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# ▶ Report on Review of Malaysia's Labour Dispute Resolution System

ILO Labour Law and Industrial  
Relations Reform Project in Malaysia

Michael Gay, Craig Bosch



# **Report on Review of Malaysia's Labour Dispute Resolution System**

**Michael Gay, Craig Bosch**

ILO Labour Law and Industrial Relations Reform Project in Malaysia

International Labour Office  
Geneva  
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Law is made for man, not man for the law.

TUN MOHAMED SUFFIAN

*Former Lord President of the Federal Court of Malaysia and the first Asian jurist to be appointed as a judge of the Administrative Tribunal of the International Labour Organization.*

## Foreword

Developed under the ILO Labour Law and Industrial Relations Reform Project in Malaysia, the timely publication of this report coincides with the recent legislative amendment of three main labour laws in Malaysia, namely the Employment Act 1955, the Trade Unions Act 1959 and the Industrial Relations Act 1967.

This report assesses the importance of sound labour dispute resolution (LDR) systems in ensuring the prevention and just settlement of employment-related conflicts. In addition to a comprehensive analysis of Malaysia's LDR system, the report makes a general call for improvements, and in some cases provides specific recommendations with the aim of enhancing the effectiveness and expedition of the system. This report reflects on the functional elements of the LDR system, such as the representation of parties and procedural timeframes. The report also analyses the different procedures available for the resolution of specific disputes such as recognition disputes, and other disputes relating to the collective bargaining process.

The data provided in the report's analysis will assist the various Ministry Departments in considering implementation of the recommendations in this report. These include calls to increase the number of labour officers, and the clear differentiation between officers in charge of labour inspections, and those responsible for dispute settlement duties. This Ministry welcomes any training opportunities from the ILO's expertise in building effective and efficient labour systems, and seeks an enhanced understanding of the virtuous cycles generated by the interaction of different labour market characteristics.

I would like to take this opportunity to thank the ILO for this report, especially to Mr. Michael Gay and Mr. Craig Bosch. We hope that this report will be a useful tool for my Ministry generally, and will contribute to the strengthening of labour dispute prevention and resolution systems in Malaysia particularly.

YB M. Kula Segaran  
Minister of Human Resources  
Malaysia

# Preface

Conflict is inevitable in the employment relationship and in industrial relations. Conflict can and does lead to labour disputes. Procedures and mechanisms for the effective prevention and resolution of labour disputes are therefore critical to promote sound industrial relations, and to ensure the functioning labour governance systems. The ILO's tripartite constituents have highlighted the important role of governments in developing labour dispute resolution systems that are effective, accessible and transparent, to ensure the rule of law at the national level.

This report and analysis of Malaysia's labour dispute resolution system was developed in the context of the ILO's continued efforts to support member States in improving the performance of labour dispute resolution systems, and ensuring access to justice for all. Authors Michael Gay and Craig Bosch delve into the various mechanisms for the resolution of disputes, spanning from enterprise-level grievance procedures, to "labour court" processes under the Director General of Labour. They also examine the range of processes for the resolution of different types of disputes, both individual and collective in nature. These analyses ultimately highlight the complex interactions between different institutions, their actors, and their regulatory frameworks, and identify areas for legislative and institutional reform.

Drawing on the important theme of ensuring access to justice for all, the report highlights the obstacles presented by the current framework, particularly in the case of domestic and migrant workers. Gay and Bosch offer a range of recommendations addressing potential barriers to the labour dispute resolution system including: complex and formalized processes in the labour court and Industrial Court; procedural uncertainty due to unclear legislative provisions; and legislative exclusion of some workers from certain legal protections.

We thank Michael Gay and Craig Bosch for their important contributions to the ILO Labour Law and Industrial Relations Reform Project in Malaysia, and hope this report provides a solid analytical basis to inform the labour law reform process. By highlighting the need for training and professional development of dispute resolution actors such as chairpersons, conciliators, mediators and labour court officials, we also hope the report will support efforts to strengthening existing labour dispute resolution mechanisms and institutions.

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# Contents

Foreword.....	iv
Preface .....	v
Contents.....	vi
Executive summary .....	ix
Abbreviations and definitions.....	xii
1. Introduction.....	1
2. Background .....	3
3. Primary Labour Legislation and LDR System in Brief .....	5
Employment Act.....	5
Industrial Relations Act .....	6
4. Role of Ministry .....	8
(i) Current framework .....	8
Referral role .....	8
Decision-making role.....	9
(ii) Proposed amendments.....	10
(iii) Discussion .....	11
(iv) Recommendations .....	15
5. Jurisdiction and Powers of the Courts.....	16
(i) Current Framework .....	16
Labour courts .....	16
Industrial Court .....	18
(ii) Proposed amendments.....	21
(iii) Discussion .....	22
(v) Recommendations .....	31
6. Representation of Parties .....	33
(i) Current framework .....	33
(ii) Proposed amendments.....	34
(iii) Discussion .....	34
(iv) Recommendations .....	36



7.	Time-Bound System .....	37
	(i) Current framework .....	37
	(ii) Proposed amendments.....	37
	(iii) Discussion .....	37
	(iv) Recommendations.....	39
8.	Recognition Disputes and other Disputes Relating to the Collective Bargaining Process .....	41
	(i) Current framework .....	41
	Recognition disputes.....	41
	Trade disputes.....	42
	(ii) Proposed amendments.....	43
	Recognition disputes.....	43
	Trade disputes.....	43
	(iii) Discussion .....	44
	(iv) Recommendations.....	46
9.	Resolution/Adjudication of Unfair Labour Practices.....	47
	(i) Current framework .....	47
	(ii) Proposed amendments.....	48
	(iii) Discussion .....	48
	(iv) Recommendations.....	50
10.	Enterprise-Level Grievance Procedures.....	51
	(i) Current framework .....	51
	(ii) Proposed amendments.....	51
	(iii) Discussion .....	52
	(iv) Recommendations.....	53
11.	Accessibility of LDR Processes for Migrant Workers.....	54
	(i) Current framework .....	54
	(ii) Proposed amendments.....	54
	(iii) Discussion .....	55
	(iv) Recommendations.....	60
12.	Training and Professional Development.....	62
	(i) Current framework .....	62
	(ii) Proposed amendments.....	62
	(iii) Discussion .....	62
	(iv) Recommendations.....	65

13.	References .....	66
14.	Annexes.....	69
	1 – List of Recommendations .....	69
	2 – List of Persons Consulted .....	73
	3 – List of Documents Reviewed .....	75
	4 – LDR Chart .....	78
	5 – LD Workflow for Trial of Labour Cases .....	79
	6 – LD Workflow for Appeals on Decisions of the Labour Court .....	80
	7 – LD Peninsular Statistics 2018.....	81
	8 – LD Sabah Statistics 2013-2018 .....	82
	9 – LD Sarawak Statistics 2013-2018 .....	85
	10 – IRD Statistics 2013-2018 .....	86
	11 – IC Registration of Cases 2013–2018.....	92
	12 – IC Timeframe for Resolution of Cases 2013–2018 .....	93
	13 – IC Case Settlement Rates 2013–2018.....	94
	14 – IC Evaluation Data Report 2018 .....	95
	15 – IC Mediation Report 2005–2018 .....	96
	16 – IC Categories of Dismissal Awards 2013–2018.....	97
	17 – IC Chairpersons Positions 2013–2018 .....	98
	18 – Ministry Organigram.....	99

## Executive summary

In most, if not all, employment relationships, the perspectives, interests and needs of the employer and employees are unlikely to co-exist in perfect accord. A key objective of a sound labour dispute resolution (LDR) system is to assist in the prevention and just settlement of employment-related disagreements at the earliest possible stage, before they lead to serious disputation and fractured relationships. This Report, on the overall functioning of the LDR system in Malaysia, calls generally for improvements, in some cases minor and in others structural, that will enhance the effectiveness, overall accessibility and expedition of the LDR system. The Report not only reflects our views but focuses on areas identified by the Malaysian stakeholders in the LDR system.

### ***The role of the Ministry of Human Resources***

The Ministry of Human Resources (the Ministry) in Malaysia plays a central, sometimes determinative, role in industrial relations and dispute resolution, contrary to the role played by the authorities in “our” jurisdictions of Australia and South Africa. In this respect, to ensure the speedy resolution of disputes, the Minister’s referral role should be removed and consideration given to allowing automatic referrals of cases by the Director-General for Industrial Relations (DGIR) – or, alternatively, allowing either party to file their case at the Industrial Court (IC) – if the case has not been successfully conciliated within a specific period of time, e.g. three months.

### ***Jurisdiction and powers of the courts***

Under Malaysia’s labour laws, two separate entities resolve and decide on labour disputes; the “labour court” under the Employment Act (EA) and the IC under the Industrial Relations Act 1967 (IRA).

At the labour court, the number of labour officers should be increased, and a clear differentiation should be made between officers in charge of labour inspection and those responsible for dispute settlement duties.

Although not part of the judicial arm, we consider that in particular the IC, in purpose, form and consequence, emulates in large part the workings of a civil court. Given the overriding need for the IC to be easily accessible to employers, employees and their organizations, a key issue to be addressed is overly formalized proceedings before the IC being cumbersome and a potential barrier to access to justice. We furthermore recommend an automatic rotation system for the assignment of cases to IC panel members together with measures to ensure the real and perceived independence of the IC.

We welcome the establishment of an Employment Appeal Court (EAC) as a major advance and, more generally, recommend that all labour-related disputes, both under the EA and the IRA, are heard and determined to finality, in the specialized system of labour court/IC and EAC.

The best LDR system would be one understood by every worker and employer and requiring minimal intervention by a lawyer. In this respect, it is important that more information in an easily digestible form should be made available to the public through the Ministry and IC websites to facilitate access to justice for all.

### ***Representation of parties***

Representation before the labour courts is regulated by the hearing officer through internal directives. To assist aggrieved parties in the preparation of their case before the labour court, it is vital for these internal directives to be made public.

In the IC, legal representation is only permitted with the consent of the sitting Chairperson, although it should be noted that this consent is hardly, if ever, withheld. Conversely, proposed amendments require that only lawyers appear before the EAC. Consideration should be given to permitting the same class of persons to represent parties both at the IC and EAC.

### ***Time-bound system***

Under international standards and best practice, the role of the Ministry in an effective LDR system is to provide conciliation, mediation and arbitration mechanisms that are free and expeditious. In this context, strict and published timelines for all stages of the dispute resolution process should be introduced; rigorous case management should be applied; and postponements, whether at the IC, labour court or during conciliation at the DGIR should be limited in purpose and number.

### ***Recognition disputes and other disputes relating to the collective bargaining process***

While under the current law, disputes relating to collective bargaining may be referred to the IC by the Minister of his own motion, it is worthwhile to note that proposed amendments will require that such trade disputes be referred to the IC only with the consent of both parties (some exceptions apply). Due to the public interest importance of rapid resolution of disputes concerning recognition of trade unions and the legality of strikes, we recommend that these disputes be fast-tracked directly to the future EAC. Allied to the recognition issue, we further recommend that employees should be able to strike on issues relating to recognition (and other matters outside collective bargaining), consistent with ILO principles.

### ***Resolution/adjudication of unfair labour practices***

There is currently some uncertainty with the procedure of dealing with unfair labour practices due to the availability of competing processes under sections 8 (civil redress) and 59 (criminal complaint) of the IRA. This position should be clarified, together with the introduction of a reverse onus of proof in criminal complaints of anti-union discrimination. It is vitally important that union plurality be allowed to ensure all workers have genuine union representation of their own choosing.

### ***Enterprise level grievance procedures***

Requiring the establishment of an enterprise-level grievance procedure for all employees in an enterprise with minimum employment number and for all aspects of the employment relationship, will go a long way in preventing the escalation of disputes which may strain the LDR system.

### ***Accessibility of LDR processes for foreign workers***

Malaysia is heavily reliant on foreign labour. In this respect, a key finding from our consultations is for all foreign workers, whether documented or undocumented, to be allowed full and unhindered access to LDR mechanisms at the labour court, IR Department (IRD) and the IC. We recommend that foreign workers be

allowed to change their employer or at least be allowed to remain in the country until the final disposition of any disputed case relating to exploitative labour conditions which may be on foot. As an employment right and to aid compliance, employers should be required to supply foreign workers with employment contracts in the worker's home language and, similarly, be provided with individual payslips that have the various headings in the home language.

### ***Training and professional development***

Nearly all stakeholders expressed a desire for targeted training and professional development (PD). In our view the ongoing provision for skills enhancement for chairpersons, conciliators, mediators and labour court officials is fundamental to the provision of judicial and quasi-judicial service to the community. Professional development should be improved through both induction training and a continuing PD programme of various modalities including, for example, mentoring, online and workshop training and certification. Importantly, advocacy courses should be established for lay union officials and employer representatives to ensure an effective and efficient dispute resolution process.

# Abbreviations and definitions

ATIPSOM	Anti-Trafficking in Persons and Anti-Smuggling of Migrants
CCMA	South Africa’s Commission for Conciliation, Mediation and Arbitration
CEACR	ILO Committee of Experts on the Application of Conventions and Recommendations
CFA	ILO Committee on Freedom of Association
CoC	Code of Conduct for Industrial Harmony 1975
DGIR	Director General for Industrial Relations
DGL	Director General of Labour
DGTU	Director General of Trade Unions
EA	Employment Act 1955
EAC	Employment Appeal Court
FOA	freedom of association
FWA	Australia’s Fair Work Act 2009
IC	Industrial Court
ILKAP	Institut Latihan Kehakiman dan Perundangan (Judicial and Legal Training Institute)
ILO	International Labour Organization
IR	industrial relations
IRA	Industrial Relations Act 1967
IRD	Industrial Relations Department
ITC-ILO	International Training Centre of the International Labour Organization
KPI	key performance indicator
LCP	Malaysia – United States Labour Consistency Plan
LD	Labour Department
LDR	labour dispute resolution

MEF	Malaysian Employers Federation
Minister	Minister of Human Resources
Ministry	Ministry of Human Resources
MoU	memorandum of understanding
MTUC	Malaysian Trades Union Congress
NEDLAC	South Africa's National Economic, Development and Labour Council
PD	professional development
Project	ILO Labour Law and Industrial Relations Reform Project in Malaysia
RM	Malaysian ringgit (currency)
TUA	Trade Unions Act 1959
UUMJLS	Universiti Utara Malaysia Journal of Legal Studies





# 1. Introduction

1. This Review of Malaysia's Labour Dispute Resolution (LDR) system has been commissioned by the ILO's *Labour Law and Industrial Relations Reform Project* (the Project) to support the ongoing labour law reform process being spearheaded by the Ministry of Human Resources (the Ministry). We do not present our Report as a critique of the current workings of the Malaysian industrial system; we have rather joined with the Malaysian parties in identifying areas where adjustments might be made in the delivery of industrial justice – for the benefit of all employees, employers and the economy generally. In undertaking this Review, we have faced a number of limitations, chief of which has been the short time frame within which we were expected to deliver practical solutions for a more efficient, accessible and fair dispute resolution system in Malaysia, so as to allow the recommended solutions to feed into the ongoing reform process. Additionally, our reviews and recommendations as set out in this Report are based on the proposed January 2019 legislative amendments and, while there may be more recent drafts, a cut-off date thus had to be chosen in undertaking such a Review.
2. Our Report is intended to present concrete proposals to strengthen and refine the legislative and institutional changes currently being proposed by the Ministry under the amendments to the Trade Unions Act 1959 (TUA), the Industrial Relations Act 1967 (IRA) and the Employment Act 1955 (EA); and, more generally, establish a set of findings, suggestions and/or recommendations. The Report is based on a multi-phased approach undertaken by the ILO's Labour Law and Industrial Relations Reform Project. Phase One of the Review involved, among others, a one-day tripartite consultative meeting in January 2019 and a high-level meeting with various relevant agencies under the purview of the Ministry in February 2019. Under this phase, a number of issues related to the functioning of the labour dispute resolution system in Malaysia were discussed and identified, which largely correspond with the headings of the chapters in this Report. Phase Two of the Review aimed to build upon the work carried out under the first phase and involved a desk review of a wide range of documents including applicable laws and regulations, proposed amendments, relevant publications, reports and data collected from the Ministry. This phase also drew on many consultative discussions, held separately with key people involved in Malaysia's labour dispute resolution system. The third phase concerned an intensive tripartite study tour to Australia's Fair Work Commission in Melbourne, to learn lessons from and avoid pitfalls of the well-developed, Australian system.<sup>1</sup>
3. This, our final Report, contains some variations from that distributed electronically in August 2019. The structure of the Report aims to assist the stakeholders in readability and accessibility. Firstly,

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<sup>1</sup> The support of the Fair Work Commission's President, Justice I. J. K. Ross AO, Deputy President V. Gostencnik, General Manager B. O'Neill, of Justice M. Bromberg of the Federal Court of Australia, of J. Bornstein, Principal, Maurice Blackburn Lawyers, and N. Ogilvie, Partner of Herbert Smith Freehills is gratefully acknowledged.

each chapter outlines the “Current framework”, that is to say, the prevailing system both in law and practice. Next, we highlight amendments being considered in the Ministry’s legislative drafts. We then move on to a “Discussion” section, which includes our views on the present system and as to the proposed amendments, as well as general thoughts for how these might be improved – with some reference to international labour standards and comparative best practice. In text boxes are our “Recommendations”, which we hope will seamlessly feed into the ongoing legislative reform process. For easy reference, a separate overview of the recommendations is provided in **Annexure 1**, while lists of persons consulted and documents reviewed are attached as **Annexures 2 and 3** respectively. All relevant data (which we received from the Ministry) can be found in **Annexures 7 to 17**. Where the text refers to the masculine gender, it shall be deemed to include the feminine and vice versa.

4. The authors comprise former Commissioners of Australia’s Fair Work Commission and South Africa’s Commission for Conciliation, Mediation and Arbitration, with much of the commentary and analysis deriving from their own personal knowledge and expertise. Views and recommendations expressed in the Report are those of the authors and do not necessarily reflect those of the ILO.
5. Finally, the authors would like to express their appreciation to the following individuals and institutions, without whom this Report would not have been possible. First of all, the Project team comprising Hugo van Noord and Dominique F. Fernandes, who were instrumental in compiling material for the Report as well as editing and providing invaluable feedback. Furthermore, Colin Fenwick (Head of the ILO Labour Law and Reform Unit) and Karen Curtis (Chief of the ILO’s Freedom of Association Branch) are acknowledged for their review of and critical comments to the Report.

Michael Gay  
Craig Bosch

## 2. Background

6. The Government of Malaysia has embarked on an overhaul of its industrial relations system through a holistic review and revision of its main labour laws to ensure conformity with international obligations and with a view to bringing the industrial relations system in line with the overall transformation process of the country. This review and revision of legislation will be accompanied by institutional reforms, including with regard to the labour inspectorate and labour dispute resolution system, to enable these important state bodies to implement and enforce the amended laws effectively.
7. The labour law and institutional reform was initially in large part driven by Malaysia's commitments as elaborated in the *Malaysia – United States Labour Consistency Plan* (LCP), which was signed between the two countries as a side agreement to the *Trans-Pacific Partnership Agreement* (TPPA). Although the LCP is no longer a legally binding document due to the withdrawal of the US from the trade pact, the Government of Malaysia has indicated its intention to continue to pursue the objectives of the LCP and has committed to adherence to international standards and conventions established by the ILO. In so doing, it has sought the cooperation, advice and technical assistance of the ILO, following which the Project was established in Malaysia.
8. Anticipated legislative amendments include variation to the TUA and IRA to lift restrictions on union organizing, collective bargaining and strike activity; to establish judicial review of, among others, administrative decisions on union registration and determinations of strike illegality; to remove administrative discretion as to intervention in trade disputes; and various other amendments related to the framework for labour dispute resolution. Significant among these is the establishment of an Employment Appeal Court (EAC). The EA, too, is expected to undergo revision to, among others, expand its coverage through removal of the existing salary cap of RM 2,000 a month; introduce provisions ensuring equal opportunity throughout the entire employment process (from recruitment to dismissal) and establishing processes for the resolution of complaints alleging breaches of the said provisions.
9. The legislative reforms will require the introduction of multiple simultaneous reforms and improvements (including legal and regulatory changes) to Malaysia's labour dispute resolution system, with a view to enabling dispute resolution bodies to effectively implement and enforce the amended provisions. These adjustments will allow dispute resolution bodies to cope with their expanded jurisdiction, as well as with the expected increase in both collective and individual disputes associated with an increase in union organizing and collective bargaining and with the removal of the salary cap in the EA. It is imperative that complementary reforms and improvements to the labour dispute resolution system be accomplished by the time the legislative amendments to the TUA, IRA and EA enter into force, thereby ensuring there are no gaps in the implementation and enforcement of those legislative amendments.

10. A more comprehensive examination of the primary laws that make up Malaysia's labour dispute resolution system is set out below.

### 3. Primary Labour Legislation and LDR System in Brief

11. There are three primary pieces of labour legislation in Malaysia, i.e. the TUA, IRA and EA. The focus of this Report will be on the EA and the IRA given that these laws govern the relationship between employers and employees and between employers and trade unions, including the processes and procedures for the settlement of labour disputes. It is useful to set out in general terms the regulatory role of the EA and IRA in their current form and how the labour dispute resolution system is structured under these laws. As discussed further below, two specialized mechanisms for the settlement of labour disputes have been created, i.e. proceedings before the Director General of Labour (DGL) in the Ministry – known colloquially as the “labour court” – under the EA, and the IC under the IRA.

#### Employment Act

12. The EA contains protections relating to minimum conditions of employment. It protects categories of employees specified in the First Schedule of the Act, i.e. those earning not more than RM 2,000 per month and certain other categories of employees regardless of earnings.
13. Some provisions apply irrespective of an employee’s earnings and whether they are specified in the First Schedule, namely maternity protection in Part IX and protections against sexual harassment in Part XVA.<sup>2</sup>
14. The EA also excludes certain categories of employees from some of its provisions. For example, apprenticeship contracts that are in a form approved by and filed with the DGL are excluded from sections 10-16,<sup>3</sup> while under the First Schedule domestic workers are excluded from key protections under the EA, i.e. sections 12, 14, 16, 22, 61 and 64 together with Parts IX, XII and XIII.
15. Disputes arising within the scope of the EA are dealt with under the auspices of the DGL, where generally an initial attempt is made to resolve each dispute by conciliation. Within its broad authority, the DGL has the power to resolve disputes between employers and employees relating to payment of wages or any other payments due under an employment contract,<sup>4</sup> under any of

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<sup>2</sup> EA, sections 44A and 81G respectively.

<sup>3</sup> Ibid. section 17A.

<sup>4</sup> While for clarity this Report uses the term “employment contract”, the EA refers to “contract of service” (as opposed to “service contract”, a term used for independent contractors).

the provisions of the EA and its subsidiary regulations, or under the provisions of the minimum wage law;<sup>5</sup> claims for indemnity for termination of employment contracts without notice;<sup>6</sup> and, importantly, complaints of sexual harassment.<sup>7</sup> The DGL can also deal with disputes in respect of employees who earn more than RM 2,000 but not more than RM 5,000 per month where their complaint relates to non-payment of wages or other payments due in terms of their employment contracts.<sup>8</sup>

16. When conciliation is unsuccessful, the DGL, in the form of what is commonly referred to as the labour court, will make an order as to the outcome. Decisions of the labour court may be appealed to the High Court.<sup>9</sup> Orders made by the labour court are enforced via the Sessions courts.<sup>10</sup> Some other decisions under the EA may be appealed to the Minister of Human Resources (the Minister)<sup>11</sup> and/or taken to the High Court on review. A chart of the various labour dispute resolution processes under both the EA and IRA, with reference to relevant sections, is attached as **Annexure 4**.

