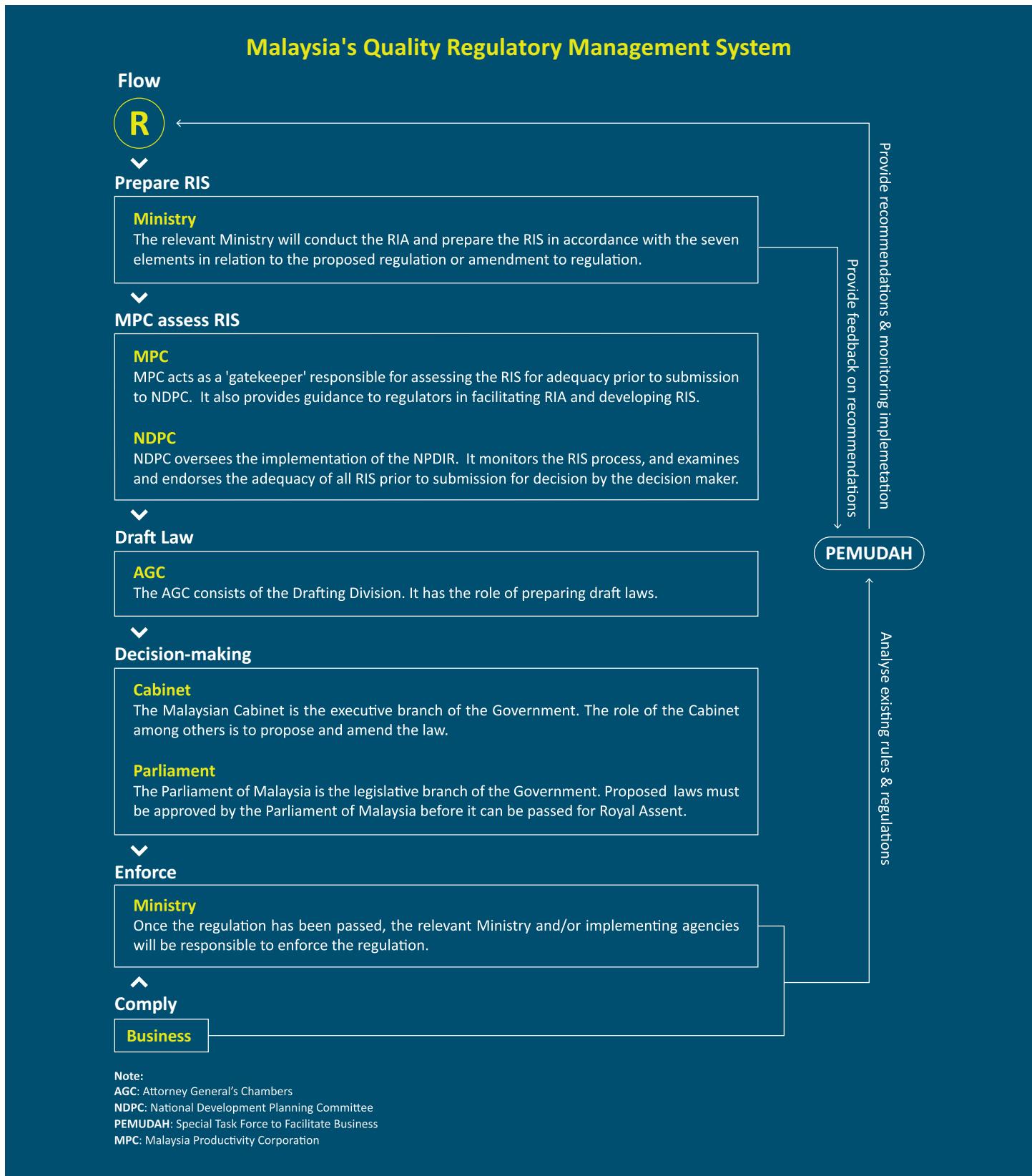
A brief outline of the process is as follows:



Source: National Policy on the Development and Implementation of Regulations, Chart 1: RIS Process, page 10.

ROLES AND RESPONSIBILITIES OF KEY RIA INSTITUTIONS

The roles and responsibilities of key RIA institutions involved are as follows:



Source: Malaysia Productivity Corporation

RIA DEVELOPMENT

Over the years, MPC has undertaken various initiatives to push for NPDIR adoption. These initiatives have been rolled out to a range of RIA actors, public and private sector alike, to collectively strengthen the RIA framework. From an organisational perspective, MPC has undertaken a paradigm shift to focus on GRP related programmes such as Reducing Unnecessary Regulatory Burdens (RURB), Guillotine Approach (Deregulation), and Cutting Red Tape (MyCURE) to name a few. In fact, MPC's annual convention has been aptly renamed to the "Good Regulatory Practice Convention" as a testament to its ideological significance to the agency.

Internally, MPC has continually undertaken capacity building through regular RIA training to ensure the competency of its own personnel. MPC has also worked with international organisations such as OECD and the World Bank in developing RIA tools such as the online Unified Public Consultation ("UPC") Portal (with the World Bank). These organisations have been integral in providing continued technical support in this area through regular engagement and peer review as seen in the report by OECD on Implementing Good Regulatory Practice in Malaysia (2015).