## Industrial Relations Act

17. The stated purpose of the IRA is “to promote and maintain industrial harmony and to provide for the regulation of the relations between employers and workmen and their trade unions and the prevention and settlement of any differences or disputes arising from their relationship and generally to deal with trade disputes and matters arising therefrom”.
18. Inter alia, the IRA therefore regulates trade union recognition, protections for participating in the activities of trade unions, strikes and lock-outs, and collective bargaining and collective agreements. As to disputation, the IRA addresses union recognition disputes; trade union discrimination/interference disputes; trade disputes generally; interpretation/variation of awards

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<sup>5</sup> EA, section 69.

<sup>6</sup> Ibid., section 69C.

<sup>7</sup> Ibid., section 81D.

<sup>8</sup> Ibid., section 69B.

<sup>9</sup> Ibid., section 77, for decisions by the DGL under sections 69, 69B, 69C, 73 or 81D(4). Note that labour court decisions on complaints about discrimination between a local employee and a foreign employee (section 60L) are not covered under section 77, and are thus only open to review by the High Court.

<sup>10</sup> Ibid., section 75.

<sup>11</sup> Ibid., sections 29(3), 60A(1B) and 60A(4)(aa).

and collective agreements and cases involving alleged non-compliance with awards and collective agreements; together with dismissals where reinstatement is claimed.<sup>12</sup>

19. These IRA disputes are dealt with firstly under the auspices of the Director-General for Industrial Relations (DGIR), where they are conciliated within the Ministry and then, if conciliation fails, referred to the Minister for a decision (in case of recognition disputes) or for him to determine whether the dispute should be referred to the IC (in case of trade union discrimination/interference disputes, trade disputes generally, and dismissals). As an exception, questions arising regarding the interpretation of any award or collective agreement and alleged non-compliance with awards or collective agreements may be brought directly to the IC by any of the parties.<sup>13</sup>
20. The IC, established under the IRA is in fact an arbitration institution consisting of a President and Chairpersons appointed by the *Yang di-Pertuan Agong* (Head of State) as well as a panel of persons representing employers and a panel of persons representing workmen, all of whom are appointed by the Minister.<sup>14</sup>

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<sup>12</sup> The IC has jurisdiction whether or not the case is taken up by a trade union. Dismissal cases comprise by far the greatest number of disputes, with 31,040 disputes reported to the IRD over the years 2013 to 2018, or 76.4 per cent of the total number of disputes, see **Annexure 10** (IRD Statistics 2013–2018).

<sup>13</sup> IRA, sections 33(1) and 56(1) respectively.

<sup>14</sup> *Ibid.*, sections 21(1) and 23(2).

## 4. Role of Ministry

### (i) Current framework

21. The Ministry plays a central role in Malaysia's LDR system. In addition to its conciliation function, it determines whether certain disputes should be referred to the IC and it determines the outcomes of certain other disputes.

### Referral role

22. In terms of the IRA, disputes relating to trade union discrimination/interference,<sup>15</sup> trade disputes,<sup>16</sup> and dismissal disputes<sup>17</sup> are submitted to the DGIR for resolution through conciliation by a departmental officer (DGIR conciliator).<sup>18</sup>
23. If a dispute remains unresolved and the DGIR is satisfied that there is no likelihood of it being settled, he is obliged to notify the Minister.
24. Where, in the case of trade disputes, the Minister considers it necessary or expedient, he may exercise a discretion whether or not to refer the dispute to the IC of his own motion or after a joint request by the parties.<sup>19</sup> The Minister is also given the power to first attempt further conciliation.<sup>20</sup>
25. There is no provision for further conciliation by the Minister in trade union discrimination/interference and dismissal disputes. After receiving notification from the DGIR that

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<sup>15</sup> Ibid., section 8.

<sup>16</sup> Ibid., section 18. "Trade dispute" is defined in section 2 of the IRA as "any dispute between an employer and his workmen which is connected with the employment or non-employment or the terms of employment or the conditions of work of any such workmen".

<sup>17</sup> Ibid., section 20. In order to rely on section 20, employees must seek reinstatement (but in the great majority of cases receive compensation in lieu of reinstatement) and must file the complaint within 60 days of the date of dismissal.

<sup>18</sup> In terms of IRA sections 8(2), 18(2) and 20(2) the DGIR may, or shall, take such steps as he considers necessary to achieve an expeditious settlement. This essentially involves attempting to resolve the relevant disputes by conciliation.

<sup>19</sup> IRA, section 26.

<sup>20</sup> Ibid., section 19A.



such disputes remain unresolved, the Minister must exercise his discretion in either referring or not referring the dispute to the IC for hearing and award.<sup>21</sup>

26. The Minister's decision to refer, or not to refer, a dispute to the IC may be challenged in the High Court on review, although in the leading case, *Minister of Labour Malaysia v. Lie Seng Fatt*, the Supreme Court made it clear that, subject to Ministerial satisfaction of the classic discretionary judgement criteria, the Court would not interfere.<sup>22</sup>

## Decision-making role

27. Under IRA, trade union recognition disputes are initially referred to the DGIR, who may take the necessary steps to address the dispute.<sup>23</sup> Thereafter, absent agreement or withdrawal of the claim, the dispute is referred to the Minister, who determines the dispute.<sup>24</sup> His decision is said to be final and not subject to being questioned in any court.<sup>25</sup> However, this judicial ouster clause has not prevented such decisions from being dealt with by the High Court on review.<sup>26</sup>
28. Disputes arising from the EA, including those relating to wages,<sup>27</sup> claims for indemnity for termination without notice,<sup>28</sup> and sexual harassment,<sup>29</sup> are dealt with under the auspices of the DGL, initially through conciliation by labour officers. If conciliation fails, the DGL will issue a

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<sup>21</sup> There are limited instances where parties can refer disputes directly to the IC without prior conciliation by the DGIR or Minister, i.e. questions regarding the interpretation of any award or collective agreement (section 33(1) IRA) and alleged non-compliance with awards or collective agreements (section 56(1) IRA).

<sup>22</sup> In *Minister of Labour Malaysia v. Lie Seng Fatt* [1990] 2 MLJ 9 the Malaysian Supreme Court held that the Minister has a wide discretion and that courts will not interfere on review "so long as he exercises his discretion without improper motive, the exercise of discretion must not be interfered with by the Court unless he had misdirected himself in law or had taken into account irrelevant matters or had not taken into consideration relevant matters or that his decision militates against the object of the statute". See furthermore *National Union of Hotel, Bar & Restaurant Workers v. Minister of Labour & Manpower* [1980] 2 MLJ 189. See also the Australian High Court decision of *House v. The King* (1936) 55 CLR 499 and, in a more contemporary IR setting, the High Court in *Coal and Allied Operations Pty Ltd v. Australian Industrial Relations Commission* [2000] HCA 47, 203 CLR 194.

<sup>23</sup> IRA, sections 9(1B) and 9(4A).

<sup>24</sup> *Ibid.*, sections 9(1D) and 9(5).

<sup>25</sup> *Ibid.*, section 9(6).

<sup>26</sup> See *Hotel Equatorial (M) v. National Union of Hotel, Bar and Restaurant Workers* (Federal Court) [1984] 1 MLJ 363; *R Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; and *Sabah Forest Industries Sdn. Bhd. v. Industrial Court Malaysia & Anor*, Court of Appeal, Putrajaya, Civil Appeal No: S-01-227-2011] 15 May 2012. These cases dealt with statutory provisions purporting to shield IC awards from judicial scrutiny, but the principles contained in them are equally applicable to the judicial ouster clauses relating to the Minister's decisions.

<sup>27</sup> EA, section 69.

<sup>28</sup> *Ibid.*, section 69C.

<sup>29</sup> *Ibid.*, section 81D.

decision on the dispute, emanating from what is commonly referred to as the labour court. If a party is dissatisfied with the DGL's decision it may appeal to the High Court.<sup>30</sup>

## (ii) Proposed amendments

29. The Government has proposed doing away with the Minister's discretionary referral role under the IRA. Under proposed amendments, trade disputes would be mandatorily referred by the Minister to the IC if they cannot be resolved by the DGIR at conciliation.<sup>31</sup> This amendment is intended both to expedite the resolution process and to remove administrative discretionary authority, addressing concerns raised by the ILO<sup>32</sup> on ministerial discretion in respect of referrals of interests disputes.<sup>33</sup> On the other hand, disputes relating to dismissals would be mandatorily referred by the DGIR to the IC if they cannot be resolved at conciliation. There are further proposed amendments to alter the Minister's decision-making powers in trade union recognition disputes, leaving those decisions to be made by the DGIR and thus expediting the recognition process.
30. No relevant amendments are foreseen to the EA in respect of the Ministry's role in the resolution of disputes.

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<sup>30</sup> Ibid., section 77. As noted earlier, there are certain instances where DGL decisions are to be instead appealed to the Minister (sections 29(3), 60A(1B) and 60A(4)(aa) EA), whose decisions can in turn be challenged, notwithstanding ouster clauses, at the High Court on review. In other instances DGL decisions are only open to review by the High Court, as no provision on appeal is provided for (sections 16(1), 25A(6), 60(1) and 60A(2), as well as 60L EA).

<sup>31</sup> If, however, the trade dispute is related to a refusal to commence collective bargaining or to a deadlock on collective bargaining, reference shall not be made without the consent in writing by the parties, with the exception of (a) trade disputes relating to the first collective agreement; (b) trade disputes referring to any essential services specified in the First Schedule; (c) trade disputes that would result in acute crisis if not resolved expeditiously; and (d) trade disputes where parties are not acting in good faith to resolve the dispute expeditiously. The said exceptions address concerns raised by the ILO.

<sup>32</sup> See, e.g., ILO: Committee on Freedom of Association (CFA) Case No. 3126 (383rd Report, October 2017, paragraph 454), [https://www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/freedom-of-association/WCMS\\_632659/lang-en/index.htm](https://www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/freedom-of-association/WCMS_632659/lang-en/index.htm) [assessed 9 Aug. 2019]; and ILO: Committee of Experts on the Application of Conventions and Recommendations (CEACR) Observation on Malaysia in respect of ILO Right to Organize and Collective Bargaining Convention, 1949 (No. 98) – adopted 2018, published 108th ILC session (2019), [https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100\\_COMMENT\\_ID:3960858](https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3960858) [accessed 8 Aug. 2019].

<sup>33</sup> While the distinction between rights and interests disputes is relevant under Malaysian law, no definitions are provided in the law. Rights disputes are usually defined as disputes concerning the violation of an existing entitlement embodied in the law, a collective agreement or employment contract. Interests disputes, on the other hand, are concerned with future benefits; such disputes are not based on existing entitlements but on the desire of one party to create new rights in the future.

### (iii) Discussion

31. We were made aware of two major issues concerning the role played by the Ministry in the dispute resolution process: delays in receiving a decision on referral, and Ministerial discretion acting as a filtering mechanism. These issues are in addition to those raised by stakeholders related to the training and capacity needs of the various actors, including Ministry officials, in the LDR process.
32. Stakeholders indicated that the referral process causes inordinately **lengthy delays**, not infrequently extending for nine months or one year, leaving parties waiting to have a decision taken on whether a dispute will be referred to the IC. Stakeholders also highlighted that it is open to parties to challenge the decision on referral in the High Court, which is a potential source of further delay.<sup>34</sup> It was proposed that the DGIR be given a time-limit, e.g. three months, within which to attempt to conciliate disputes, failing which they would automatically be referred to the IC or, alternatively, either of the parties would be allowed to themselves file their case at the IC (see on this issue also Chapter 7 on Time-bound System below).
33. The intervention of the Minister clearly causes delays in resolving disputes, either due to the time taken to render decisions on referrals or to the potential for challenges to decisions in the High Court. This problem would remain if the DGIR (instead of the Minister) was given the discretion to refer a dispute to the IC, as was suggested by some discussants. In our view the delays identified as normative run afoul of international labour standards and best practice, which provide that the role of the Ministry in an effective LDR system is to provide (or sponsor through independent, State labour tribunals/courts) conciliation, mediation and arbitration mechanisms that are free and expeditious.<sup>35</sup>
34. In addition, save for an application for judicial review of the Minister's decision at the High Court, a costly and time-consuming procedure, the refusal of the Minister to refer a case to the IC generally signifies the effective end of the matter. Where, for example, cases concern union discrimination or trade disputes, the non-referral to the IC negatively affects broader rights on freedom of association, as there is no alternative avenue for the resolution of these disputes. It also means that the Minister, a member of the executive, is exercising a quasi-judicial role, thus arguably blurring the lines of the separation of powers. The consequences are seen as detrimental to industrial relations and, in our view, undermine confidence in the dispute resolution system.
35. Moreover, it is significant that, as noted earlier, by far the greatest number of disputes referred to the DGIR and then, via the Minister, to the IC relate to dismissals. That is an area where delays are

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<sup>34</sup> No data were available on the number of challenges.

<sup>35</sup> International Training Centre of the International Labour Organization (ITC-ILO): *Labour dispute systems: Guidelines for improved performance* (ILO, Turin, 2013), [https://www.ilo.org/wcmsp5/groups/public/---ed\\_dialogue/---dialogue/documents/publication/wcms\\_211468.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---dialogue/documents/publication/wcms_211468.pdf) [accessed 7 Aug. 2019.] See pages 16 and 32. See also Article 3 of the *Voluntary Conciliation and Arbitration Recommendation, 1951 (No. 92)*.

particularly problematic given that such disputes, usually involve individual dismissed employees who are without an income. Expedient dispute resolution is critical for them, as it generally is for employers who need speedy finality in dismissal disputes in order to know how to plan for their businesses (in practical terms; whether to recruit a new employee to replace a dismissed employee). The importance, to employer and employee alike, of timely handling of termination of employment cases is reflected in Article 8(3) of the ILO Termination of Employment Convention, 1982 (No. 158). It acknowledges that if a dismissed employee is dilatory in making an application for relief, the employee may be deemed to have waived their right to appeal against their dismissal.

36. It is also significant that removing the Minister's referral role in dismissal disputes is entirely consistent with Article 8 of the Termination of Employment Convention providing that:

"A worker who considers that his employment has been unjustifiably terminated shall be entitled to appeal against that termination to an impartial body, such as a court, labour tribunal, arbitration committee or arbitrator."

37. There were some stakeholders who mooted the idea of direct access to the IC without the prior conciliation process at the DGIR. In our experience and having regard for international best practice, a key objective of an effective LDR system is ensuring that disputing parties have, initially, ready access to quick and informal resolution of their dispute – through State-provided conciliation or mediation. Clearly, this function may be provided as at present through the departmental conciliation function.<sup>36</sup>
38. In Malaysia, conciliation is a mandatory process that provides an avenue for consensus-based resolution of disputes under the IRA and that has proven to be efficient in resolving these disputes, as evidenced by the data from the IRD.<sup>37</sup> Between 2013-2018, 64.8 per cent of section 8 IRA cases (on trade union discrimination/interference) were resolved at conciliation,<sup>38</sup> whereas in terms of section 18 (trade disputes) and section 20 (dismissals), the success rate at conciliation was 74.8 per cent and 46.4 per cent respectively. It is of interest to note that in the Australian unfair dismissal jurisdiction, of the 13,595 applications lodged in 2017-2018, the median number of days to a staff

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<sup>36</sup> See, for example, <https://www.ilo.org/ifpdial/areas-of-work/labour-dispute/lang-en/index.htm> [accessed 7 Aug. 2019].

<sup>37</sup> See **Annexure 10** (IRD Statistics 2013-2018). The IRD has 16 offices and a total number of 120 officers (conciliators) throughout Malaysia.

<sup>38</sup> "Resolved cases" comprise (a) cases resolved through conciliation and (b) cases resolved through a decision of the Minister to refer or not to refer the case to the IR.

conciliation<sup>39</sup> was 27 days from lodgement, and that 79 per cent of the applications conciliated by staff were resolved by the parties reaching accord.<sup>40</sup>

39. Some stakeholders expressed concerns that removing the referral role of the Minister under the IRA would mean the loss of a useful layer of filtration to keep **frivolous disputes** from making their way to the IC. It was suggested that, as a result, the IC could be overwhelmed by the number of disputes that would be sent its way. With this concern in mind it was suggested that, at least, the DGIR (if not the Minister) should be given a discretion to determine whether disputes should be referred to the IC. However, as noted above, this would allow the problem of lengthy delays caused by the referral process, to remain. Nothing was put to us which supported a conclusion that there were currently a significant number of applications which were frivolous and which applications were eliminated through Ministerial filtering action. We agree that such applications in any number could prove time consuming and ought not be encouraged. At the same time we have no doubt that applications of a frivolous or querulous nature, characterized (we have inferred) by their being vexatiously intended, or so lacking in substance or foundation as to have no reasonable prospect of success, will be dealt with decisively at conciliation. Our recommendations below include active measures in this regard, to resolve the alleged difficulty of “frivolous” applications.
40. There were differing views on the number of disputes referred by the Minister to the IC. However, information supplied by the IRD showed that between 2013 and 2018 the Minister referred almost all the disputes he received in terms of sections 8 (trade union discrimination/interference) and 13 (trade disputes as a result of refusal to bargain collectively) of the IRA, whereas he referred 75.6 per cent of disputes received in terms of section 18 (general trade disputes) and 64.7 per cent of disputes received relating to section 20 (dismissals).<sup>41</sup>
41. It is perhaps understandable that a concern about removing the Minister’s referral function relates to frivolous disputes making their way to the IC. However, it is not clear how many disputes could properly be called “frivolous”, as it is difficult to objectively determine whether a dispute is pursued without merit or reasonable cause until the relevant evidence has been led and tested. Certainly, no evidence or research was cited that might underpin the assertion that a large proportion of applications could be considered frivolous. Consideration should thus be given to whether that concern could not be addressed in (an)other way(s).

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<sup>39</sup> In the Australian system trained registry officers (public servants) deal with initial conciliations – usually by telephone conference. See also the following footnote.

<sup>40</sup> Fair Work Commission: *Annual Report 2017–2018*, p. 30, <https://www.fwc.gov.au/about-us/news-and-events/annual-report-2017-18-published> [accessed 7 Aug. 2019]. Also of note is that the Fair Work Commission in Australia conducts conciliations by way of telephone to reduce the need for parties and conciliators to spend time and money on travel. In 2017–2018, 32 per cent of all hearings and conferences conducted by Members were held by telephone or videoconference, up from 27 per cent in 2016–2017. See the above Annual Report, Appendix D.

<sup>41</sup> See **Annexure 10** (IRD Statistics 2013–2018).

42. One such way would be to charge dismissal applicants a nominal filing fee indexed at a percentage (say, at 10 per cent) of the applicant's base weekly wage/salary to dissuade vexatious and petty complainants – but not at such a level as to dissuade genuine applicants.<sup>42</sup> Such a filing fee could be waived by a departmental officer upon the officer being satisfied the applicant was impecunious or if the fee would impose serious hardship – as applies in Australia. The fee could be refunded if the party is successful in their application. Such a fee is likely to have the effect of deterring claims that are obviously entirely without merit, where the dismissed previous employee wishes to cause his old employer some aggravation.<sup>43</sup>
43. An alternative measure to discourage frivolous claims, one that we prefer, is that parties (although both the IC and conciliation at the DGIR are currently costs-free environments) should face costs if they lose a case that is deemed frivolous or made without reasonable cause, or where they have opted not to use or properly participate in conciliation (or mediation as is practiced at the IC) options prior to a full hearing of the dispute. In relation to a costs schedule, guidance may be obtained from the Appendix (Parts I and II) to Order 59 of Malaysia's Rules of Court 2012.<sup>44</sup>
44. In this regard, Australia's Fair Work Act 2009 (FWA) is also of interest. It must first be noted that generally, in its dispute settlement and other functions Australia's Commission is also a costs free tribunal. However, costs may be awarded in unfair dismissal applications, and in cases where the "general protections" provisions (which may include dismissal) are used. Speaking generally, Section 400A of the FWA permits costs to be awarded against either party if the Commissioner is satisfied that costs were incurred because of an unreasonable act or omission of that party in relation to the conduct or continuation of the case. In addition, Section 401 provides for costs against lawyers or paid representatives who encourage applicants to start, continue or respond when it should have been reasonably apparent that the person had no reasonable prospect of success in the dispute.<sup>45</sup>

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<sup>42</sup> Under Australia's Fair Work Act the filing fee for unfair dismissal, general protections and anti-bullying applications is set from 1 July 2019 at AU\$73.20, when, for reference, the national minimum wage from 1 July 2019 is to be AU\$740.80.

<sup>43</sup> Great care must be taken, however, not to set fees at such a level that they disincentivize use of the LDR system – i.e., to access to justice. See in this context, for example, with respect to the introduction of filing fees at the Employment Tribunals in the United Kingdom, Abi Adams and Jeremias Prassl: "Vexatious claims: Challenging the case for employment tribunal fees", *The Modern Law Review* (2017) 80(3): 412–442.

<sup>44</sup> See also for comparative interest, the Australian FWA, sections 403 and 611 and FW Regulation 3.08.

<sup>45</sup> The Rules (Rule 39(1)(d)) applicable to the South African Commission for Conciliation, Mediation and Arbitration (where parties are also not charged a fee to access the Commission) make provision for an order for the payment of costs having regard, inter alia, to "whether a party or the person who represented that party in the arbitration proceedings acted in a frivolous and vexatious manner –

- (i) By proceeding with or defending the dispute in the arbitration proceedings; or
- (ii) In its conduct during the arbitration proceedings".

See also Order 59, Rule 6 of Malaysia's Rules of Court 2012, which provides for Personal Liability of Solicitor for Costs.

45. The IC currently has in place a system that deals with dismissal cases prior to a full hearing called “early evaluation”.<sup>46</sup> Early evaluation requires that both parties agree to have a Chairperson, different from that who will eventually hear the case in full, to advise both parties on the strength of their case. We consider that provision might be made to ensure this process is mandatory. This would require the Chairperson, or a conciliator/mediator nominated by the IC, who deals with such a dispute at first instance to provide a Certificate, based on the material advanced at early evaluation. In appropriate circumstances the Certificate would advise that in the view of the Chairperson or conciliator/mediator the application was frivolous or vexatious, or was so lacking in substance that it was bound to fail, and thereby advise the party. This Certificate may be brought to the attention of the adjudicator only at a later stage, if a costs order was sought subsequent to the recipient disregarding the Certificate and unsuccessfully persisting to arbitration.
46. All stakeholders expressed a concern, also in light of the removal of the Minister’s referral role under the IRA, to ensure that the various officers in the conciliation and decision-making process at the Ministry be properly **trained** and skilled. In particular, DGIR conciliators involved in initial conciliations and labour officers who conciliate disputes arising under the EA were thought likely to benefit from professional development. Additionally, it was considered crucial for both employer and union representatives involved in conciliation to be similarly trained to ensure an effective and efficient conciliation process. See a fuller discussion on this in Chapter 12 on Training and Professional Development further below.

## (iv) Recommendations

47.

1. The Minister’s referral role under the IRA should be removed and consideration be given to ensuring automatic referrals of cases by the DGIR to the IC (or alternatively, allowing either party to file their case at the IC) if the case has not been successfully conciliated within a specific period of time, e.g. three months.
2. Consideration should be given to deterring the referral of frivolous or vexatious disputes via costs orders by the IC, taking into account the views of the Chairperson on the frivolity of the case as expressed via Certificates issued during (mandatory) early evaluation.
3. Ensure that DGIR conciliators, labour officers and party representatives are properly trained to ensure an effective and efficient conciliation process in accordance with international best practice.

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<sup>46</sup> See IC: *Practice Note No. 3 of 2010: Guidelines on early evaluation of cases*, [http://www.mp.gov.my/practice\\_note/3\\_BI.pdf](http://www.mp.gov.my/practice_note/3_BI.pdf) [8 Aug. 2019].

## 5. Jurisdiction and Powers of the Courts

### (i) Current Framework

48. As noted earlier, under Malaysia's labour laws, two separate entities resolve and decide on labour disputes. Firstly, under the EA, there is the "labour court" (where a Ministry official acts pursuant to the authority of the DGL), which body decides on individual disputes between an employee and their employer. Secondly, the IRA establishes an IC, which in fact is an arbitral body that decides on disputes between a trade union and an employer, including disputes where the trade union acts for its member or members. The IC also has jurisdiction over dismissal disputes brought by an individual employee, but only where reinstatement is sought.

### Labour courts

49. Claims as to employment contracts and certain other disputes as detailed in the EA are dealt with by the office of the DGL according to procedures set forth in the EA. As we have indicated, the EA, in general, only applies to employees earning not more than RM 2,000 per month. Complaint categories under the EA are:
- a. DGL (labour court) decisions that can be appealed to the High Court (e.g. relating to disputes on wages, complaints against an employer's decision (dismissal or punishment) on an employee's misconduct to be rendered after due inquiry, claims for indemnity for termination without notice, and sexual harassment).<sup>47</sup> Here, it is important to note again that Part XVA of the EA on sexual harassment applies to every employee irrespective of wages.<sup>48</sup>
  - b. DGL decisions that can be appealed to the Minister, with possible review in the High Court notwithstanding ouster clauses (e.g. relating to approval of amenities, night work for women, additional hours of work and overtime in excess of the limit ).<sup>49</sup>
  - c. DGL decisions without any express appeal provision (e.g. relating to work in an agricultural undertaking, payment other than through bank, work on a rest day and work in excess of limit of hours), which are only open to review by the High Court.<sup>50</sup>

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<sup>47</sup> EA, section 77.

<sup>48</sup> Ibid., section 81G.

<sup>49</sup> Ibid., sections 29(3), 34(2), 60A(1B) and 60A(4)(aa).

<sup>50</sup> Ibid, sections 16(1), 25A(6), 60(1) and 60A(2).



50. Complaints under (a) are made to labour offices where they are perused to determine whether they have merit and are actionable. If so, a mention date before a labour court<sup>51</sup> is fixed and the employer and employee are informed accordingly. On the mention date an attempt is made to resolve the dispute by discussion/conciliation by the labour court official. The employer may concede the claim, or the parties may come to an agreement, in which case a consent order is issued. Should the claim be challenged, or if the employer is absent, a hearing date is set and the parties are informed accordingly. A hearing is conducted at which evidence is led and the labour officer hearing the matter renders a decision.<sup>52</sup>
51. As we have observed, these decisions of the labour court can be challenged by way of an appeal to the High Court,<sup>53</sup> which involves the payment of a small fee and a security deposit.<sup>54</sup> The final appeal for these decisions lies at the Court of Appeal.<sup>55</sup>
52. The process for referring, and dealing with, complaints to and in labour courts is informal and relatively easy.<sup>56</sup> No fees are charged to access labour courts and there are no express rules in the EA relating to representation, for example by lawyers, trade union representatives and human resource (HR) consultants, but the labour officer presiding over the hearing in practice maintains a discretion to permit or restrict representation (see on this issue Chapter 6 on Representation of Parties further below).
53. The labour courts have an internal key performance indicator (KPI) to resolve disputes within 90 days of their referral – although this is apparently made difficult due to frequent requests for postponement.<sup>57</sup> This circumstance raises the difficulty of tribunals granting adjournments, something considered in more detail below, in Chapter 7, on Time-bound System.
54. It should be borne in mind that labour officers fulfil a wide range of functions, in addition to presiding over labour court enquiries. Other functions include inspections, providing advice, and

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<sup>51</sup> As noted earlier, there is no mention in Malaysian statutes of a “labour court”. That is the name that has been given to labour officers sitting in a decision-making capacity.

<sup>52</sup> For a more detailed description of the workflow, see **Annexure 5** (LD Workflow for Trial of Labour Cases).

<sup>53</sup> Appeals are lodged with the Labour Department, which will then compile the record and file it with the High Court.

<sup>54</sup> See **Annexure 6** (LD Workflow for Appeals on Decisions of the Labour Court).

<sup>55</sup> Court of Judicature Act 1964.

<sup>56</sup> We benefitted from the opportunity to observe the Kuala Lumpur labour court hearing rooms and to hear of the fashion in which this quasi-judicial function is carried out.

<sup>57</sup> According to internal practice directives, a maximum of two postponements may be given, but labour officers who preside over cases retain the discretion to grant further postponements for extenuating reasons.

enforcement. They are responsible for administering/enforcing a total of 12 Acts, including the EA.<sup>58</sup>

55. In Peninsular Malaysia, there are 14 state and 39 district labour offices. Labour courts are only situated at district labour offices and in Peninsular Malaysia there are a total of 60 labour courts. In 2018 the approximately 300 labour officers spread throughout Peninsular Malaysia received a total of 22,354 disputes, of which 3,991 were successfully conciliated and 13,639 heard in the labour court.<sup>59</sup> It is significant that relatively few decisions are appealed to the High Court. Of the 13,639 cases which came before the labour court for determination in 2018 only 28 decisions were appealed to the High Court.
56. As for East Malaysia, Sabah has a total of 15 labour courts and 88 labour officers as of 2018. These labour officers received a total of 1,453 disputes in 2018 of which 527 were successfully conciliated. Only one decision of the labour court in Sabah was appealed to the High Court in 2018.<sup>60</sup> In Sarawak, the 16 labour courts were staffed, in 2018, by 67 labour officers. These officers received a total of 1,132 disputes in 2018 and had a disposal rate of 87 per cent with only three cases appealed to the High Court.<sup>61</sup>

## Industrial Court

57. The IC, which as we have indicated is an arbitration tribunal, is regulated by the IRA.<sup>62</sup> It comprises a President, Chairpersons, and panels representing employers and employees. Dismissal disputes are decided by Chairpersons sitting alone. All other disputes are decided by three-member

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<sup>58</sup> These are the Weekly Holidays Act 1950, Holidays Act 1951, Workmen's Compensation Act 1952, Employment Information Act 1953, Children and Young Persons (Employment) Act 1966, Employment (Restriction) Act 1968, Private Employment Agencies Act 1981, Minimum Standards of Housing and Amenities Act 1990, National Wages Consultative Council Act 2011, Minimum Retirement Act 2012, and Human Resources Development Fund Act 2001.

<sup>59</sup> According to information supplied by the Labour Department of Peninsular Malaysia, claims received in 2018 related to, among other issues: unpaid wages (6,143 disputes), salary in lieu of notice by employers (3,131 disputes), salary in lieu of notice by employees (4,115 disputes), salary in lieu of annual leave (1,317 disputes), overtime pay on normal days (1,136 disputes), termination benefits (2,445 disputes), balance of unpaid minimum wages (594 disputes), and other claims (1,198 disputes). See **Annexure 7** (LD Peninsular Statistics 2018).

<sup>60</sup> See **Annexure 8** (LD Sabah Statistics 2013–2018).

<sup>61</sup> According to information supplied by the Labour Department of Sarawak, claims received in 2018 related to, among other issues: unpaid wages (367 disputes); overtime pay (89 disputes); salary in lieu of leave (50 disputes); salary in lieu of notice (472 disputes); and termination/lay-off benefits (154 disputes). See **Annexure 9** (LD Sarawak Statistics 2013–2018).

<sup>62</sup> IRA, part VII.

divisions consisting of a Chairperson and two laypersons who are drawn, one each from the panels representing employers and employees respectively.<sup>63</sup>

58. The IC has jurisdiction over union discrimination/interference disputes, trade disputes generally, dismissals where the worker claims reinstatement, interpretation/variation of awards and collective agreements, and cases involving alleged non-compliance with awards and collective agreements.<sup>64</sup> It also takes cognizance of all collective agreements to ensure conformity with the requirements of section 14 of the IRA.<sup>65</sup> It has no jurisdiction over recognition disputes (which are decided by the Minister<sup>66</sup> with possible review, notwithstanding ouster clause, in the High Court), nor over union discrimination/interference disputes where a criminal complaint has been filed under section 59 of the IRA<sup>67</sup> (see Chapter 9 on Unfair Labour Practices).
59. The IRA grants the IC a wide equitable supervision over matters coming before it, with relief not being limited to the specific claim<sup>68</sup> and section 30(5A) extending the IC's jurisdictional reach to include general agreements or codes relating to employment practices between workers' and employers' organizations previously given Ministerial approval. There appears to be no powers deficit requiring attention.
60. As noted earlier, notwithstanding ouster clauses, awards made by the IC may be taken on review to the High Court whose decisions may be appealed to the Court of Appeal<sup>69</sup> with the prospect of a final appeal to the Federal Court.
61. Awards made by the IC may be retrospective, but not so as to operate more than six months earlier than the date the dispute was referred to the court. The exceptions are orders to vary or set aside certain terms of an award or collective agreement, which may be retroactive without restriction.<sup>70</sup> There is a further exception in awards relating to the reinstatement of an employee after a finding

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<sup>63</sup> Ibid., sections 22(1) and 23(1)-(4).

<sup>64</sup> Ibid., sections 8(2A), 26(1)-(2), 20(3), 33(1) and 56(1) respectively.

<sup>65</sup> Ibid., section 16.

<sup>66</sup> Ibid., sections 9(1D) and 9(5).

<sup>67</sup> Ibid., sections 8(4) and 20(5A).

<sup>68</sup> Ibid., see section 30.

<sup>69</sup> In *Sivalingam v. Periasamy* [1995] 3 MLJ 395, referring to the grounds on which an appeal might be granted, the Court of Appeal held that: "It is trite law that an appellate court will not readily interfere with the findings of fact arrived at by the trial court to which the law entrusts the primary task of evaluation of the evidence. However, the appellate court has a duty to intervene where a trial court has so fundamentally misdirected itself that one may say that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion".

<sup>70</sup> IRA, section 30(7).

that the dismissal was unjust. In 2007 the IRA was amended to limit back wages that can be awarded to a reinstated employee to 24 months.<sup>71</sup>

62. The IC operates in a fairly formal fashion, with the parties filing pleadings and usually being legally represented. The proceedings are conducted in a similar fashion to a court trial, and it can take a long time for a dispute to be finalized in the IC.<sup>72</sup> That is despite the injunction in section 30(3) IRA, that in trade disputes and dismissal disputes the court must make its award without delay and where practicable within 30 days from the date the dispute was referred to it.
63. In order to address delays, the IC has implemented various measures to speed up the resolution of disputes. The IC's Practice Note No. 2 of 2019 on Postponement of Cases mandates, as a rule, that Chairpersons do not postpone cases and, if extenuating circumstances were to arise, another Chairperson takes over the hearing of the case. In the same Practice Note, parties are not allowed to seek a postponement on the day of the hearing. As of January 2019, parties are required to file documents with the court via the internet using an electronic filing system. In March 2018, the President established 10 extra "task force" courts to deal with the backlog of cases. And since 2010 certain cases (dismissals) have been allocated for early evaluation<sup>73</sup> and mediation is actively encouraged.<sup>74</sup> In addition, eight courts have been equipped with state-of-the-art audio and video recording equipment that expedites the resolution of disputes.<sup>75</sup> (See also Chapter 7 on Time-bound System further below).
64. Representation is regulated by section 27 of the IRA, which provides that trade unions may be represented by their officials or employees, while employers or employees may represent

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<sup>71</sup> The Second Schedule to the IRA provides that "In the event that back wages are to be given, such back wages shall not exceed 24 months' back wages from the date of dismissal based on the last-drawn salary of the person who has been dismissed without just cause or excuse".

<sup>72</sup> See in this regard **Annexure 12** (IC Timeframe for Resolution of Cases 2013–2018). The IC's Client Charter provides that disposal of dismissal cases are to be within 16 months and other cases within 12 months; awards are to be handed down within three months from the date of last submission; and collective agreements will be accorded cognizance within six weeks of deposition with the IC. Industrial Court of Malaysia (IC): *Client's charter* (Kuala Lumpur, Ministry of Human Resources), <http://www.mp.gov.my/en/about-us/client-s-charter> [accessed 8 Aug. 2019].

<sup>73</sup> This involves the case being allocated, by agreement between the parties, to a Chairperson other than the Chairperson allocated to hear it. He or she will attempt to mediate the dispute and can discuss the merits. See in this regard IC Practice Note No. 3 of 2010: *Guidelines on early evaluation of cases*, [http://www.mp.gov.my/practice\\_note/3\\_BI.pdf](http://www.mp.gov.my/practice_note/3_BI.pdf) [accessed 8 Aug. 2019]. Parties may select a preferred Chairperson for early evaluation, or one will be allocated to them. In 2018, according to data supplied by the Industrial Court, 67 disputes were allocated to early evaluation of which 35 were settled and nine postponed. Although promising, this is a small proportion considering that in 2018 alone 3,122 disputes were registered with the Industrial Court. See **Annexure 14** (IC Early Evaluation Data Report).

<sup>74</sup> See **Annexure 15** (IC Mediation Report 2005–2018), which gives an indication of the number of mediations carried out by the IC since 2005. In 2018 there were 1,044 mediations, with a success rate of 36 per cent. Likely scope presents itself here for focused professional development workshops/seminars.

<sup>75</sup> This is primarily so because the audio recording can be reduced to a transcribed record within five days using specialized software. The savings in terms of costs and time are obvious.

themselves or be represented by officials or employees of the trade unions to which they belong. Employers may also be represented by their duly authorized employees. Representation by advocates or officials of registered employers' or workmen's organizations (which are not trade unions) is permitted with the permission of the President or the presiding Chairperson. (Discussed in more detail in Chapter 6 on Representation of Parties further below.)

## **(ii) Proposed amendments**

65. The EA is to be amended to include protections against discrimination, both in pre-employment and during employment. Complaints will be referred to the DGL and would thus be dealt with by labour officers and, it would appear, labour courts.
66. Under the IRA, the most significant proposed amendment is the establishment of an Employment Appeal Court (EAC).<sup>76</sup> The latest draft legislation indicated that the EAC's jurisdiction would extend to appeals from an award, decision or order of the IC made under the IRA; from orders of the DGL relating to sexual harassment under the EA;<sup>77</sup> from decisions and orders of the Director General of Trade Unions (DGTU) made under the TUA; and from decisions of the DGIR relating to trade union recognition or applications for sole bargaining rights under a proposed new section 9A of the IRA. Notably absent is provision for appeals against decisions of the labour courts and other decisions under the EA not relating to sexual harassment claims.
67. There is an automatic right of appeal, without the need to seek leave to appeal from the IC or other decision-makers. Appeals will be a complete re-hearing of the record of the decision on appeal and a notice of appeal must be issued within 30 days from the date on which the decision appealed from is made.
68. The EAC will comprise a Chief Judge, Deputy Chief Judge<sup>78</sup> and not fewer than five other judges selected from persons who have served the judiciary, persons who have served as a Chairperson of the IC, or persons with special knowledge and experience in labour and industrial relations.
69. The EAC, when it is sitting, will comprise three members, the majority decision prevailing. It is not clear how long the term of office will be of the members of the EAC.
70. The Chief Judge of the EAC will designate the dates, times and places at which the court will sit and proceedings may take place anywhere in Malaysia. Pending the decision of an appeal to the EAC,

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<sup>76</sup> IRA, in a new Part VIIA.

<sup>77</sup> This also includes similar amendments being proposed to the Sabah and Sarawak Labour Ordinances.

<sup>78</sup> The Chief Judge and Deputy Chief Judge of the EAC will be judges from the Court of Appeal nominated by the President of the Court of Appeal.

an award of the IC or decision or order of the relevant Director General shall be valid, binding and enforceable except where a stay of the award of the IC or decision or order of the Director General has been applied for by the appellant and granted by the EAC. Applications for a stay order must be made on or after the same day that the notice of appeal is delivered.

71. We were advised that it had initially been envisaged that the EAC would be at the same level as the High Court and that its decisions would be appealed to the Court of Appeal. However, the latest draft legislation reflects that appeals will lie from the EAC to the Federal Court with leave of the Federal Court and such an appeal is restricted only to a question of law.

### (iii) Discussion

72. With respect to labour courts, stakeholders highlighted the huge workload involved in enforcing 12 pieces of legislation together with its attendant paperwork, as well as the disproportionately small number of labour officers. As a starting point, we support the recommendations in the ILO's Technical Memorandum on the Malaysia Labour Inspection Needs Assessment (validated by the Ministry in August 2018) regarding the **understaffing at the labour departments and the multitude of functions of labour officers**.<sup>79</sup> Among the ILO recommendations it was proposed that the Ministry should strive to fill vacant labour officer positions and hire additional labour officers, including legal officers, and to clearly differentiate between officers responsible for labour inspection duties and officers responsible for labour dispute and/or other duties. We strongly concur that differentiation of functions would assist in permitting the delivery of targeted training to specialized groups of officers, including those tasked with the difficult function of dispute settlement. (See also the discussion on training below and in Chapter 12 on Training and Professional Development.)
73. Stakeholders expressed concerns that procedures and **proceedings in the IC have become formalized** despite the IRA provision requiring the IC to "act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form"<sup>80</sup> and in stark contrast to the relatively informal manner of proceedings in the labour courts.<sup>81</sup>

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<sup>79</sup> See International Labour Organization (ILO): *Technical Memorandum Malaysia Labour Inspection Needs Assessment* (validated by the Ministry of Human Resources in August 2018), pp. 30 and 34–35.

<sup>80</sup> IRA, section 30(5).

<sup>81</sup> Some stakeholders expressed concern that formality requirements had been extended to parties' attire. We were informed that some Chairpersons at the IC were enforcing strict guidelines in this respect, and that there were instances where cases were stood down due to a claimant's lack of a tie. It might be argued that this stringent dress code detracts from ease of access to the IC – an institution, after all, described by union officials as a "workers' court".

74. Although stakeholders acknowledged that as a result of the measures referred to above, cases are currently taking less time to be resolved,<sup>82</sup> the legalistic nature of the proceedings was seen to still cause unnecessary delays. With respect to dismissal cases specifically, these delays then, in the view of some, make the remedy of reinstatement more difficult/unattainable, as after time has passed reinstatement comes with a greater monetary cost and practical inconvenience. That, in turn, it was said, makes it more likely that reinstatement orders would be taken on review. It was suggested that, ideally, cases should be heard and disposed of by the IC in a few months. Some concern was also expressed that employees do not always have access to facilities to enable them to use the IC's electronic filing system.
75. Those involved in delivering industrial justice are universally concerned with facilitating access (particularly for the one-time and infrequent users of the system) and expedition in dispute resolution while ensuring high quality decision-making. It is noteworthy that the IC, although court-like in appearance, is an arbitral tribunal and not a court. Arbitration is usually preferred in order to avoid the technical and dilatory processes that accompany court proceedings. Moreover, arbitration will often take place in an environment where the parties' ongoing relationship is a vital consideration in the mind of the decision-maker. Very frequently the expert arbitrator, alert to the personalities, the corporate stance, the union involved and the parties industrial past, may be less inclined in their decision-making to punish and declare a "loser", than might be a judge focused solely on black letter law.<sup>83</sup> This is because the decision-maker in a State-sponsored labour institution is mindful of both private and public interest elements in harmonious and productive industrial relations.
76. Arbitration allows an opportunity to limit the court system's formal steps (with the transactional costs to the parties of Mentions, Interrogatories, and Discovery) and to run proceedings in a manner that does not too closely resemble a courtroom trial. But for this, the applicable rules (while ensuring procedural fairness) have to be simple and proceedings conducted in a relatively informal manner. For example, the arbitrators could, where appropriate, be encouraged to adopt an inquisitorial approach to oral evidence or it could be accepted that the conventional rules of

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<sup>82</sup> **Annexure 12** (IC Timeframe for Resolution of Cases 2013–2018) reveals that in 2018, 1,917 cases were disposed of within 12 months, as opposed to 876 in 2017 and 776 in 2016. In addition, **Annexure 15** (IC Mediation Report 2005–2018) reveals that in 2018 there was a significant increase in the number of mediations performed by the Industrial Court. It is noteworthy that around 36 per cent of those disputes were settled via mediation. Such an emphasis on conciliation of matters coming before the court is reflected in the practice of Full Benches hearing appeals in Australia's Fair Work Commission to discern early opportunities for resolution efforts and to make available a member of the Full Bench to assist the parties in conciliation. Often this will occur at the outset of the appeal hearing. In such cases, where a Member of the Full Bench assists, it will be accepted that Members involving themselves in such settlement discussions will disregard what has occurred in conciliation, should those efforts not produce a settlement and it be necessary for the Full Bench to proceed. In the Fair Work Division of the Federal Court, pre-hearing conciliation is almost universal and is conducted by an appropriately trained Registrar acting as conciliator.

<sup>83</sup> The stated mission of the IC is to "uphold social justice and maintain industrial harmony through expeditious court awards and collective agreements".

evidence (such as those relating to the admissibility of hearsay evidence) are not as strictly applied in arbitration proceedings.<sup>84</sup>

77. Thus, section 138 of South Africa's Labour Relations Act 66 of 1995 indicates that arbitrating commissioners of the Commission for Conciliation, Mediation and Arbitration (CCMA):
- (1) ... may conduct the arbitration in a manner that the commissioner considers appropriate in order to determine the dispute fairly and quickly, but must deal with the substantial merits of the dispute with the minimum of legal formalities.
  - (2) Subject to the discretion of the commissioner as to the appropriate form of the proceedings, a party to the dispute may give evidence, call witnesses, question the witnesses of any other party, and address concluding arguments to the commissioner.
78. Similarly, Australia's Fair Work Act 2009 (FWA), at sections 397-399, imposes procedural obligations upon the Commissioner hearing a dismissal case, to have regard for "any difference in the circumstances of the parties"<sup>85</sup> in considering the application and in informing itself in relation to the application. The matter of accessibility is further addressed by the Commissioner being required (see section 398(4)) to take into account the wishes of the parties as to the way, conference or hearing, the Commission considers the application and informs itself in relation to the application. The FWA goes on to require the Commissioner in a dismissal case to hold a hearing only when that course is the most effective and efficient way to proceed.
79. In practice, almost all Australian cases involving disputed facts are heard on the record, with permission to appear being granted for legal practitioners only when it would be more efficient to grant representation to a party, or where it would be unfair to a party – that party being unable to represent themselves and having regard for "fairness between the person and other persons in the same matter".<sup>86</sup>
80. Facilitating a shift away from legalism, formality and technicality, while highly desirable, may prove difficult as it will involve changing rules, procedures and, to a significant extent, mindsets. A proper exposition of the various options in this regard is beyond the scope of this Report, but clarity on what might be helpful in the Malaysian context may be achieved by way of a further analysis and assessment of best practice in comparable jurisdictions.

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<sup>84</sup> This appears to be the approach adopted in the labour courts, which are more concerned to gather enough credible evidence to enable them to reach a fair decision than with technicalities.