Externally, MPC has actively been promoting RIA to regulators through awareness programmes and one-on-one engagements. For regulators undertaking RIA, MPC would typically assist throughout the process by providing feedback on the RIA approach and the preparation of the RIS. MPC's access to the Regulatory Coordinators of each regulator also provides a monitoring platform to ensure consistent NPDIR implementation. At State and Local Authority level, MPC has continuously conducted outreach programmes to ensure adoption of the NPDIR, where as an example the State Government of Sarawak had passed its own Circular on Sarawak Good Regulatory Practice in 2019.

In relation to training, the National Institute of Public Administration ("INTAN") has been tasked with responsibility under the NPDIR to work with MPC to organise public service RIA training. For the industry, MPC has actively conducted several 'Training of Trainer' (ToT) sessions since the promulgation of the NPDIR in order to develop and grow RIA experts in the country. Throughout the years, MPC also commissioned international RIA experts such as from Jacobs, Cordova & Associates to conduct bespoke sessions for knowledge and best practice sharing.



As a result of these efforts, the statistics have evidenced steady growth in relation to RIA adoption since the inception of NPDIR in 2013. This is reflected in the total number of RNFs submitted, the number of regulators submitting RNFs, and the number of regulators submitting RIS that has roughly doubled from 2014 to 2018. This progress is

expected to continue in which MPC can further spur RIA uptake by observing best practices and adopting progressive RIA trends from other mature jurisdictions.

A summary of the statistics are as follows:

Status of Regulatory Proposals	2014	2015	2016	2017	2018	Total
Regulatory Notification received by MPC	40	55	75	70	75	315
Number of Regulators Submitted Regulatory Notification	17	11	18	14	49	109
Number of Regulators Submitted Regulatory Impact Statement	8	3	6	3	15	35

Source: Malaysia Productivity Corporation Annual Report 2018, <http://www.mpc.gov.my/wp-content/uploads/2019/12/MPC-ANNUAL-REPORT-2018.pdf>, pages 30-31.

WAY FORWARD

Almost a decade after implementation of the NPDIR, the Malaysian RIA experience can still be considered at its infancy. The stark observation is that RIA, albeit fragmented, has already been practiced to some extent in the regulatory development process. Piecemeal RIA tools such as public consultation and cost benefit analysis are some of the more prominent features used in developing public policy goals. Other tools such as problem definition, objective setting, consideration of options, and implementation plans have been applied by regulators at varying degrees.

Despite MPC's best efforts, there are still challenges that exist with RIA implementation. This includes a fragmented RIA framework, inconsistent RIA application, and a general lack of awareness, to name a few. Without integration in the decision-making process, there is a growing divide between RIA that is practised and RIA that is preached. Nonetheless, solutions to institutional issues can be tackled by among others applying a '*whole-of-government approach*' to RIA adoption in order to strengthen MPC's gatekeeper role.

One possible contention is that the fundamental problem stems from the traditional understanding of the rule-making process. This is because

since time immemorial, policy has always been driven from a '*top down*' approach with little or no analysis of the rationale and implications. The suggestion that the author makes is that a fundamental shift in creating evidence-based policy decisions is required across all levels of Government. Although many more RIA related initiatives can be implemented, adoption will always be '*swimming against the tide*' unless this mind-set can be rectified.

The impending NPDIR is expected to undergo a revamp in 2020 with the introduction of the much-awaited National Policy on Good Regulatory Practice or "**NPGRP**". The NPGRP provides a fresh opportunity for MPC to give a holistic reboot to the GRP initiative. The building blocks of this policy should be a cultural reset to ensure ingrained responsibility and accountability in the rule-making process. At the end of the day, RIA needs to be appreciated as an important and necessary policy-making tool, and not seen merely a form of regulatory compliance. Failing which, RIA will remain as a '*check the box*' process that does not seriously influence policy development.

If you have any questions or require any additional information, please contact Mohamad Izahar Mohamad Izham or the Zaid Ibrahim & Co. partner you usually deal with.



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Mohamad Izahar is a Partner in the Corporate and Government Advisory practice group at Zaid Ibrahim & Co. (a member of ZICO Law).

His practice focuses in the area of law reform. This includes advising Federal and State Governments including Ministries, regulators, and statutory bodies on the '*end-to-end*' law reform spectrum ranging from regulatory mapping, undertaking feasibility studies, conducting regulatory impact analysis (RIA), assisting in the drafting of primary and subsidiary legislations, and implementing regulatory frameworks.

He has also been involved in post-law reform work through his experience in compliance and governance with legal awareness initiatives, advising on regulatory compliance, developing legal audit programmes, and advising on rationalization, privatization, and corporatization exercises.

At the same time, his practice includes providing strategic and legal support to private sector clients interested in engaging the Government in policy development and reform. This includes industry proposals to amend or introduce new laws as well as complex and novel regulatory applications and approvals.

This article was edited by ZICO Knowledge Management.

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