<sup>85</sup> See specifically section 398(3) of the FWA.

<sup>86</sup> *Ibid.*, section 596.



81. We recommend that more information in an easily digestible form should be made available to the public through the **Ministry and IC's websites** to facilitate access to justice for all.<sup>87</sup> In this regard, while we were generally impressed that all the awards of the IC are made public on its website, consideration should be given to enhancing the website's "search" function to enable users to readily search through the database by way of keyword and/or issue.
82. Stakeholders were also concerned that **panel members in disputes at the IC are selected by the President**,<sup>88</sup> and there is a perception that if a panel member is inclined to dissent they will not be selected again. To address this important integrity point, it was suggested that panel members be allocated on an "automatic" rotational basis. That appears to be a most sensible and orderly option, eliminating transparency concerns as to the basis of selection or preferment, and, vitally, the non-preferment, of a particular member.
83. The issue of the perception of independence of the IC as an institution was also brought to our attention. Both the **President and Chairpersons of the IC do not enjoy security of tenure** and at least insofar as those drawn from the Judicial and Legal Service are concerned, are liable to transfer orders.<sup>89</sup> Chairpersons appointed on a contract basis, on the other hand, are limited by two-year appointments at the end of which, a fresh application has to be filed accompanied by a medical examination. To add to this perception of a lack of independence of the **IC is its positioning within the Ministry, as reflected in the organigram of the Ministry**,<sup>90</sup> which places the IC under the purview of the Ministry's Secretary-General, instead of as a separate and independent branch.
84. There was general consensus among stakeholders that the establishment of the EAC is a welcomed move. As to the EAC's position within the judicial/institutional hierarchy, some stakeholders suggested that the EAC be an appeal court at the same level in the judicial hierarchy as the High Court and appeals allowed from it to the Court of Appeal. Others suggested that the EAC should be at the same level as the Court of Appeal and should be staffed by judges of the Court of Appeal. As we have indicated above, the latest draft amendments propose an EAC at the same level as the Court of Appeal. It seems to us that there are very sound policy reasons for this to be so.

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<sup>87</sup> There can be no doubt as the market appetite for such information. See, for example, the Fair Work Commission's Annual Report 2017–2018, p. 21 where the website visits are recorded as over 4.3 million and telephone enquiries to the "Information line" just under 200,000. Similarly, the Australian Fair Work Ombudsman homepages (with over 16 million visits and 450,000 enquiries to Advisers in 2017–2018) provide a wealth of empirical pay and workplace rights information, including a "Pay Calculator" and the opportunity for confidential enquiries to be made, to which the Ombudsman staff reply.

<sup>88</sup> IRA, section 23(3).

<sup>89</sup> In comparison, Commissioners at Australia's Fair Work Commission have security of tenure similar to Judges of the High Court and can only be removed on the ground of "proved misbehaviour" on a joint motion to the Governor General by both houses of Parliament passed in the same session. (See FWA, section 641(a)).

<sup>90</sup> See **Annexure 18** (Ministry Organigram), received from the Ministry.

85. **To limit the number of appeals**, it is no doubt preferable to have the EAC appropriately elevated within the judicial hierarchy. As one stakeholder pointed out, currently the process under the IRA is unique in that there are four “rounds” in court, i.e. IC, High Court, Court of Appeal and Federal Court. As presently understood, this potential for delay, cost and legal obfuscation is removed by the EAC having parity with the Court of Appeal and then, recourse being had to the Federal Court only on a question of law.
86. Some stakeholders were generally content with a broad **basis for appeals to the EAC** on both the facts and the law. However, it is, in our view, detrimental to the standing of the IC and its decisions at first instance, if, by right, they can be taken on appeal to the EAC, not only as to error, but also as to merit. The relatively expeditious process of industrial arbitration is obviously undermined if its decisions, its awards, are challenged with regularity. Our concern is not the capacity for correction of error, as to which we wholeheartedly agree that appeal must be available, but rather, if appeal as to merit is also available, that many cases will be appealed as a matter of course by a losing party with a deep pocket. The party whose first instance case was successful on the merits at the IC would then, we apprehend, be regularly put to the cost of defending their victory in the legalistic and technically rarefied appellate environment. Many victors at the IC are unlikely to be in an economic position to defend their success.
87. While some countries without State-sponsored arbitration systems prohibit or severely restrict appeals against the awards/decisions of labour arbitrators, others permit review in civil courts that may have little appreciation of, or time for, industrial relations nuance and precedent.<sup>91</sup> While the detail of a wide-ranging comparative study of appellate jurisdictional practice is beyond the scope of this Report, such further research may be thought to be beneficial. In our view the principle challenge is to simultaneously ensure that labour arbitrators act fairly and render decisions which are rational, while permitting the correction of error or jurisdictional excess.
88. We note in this important regard, the position obtaining in Australia’s Fair Work Commission, where, prescribed by the Commission, appeals are heard through an internal appeals mechanism, essentially on the basis of legal error, jurisdictional excess or on a natural justice point.<sup>92</sup> Such appeals, heard by Full Benches of not less than three members (including at least one Presidential member), are concerned with identifying and correcting error. Such appeals are not “by right”, requiring the grant of an initial public interest “leave to appeal”, do not generally permit the re-canvassing of the merits or permit re-argument of the case heard at first instance or permit the

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<sup>91</sup> See in this regard the useful discussions in M. Berger: “Judicial review of labor arbitration awards: Practices, policies and sanctions” (1992) 10(1) *Hofstra Labor and Employment Law Journal* 10(1): 245–297, <https://scholarlycommons.law.hofstra.edu/cgi/viewcontent.cgi?article=1163&context=hlej> [accessed 8 Aug. 2019]; L. Yurchak: “Judicial review of labour relations board and labour arbitration decisions in the post-Dunsmuir period in Ontario” (2017) 20 *Canadian Labour & Employment Law Journal* 20: 447–486, <https://labourstudies.ca/en/citation/9435> [accessed 8 Aug. 2019].

<sup>92</sup> FWA, op. cit., section 604.

presentation of new argument which could have been made when the case was first heard. By this time-efficient means, the standing of decisions at first instance is maintained, spurious appeals discouraged, error promptly corrected and finalization of industrial disputes not unnecessarily delayed.

89. In the event of the establishment of the EAC, there is a cause for concern regarding **potential forum shopping in challenging awards of the IC**, leading to the development of two (possibly competing) streams of jurisprudence arising from the civil courts and the EAC. Parties will thus be able to elect whether to go to the High Court on review, or to the EAC on appeal. The option they select will, no doubt, depend on which forum is seen as more accessible and more likely to render the relief they seek. While legislative attempts to exclude review in the High Court have proven difficult given that very explicit ouster clauses in the IRA have not prevented the High Court from entertaining reviews of decisions, the EAC's introduction being an avenue for appeal of IC awards should render the High Court disinclined to grant reviews.<sup>93</sup>
90. To make this position clear, we support the suggestion of some stakeholders that judicial review of IC awards be explicitly removed and for appeals to be exclusively channelled through the specialized EAC.<sup>94</sup>
91. **The introduction of an EAC could thus have the effect of having appeals in employment-related matters dealt with under one roof by judges who have appropriate expertise and experience** (the current draft legislation makes provision for the appointment of specialist judges) that would, on the face of it, ensure a consistent, specialist jurisprudence. Our view, at a time of reappraisal of the LDR system and in an endeavour to achieve jurisprudential constancy within the Malaysian industrial institutions, is that all labour-related disputes, including appeals of labour court decisions and other decisions under the EA together with disputes relating to recognition of trade unions and legality of strikes, should be handled in the specialized system of labour court/IC and EAC, with appeal to the Federal Court on questions of law. The ousting of the inherent jurisdiction of the High Court to review all administrative decisions in this instance is important to ensure that decisions on appeal are taken by judges who fully appreciate the issues in the employment context. To achieve this, guidance may be sought from South Africa where provision is made for judicial reviews only to a specialist court with judicial reviews in the general civil courts being prohibited.<sup>95</sup>

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<sup>93</sup> The Supreme Court in *Government of Malaysia & Anor v. Jagdis Singh* [1987] 2 MLJ 185 held that where there is an appeal procedure available to the applicant, certiorari should not normally issue save in exceptional circumstances.

<sup>94</sup> This may require amendments to the Court of Judicature Act 1964 to remove the High Court's power of judicial review.

<sup>95</sup> Reviews of decisions by the CCMA may only be taken on review to the Labour Court.

92. As set out earlier, under the proposed amendments, appeals from decisions of the labour court do not fall within the proposed jurisdiction of the EAC and will stay at the High Court. While some stakeholders appeared to be of the view that labour court matters do not require specialization in employment law, others expressed frustration at civil judges overturning decisions of the labour court without a sound basis in employment law. Again, it is our respectful view that **having two streams of employment-related appeal cases** will, it is very likely, lead to the fragmentation of labour law with competing or varying jurisprudence unlikely to benefit any nation's social fabric.
93. It follows from the discussion above that we recommend consideration be given to streamlining all labour-related disputes through a similar process, i.e. initiated from either the DGIR/DGL to the IC to the EAC, and finally to the Federal Court only on a question of law. Currently, cases from the DGL do not make their way to the IC and while many users of the system within Malaysia have become accustomed to this process, it creates opportunities for confusion and fragmentation. Such streamlining would also assist in overcoming the issue of the IC being empowered to hear dismissal cases only where claimants plead for reinstatement<sup>96</sup> even in circumstances where the employment relationship has fractured beyond repair.
94. Stakeholders have raised concerns about a **possible sudden influx of cases to the IC and EAC in the event of such streamlining**, where all employment-related matters, including disputes under the EA, will be able to be referred to them on appeal. To help manage this potential issue, consideration may be given to staggering the date of entry into force of the legislative amendments with respect to the various dispute categories under the EA to ensure that the jurisdiction of the IC and EAC is gradually increased over a period of time.
95. Our recommendation above on streamlining of all labour-related disputes (together with several other recommendations in this Chapter) are aimed at ensuring a better integrated and effective LDR system, with accessibility and consistency in its outcomes. These recommended measures could also serve as a **prelude to full integration of the LDR system**. This would have the effect of both the DGIR conciliators as well as the conciliation and determinative role currently performed by the labour court officials, integrated into the IC. While a break from the past, subsuming the above functions (and skills) within the IC would enable the IC to function fully as a court of first instance for all industrial cases. We advance this long-term vision of a fully integrated LDR system

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<sup>96</sup> Under section 20 of the IRA, a worker is required to make representations to be reinstated and the IC has no jurisdiction to hear cases of dismissals unless reinstatement is sought. However, under section 30(6) of the IRA, the IC shall not be restricted to the specific relief claimed by the parties but has the power to include in its award any matter or thing necessary or expedient and therefore, more often than not, awards compensation in lieu of reinstatement. Workers who are desirous of claiming compensation in the first instance, file a claim under section 69 of the EA and are heard before the labour court. By virtue of section 69A of the EA, claims filed under section 69 of the EA may not be heard by the labour court if the claim or dispute has already been referred to the IC under section 20 of the IRA. It is also worth noting that under the second schedule of the IRA, compensation in dismissal cases is capped at 24 months of back wages, while under the EA the labour court only has jurisdiction in cases of termination without notice in which case, compensation would be limited to the notice period in the employment contract.

for future reflection by the Ministry and social partners, as it is beyond the limited scope of this Review.

96. We recommend that consideration should be given to **fast-tracking certain disputes such as those concerning recognition of trade unions and the legality of strikes, directly to the EAC** due to the public interest importance of rapid resolution of disputes of this nature.
97. Many stakeholders shared the view that given the importance of the role of judges of the new court and of the court itself, **there should be broad consultation as to who might be appointed to the EAC**. In that regard, and acknowledging that ultimately such appointments are a matter for Government, consideration should be given to empowering the National Labour Advisory Council (NLAC) to provide input and give recommendations to the Government regarding possible appointment to the EAC. There is precedent for this in South Africa's National Economic, Development and Labour Council (NEDLAC).<sup>97</sup> That body consists of representatives of the State, organized business, organized labour and organized community and development interests (essentially non-governmental organizations (NGOs)). Labour Court and Labour Appeal Court judges are appointed by the President of South Africa acting on the advice of NEDLAC and the Judicial Service Commission after consultation with the Minister of Justice and the Judge President of the Labour Court.<sup>98</sup>
98. A process such as this allows the stakeholders input into the appointment of judges but avoids judges being selected by one or other constituency. Consideration could also be given as to whether a similar process should be limited to appointment to the EAC, or should also apply to the appointment of Chairpersons in the IC.
99. In terms of resources, it is our view that it is critical that the EAC and IC be **adequately staffed** in proportion to the amount of work within the jurisdiction for which both institutions are responsible, to avoid backlogs of cases within registries and creating stresses within the system.
100. Stakeholders also raised the issue of the **geographic accessibility of the EAC**. While some suggested that it will be easier to access an EAC proceeding than the High Court, other stakeholders suggested that appeals from, at the very least, the labour courts should continue to go to the High Court if the EAC was going to sit only in Kuala Lumpur. The latest version of the amendments, however, sensibly provides the Chief Judge with power to direct the EAC to undertake circuit hearings.<sup>99</sup> We support the proposal that the EAC sit on circuit when necessary.
101. Some stakeholders raised concerns that **hearing officers in the labour courts are not required to be lawyers** or necessarily legally qualified, which can sometimes lead to questionable decisions.

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<sup>97</sup> Established in terms of the National Economic Development and Labour Council Act 35 of 1994.

<sup>98</sup> Sections 153(4) and 169 of the Labour Relations Act 66 of 1995.

<sup>99</sup> The Chief Judge has the power to direct that an appeal be heard at any time and in any place in Malaysia.

In addition, there is a concern that **Chairpersons in the IC are appointed without any experience in the court** and thus take time to familiarize themselves with the court and its functioning. Some stakeholders were concerned that IC Chairpersons are often drawn from the ranks of the Judicial and Legal Service<sup>100</sup> and often lack knowledge of, and experience in, industrial relations. Such persons, it was suggested, are prone to introducing the legal technicalities with which they are familiar. We recommend that concerns relevant to the knowledge of newly appointed hearing officers and IC Chairpersons and panel members could be addressed by way of orientation and induction programs.

102. It is important that subsequent access is ensured to broad-ranging professional development including in the application of general legal principles, industrial conciliation and arbitration, the principles of natural justice and sexual harassment. Given that the protections against discrimination are new and specialized, decision-makers will also require training on the principles relating to discrimination and when it might be justified in relation to the inherent requirements of the job.
103. It was our general impression that those with whom we consulted held the view that the fact of a decision-maker not having a legal background,<sup>101</sup> but being otherwise qualified through experience or a discipline other than law, should not preclude that person from being able to apply relevant legal principles. We concur with that view, in the knowledge that many industrial tribunals (as in Australia and Cambodia) benefit from the expertise of industrial practitioners not necessarily legally qualified, often drawn from business, the trade unions, academia and the peak employer and employee representative councils and experienced at a high level – together with economists and government officials.<sup>102</sup>

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<sup>100</sup> See **Annexure 17** (IC Chairpersons Positions 2013–2018). In 2018, 16 Chairpersons were from the Judicial and Legal Service, against six contract appointments from the private sector.

<sup>101</sup> Under section 23A of the IRA, the President and Chairpersons of the IC must possess legal training.

<sup>102</sup> In Australia, section 627 of the FWA sets out the slightly varying qualifications for appointment as President, Vice President, Deputy Presidents and Commissioner. Essentially, the pre-requisites are: knowledge or experience such as to satisfy the Minister that the person is qualified for appointment by knowledge of, or experience in, workplace relations; law; business, industry or commerce. In Cambodia, appointment to the national workplace relations tribunal, the Arbitration Council, created for the compulsory arbitration of collective industrial disputes, is provided for in Article 311 of the 1997 Labour Law. Article 311 provides that Members of the Council (Arbitrators) be selected from magistrates, members of the Labour Advisory Committee, “and generally from among prominent figures known for their moral qualities and their competence in economic and social matters”. This most successful tribunal has, in practice, drawn its Arbitrators from a diverse range of employment backgrounds, including employer and employee law firms, business, academia, unions and employer associations, and the public service – with not all legally qualified. See <https://www.arbitrationcouncil.org/en/about-us/the-arbitration-council/list-of-arbitrators> [accessed 8 Aug. 2019].

## (v) Recommendations

104.

4. Increase the number of labour officers and clearly differentiate between officers in charge of labour inspection and those responsible for labour dispute and/or other duties.
5. Conduct a study on international best practice in arbitration in order to establish what might be useful in the Malaysian context to move away from legalism, formality and technicality.
6. Make more information in an easily digestible form available to the public through the Ministry and IC websites and enhance the search function on the IC website to enable users to search through the database by way of keyword and/or issue.
7. Introduce an automatic rotation at the IC to assign cases to panel members. Security of tenure should be introduced for the President and all Chairpersons of the IC. Revise the Ministry's organigram to clearly reflect the IC as a separate and independent branch of the Ministry.
8. Ensure the EAC is placed as high as possible in the judicial hierarchy (at the level of the Court of Appeal) to limit the number of appeals.
9. The scope for appeal to the EAC should be limited to deter parties from seeking appeals and thus delaying the finalization of disputes.
10. Consideration should be given to explicitly excluding reviews of IC decisions in the High Court.
11. Ensure that all labour-related disputes, both under the EA and IRA, are handled in the specialized system of labour court/IC and EAC.
12. In line with the above, streamline all labour-related disputes through a similar process, i.e. from DG to the IC with an appellate procedure to the EAC and final disposition at the Federal Court, only on a question of law.
13. Consideration may be given to staggering the date of entry into force of the legislative amendments with respect to the various EA categories of disputes.
14. Long-term vision of a fully integrated LDR system, with DGIR conciliators integrated into the IC and the jurisdiction of the labour court subsumed into the IC – thereby providing a multi-skilled conciliation and arbitration institution; for future reflection by Ministry and social partners.
15. Consideration should also be given to fast-tracking disputes on recognition of trade unions and legality of strikes directly to the EAC for rapid resolution/decision-making.
16. Stakeholders should be allowed input into the selection of EAC judges (and possibly IC Chairpersons).

17. The EAC must be properly resourced in terms of staff and judges to deal with the cases to be referred to it.
18. The EAC should have regular sittings throughout Malaysia, as necessary, in order to ensure that it is accessible to the parties.
19. Orientation and induction programs should be provided for newly appointed hearing officers and IC Chairpersons and panel members.
20. Ensure subsequent access to broad-ranging professional development.



## 6. Representation of Parties

### (i) Current framework

105. The procedure for resolving complaints relating to sections 69, 69B and 69C in the labour courts is set out in section 70 of the EA. The section says nothing about representation. The labour court has thus adopted the approach that it has a discretion to allow representation and parties appear in person or are represented by lawyers, trade union representatives or (in the case of employers) human resources consultants. The procedure relating to complaints of sexual harassment that might be brought to the DGL is prescribed in section 81D of the EA, also without reference to representation of parties.
106. As described in preceding chapters, the IRA also makes provisions for conciliation of trade disputes by the DGIR under section 18 of the IRA and by the Minister under section 19A. In this respect, section 19B of the IRA provides that in conciliations of a trade dispute, whether by the DGIR or Minister, an *employer* may represent himself or be represented by his duly authorized employee; or be represented by an officer or employee of an employers' association (if they belong to one); or an official of an organization of employers registered in Malaysia (not being an employers' association). The *trade union* on the other hand, may be represented by an officer or employee of the trade union; or an official of an organization of workmen registered in Malaysia (not being a trade union). Neither party may be represented by a lawyer, adviser, consultant or any other person.
107. The IRA makes no provision for representation in conciliation of recognition disputes nor cases relating to trade union discrimination/interference, except where such discrimination/interference results in a dismissal, in which case section 20 applies. Section 20, which regulates dismissal disputes, provides that in conciliation parties may appear in person or be represented.<sup>103</sup> *Employers* may be represented by authorized employees, officers or employees of an employers association (if they belong to one) or officials of registered organizations of employers (not being an employers' association). *Employees* may be represented by officers or employees of a trade union (if they belong to one) or officials of registered organizations of workmen (not being a trade union). Neither employers nor employees may be represented in conciliation by a lawyer, adviser, consultant or any other person.<sup>104</sup>

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<sup>103</sup> IRA, section 20(6).

<sup>104</sup> Ibid., section 20(7).

108. Representation in the IC is regulated by section 27 of the IRA and has been dealt with in Chapter 5 on Jurisdiction and Powers of the Courts further above, not now reiterated.

## (ii) Proposed amendments

109. The proposed amendments relating to representation are minor. Sections 19B(1) and 20(6)(b) of the IRA are to be amended to allow representation in the conciliations of trade disputes and dismissal disputes by employees (in addition to officials) of registered organizations of employers and workmen.

110. The amendments relating to the new EAC make no mention of who might represent parties there. Arguably, in order to make the EAC accessible, representation ought to be permitted by the same people who may represent parties in the IC.

## (iii) Discussion

111. None of the stakeholders indicated that they had experienced any difficulties with representation in conciliation proceedings. It is incongruous that there are not provisions expressly regulating **representation in the conciliation for union recognition disputes as well as union discrimination/interference disputes**. If it is considered necessary to have that spelled out, the situation is easily remedied by simply inserting the provisions in sections 19B and 20(6) of the IRA into a consolidated section on representation during all forms of conciliation.

112. The most controversial aspect of representation in conciliation is the exclusion of lawyers. That is not universally done,<sup>105</sup> but it is not unique to Malaysia.<sup>106</sup> There is no necessary harm in having lawyers present in conciliation where parties may need advice on their rights and lawyers may be proficient in engaging, and thus assisting, with mediation processes. However, there is no doubt a concern on the part of the Government that lawyers could obstruct the joint problem-solving process that is conciliation, by adopting an adversarial approach.

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<sup>105</sup> For example, in industrial matters Australia's Fair Work Commission allows representation by lawyers in conciliation – by permission. See FWA, *op. cit.*, section 596.

<sup>106</sup> In conciliation proceedings in South Africa's CCMA, a party may appear in person or only be represented by a director or employee of that party or any member, office bearer or official of that party's registered trade union or registered employer's organization.

113. Arguments can be made both for and against allowing legal representation in conciliation and we are mindful that through amendments in 1980 and 1989,<sup>107</sup> the Government specifically excluded lawyers from conciliation proceedings as settlement rates were low, due, one is told, in large part to the introduction of legal technicalities by lawyers. Given that the stakeholders have expressed no concerns in that regard, there appears to be no obvious need to introduce amendments to once again, allow such representation.<sup>108</sup>
114. None of the stakeholders expressed concerns regarding representation in the labour court. And while there is **no provision in the EA on representation in the labour court** there appears to be no need for it. Internal directives that set out the powers of hearing officers to regulate representation in the labour court should be made public for purposes of transparency. It is important, in our view, for employees (and employers) who are aggrieved, to have access to these procedures and directives prior to filing a complaint at the labour court.
115. Legal representation is, on the face of it, not a given in the IC. Parties may be legally represented with the permission of the presiding Chairperson.<sup>109</sup> We were informed during consultations that such permission is seldom, if ever, withheld.
116. While parties may have representatives in the IC who are not lawyers, it is important that such representatives are competent. Poor representation can cause unnecessary delays due to a failure to properly understand the court and its processes and, most notably, to properly represent their client's case and to best respond to that put by their opponent. We will suggest that consideration be given to **providing advocacy training** to trade union officials and employer representatives who regularly appear at the IC (and the labour court). Such training in industrial advocacy has been long provided to the industrial parties in other jurisdictions. The Cambodian Arbitration Council Foundation, which provides administrative support and legal research for the Council's Arbitrators, also provides general (non-case specific) training for the parties in how to appear before the tribunal and to best structure and advocate cases. In Australia, for example, the Victorian Industrial Relations Society, in conjunction with the Fair Work Commission, similarly provides an annual series of advocacy workshops (culminating in a moot court) to benefit young advocates. Such training could be provided via the IC by current or former Chairpersons or legal practitioners. See also Chapter 12 on Training and Professional Development.

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<sup>107</sup> In respect of section 19B, see Amendment Act A484 (entered into force 30 May 1980) and in respect of section 20(7), Amendment Act A718 (entered into force 10 February 1989).

<sup>108</sup> The ILO, however, mandates that organizations of employers and workers should have the right to choose, without any hindrance, the persons from whom they wish to seek assistance during dispute settlement procedures. See ILO Committee on Freedom of Association (CFA): *Compilation of decisions* (6th ed., 2018), para 1402, [https://www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/freedom-of-association/WCMS\\_632659/lang--en/index.htm](https://www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/freedom-of-association/WCMS_632659/lang--en/index.htm) [accessed 9 Aug. 2019].

<sup>109</sup> IRA, section 27(1)(d).

117. Arguably, in order to make the EAC accessible, representation ought to be permitted by the **same people who may represent parties in the IC**. Thus, in South Africa, parties may be represented in both the Labour and Labour Appeal Courts by lawyers, officials of trade unions or (if the party is an employer) directors and employees.<sup>110</sup>

## (iv) Recommendations

118.

21. There should be consistency regarding the regulation of representation in conciliation, which could be achieved by inserting a consolidated section on representation during all forms of conciliation.
22. Internal directives relating to labour court procedures, including the powers of hearing officers to regulate representation, should be made public.
23. Training should be provided to representatives in the IC.
24. Representation in the EAC should be extended to non-lawyers in line with the level of representation at the IC.

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<sup>110</sup> Sections 161 and 178 of the Labour Relations Act 66 of 1995.

## 7. Time-Bound System

### (i) Current framework

119. Malaysia's labour legislation contains various time periods within which parties must take certain steps.<sup>111</sup> The purpose of most of these periods is to ensure that steps are taken by parties within acceptable time frames. Many other process steps, however, including those for decision-making, are not time-bound.

120. It is noteworthy that, where maximum time periods exist in the EA and IRA, there appears to be no provision in legislation for extensions of these time periods should parties fail to comply with them. Insofar as the Industrial Court Rules 1967 are concerned, the President has the power to allow for an extension of time for the filing of a statement of case as well as a statement in reply.<sup>112</sup>

### (ii) Proposed amendments

121. There is only one significant amendment to the time periods contained in the labour legislation. It has been proposed that the time period within which an employer or trade union of employers must respond to a claim for recognition be reduced from 21 to 14 days.<sup>113</sup>

### (iii) Discussion

122. As set out in our discussions in Chapters 4 and 5 on the Role of the Ministry and Jurisdiction and Powers of the Courts above, stakeholders informed us of **delays at the various stages of dispute resolution** under the EA and IRA, including during the referral process from the DGIR to the IC. We do not wish to recount the details of these delays here, save to say that the introduction of strict and published timelines at all stages of the dispute resolution process would go a long way in abolishing delays and making the system more accessible and efficient, in line with international best practice.

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<sup>111</sup> See for example sections 4, 29(3), 34(2), 60A(1B), 60A(4)(aa) and 69(3) of the EA and sections 9(3), 9(4), 13(4)-(6), 20(1A), 30(3), 33A(3) and 43(1) of the IRA. See also, e.g., rules 9, 10, 11 and 21A of the Industrial Court Rules 1967.

<sup>112</sup> See rules 9(2) and 10(2) of the Industrial Court Rules 1967.

<sup>113</sup> IRA, see the current section 9(3).

123. In relation to timelines at the labour court, we were informed that **internal KPIs** are in place to ensure that disputes are resolved within 90 days of its referral although these KPIs are neither in the law nor binding on parties. Hearing officers are sometimes faced with difficulties in meeting this timeline due to frequent requests for postponements. Cases that are resolved outside the 90-day mark will result in an internal show-cause letter issued to the hearing officer. It is our view that it would be preferable for this timeline (and for guidelines on postponement (akin to Practice Notes at the IC)) to be made public.
124. Such self-imposed measures as “timeliness benchmarks” have an important role in achieving organizational effectiveness, in particular with respect to publicly funded bodies that should perform efficiently and be open to reasonable public scrutiny. In this regard we note that Australia’s Commission has adopted rigorous hearing and decision writing/publication goals for its members to reach, regularly providing such performance data on its website and setting out the detailed results in its Annual Report.<sup>114</sup>
125. We recommend the provision of institutional timeliness or performance benchmarks (however titled) for the general guidance of hearing officers (and to establish broad expectations for those appearing before the IC). Actual performance outcomes regularly achieved (expressed on an institutional basis) should, in our view, be posted on a quarterly basis to the Ministry’s website as is done by the IC on its website.
126. In our view, the answer to delay is likely to centre upon **rigorous case management** by the hearing officer, whereby procedural Directions are issued following the receipt of a dispute notification. Where, in the view of the hearing officer an applicant is unreasonably delaying the hearing of their application they can be put on notice that the file will be closed unless steps set out are complied with.
127. Similar strong measures can be taken where a respondent delays the hearing of a matter by the hearing officer indicating that the matter will be set down for hearing on a certain date and that the case will proceed and be decided on the basis of the information then before the labour court and filed consistent with the Directions previously issued. In our view a practice/advisory note to parties should appear on all labour court forms, advising the unambiguous terms under which the case will be managed and adjournments granted or delays tolerated.
128. As also mentioned in Chapter 4 on the Role of the Ministry above, stakeholders referenced delays at two points during conciliation under the IRA – firstly at conciliation proper and secondly following the Ministerial referral process. With respect to conciliation, stakeholders informed us of the **drawn-out conciliation processes** although, as is the case at the labour court, DGIR

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<sup>114</sup> Fair Work Commission Annual Report 2017–2018, op. cit., pp. 22–26.

conciliators too have internal KPIs to satisfy.<sup>115</sup> And while the Ministry has sought to cure the delay caused by the referral process through amendments to sections 20(3) and 26(2) of the IRA, it remains that referrals, albeit mandatory ones, must still be made, thereby giving space for potential backlogs. Consideration should therefore be given to providing for automatic referral to the IC after the lapse of a certain time period, e.g. three months, during which genuine conciliation has taken place, but a settlement has not been forthcoming or, alternatively, allowing either party to file a case directly at the IC upon the lapse of the aforementioned time period.

129. We have been made aware that, in order to deal with a backlog in cases at the IC, ten “task force” courts were set up. Additionally, Practice Note No. 2 of 2019 was issued, imposing **strict limits to requests for postponements**. We support such active case-management measures to resolve persistent instances of delay. We note that it is not unfair for parties to be required to rigorously pursue an application they propose or to similarly defend an action they oppose. Stringent supervision of timelines, adjournment applications and imposed Directions dates are to be commended and extensions of time (say, to satisfy a Directions obligation) and adjournments granted only for compelling reasons or in exceptional cases.

130. As to the proposed amendment to the timeline for union recognition, some stakeholders expressed concerns that the truncated time period in section 9(3) of the IRA will create difficulties because employers need more time to consider whether recognition should be granted, especially where an employer’s headquarters is overseas. It is our view, however, that the right to recognition is a factual (not discretionary) issue, largely depending on the number of workers represented by the union, which should not require time-consuming inputs from headquarters, whether overseas or not.

## (iv) Recommendations

131.

25. Introduce strict and published timelines at all stages of the dispute resolution process.
26. Provide for institutional timeliness/performance benchmarks for the general guidance of hearing officers and establish broad expectations for those appearing before the IC. Actual performance outcomes regularly achieved (expressed on an institutional basis) should be posted on a quarterly basis to the Ministry’s website.
27. Rigorous case management should be applied by hearing officers and IC Chairpersons.

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<sup>115</sup> According to information received from the IRD, disputes are to be resolved within 75 days in large states such as Selangor and Kuala Lumpur, and 60 days in other states, while in practice the average time to settle a dispute is three to four months.

28. Allow automatic referral to the IC after a lapse of a certain time period, say three months, during which conciliation has taken place without settlement or, alternatively, allow either party to directly access the IC upon the lapse of the aforementioned time period.
29. Limit the number of and reasons for postponements that may be granted by the IC, labour court and DGIR and make public any guidelines on postponements.



## 8. Recognition Disputes and other Disputes Relating to the Collective Bargaining Process

### (i) Current framework

#### Recognition disputes

132. In Malaysia, a trade union cannot participate in collective bargaining unless it has been recognized by the employer. Trade union recognition is regulated by Part III of the IRA<sup>116</sup> and the Industrial Relations (IR) Regulations of 2009. The process commences with a trade union serving a formal claim on an employer for recognition in respect of employees or a specified class of employees. The union must also submit to the employer (and the DGIR) a copy of its rules.<sup>117</sup>
133. The employer is required to respond to the request within 21 days. It may elect to recognize the trade union. Should the employer refuse the request or fail to respond, the union has 14 days within which to report the matter to the DGIR. The DGIR may then take the steps he deems necessary to ascertain the eligibility of the trade union to represent the relevant employees.<sup>118</sup> In doing so, he may require additional information, refer the case to the DGTU to conduct a competency check on the trade union,<sup>119</sup> and/or hold a secret ballot among the relevant employees. Once the DGIR is satisfied that the union is eligible he will notify the Minister who will decide whether the union ought to be afforded recognition, in which case such recognition shall be deemed to be accorded by the employer. The Minister's decision is said to be "final and shall not be questioned in any court", however, as noted earlier, these judicial ouster clauses have not barred the High Court from exercising its review jurisdiction.
134. It has been reported that the recognition process takes just over three months in cases of voluntary recognition and four and a half months in cases resolved by the DGIR without judicial review.<sup>120</sup> Delay in concluding the process is significant given that employees may not go on strike

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<sup>116</sup> IRA, section 9 in particular.

<sup>117</sup> Regulation 3, IR Regulations 2009.

<sup>118</sup> This is done with reference to the category of employees and the union's representativeness among them. To secure recognition, a trade union must represent the majority of the relevant category of employees. See regulation 11, IR Regulations 2009.

<sup>119</sup> This entails that the relevant employees must fall within a particular trade, occupation or industry as reflected in the trade union's rules.

<sup>120</sup> CEACR: Observation on Malaysia in respect of Convention No. 98 – adopted 2018, published 108th ILC session (2019). The following, however, provides the time frame for recognition at nine months: Razak, A;

for any reason until proceedings under section 9 have been concluded.<sup>121</sup> In addition, no other trade union may make a claim for recognition in respect of the relevant employees until a pending recognition claim has been finalized.<sup>122</sup>

135. Once a trade union has been accorded recognition no other trade union may claim recognition in respect of the relevant employees for a period of three years. If a claim for recognition fails, no new claim may be brought by the same union until six months have elapsed.<sup>123</sup>

## Trade disputes

136. Recognition gives a trade union the status required to bargain with an employer. But it does not guarantee that the employer will engage in bargaining. The path to collective bargaining is governed by section 13 of the IRA. The trade union must extend a written invitation to the employer to commence collective bargaining. That invitation must contain proposals for a collective agreement while the subject matter that such proposals may contain is circumscribed in the IRA.<sup>124</sup> The employer must reply to the union's invitation within 14 days. If it accepts, bargaining must commence within 30 days of the employer's reply. If it refuses or has not accepted within 14 days or bargaining has not commenced within 30 days, the trade union may refer the matter to the DGIR in writing. The DGIR may take such steps as may be necessary or expedient with a view to bringing the parties to commence collective bargaining without undue delay.<sup>125</sup> If the DGIR is unsuccessful, a "trade dispute" (as defined in the IRA) comes into being around the matters set out in the initial invitation to bargain.<sup>126</sup>
137. Under section 2 of the IRA, a trade dispute is defined as "... any dispute between an employer and his workmen which is connected with the employment or non-employment or the terms of employment or the conditions of work of any such workmen". It may be resolved by referral, by either of the parties, to the DGIR for conciliation, who in turn shall notify the Minister if he is

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Mahmod, N.; et al. : "Trade union recognition in Malaysia: Legal issues", *Universiti Utara Malaysia Journal of Legal Studies* (UUMJLS) 9(1): 25, <http://repo.uum.edu.my/25590/> [accessed 8 Aug. 2019].

<sup>121</sup> IRA, section 10(1).

<sup>122</sup> *Ibid.*, section 10A.

<sup>123</sup> *Ibid.*, sections 11 and 12 respectively.

<sup>124</sup> *Ibid.*, sections 13(2) and (2A) respectively. The latter provision lists training, annual review of the wage system, and performance-based remuneration as possible subject matters. Section 13(3) explicitly prohibits bargaining over, inter alia, employee promotions, transfers and employment termination and dismissals. There is, however, nothing to prevent the trade union from raising these issues with the employer in the course of their discussions. The employer may then bargain with the union on those topics should it be amenable to doing so. There is express provision for this in relation to promotions in the latter part of section 13(3) IRA.

<sup>125</sup> *Ibid.*, section 13(6).

<sup>126</sup> *Ibid.*, section 13(7).

satisfied that there is no likelihood of the trade dispute being settled.<sup>127</sup> The Minister may take the necessary steps to conciliate the dispute again<sup>128</sup> and, if the dispute remains unresolved, refer the dispute to the IC either on the joint request in writing of the parties or of his own motion.<sup>129</sup> After referral of the dispute to the IC, the employees may not resort to strike action, for example to compel the employer to accept their demands on the above matters.<sup>130</sup>

## (ii) Proposed amendments

### Recognition disputes

138. In Chapter 7 on Time-bound System, we referred to the proposed amendments relating to truncating the time period in IRA section 9 (on recognition claims). In the spirit of expediting proceedings, the proposed amendments also make provision for the DGIR to require the DGTU to furnish relevant information for recognition, as opposed to the whole matter being referred to the DGTU. Once the DGIR determines that the trade union is eligible he will give his decision to that effect, as opposed to having to refer the matter to the Minister. That decision may be given despite the employer's failure to furnish information required by the DGIR.

### Trade disputes

139. There is a significant amendment in the form of a new section 9A in the IRA. It would regulate cases where an employer has recognized more than one trade union to represent the same employees or class of employees.<sup>131</sup> In such cases, it is proposed, the employer or any trade union concerned would be entitled to bring an application to the DGIR for sole bargaining rights. The DGIR will then take steps to facilitate a secret ballot to ascertain the relevant employees' preference regarding which union should represent them. Whichever union secures the highest number of votes will be awarded sole bargaining rights. Once a decision has been rendered no similar application may (in terms of a new section 9B) be brought for a period of three years from the date of the DGIR's decision.

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<sup>127</sup> Ibid., section 18.

<sup>128</sup> Ibid., section 19A.

<sup>129</sup> Ibid., section 26.

<sup>130</sup> Ibid., section 44.

<sup>131</sup> The Ministry has stated that the minimum requisite percentage membership in the relevant workforce for recognition of a trade union will be 30 per cent, which will be prescribed in regulations. This would mean that there could be a maximum of three recognized unions for a certain category of employees in one enterprise.

140. The above amendment has been introduced to deal with proposed amendments to the TUA, which recognize that trade unions can be established across trades, industries or occupations and which allow for the registration of multiple unions in respect of a particular establishment, trade, occupation or industry.<sup>132</sup>
141. Employees (even those from a currently recognized union) will be prohibited from striking for any reason pending the outcome of an application for sole bargaining rights.
142. Section 13(3) of the IRA is to be amended to remove the list of topics on which collective bargaining may not take place. However, the list of topics in section 13(2A) to which a proposal for a collective agreement may relate, remains unchanged.
143. Importantly, and as noted in Chapter 4 on the Role of the Ministry, the Government has proposed that trade disputes would automatically, without discretion, be referred to the IC by the Minister if they cannot be resolved by the DGIR. If, however, the trade dispute relates to a refusal to commence collective bargaining or to a deadlock within collective bargaining, reference shall not be made without the consent in writing by the parties.<sup>133</sup>

### (iii) Discussion

144. It is worth recalling that Malaysia's Federal Constitution protects the right to freedom of association. Malaysia is also, by virtue of its membership of the ILO, bound to respect the principles in ILO Conventions relating to freedom of association and collective bargaining.<sup>134</sup> And it has ratified the Right to Organize and Collective Bargaining Convention 1948 (No. 98), which obliges member States to adopt measures:

“appropriate to national conditions . . . where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organizations and workers' organizations, with a view to the regulation of terms and conditions of employment by means of collective agreements.”

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<sup>132</sup> See in particular TUA sections 2 (definition of a trade union) and 12.

<sup>133</sup> With the exception, as noted earlier, of (a) trade disputes relating to the first collective agreement; (b) trade disputes referring to any essential services specified in the First Schedule; (c) trade disputes that would result in acute crisis if not resolved expeditiously; and (d) trade disputes where parties are not acting in good faith to resolve the dispute expeditiously.

<sup>134</sup> The Declaration of Philadelphia, as part of the ILO Constitution of 1946, forms the basis of both Malaysia's obligation to respect freedom of association principles and the jurisprudence of the CFA. The principle of allowing plurality of unions is one of the cardinal tenets for freedom of association and has been consistently recognized by the CFA (as well as by the CEACR).

145. Collective bargaining is relatively difficult to realize in Malaysia with trade unions having to go through formal processes relating to recognition (in terms of section 9 of the IRA) and attempting to secure bargaining with the employer (in terms of section 13 of the IRA). If an employer does not want to bargain with a union on issues relating to terms and conditions of employment, the Minister of his own motion, is empowered to refer the matter to the IC as a trade dispute to be resolved by arbitration.<sup>135</sup> In our view this does not facilitate collective bargaining and employees are, to all intents and purposes, precluded from striking to secure recognition, and bargaining demands.<sup>136</sup> This appears to be inconsistent with ILO standards relating to freedom of association, collective bargaining and the right to strike.<sup>137</sup> We are mindful however that under the proposed amendments, the provision under section 44 precluding strikes when reference has been made to the IC, will not be so easily triggered because the proviso in section 26 requires that trade disputes be referred to the IC only with the consent of both parties. Additionally, the proposed amendments also include the removal of management prerogatives under section 13(3) and consequently, the limitation on strike action in respect of those matters will also be lifted.
146. While the stakeholders with whom we consulted in this study did not pertinently raise the strike prohibitions as significant concerns, in our view these warrant further attention. The proposed amendments are to be welcomed to the extent they seek to expedite the recognition process and expand the topics on which bargaining might take place. However, they do not address the **fairly severe restrictions on the right to strike pending recognition of a trade union or application for sole bargaining rights**. Under the amendments, such disputes, if not resolved by agreement, must be resolved by the IC rather than by strike action. This is undesirable, given the delays associated with that process and the limitation on the right to strike. In addition, if there are disputes around recognition, strike action “for whatever reason” is prohibited, which is also undesirable.
147. Stakeholders also raised concerns on the methodology currently used to ascertain membership strength of a union for purposes of recognition.<sup>138</sup> The IRD, in accordance with the IR Regulations 2009, ascertains the strength of a union’s membership by the total number of workers on the date of the recognition claim instead of the total number of workers at the time the secret ballot is

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<sup>135</sup> See CEACR: Observation on Malaysia in respect of ILO Right to Organize and Collective Bargaining Convention, 1949 (No. 98) – adopted 2018, published 108th ILC session (2019), where the Committee hopes that the Government will take necessary measures to ensure that the legislation only authorizes compulsory arbitration in essential services, in the strict sense of the term, for public servants engaged in the administration of the State or in cases of acute national crisis.

<sup>136</sup> IRA, in particular sections 10(1) and 44(b).

<sup>137</sup> *Compilation of Decisions* of the CFA, op. cit., paras 754, 772 and 773.

<sup>138</sup> See also CEACR: Observation on Malaysia in respect of ILO Right to Organize and Collective Bargaining Convention, 1949 (No. 98) – adopted 2015, published 105th ILC session (2016), [https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100\\_COMMENT\\_ID:3255358](https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3255358) [accessed 20 Aug. 2019].

held.<sup>139</sup> The **lapse of time between the date of the recognition claim and when the secret ballot is held**, may result in unions being unable to meet the simple majority requirement as members may, for example, have been repatriated (in cases of foreign workers), transferred, or terminated. While proposed amendments<sup>140</sup> no longer contain the requirement for a secret ballot to be conducted, at the time of our discussions uncertainty remained in respect of the entire recognition process. To minimize the recurrence of issues with attrition of members due to judicial challenges in respect of the list of members, serious consideration should be given to a speedy resolution of these disputes directly to the EAC, without recourse to judicial review. In this respect, see also discussions in Chapter 5, above, on the Jurisdiction and Powers of the Courts.

## (iv) Recommendations

148.

30. Amend section 10(1) of the IRA to allow employees to strike on issues relating to recognition of trade unions (and other matters outside collective bargaining), which would be consistent with the applicable ILO principles.
31. Resolve all recognition disputes as a matter of priority through decision-making directly by the EAC with limited rights to appeal.

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<sup>139</sup> See IR Regulations 2009, regulations 6 and 10.

<sup>140</sup> Amendments to sections 9(4A) and 9(4B) of the IRA.

## 9. Resolution/Adjudication of Unfair Labour Practices

### (i) Current framework

149. Broadly speaking, unfair labour practices<sup>141</sup> are dealt with under sections 4, 5 and 7 of the IRA. A complaint as to a violation of these sections may either be referred to the IC through the procedures of the DGIR and Minister, or through a criminal complaint under section 59 of the IRA, to the Magistrates Court. According to section 8(4), however, filing a criminal complaint under section 59 precludes the jurisdiction of the IC to inquire into a section 4, 5 or 7 complaint. A distinct difference between section 8 and section 59 is the burden of proof<sup>142</sup> as well as the available sanction and remedy.<sup>143</sup>
150. It is important to note that employers maintain significant discretion under section 5(2) in relation to suspending, transferring, laying-off, discharging and not promoting an employee and thereby affecting union membership.
151. Further, under section 12(2) of the TUA, the DGTU is empowered to refuse registration of a trade union if satisfied that there already exists a trade union representing the workmen in that particular establishment, trade, occupation or industry. This essentially creates unity within the trade union movement through legislation and allows the proliferation of “yellow unions” – unions controlled by employers that prevent the establishment of a genuine trade union.

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<sup>141</sup> As to the meaning of the term “unfair labour practice”, to avoid a complex etymological and legal analysis we have instead accorded the words their normal contextual meaning. It follows for example, that the action of a party A, which serves to deny or diminish a right of fair, non-discriminatory treatment for party B, or to lessen or artificially delay the access of party B to relief accorded either by the IRA, EA or the TUA or to otherwise deny fairness in an industrial setting, will come within the term’s orbit. Any act that contravenes sections 4, 5 or 7 of the IRA would amount to an unfair labour practice and render such a dispute justiciable before the IC. See also the IRA, section 8.

<sup>142</sup> As the IRA, section 59, deals with a criminal complaint, the burden of proof is one of beyond reasonable doubt, whereas section 8 requires that one establishes the complaint on the balance of probabilities.

<sup>143</sup> Section 59 explicitly provides that an employer found guilty may be imprisoned for a term not exceeding one year or to a fine not exceeding RM 2,000 or both; and provides that an employee may be reinstated with appropriate back wages. Section 8 is silent on penal sanctions as well as remedies, relying instead on the broader jurisdiction of the IC.

## (ii) Proposed amendments

152. There are no proposed amendments to sections 4, 5, 7 and 59 of the IRA. In line with the proposal as far as possible, to remove ministerial discretion as regards LDR, section 8(2) will be amended to mandate the DGIR to refer cases to the IC if not resolved by way of conciliation. The Minister's referral power under section 8(2A) of the IRA will be removed. See also Chapter 4, above, on the Role of the Ministry.
153. Section 12(2) of the TUA and other related provisions of the TUA will undergo revisions to allow plurality of unions within a similar establishment, trade, occupation and industry.

## (iii) Discussion

154. In past observations,<sup>144</sup> the ILO's Committee of Experts on the Application of Conventions and Recommendations (CEACR) had noted that a majority of anti-union discrimination cases in Malaysia were dealt with under section 8 of the IRA, that is to say, at the IC through the DGIR and the Minister, instead of through the criminal procedure outlined in section 59.
155. We were informed by stakeholders that **significant confusion exists by virtue of the concurrent procedures available for anti-union discrimination complaints**. Complainants seeking the relief of section 8 have been advised to file a police report under section 59 to trigger a criminal complaint, and when attempting to do so, complainants have been advised to avail of the DGIR's jurisdiction under section 8. The consequence is said to be that for many, there is no proper remedy and that, compellingly, no case has ever been prosecuted under section 59.
156. This leads us to our second point. In its 2018 Observation, the CEACR recognized that **criminal procedures provide for strict standards of proof** but nonetheless underscored the importance of avoiding obstacles to bringing an action and obtaining an appropriate remedy for anti-union discrimination.<sup>145</sup> In this regard, the Committee noted the following:

...reversing the burden of proof by placing the burden on the employer once a prima facie case has been made is one of the preventive mechanisms used by a number of States to afford protection against anti-union discrimination while many other States have, in such cases, lowered the burden of proof applicable to workers. The Committee considers that

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<sup>144</sup> CEACR: e.g. Observation on Malaysia in respect of ILO Right to Organize and Collective Bargaining Convention, 1949 (No. 98) – adopted 2018, published 108th ILC session (2019).

<sup>145</sup> CEACR Observation on Convention No. 98 (Malaysia) – adopted 2018, published 108<sup>th</sup> ILC Session (2019). See also ILO: *General survey on the fundamental Conventions*, 2012, para 192, [https://www.ilo.org/global/standards/WCMS\\_125798/lang--en/index.htm](https://www.ilo.org/global/standards/WCMS_125798/lang--en/index.htm) [accessed 9 Aug. 2019].



placing on workers the burden of proving beyond reasonable doubt that the act in question occurred as a result of anti-union discrimination in order to access adequate protection would constitute a dissuasive obstacle to bringing an action and obtaining an appropriate remedy.

We agree with this position.<sup>146</sup>

157. In protecting against unfair labour practices in general and anti-union discrimination specifically, it is important that Malaysia has in place a **mechanism that ensures rapid and effective protection**.<sup>147</sup> To this end, consideration should be given to allowing the IC to deal with cases of anti-union discrimination as a matter of priority through a certificate of urgency. Some stakeholders were of the view that a long case in court benefits the party with more resources, thereby causing harm both to the individual victim and the larger freedom to associate. See also Chapter 5, above, on Jurisdiction and Powers of the Courts.
158. Stakeholders also referred to **employers having wide discretionary powers** to suspend, transfer, lay off, discharge and not promote employees as often reflecting camouflaged discriminatory and unfair labour practices. As these areas of employment activity will now be subject to collective bargaining under proposed amendments to section 13(3) of the IRA, such discriminatory acts should no longer pass unchallenged as prerogative matters.
159. We support the proposal of the Ministry to **allow plurality of unions**. Current legislative provisions in the TUA not only run counter to ILO Convention on Freedom of Association and Protection of the Right to Organize, 1948 (No. 87),<sup>148</sup> but also allow the establishment of “yellow unions” in the place of genuine trade unions, to the detriment of employees in Malaysia.<sup>149</sup>

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<sup>146</sup> Relevantly, Australia’s FWA has historically (since 1904) given protection to employees against their being prejudicially treated in the workplace or as to their employment, by virtue of trade union membership (and more recently by non-membership) together with a now lengthy list of discriminatory grounds reflecting changing societal values. From the Conciliation and Arbitration Act of 1904 there has always existed a statutory “reverse onus”, requiring that an employer said to have breached one of the protected/impermissible grounds by injuring or disadvantaging their employee for a reason which included a proscribed ground, had to prove, in the Court, that this was not so – that the ground for taking the action, notwithstanding whatever else may have actuated the employer, did not include an impermissible ground. See FWA, *op. cit.*, section 361(1).

<sup>147</sup> See *Compilation of decisions of the CFA*, *op. cit.*, paras 1134–1162.

<sup>148</sup> Workers should be free to choose the union which, in their opinion, will best promote their occupational interests without interference by the authorities. It may be to the advantage of workers to avoid a multiplicity of trade unions, but this choice should be made freely and voluntarily and not be imposed by legislation. See *Compilation of decisions of the CFA*, *op. cit.*, in particular para. 485.

<sup>149</sup> *Ibid.*, paras 475–501.

## (iv) Recommendations

160.

32. Remedy the confusion with respect to IRA sections 8 and 59 to ensure criminal action under section 59 does not preclude another (civil) under section 8 or, at the very minimum, by introducing clear guidelines on procedures for filing complaints either with the DGIR under section 8 or through criminal procedures under section 59.
33. Provide for a reverse onus of proof in criminal complaints of anti-union discrimination.
34. Allow the IC to deal with cases of anti-union discrimination as a matter of priority through a certificate of urgency.
35. Limit management prerogatives to suspend, transfer, lay off, discharge and not promote employees that may affect trade union activities.
36. Allow for plurality of unions in line with ILO Convention No. 87 to reduce “yellow unions” and to ensure employees are not left without genuine union representation.

## 10. Enterprise-Level Grievance Procedures

### (i) Current framework

161. Section 14(2) of the IRA provides that every collective agreement shall, “unless there exists appropriate machinery established by virtue of an agreement between the parties for the settlement of disputes, prescribe the procedure for the adjustment of any question that may arise as to the implementation or interpretation of the [collective] agreement and reference of any such question to the IC for a decision”.
162. The procedure under section 14(2) is meant to address, among others, any grievances or complaints by one or more employees arising at work or out of their work situation. Further to this, paragraphs 38-40 of the Code of Conduct for Industrial Harmony (Document I: Areas of Cooperation and Agreed Industrial Relations Practices) set out the general procedure for resolving individual grievances at the enterprise-level. The Code provides that the procedure should include these features: be in writing; be made known to all employees; be simple and rapid with prescribed time limits; include a procedure for appeal; require a recording of the outcome; and give the worker the right to representation.
163. Section 16 of the IRA mandates parties, within one month of signing the collective agreement, to jointly deposit the signed collective agreement with the Registrar of the IC, who shall then bring it to the notice of the IC for its cognizance. Further, the IC may refuse to take cognizance if the collective agreement does not comply with section 14, which implies that all binding collective agreements in Malaysia contain a dispute resolution procedure as referred to above.<sup>150</sup> In this context, it is important to note that pursuant to section 17 of the IRA, every collective agreement that has been taken cognizance of by the IC is binding on the parties to the agreement and all workmen employed or subsequently employed in the undertaking to which the collective agreement relates.

### (ii) Proposed amendments

164. No amendments have been proposed to the above provisions.

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<sup>150</sup> We were advised that the grievance procedures set out in collective agreements in Malaysia are usually comprehensive, including a number of time-bound steps to be followed in resolving complaints by employees.

### (iii) Discussion

165. The framework provided for in the IRA ensures that in practice employees in unionized enterprises with a collective agreement in force, can make use of proper grievance procedures to address any grievances or complaints regarding work and/or working relationships. During our discussions, stakeholders raised the issue of whether the requirement for establishing a grievance procedure should be extended to employees in non-unionized enterprises and/or employees that do not fall under collective agreements (e.g. management, executives, etc.).
166. Essentially, our view is that all matters pertaining to the employment relationship that can give rise to a grievance and dispute should be amenable to resolution through discussion at the workplace and then through subsequent agreed steps contained in an enterprise-level grievance procedure. We find support for this view in the ILO Examination of Grievances Recommendation, 1967 (No. 130), which provides in paragraph 8 that, as far as possible, grievances should be settled within the undertaking itself according to effective procedures.
167. The need for an enterprise-level grievance procedure is reflected in the employment best-practice axiom, that **disputes are best settled (faster, more effectively and with less damage to relationships/morale and productivity) when dealt with speedily and as close to the work in question as possible**. This does not mean that all grievances must, at all costs, be resolved at the enterprise-level, but rather procedures ought to be in place to avoid the unnecessary escalation of disputes which could, in turn, inundate DGIR officials.
168. The question of the specific type of enterprise disputes procedure most effective in Malaysian workplaces was the subject of discussion at the tripartite consultation conducted in January 2019 by the ILO. During those discussions as well as our further consultations with stakeholders, there appeared to be near unanimity as to the desirability of access to effective grievance procedures at the workplace, followed by more formal conciliation and, where necessary, by arbitration.
169. It is also centrally important that such procedures allow for aspects of the employment relationship that affect workers, and may give rise to disputes, but which are not included in collective agreements (for example, a company policy which affects employees) to be the subject of a grievance.
170. The question arising is: what should happen where there is either no collective agreement or if groups of employees are specifically excluded from the application of a collective agreement? We recommend that the IRA (or EA) contain a provision requiring the establishment of a general grievance procedure, which will have application to all employees (i.e. including non-executive, supervisory and managerial), regardless of union membership and/or presence in any given enterprise. For this, we refer for example to section 9C of India's Industrial Disputes Act, which simply provides a framework grievance mechanism that must be established in all enterprises

employing 20 or more workmen.<sup>151</sup> An even broader framework can be found in Germany's Works Constitution Act wherein section 84 gives an employee the right "to make a complaint to the competent bodies in the establishment" and obliges the employer to "inform the employee on how his complaint will be dealt with", while it is stipulated that the employee "shall not suffer any prejudice as a result of having made a complaint".<sup>152</sup>

## (iv) Recommendations

171.

37. Introduce a general provision in the IRA (or EA) requiring the establishment of an enterprise-level grievance procedure for all employees in an enterprise with minimum employment number and for all aspects of the employment relationship.

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<sup>151</sup> Section 9C (Setting up of Grievance Redressal Machinery):

"(1) Every industrial establishment employing twenty or more workmen shall have one or more Grievance Redressal Committee for the resolution of disputes arising out of individual grievances.

(2) The Grievance Redressal Committee shall consist of equal number of members from the employer and the workmen.

(3) The chairperson of the Grievance Redressal Committee shall be selected from the employer and from among the workmen alternatively on rotation basis every year.

(4) The total number of members of the Grievance Redressal Committee shall not exceed more than six: Provided that there shall be, as far as practicable, one woman member if the Grievance Redressal Committee has two members and in case the number of members are more than two, the number of women members may be increased proportionately.

(5) Notwithstanding anything contained in this section, the setting up of Grievance Redressal Committee shall not affect the right of the workman to raise industrial dispute on the same matter under the provisions of this Act.

(6) The Grievance Redressal Committee may complete its proceedings within thirty days on receipt of a written application by or on behalf of the aggrieved party.

(7) The workman who is aggrieved of the decision of the Grievance Redressal Committee may prefer an appeal to the employer against the decision of Grievance Redressal Committee and the employer shall, within one month from the date of receipt of such appeal, dispose of the same and send a copy of his decision to the workman concerned.

(8) Nothing contained in this section shall apply to the workmen for whom there is an established Grievance Redressal Mechanism in the establishment concerned."

<sup>152</sup> Similarly, section 146 of Australia's FWA provides that "modern awards" must include a term providing a procedure for settling disputes about any matters arising under the award and in relation to the legislated National Employment Standards. A "modern award" is a document maintained and reviewed by the Fair Work Commission that sets out the minimum terms and conditions of employment (such as leave entitlements, allowances, overtime and shift-work premiums) within a specific industry or occupation. The award provisions, having the force of federal law, constitute the safety-net minima for Australian workers - above which sits the bargaining stream for those individual enterprises which have negotiated a collective agreement. All collective agreements must also contain a dispute settlement procedure.

# 11. Accessibility of LDR Processes for Migrant Workers

## (i) Current framework

172. The protections guaranteed by labour laws to local workers in Malaysia are also generally applicable to foreign workers, with a few specific exceptions as found in section 60N of the EA (obliging the employer in cases of redundancy necessitating the retrenchment of employees, to not terminate a local employee unless he has first terminated all foreign employees) and in section 28 of the TUA (prohibiting non-citizens from being an executive of a trade union and thus from forming their own unions).<sup>153</sup> In addition, it is noted that the First Schedule of the EA removes the protections of large parts of the EA from domestic workers, who are nearly all foreigners.<sup>154</sup> In *Ali Salih Khalaf v. Taj Mahal Hotel*,<sup>155</sup> the IC found that the EA and the IRA apply to all workers regardless of whether the person is a local or a foreign worker, documented or undocumented.

## (ii) Proposed amendments

173. The current round of labour law amendments contains various changes that would affect the position of foreign workers. A new proposed section 17C in the EA prohibits forced labour.<sup>156</sup> The stipulated maximum punishment on conviction is to be a fine of RM 50,000. A proposed amendment to section 60K in the EA forbids employers from employing any foreign worker unless they have obtained certification from the DGL. Failure to comply constitutes an offence punishable on conviction with a fine not exceeding RM 100,000 or imprisonment not exceeding three years or

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<sup>153</sup> In addition to the protections under the EA, TUA and IRA, foreign workers may also avail themselves of the protections under, among others, the Workers' Minimum Standards of Housing and Amenities Act 1990, the Employees' Social Security Act 1969, and the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007.

<sup>154</sup> Item 2(5) of the EA's First Schedule provides that sections 12, 14, 16, 22, 61 and 64, as well as Parts IX (Maternity Protection), XII (Rest Days, Hours of Work, Holidays and Other Conditions of Service), and XIII (Termination, Lay-Off, and Retirement Benefits) are not applicable to domestic workers. Further of note is Part XIIb (Employment of Foreign Employees) of the EA which specifically deals with the Employment of Foreign Employees.

<sup>155</sup> Case No. 22(27)/4-1580/12; Award No. 245 of 2014.

<sup>156</sup> "Forced labour" is defined as the condition of any person who is compelled to provide labour or services by the use of threat or deception, and in which any reasonable person would not consider himself to be free: to cease providing the labour or services; or to leave the place or area where the victim provides the labour or services. This definition is in keeping with that in the ILO's Forced Labour Convention, 1930 (No. 29).

both. If the employer is granted certification he must, within 14 days of employing the foreign worker, furnish the DGL with the particulars of the foreign worker. The amendment to section 60K also introduces a provision allowing the DGL to deny an employer's request to employ foreign workers if the employer has been convicted of a large-scale, repeated or egregious violation of employment law.

174. Other proposed amendments to the EA include enhanced protections for those employed under an employment contract (Part II),<sup>157</sup> extended joint liability of employers, contractors and sub-contractors for wages to contractors for labour (section 33), as well as deemed invalidity of variations or substitutions to any existing employment contract that are less favourable to the employee (section 60K(7)). Additionally, and in connection with domestic workers specifically, the First Schedule to the EA is being amended to guarantee domestic workers (under the amendments called "domestic employees" instead of "domestic servants") one rest day a week (section 59(1)).
175. Under the proposed amendments to the TUA, the requirement that an executive of a trade union or any branch thereof be a citizen of Malaysia will be removed, thus paving the way for foreign workers to establish their own unions and hold official positions therein.

### (iii) Discussion

176. There is significant demand for foreign labour in Malaysia, with an estimated 3-4 million foreign workers in the labour market, which is in the order of 20 per cent to 30 per cent of the country's workforce.<sup>158</sup> Of these, between 300,000 and 400,000 are domestic workers.<sup>159</sup> Although, as noted above, foreign workers are not without legal rights and protections in Malaysia, significant concerns have been raised over the years regarding the vulnerable position and poor treatment of foreign workers. These include human trafficking, forced labour, debt bondage, wages below the statutory minimum, lack of overtime pay, restrictions on freedom of association, gender-based

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<sup>157</sup> New EA sections 7C (Presumption as to who is an employee); 17B (Discrimination in employment); and 17C (Prohibition of forced labour), and amendments to section 10 (Contracts to be in writing and to include provision for termination).

<sup>158</sup> B. Harkins: "Review of labour migration policy in Malaysia: tripartite action to enhance the contribution of labour migration to growth and development in ASEAN (TRIANGLE II Project)", Bangkok, ILO Regional Office for Asia and the Pacific, 2016, p. 1. The following report has estimated the number of migrant workers at as many as 6 million. Migrant Workers Right to Redress Coalition: *Towards a comprehensive national policy on labour migration for Malaysia* (2017) p. 2, <https://partisosialis.org/wp-content/uploads/2019/01/Managing-Labour-Migration.pdf> [accessed 9 Aug. 2019].

<sup>159</sup> *Ibid.*, p. 21.

discrimination, imposition of large amounts of debt, contract substitution, and holding and withholding of documents such as passports.<sup>160 161</sup>

177. While the situation of foreign workers in the country is indeed dire,<sup>162</sup> the Government has signified its commitment to improving their position through ensuring the rights of all workers are in line with international labour standards.<sup>163</sup> The proposed amendments referred to above go some way to improve the rights of workers in Malaysia. However, further legislative intervention is needed to specifically deal with the plight of foreign workers, and this was also indicated by stakeholders. In formulating recommendations for this Chapter, we have limited ourselves only to recommendations on foreign workers in relation to the LDR system in Malaysia.
178. Workers may not work in Malaysia if they do not possess a valid employment pass.<sup>164</sup> If they do not have the requisite documentation they may be arrested and detained. If convicted they stand to be fined, imprisoned and/or whipped.<sup>165</sup> Stakeholders have highlighted that a major difficulty in this area is **that an employment pass is linked to a single employer** and the termination of an employment contract would invariably lead to the automatic cancellation of an employment pass. The power this hands employers is obvious. Some stakeholders have suggested there be established a realistic employment flexibility, in that workers be permitted to change employers – to minimize the risk of foreign workers feeling unable to report exploitative labour conditions due to a fear of retaliation. We strongly support this suggestion.<sup>166</sup>
179. It was the experience of a significant proportion of those with whom we spoke, (individuals were assured of confidentiality), that any employee who lodges a complaint stands to have their

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<sup>160</sup> Amnesty International: “Trapped: The exploitation of migrant workers in Malaysia” (2010), pp. 5–8; Harkins, op. cit., p. 3.

<sup>161</sup> Apart from the fact that being without proper documentation may cause foreign workers to be arrested and limits their ability to travel, the Passports Act 1966 (section 12(1)(f)) renders it illegal to hold the passport of another. However, it is generally acknowledged by most stakeholders to be a widespread practice in Malaysia for employers to hold the passports of foreign workers. See Ramchandran: “The plight of migrant workers in Malaysia” (2018), *The Law Review* 201:211.

<sup>162</sup> Harkins, op. cit., pp. 3–4.

<sup>163</sup> Promise 35: Raising the dignity of workers and creating more quality jobs. See Pakatan Harapan: *Manifesto*, p. 78, <https://pakatanharapanmanifesto.polimeter.org/promise/10586> [accessed 9 Aug. 2019].

<sup>164</sup> Section 5 of the Employment (Restriction) Act 1968. See also section 6 of the Immigration Act 1959/63.

<sup>165</sup> Section 6(3) of the Immigration Act 1959/63 renders it an offence for non-Malaysians to live in Malaysia without a valid pass or permit. That offence is punishable by a fine of not more than RM 10,000 or imprisonment not exceeding five years or both; offenders are also liable to a whipping of not more than six strokes.

<sup>166</sup> Practical issues arise where employers have paid for foreign workers’ recruitment costs, airfare, etc. and the worker leaves for alternative employment shortly after arrival. That might be remedied by appropriate provisions in the employment contract precluding foreign workers from leaving and working elsewhere for a minimum period. This matter would benefit from tripartite discussions to develop practical options that balance the interests of employee and employer. There are difficulties, however, with such bonded employment proving hard to enforce over recent decades in Australia.



employment terminated and, by extension, their employment pass cancelled. Such an employee was rendered **unable to work or remain in the country while their complaint was being processed**. If such an employee wished to remain in Malaysia, they would have to consider working without documentation, which, opens the employee, penalty aside, to significant vulnerability and employment abuse. Alternatively, an employee in this position must return home and there await the outcome of any investigation into their complaint. In practical terms this is very problematic.

180. Under regulation 14 of the Immigration Regulations 1963, foreign workers may obtain a Special Pass from the immigration authorities to remain in the country for any special reason. This “special reason” has been interpreted to include bringing a legal claim against an employer, but it costs RM 100 per month and, according to a stakeholder, can only be renewed for three months.<sup>167</sup> In addition, the worker, often under enormous pressure to earn an income,<sup>168</sup> is not allowed to work pending the outcome of the investigation.
181. Interestingly, the protection afforded to victims of trafficking greatly differs from that available to foreign workers who have been victims of exploitative labour conditions. According to the ATIPSOM<sup>169</sup> (Permission to Move Freely and to Work) (Foreign National) Regulations 2016, a foreign worker issued with an interim protection order<sup>170</sup> is also separately eligible for a Special Pass, to move freely, as well as a Visit Pass (to be applied for by the new employer) for temporary employment for up to three years. Under the same regime, courts are empowered to make an order for the payment of arrears of wages even in cases of non-conviction of an offence.<sup>171</sup> Consideration should be given to extending these protections to foreign workers who have cases relating to exploitative labour conditions against their employers pending in the LDR system.
182. Additionally, consideration should also be given to further amending sections 57B and 60K of the EA, which seem to imply that a **contract will be terminated (automatically) upon the expiry of the employment pass**. This may lead to exploitation of workers if an employer requires an employee to work beyond the expiry of the employment pass without an employment contract, especially since the renewal of an employment pass is in practice an action taken by the employer, not the employee. The termination of an employment pass, and the termination of an employment

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<sup>167</sup> Under Regulation 14(2) of the Immigration Regulations 1963, the Special Pass is issued for an initial period of one month but may be extended, from time to time, without limitation as to the time period.

<sup>168</sup> This is an imperative not just to put food on the table, but also to repay debts in a foreign worker’s home country and to local agents. See for this and Ramchandran, op. cit., p. 210.

<sup>169</sup> ATIPSOM stands for Anti-Trafficking in Persons and Anti-Smuggling of Migrants.

<sup>170</sup> Section 44 of ATIPSOM Act 2007.

<sup>171</sup> See section 66B (Order for payment of wages in arrears in the case of no conviction) ATIPSOM Act 2007. For compensation to victims where conviction of an offence takes place, see section 66A (Order for payment of compensation to the trafficked person) ATIPSOM Act 2007.

contract are administrative and contractual respectively and should be treated separately. (See also our discussion below on the labour court decision.)

183. One of the seven core recommendations of the Independent Committee on Foreign Workers Management,<sup>172</sup> established by the Malaysian Cabinet in August 2018, focuses on access to justice for foreign workers. In this context, the extent to which **undocumented foreign workers can in practice rely on the LDR system** has proven to be limited and requires improvement, as evidenced in the recent case of *Fice Fransina Nenobais v. Angee Lee (Lee Hee Choon)*,<sup>173</sup> where the complainant was an undocumented domestic worker who sought to claim unpaid wages in terms of the EA in the labour court. The court found (despite the conclusion of the IC in *Ali Salih Khalaf v. Taj Mahal Hotel* referred to further above) that the “complainant is a worker without a valid working permit, hence all transaction done by her is invalid. As a result, the Complainant has no right to make any claims against the Defendant”. The court therefore concluded that it lacked authority to determine the matter on its merits.<sup>174</sup>
184. There is an apparent fundamental conflict between this decision and international labour standards as found in Article 9 of the ILO Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143), not ratified by Malaysia, which reads as follows:
- (1) Without prejudice to measures designed to control movements of migrants for employment by ensuring that migrant workers enter national territory and are admitted to employment in conformity with the relevant laws and regulations, the migrant worker shall, in cases in which these laws and regulations have not been respected and in which his position cannot be regularized, enjoy equality of treatment for himself and his family in respect of rights arising out of past employment as regards remuneration, social security and other benefits.<sup>175</sup>
185. In relation to the immigration status of foreign workers in Malaysia and the enforcement duties carried out by the labour inspectorate, we note that labour inspectors do not directly enforce

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<sup>172</sup> Independent Committee Interim Report, 14 January 2019. This Independent Committee was set up by the Cabinet to streamline policies on foreign workers and make recommendations to the Government to improve the management of foreign workers.

<sup>173</sup> Labour Court, Department of Labour Port Klang, State of Selangor Darul Ehsan, Director-General of Labour Summons Case No. KBR/11002/2018/0273.

<sup>174</sup> The decision of the labour court was appealed to the High Court. On 29 July 2019, High Court Judge Azizah Nawawi remitted the case back to the labour court for a hearing on its merits deciding that it was premature for the labour court to have considered the issue of the validity of the work permit without first ascertaining whether there was an employment relationship between the parties.

<sup>175</sup> Paragraph 8(3) of the Migrant Workers Recommendation, 1975 (No. 151) provides that: “Migrant workers whose position has not been or could not be regularized should enjoy equality of treatment for themselves and their families in respect of rights arising out of present and past employment as regards remuneration, social security and other benefits as well as regards trade union membership and exercise of trade union rights”.

immigration law but rather inform the relevant authority (i.e. Immigration Department or Royal Malaysia Police) regarding any cases of non-compliance. According to the ILO's Labour Inspection Needs Assessment, there have also been instances of inspectors conducting visits together with immigration officials.<sup>176</sup> While the Government has full authority to actively enforce domestic immigration laws, joint visits between inspectors and immigration authorities who have conflicting mandates could detract from the proper enforcement of the legal provisions relating to conditions of work and the protection of workers. In this context, it is worth noting that Australia's Fair Work Ombudsman established under the FWA, with a broad mandate to educate, investigate and prosecute does not concern itself with the immigration status of workers during inspections and investigations, as workers, regardless of immigration status, insofar as the Ombudsman is concerned, have the same rights as Australian citizens.

186. To further regularize the position of foreign workers, we also support suggestions made by some stakeholders for employers to be compelled to **supply foreign workers with employment contracts in their home language** and, similarly, with individual payslips that have the various headings in the home language with detail as to deductions.
187. Given the difficulty we were advised occasionally arises in the **foreign worker identifying their true employer**, when there is, not infrequently, a complex range of sub-contractors whose identity/identities are not communicated to the workers, we see the logic of there being an obligation resting upon the principal or originating employer to record and advise the worker, per medium of the payslip, the names of any sub-contractors to whom they are transferred/deployed or, in the event of sale of the employer's business, of the new employer.<sup>177</sup> Quite apart from the Malaysian taxation authorities having a clear picture of the employer, should that prove necessary, this would allow foreign workers to exercise, in practice, their rights under the amended section 33 of the EA. This provision extends joint liability of employers, contractors and sub-contractors for wages to contractors for labour.<sup>178</sup>
188. The situation of domestic workers was also highlighted by many stakeholders. Protecting this class of workers is particularly difficult, since **labour inspectors do not access private dwellings**. In this regard and with appropriate circumspection, the DGL is well placed to use its unquestioned authority under section 65 of the EA (Powers of Inspection and Inquiry), for the purpose of

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<sup>176</sup> See ILO: *Technical Memorandum Malaysia Labour Inspection Needs Assessment*, op. cit., pp. 3, 23. See also CEACR: Observation on Malaysia in respect of Labour Inspection Convention, 1947 (No. 81), adopted 2014, published 104th ILC session (2015), [https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100\\_COMMENT\\_ID:3177140](https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3177140) [accessed 20 Aug. 2019].

<sup>177</sup> In this respect, as to the provision to employees of information regarding their employment at the point of engagement, see the FWA, op. cit., sections 124 and 125, requiring Australian employers to provide employees with a "Fair Work Information Statement before, or as soon as practicable after, the employee starts employment". As to the Fair Work statement's content, see FWA Regulation 2.01.

<sup>178</sup> See also the amendment to introduce a new section 7C on the presumption as to who is an employee.

conducting workplace inspections at private dwellings where domestic workers are employed. To avoid any potential legal challenge to this authority, the Ministry may consider resolution of a number of these issues by requiring, as a condition of employment of foreign workers in private dwellings, for employers to consent to the entry of labour inspectors for the purpose of conducting workplace inspections.<sup>179</sup>

189. In our view and having regard for the principal objects of the EA, it is important that **further consideration be given to domestic workers** through extending to them EA coverage. While further elaboration is beyond the scope of this work, our recommendations suggest a course of action.

## (iv) Recommendations

190.

38. Reform the current work authorization system to allow foreign workers to change employers during the time period for which the permit is granted.
39. As an alternative and at the very minimum, provide that in cases relating to exploitative labour conditions where foreign workers are seeking administrative redress through the Labour Department or the IRD, they should be automatically provided with a Special Pass and Visit Pass to remain in the country and work, at least until the final disposition of their case (similar to the ATIPSOM regime).
40. Further amend sections 57B and 60K of the EA, which seem to imply that a contract will be terminated (automatically) upon the expiry of the employment pass, to avoid the situation of foreign workers being put in a vulnerable position.
41. Allow undocumented foreign workers full and unhindered access to LDR mechanisms such as the labour court, the IRD and the IC. This includes the provision of legal aid services, translation services and consular assistance where necessary.
42. Compel employers to supply foreign workers with employment contracts in their home language and, similarly, with individual payslips that have the various headings in the home language, with detail as to deductions made from worker's pay.

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<sup>179</sup> For an interesting case of good practice for labour inspection on conditions for domestic workers, see CEACR: Observation in respect of Uruguay's application of ILO Domestic Workers Convention, 2011 (No. 189) – adopted 2018, published 108th ILC session (2019), [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO::P13100\\_COMMENT\\_ID:3960136](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO::P13100_COMMENT_ID:3960136) [accessed 9 Aug. 2019].

43. Require the employer to record and advise the worker, per medium of the payslip, the names of any sub-contractors to whom they are transferred/deployed or, in the event of sale or transfer of the employer's business, the legal or full name of the new employer.
44. The DGL to use its authority under section 65 of the EA (Powers of Inspection and Inquiry), for the purpose of conducting workplace inspections at private dwellings where domestic workers are employed. To avoid any potential legal challenge to this authority, the Ministry should, as a condition of employment of foreign workers in private dwellings, require employers to consent to the entry of labour inspectors for the purpose of conducting workplace inspections.
45. Extend the coverage of the EA to domestic workers.

## 12. Training and Professional Development

### (i) Current framework

191. There is nothing in the legal framework that establishes a set curriculum for professional development (PD – a term we much prefer over *capacity-building*) of conciliators, labour court officials, IC Chairpersons, and other stakeholders in the LDR system.
192. In practice however, Chairpersons of the IC may avail themselves of PD programmes offered by the Judicial and Legal Training Institute (ILKAP) based in Bangi, Malaysia. A cursory review of the programmes offered in 2019,<sup>180</sup> however, shows that these programmes are of general application to all legal officers, judges and adjudicators in the public sector, and not specifically targeted towards Chairpersons.
193. There are currently no programmes at ILKAP targeted towards DGIR conciliators and labour court officials. These two groups of actors within the LDR system are trained internally by their respective departments or on an ad hoc basis, through external collaboration programmes with organizations like the ILO. Most officials at the IR and Labour Departments undergo on the job training without an established curriculum beyond initial induction training.

### (ii) Proposed amendments

194. No amendments have been proposed to the above framework. However, our consultations revealed consensus that a multi-faceted PD program should be instituted and adequately funded.

### (iii) Discussion

195. We felt those who are involved in disputes, whether Government, union or employer officials, showed an encouraging depth of knowledge of the LDR system. They nearly all expressed their desire for further, targeted, training and professional development. In our view the ongoing

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<sup>180</sup> See <http://www.ilkap.gov.my/download/latihan/2019/ProgramLatihanILKAP2019.pdf> [accessed 9 Aug. 2019]. Note, however, that only item 16 (Workshop on Legal Opinion Writing) specifically targets IC Chairpersons.

provision for skills enhancement for Chairpersons, conciliators, mediators and labour court officials is fundamental to the provision of judicial and quasi-judicial service to the community.<sup>181</sup>

196. In relation to PD programmes for new Chairpersons, conciliators, mediators and labour court officials, we found the Australian experience to be particularly instructive. In Australia, the President of the Fair Work Commission informally asks a Commissioner of some standing to act as an informal **mentor** for a new Commissioner during their first few months of service. This mentoring modality is something, we think, Malaysia could replicate across the LDR system spectrum.
197. Very often, new appointees do not have experience across the entire range of their jurisdiction. Therefore it is preferable for all new Chairpersons, conciliators, mediators and judges to undergo **induction training** for which the induction syllabus should accordingly be structured yet flexible so as to be targeted based on the duties and breadth of experience of the new appointment.
198. In respect of existing Chairpersons, conciliators, mediators and labour court officials, it is crucial that a **continuing PD programme (*éducation permanente*)** be established to ensure these officials have access to refresher courses, topping up programmes and retraining modules as and when necessary to keep up with the ever-evolving demands of the world of work.
199. To minimize work disruptions and associated costs, consideration could be given, where appropriate, to ensuring that both induction courses as well as those adopted under the *éducation permanente* structure are available **online**.
200. Consideration should also be given to rolling out **certification courses** for both new and existing Chairpersons, conciliators, mediators and labour court officials in collaboration with bodies such as the ILO International Training Centre (ITC) in Turin or other established national LDR institutions. Such certification programmes would respond to the targeted needs of the different LDR bodies in Malaysia based specifically on the institutional development strategies.
201. Specifically for existing Chairpersons, conciliators, mediators and labour court officials, the departmental or IC's **annual conference/retreat** will also provide an excellent opportunity for the inclusion of PD sessions – sometimes by having an expert of high standing address the members.
202. In this respect, it will also be of value for the Malaysian industrial bodies to consider establishing **links of friendship, perhaps through memorandums of understanding, with equivalent**

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<sup>181</sup> The function of a thoughtful PD programme will be to expose members to new ideas and research regarding myriad issues – inter alia judicial ethics, the provision of reasons and decision-writing, courtroom, case and witness management, the ILO Conventions, the subtle narrowing of matters in issue, the giving of extempore decisions and coping personally with the unrelenting pressure of a busy caseload.

**tribunals internationally**, such as Australia’s Fair Work Commission, as an aid to exchanging experiences and knowledge.

203. During our consultations, stakeholders regularly representing parties at disputes remarked that, while having a role to play within the LDR system, they sometimes felt ill-equipped, having had no access to training or other PD programmes. In this respect, we have broadly surveyed the types of services provided in other national jurisdictions where, like Malaysia, there exist State-sponsored conciliation and arbitration courts and tribunals,<sup>182</sup> and found that in those instances courts and tribunals offer assistance via **advocacy courses** run by law institutes. It is our view that regularizing such programmes in Malaysia (for example under the auspices of the Bar Council) will allow current users as well as younger, emerging industrial staff of unions, companies and employer organizations, to benefit from the expertise of the Chairpersons of the IC through either moot court proceedings or guest lectures.<sup>183</sup> In this context, we refer readers to Chapter 6 on Representation of Parties, where we recommend **regular advocacy training** for trade union officials and employer representatives, especially those who are not legally trained, as is done in other jurisdictions such as Australia and Cambodia.
204. As alluded to in Chapter 5, above, on Jurisdiction and Powers of the Courts, we acknowledge that considerable effort has already been given to **making publicly available material relevant** on industrial relations (such as IC awards) and conditions of employment throughout Malaysia. Conscious that many parties endeavour to seek information before, or in lieu of, obtaining “third party” guidance, our recommendation is that the Ministry and IC’s websites not only contain easily navigable access to all relevant Acts, but also user-friendly court forms and precedents, fact sheets of key elements of the system’s workings, frequently asked questions, and links to leading decisions/awards in a format searchable by keyword and/or issue.<sup>184</sup>

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<sup>182</sup> In contrast, there are alternative systems (which lie beyond the scope of this Report) where the labour market is left essentially to self-regulate and where, as in North America, labour “arbitration” in the non-public sector refers to often troubled, privatised arbitration, with shared costs, and where proceedings are not conducted by tribunal members.

<sup>183</sup> Cambodia provides a good example of tribunal PD outreach, as Arbitrators of the national workplace relations tribunal, the Arbitration Council, conduct regular advocacy courses and conduct seminars/lectures to employers and union officials on conflict theory and conciliation and arbitration as practised in that country. When, as regularly occurs, international advisers/visitors are present for consultations with the tribunal and Ministry, PD sessions with the Arbitrators are scheduled as to matters of current interest, and workshops/conferences are arranged for the industrial parties, the international buyers, interested NGOs and/or the diplomatic corps. On such occasions presentations on comparative labour systems to the major law schools are also conducted in addition to moot courts on a topical scenario.

<sup>184</sup> Many court and tribunal websites also contain detailed information in plain language, extending to such innovations as virtual maps/tours, intended to ensure accessibility, so that parties are less daunted in attending their proceeding. Similarly, detailed information, including of the need to bring relevant documentation, can be set out, outlining what can be expected on the day of the proceeding, indicating exactly where to find their allocated hearing room, how to address the Conciliator or those on the Bench, and whom they may speak to upon arrival in the hearing room for further guidance.



205. On a final note, the Fair Work Commission in Australia maintains “bench books”, setting out under detailed subject headings the summaries of decisions and associated commentary, collated previously for the sole use of Commissioners. Recently, these bench books have been made available to all,<sup>185</sup> the logic no doubt being that if parties are privy to the jurisprudence relating to their cases and so are better prepared, the cases are better argued, thereby assisting the task of Commissioners hearing them. In our view the development of topic specific bench books would be most worthwhile in helping to prepare parties with matters they bring before the labour court, the IC and the EAC.
206. In our view, the LDR system in Malaysia would benefit from a more **in-depth training needs assessment** of each professional actor/user of the system.

## (iv) Recommendations

207.

46. Establish structured induction and éducation permanente PD programmes of various modalities including, for example, mentoring, online training and certification to ensure that Chairpersons, conciliators, mediators and labour court officials are properly trained to ensure an effective and efficient arbitration/conciliation process in accordance with international best practice.
47. Include PD sessions during annual conferences/retreats of relevant Ministry departments as well as the IC.
48. Create links of friendship with equivalent tribunals internationally.
49. Establish advocacy/case preparation courses both for newly minted industrial staff of unions, companies and employer organizations, as well as those existing lay union officials and employer representatives who appear before the IC and labour courts.
50. Make more material on industrial relations and conditions of employment available on the Ministry and IC websites.
51. Conduct a more in-depth training needs assessment of each professional actor/user of the system.

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<sup>185</sup> See <https://www.fwc.gov.au/resources/benchbooks> [accessed 1 Aug. 2019].

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## 14. Annexes

### 1 – List of Recommendations

No.	Recommendations
<b>ROLE OF THE MINISTRY</b>	
1.	The Minister’s referral role under the IRA should be removed and consideration be given to ensuring automatic referrals of cases by the DGIR to the IC (or alternatively, allowing either party to file their case at the IC) if the case has not been successfully conciliated within a specific period of time, e.g. three months.
2.	Consideration should be given to deterring the referral of frivolous or vexatious disputes via costs orders by the IC, taking into account the views of the Chairperson on the frivolity of the case as expressed during (mandatory) early evaluation.
3.	Ensure that DGIR conciliators, labour officers and party representatives are properly trained to ensure an effective and efficient conciliation process in accordance with international best practice.
<b>JURISDICTION AND POWERS OF THE COURTS</b>	
4.	Increase the number of labour officers and clearly differentiate between officers in charge of labour inspection and those responsible for labour dispute and/or other duties.
5.	Conduct a study on international best practice in arbitration in order to establish what might be useful in the Malaysian context to move away from legalism, formality and technicality.
6.	Make more information in an easily digestible form available to the public through the Ministry and IC websites and enhance the search function on the IC website to enable users to search through the database by way of keyword and/or issue.
7.	Introduce an automatic rotation at the IC to assign cases to panel members. Security of tenure should be introduced for the President and all Chairpersons of the IC. Revise the Ministry’s organigram to clearly reflect the IC as a separate and independent branch of the Ministry.
8.	Ensure the EAC is placed as high as possible in the judicial hierarchy (at the level of the Court of Appeal) to limit the number of appeals.
9.	The scope for appeal to the EAC should be limited to deter parties from seeking appeals and thus delaying the finalization of disputes.
10.	Consideration should be given to explicitly excluding reviews of IC decisions in the High Court.
11.	Ensure that all labour-related disputes, both under the EA and IRA, are handled in the specialized system of labour court/IC and EAC.

No.	Recommendations
12.	In line with the above, streamline all labour-related disputes through a similar process, i.e. from DG to the IC with an appellate procedure to the EAC and final disposition at the Federal Court, only on a question of law.
13.	Consideration may be given to staggering the date of entry into force of the legislative amendments with respect to the various EA categories of disputes.
14.	Long-term vision of a fully integrated LDR system, with DGIR conciliators integrated into the IC and the jurisdiction of the labour court subsumed into the IC – thereby providing a multi-skilled conciliation and arbitration institution; for future reflection by Ministry and social partners.
15.	Consideration should also be given to fast-tracking disputes on recognition of trade unions and legality of strikes directly to the EAC for rapid resolution/decision-making.
16.	Stakeholders should be allowed input into the selection of EAC judges (and possibly IC Chairpersons).
17.	The EAC must be properly resourced in terms of staff and judges to deal with the cases to be referred to it.
18.	The EAC should have regular sittings throughout Malaysia, as necessary, in order to ensure that it is accessible to the parties.
19.	Orientation and induction programs should be provided for newly appointed hearing officers and IC Chairpersons and panel members.
20.	Ensure subsequent access to broad-ranging professional development.
<b>REPRESENTATION OF PARTIES</b>	
21.	There should be consistency regarding the regulation of representation in conciliation, which could be achieved by inserting a consolidated section on representation during all forms of conciliation.
22.	Internal directives relating to labour court procedures including the powers of hearing officers to regulate representation should be made public.
23.	Training should be provided to lay representatives in the IC.
24.	Representation in the EAC should be extended to non-lawyers in line with the level of representation at the IC.
<b>TIME-BOUND SYSTEM</b>	
25.	Introduce strict and published timelines at all stages of the dispute resolution process.
26.	Provide for institutional timeliness/performance benchmarks for the general guidance of hearing officers and establish broad expectations for those appearing before the IC. Actual performance outcomes regularly achieved (expressed on an institutional basis) should be posted on a quarterly basis to the Ministry's website.

No.	Recommendations
27.	Rigorous case management should be applied by hearing officers and IC Chairpersons.
28.	Allow automatic referral to the IC after a lapse of a certain time period, say three months, during which conciliation has taken place without settlement or, alternatively, allow either party to directly access the IC upon the lapse of the aforementioned time period.
29.	Limit the number of and reasons for postponements that may be granted by the IC, labour court and DGIR and make public any guidelines on postponements.
<b>RECOGNITION DISPUTES AND OTHER DISPUTES RELATING TO COLLECTIVE BARGAINING</b>	
30.	Amend section 10(1) of the IRA to allow employees to strike on issues relating to recognition of trade unions (and other matters outside of collective bargaining), which would be consistent with the applicable ILO principles.
31.	Resolve all recognition disputes as a matter of priority through decision-making directly by the EAC with limited rights to appeal.
<b>RESOLUTION OF UNFAIR LABOUR PRACTICES</b>	
32.	Remedy the confusion with respect to IRA sections 8 and 59 to ensure criminal action under section 59 does not preclude another (civil) under section 8 or, at the very minimum, by introducing clear guidelines on procedures for filing complaints either with the DGIR under section 8 or through criminal procedures under section 59.
33.	Provide for a reverse onus of proof in criminal complaints of anti-union discrimination.
34.	Allow the IC to deal with cases of anti-union discrimination as a matter of priority through a certificate of urgency.
35.	Limit management prerogatives to suspend, transfer, lay off, discharge and not promote employees that may affect trade union activities.
36.	Allow for plurality of unions in line with ILO Convention No. 87 to reduce “yellow unions” and to ensure employees are not left without genuine union representation.
<b>ENTERPRISE-LEVEL GRIEVANCE PROCEDURE</b>	
37.	Introduce a general provision in the IRA (or EA) requiring the establishment of an enterprise-level grievance procedure for all employees in an enterprise with minimum employment number and for all aspects of the employment relationship.
<b>ACCESSIBILITY OF LDR PROCESSES FOR MIGRANT WORKERS</b>	
38.	Reform the current work authorization system to allow foreign workers to change employers freely during the time period for which the permit is granted.
39.	As an alternative and at the very minimum, provide that in cases relating to exploitative labour conditions where foreign workers are seeking administrative redress through the Labour Department

No.	Recommendations
	or the IRD, they should be automatically provided with a Special Pass and Visit Pass to remain in the country and work, at least until the final disposition of their case (similar to the ATIPSOM regime).
40.	Further amend sections 57B and 60K of the EA which seem to imply that a contract will be terminated (automatically) upon the expiry of the employment pass, to avoid the situation of foreign workers being put in a vulnerable position.
41.	Allow undocumented foreign workers full and unhindered access to LDR mechanisms such as the labour court, the IRD, and the IC. This includes the provision of legal aid services, translation services and consular assistance where necessary.
42.	Compel employers to supply foreign workers with employment contracts in their home language and, similarly, with individual payslips that have the various headings in the home language, with detail as to deductions made from worker's pay.
43.	Require the employer to record and advise the worker, per medium of the payslip, the names of any sub-contractors to whom they are transferred/deployed or, in the event of sale or transfer of the employer's business, the legal or full name of the new employer.
44.	The DGL to use its authority under section 65 of the EA (Powers of Inspection and Inquiry), for the purpose of conducting workplace inspections at private dwellings where domestic workers are employed. To avoid any potential legal challenge to this authority, the Ministry should, as a condition of employment of foreign workers in private dwellings, require employers to consent to the entry of labour inspectors for the purpose of conducting workplace inspections.
45.	Extend the coverage of the EA to domestic workers.
<b>TRAINING AND PROFESSIONAL DEVELOPMENT</b>	
46.	Establish structured induction and <i>éducation permanente</i> PD programmes of various modalities including for example, mentoring, online training, and certification to ensure that Chairpersons, conciliators, mediators and labour court officials are properly trained to ensure an effective and efficient arbitration/conciliation process in accordance with international best practice.
47.	Include PD sessions during annual conferences/retreats of relevant Ministry departments as well as the IC.
48.	Create links of friendship with equivalent tribunals internationally.
49.	Establish advocacy/case preparation courses both for newly minted industrial staff of unions, companies and employer organizations, as well as those existing lay union officials and employer representatives who appear before the IC and labour courts.
50.	Make more material on industrial relations and conditions of employment available on the Ministry and IC websites.
51.	Conduct a more in-depth training needs assessment of each professional actor/user of the system.



## 2 – List of Persons Consulted

No.	Name	Position
<b>Ministry of Human Resources</b>		
1.	Ms Betty Hassan	Undersecretary, Policy Division
2.	Mr Shanmugam Thiagarajan	Deputy Director-General, Industrial Relations Department
3.	Mr Ahmad Kamal Mohd Nor	Industrial Relations Department
4.	Ms Noor Azian Binti Jamaludin	Industrial Relations Department
5.	Mr Mooi Poh Kong	Trade Unions Department
6.	Ms Nazatulshima Che Hassan	Trade Unions Department
7.	Ms Sumita Mabel Tambou	Labour Department, Peninsular Malaysia
8.	Ms Zainab Kamar	Labour Department, Peninsular Malaysia
9.	Mr Zamzuri Bin Bidin Abidin	Labour Department, Peninsular Malaysia
10.	Ms Meriam Binti Mohd Noor	Policy Division
11.	Ms Kala Thangarajoo	International Division
<b>Malaysian Employers Federation (MEF)</b>		
12.	Mr M. V. Gopal	General Manager – Industrial Relations
13.	Mr Goh Seng Wing	Senior Consultant – Industrial Relations
<b>Malaysian Trades Union Congress (MTUC)</b>		
14.	Mr J. Solomon	Secretary-General
15.	Mr Somasundram Karuppiah	Education Officer
16.	Mr Muhammad Zulfadlee Thye Abdullah	Migrant Resource Centre Coordinator
17.	Mr Raghwan Raghwan	MTUC Consultant
<b>Industrial Court</b>		
18.	Mr Eddie Yeo Soon Chye	President of the Court
19.	Ms Anna Ng Fui Choo	Chairperson, Court 3
20.	Mr Augustine Anthony	Chairperson, Court 4
21.	Mr Gulam Muhiaddeen bin Abdul Aziz	Chairperson, Court 6

<b>No.</b>	<b>Name</b>	<b>Position</b>
22.	Ms Noor Ruwena Binti Dato' Md Nurdin	Chairperson, Court 12
23.	Ms Sumathi A/P Murugiah	Chairperson Court 16, Johor
24.	Dato' Fredrick Indran X.A. Nicholas	Chairperson, Court 22
25.	Mr Franklin Goonting	Chairperson, Court 28 and Head of Task Force Courts
26.	Ms Noramirah binti Ali	Assistant Registrar, Industrial Court
<b>Bar Council – Industrial and Employment Law Committee</b>		
27.	Mr Anand Ponnudurai	Co-Chairperson
28.	Ms Selvamalar Alagaratnam	Member
29.	Mr Sunil Vijayan	Member
<b>Solidarity Center</b>		
30.	Mr David Welsh	Country Director for Malaysia and Indonesia
<b>Tenaganita</b>		
31.	Ms Glorene Amala Das	Executive Director
32.	Ms Elise Arya Chen	Programme Officer
<b>ILO</b>		
33.	Mr Alain Pelce	Senior Specialist on International Labour Standard and Labour Law, ILO Regional Office for Asia and the Pacific, Bangkok
34.	Mr René Robert	Specialist in Labour Administration and Labour Inspection, ILO Regional Office for Asia and the Pacific, Bangkok
35.	Mr Youngmo Yoon	Social Dialogue Specialist, ILO Regional Office for Asia and the Pacific, Bangkok
36.	Ms Florida Sandanasamy	National Project Coordinator, ILO Migrant Workers Empowerment and Advocacy Project, Kuala Lumpur

## 3 – List of Documents Reviewed

### PUBLICATIONS

See REFERENCES, Section 13, above.

### LAWS, REGULATIONS AND OTHER LEGAL INSTRUMENTS

#### Malaysia

Federal Constitution

Employment Act 1955

Employment (Restriction) Act 1968

Industrial Relations Act 1967

Trade Unions Act 1959

Anti-Trafficking in Persons and Anti-Smuggling of Migrants (ATIPSOM) Act 2007

Court of Judicature Act 1964

Immigration Act 1959

Passports Act 1966

Sabah Labour Ordinance 1950

Sarawak Labour Ordinance 1952

Industrial Relations Regulations 2009

Immigration Regulations 1963

ATIPSOM (Permission to Move Freely and to Work) (Foreign National) Regulations 2016

Industrial Court Rules 1967

Rules of Court 2012

Industrial Court Practice Notes.

Code of Conduct for Industrial Harmony 1975 (CoC)

Practice Directives Labour Court (internal)

Draft amendments to the Employment Act 1955 (12 January 2019)

Draft amendments to Industrial Relations Act 1967 (11 January 2019)

Draft amendments to Trade Unions Act 1959 (10 January 2019)

Proposed amendments to the Industrial Relations Act 1967 on the Establishment of an Industrial Appeal Court (30 January 2019)

Proposed amendments to CoC (April 2019)

### **Other jurisdictions**

Australia's Fair Work Act 2009

South Africa's Labour Relations Act 66 of 1995

South Africa's National Economic Development and Labour Council Act 35 of 1994

South Africa's CCMA Rules

Cambodia's 1997 Labour Law

India's Industrial Disputes Act 1947

Germany's Works Constitution Act 1972

## **ILO INSTRUMENTS**

Constitution, 1919

### **Conventions**

Forced Labour Convention, 1929 (No. 29)

Labour Inspection Convention, 1947 (No. 81)

Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87)

Right to Organize and Collective Bargaining Convention, 1949 (No. 98)

Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143)

Domestic Workers Convention, 2011 (No. 189)

Termination of Employment Convention, 1982 (No. 158)

### **Recommendations**

Voluntary Conciliation and Arbitration Recommendation, 1951 (No. 92)

Examination of Grievances Recommendation, 1967 (No. 130)

Migrant Workers Recommendation, 1975 (No. 151)

## **JURISPRUDENCE**

Supreme Court in *Government of Malaysia & Anor v. Jagdis Singh* [1987] 2 MLJ 185

*Minister of Labour Malaysia v. Lie Seng Fatt* [1990] 2 MLJ 9 the Malaysian Supreme Court held

*National Union of Hotel, Bar & Restaurant Workers v. Minister of Labour & Manpower* [1980] 2 MLJ 189

*Hotel Equatorial (M) v. National Union of Hotel, Bar and Restaurant Workers* (Federal Court) [1984] 1 MLJ 363

*R Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145

*Sabah Forest Industries Sdn Bhd v. Industrial Court Malaysia & Anor*, Court of Appeal, Putrajaya, Civil Appeal No: S-01-227-2011] 15 May 2012

*Sivalingam v. Periasamy* [1995] 3 MLJ 395

*Ali Salih Khalaf v. Taj Mahal Hotel* Case No. 22(27)/4-1580/12; Award No. 245 of 2014

*Fice Fransina Nenobais v. Angee Lee (Lee Hee Choon)* Labour Court of Department of Labour Pelabuhan Klang, State of Selangor Darul Ehsan, Director General of Labour Summons Case No. KBR/11002/2018/0273

Australian High Court decision of *House v. The King* (1936) 55 CLR 499

High Court in *Coal and Allied Operations Pty Ltd v. Australian Industrial Relations Commission* [2000] HCA 47, 203 CLR 194.

## **DATA**

Labour Department Peninsular Statistics (2018)

Labour Department Sabah Statistics (2013–2018)

Labour Department Sarawak Statistics (2013–2018)

Industrial Relations Department Statistics (2013–2018)

Industrial Court Data (2013–2018)

## **OTHER**

Malaysia – US Labour Consistency Plan

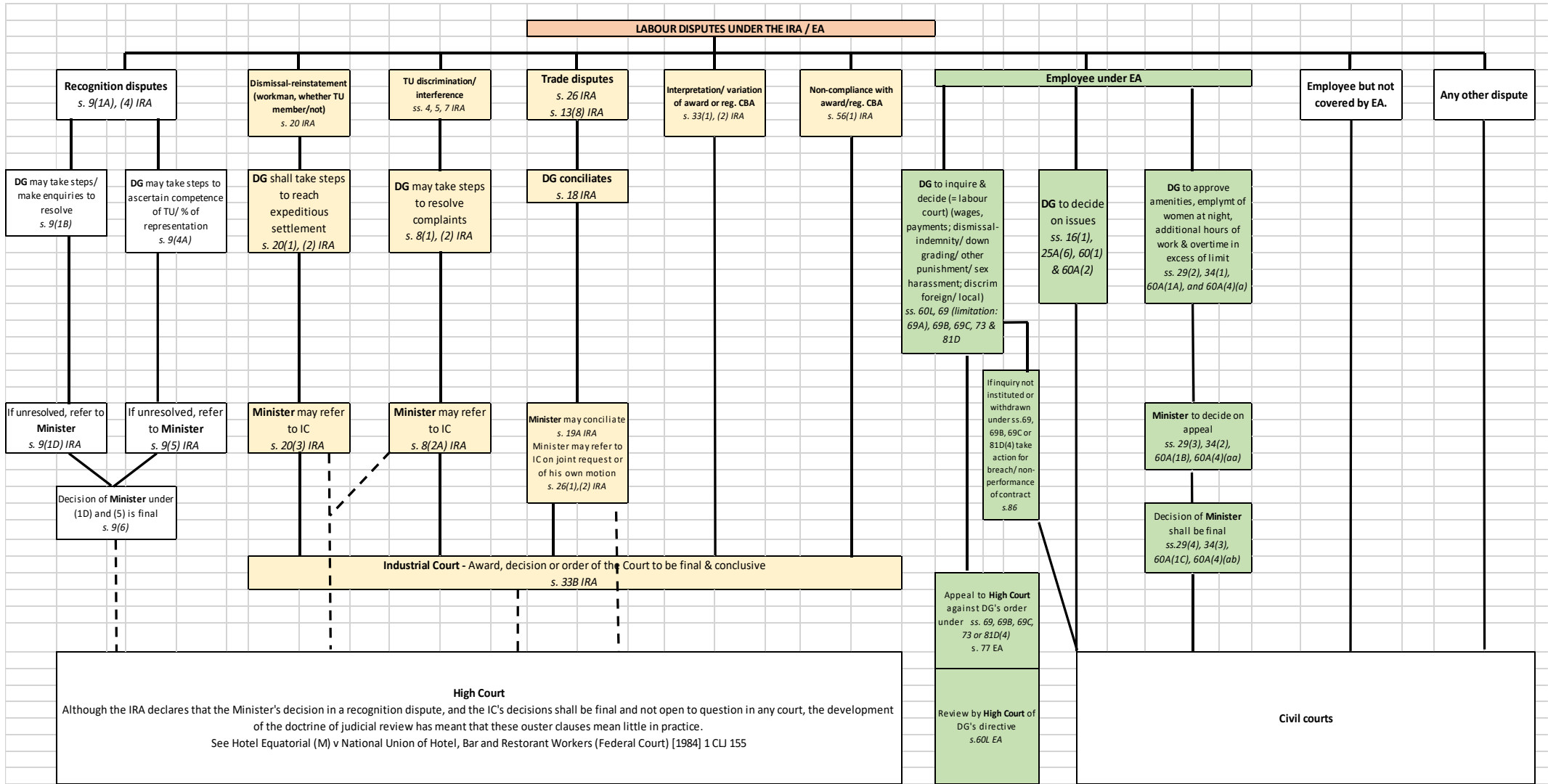
Ministry of Human Resources Organigram (received 23 July 2019)

Labour Department Workflow for Trial of Labour Cases

Labour Department Workflow for Appeals on Decisions of the Labour Court

Report of the Study Tour to Australia’s Fair Work Commission, Fair Work Ombudsman and the Federal Court in Melbourne on Employment and Industrial Relations Issues by the Malaysian Delegation, 9–11 July 2019 (received 5 August 2019).

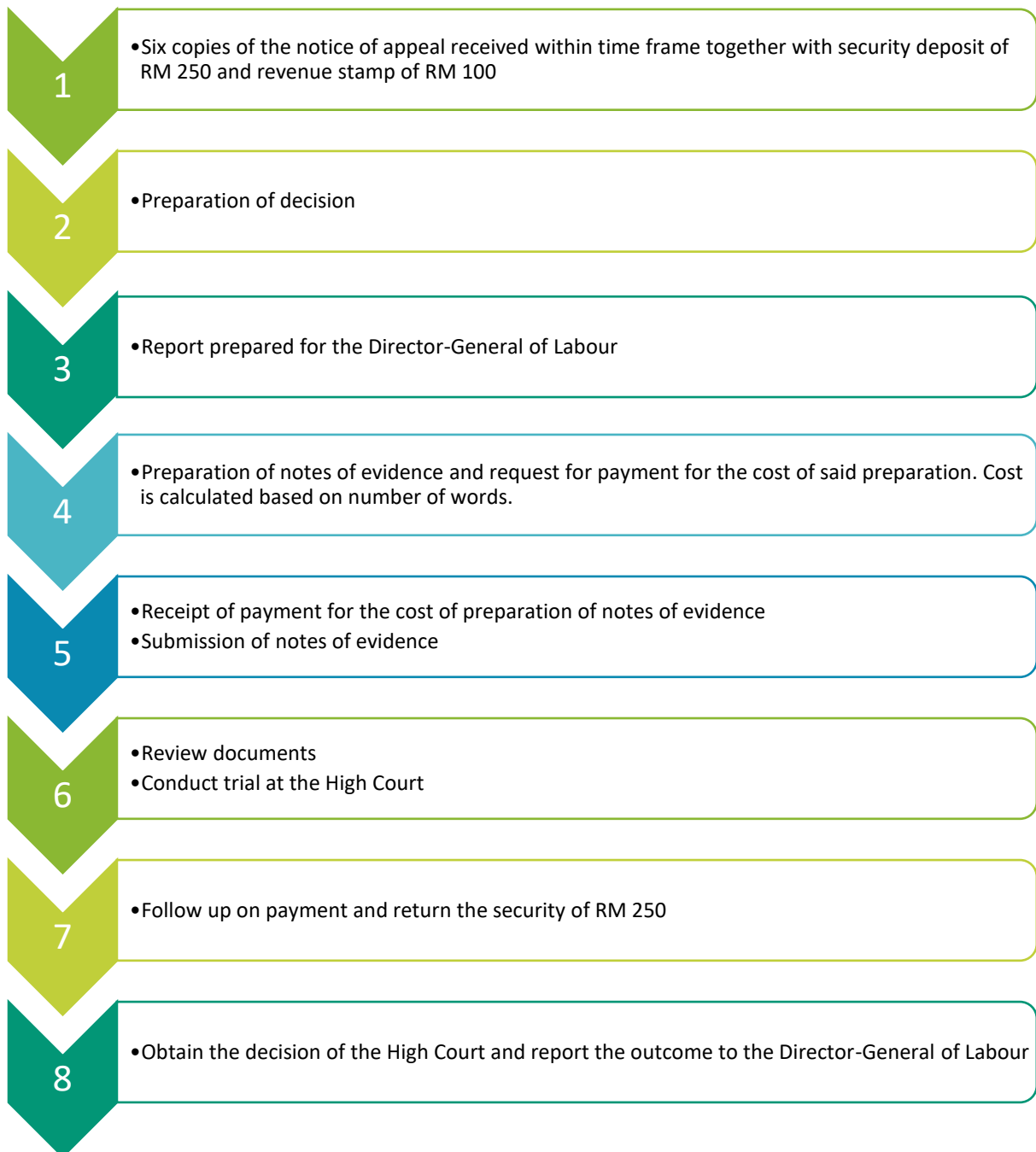
# 4 – LDR Chart



## 5 – LD Workflow for Trial of Labour Cases

1. Claimant (worker/employer) makes a claim at the labour office.
2. Research and peruse the claim/complaint to determine whether it has merit and actionable:
  - a. If the case has no merit/actionable, inform the claimant/complainant.
3. The worker is asked to take an oath and his claim recorded to determine if it has sufficient basis to go to trial.
4. Mention date is fixed.
5. Inform the claimant/complainant and employer of the mention date through a letter.
6. Mention of the case.
7. The employer admits to the claim and a consent order is issued. The employer is ordered to make payment.
  - a. Consent order is complied with and payment is made by the employer
  - b. Case is resolved
8. Employer requests for time to make payment and the request is approved. Date for payment is fixed.
  - a. Take appropriate action to ensure payment
  - b. If no payment is received, enforce the order through Judgment Debtor Summons (JDS), Writ of Seizure and Sale (WSS), etc.
9. Employer challenges the claim or is absent.
10. Both parties are informed of the trial date.
11. Trial is conducted.
12. Decision is made.
13. Case is struck off.
  - a. Order for striking off is informed to the claimant in open court and the right to appeal to the High Court is explained to parties
  - b. Case is resolved
  - c. Order for striking off is challenged by worker and appeal is lodged with the High Court (in such a case, see next actions at steps 16 and 23)
14. Order for payment is made by the court.
  - a. Payment is made and case is resolved
  - b. If no payment is made, enforce the order through JDS, WSS, etc.
15. The Order is challenged, and appeal is made to the High Court.
16. Prepare record of appeal.
17. Follow up action on the appeal.
18. The High Court makes a decision.
19. Decision of the Labour Court upheld.
  - a. Order received from the High Court, case resolved
20. Decision of the Labour Court vacated.
  - a. Order to vacate is received, case resolved
21. Decision to re-hear the case at the Labour Court. Repeat process from step 10.
22. Decision of the High Court is challenged, and an appeal is lodged with the Court of Appeal.
23. The Court of Appeal hears the appeal and makes a decision.
24. Case resolved.

## 6 – LD Workflow for Appeals on Decisions of the Labour Court





## 7 – LD Peninsular Statistics 2018

- Number of Labour Courts throughout Malaysia:
  - **There are 14 State Offices and 39 District Labour Offices in Peninsular Malaysia**
  - **Labour Courts are only at the District Office: 60 labour courts**
- Number of labour officers: **Average of 300 plus officers**
- Total number of labour complaints received: **13,639**
- Categories of complaints (e.g. unpaid wages, payment for overtime work, etc.):
  - a) **Unpaid wages – 6,143**
  - b) **Salary In Lieu of Notice (By Employer) – 3,131**
  - c) **Salary In Lieu of Notice (By Employee) – 4,115**
  - d) **Salary In Lieu of Annual Leave – 1,317**
  - e) **Overtime Pay (Normal Day) – 1,136**
  - f) **Termination Benefits – 2,445**
  - g) **Balance of Unpaid Minimum Wages – 594**
  - h) **Other Claims – 1,198**
    - The list above are the highest claims made for 2018
    - A total of 22,354 claims made in 2018
- Number of complaints conciliated/mediation – **3,991**
- Number of complaints heard before the Labour Court – **13,639**
- Total number of appeals filed to the High Court – **28 cases**

## 8 – LD Sabah Statistics 2013-2018

### Number of Labour Courts

2013	2014	2015	2016	2017	2018
15	15	15	15	15	15

### Number of Labour Officers

2013	2014	2015	2016	2017	2018
82	83	82	77	86	88

### Number of Labour Complaints Received

2013	2014	2015	2016	2017	2018
1,146	1,349	1,448	1,398	1,569	1,453

## Number of Cases by Categories

Categories	2013	2014	2015	2016	2017	2018
Unpaid wages	486	640	706	595	577	594
Salary In Lieu of Notice by Employer	229	253	244	302	277	236
Salary In Lieu of Notice by Employer	323	373	447	372	340	334
Unpaid wages – Public Holiday	16	8	19	9	18	0
Unpaid Wages – Annual Leave	51	64	74	64	86	78
Unpaid wages – Medical Leave	4	6	5	11	13	7
Payment for OT on normal working day	55	83	82	73	139	103
Payment for OT on rest day	13	20	23	20	38	40
Payment for OT on public holiday	11	19	11	26	32	34
Maternity allowance	8	4	4	11	9	1
Termination and Lay-off Benefit	238	246	285	315	319	302
Commission	22	15	23	29	17	23
Guaranteed week	0	0	1	0	0	0
Unpaid minimum wages	1	0	3	66	157	155
Others	130	179	244	153	130	105

*Note: Numbers are based on categories of complaint and not based on number of cases. Each case may contain more than one claim*

### Number of complaints conciliated/mediated

2013	2014	2015	2016	2017	2018
365	470	485	528	659	527

### Number of complaints heard before the Labour Court

2013	2014	2015	2016	2017	2018
694	801	917	806	798	780

### Disposal rate for the complaints both at hearing and conciliation/mediation

ITEM	2013	2014	2015	2016	2017	2018
C/M	32%	35%	34%	38%	42%	36%
Hearing	61%	59%	63%	58%	51%	64%

### Time frame for disposal of complaints at all stages

2013	2014	2015	2016	2017	2018
93%	93%	95%	96%	94%	93%

### Total number of appeals filed to the High Court

2013	2014	2015	2016	2017	2018
2	2	8	6	9	1

## 9 – LD Sarawak Statistics 2013-2018

### Number of Labour Courts

2013	2014	2015	2016	2017	2018
16	16	16	16	16	16

### Number of Labour Officers

2013	2014	2015	2016	2017	2018
64	64	64	63	73	67

### Number of labour complaints received by categories

Year	2013	2014	2015	2016	2017	2018
Unpaid wages	457	433	459	388	394	367
Payment for OT	69	91	90	96	154	89
Payment for Leave/Allowance	60	71	54	101	58	50
Salary in lieu of Notice	353	389	455	408	465	472
Termination and Lay-off Benefit	109	99	109	135	112	154
<b>Total</b>	<b>1,048</b>	<b>1,083</b>	<b>1,167</b>	<b>1,128</b>	<b>1,183</b>	<b>1,132</b>

### Disposal rate for the complaints both at hearing and conciliation/mediation

2013	2014	2015	2016	2017	2018
88.3%	89.1%	90.1%	90.8%	89.1%	87.0%

### Total number of appeals filed to the High Court

2013	2014	2015	2016	2017	2018
7	4	3	3	1	3

## 10 – IRD Statistics 2013-2018

### SECTION 8 (COMPLAINTS OF UNION BUSTING)

PARTICULAR	2013		2014		2015		2016		2017		2018	
	NO. OF CASES	%	NO. OF CASES	%	NO. OF CASES	%	NO. OF CASES	%	NO. OF CASES	%	NO. OF CASES	%
CASES BROUGHT FORWARD FROM PREVIOUS YEAR	3		1		5		1		6		4	
REPORTED IN CURRENT YEAR	7		9		23		33		23		14	
TOTAL DEALT	10		10		28		34		29		18	
TOTAL RESOLVED	9	90	5	50	27	96	28	82	25	86	14	78
a) *RESOLVED THROUGH CONCILIATION	3	33	3	60	18	67	17	61	20	80	9	64
b) *THROUGH DECISION BY MINISTER :-	6	67	2	40	9	33	11	39	5	20	5	36
i) *REFERRED TO INDUSTRIAL COURT	3	33	1	20	9	33	10	36	5	20	5	36
ii) *NOT REFERRED TO INDUSTRIAL COURT	3	33	1	20	0	0	1	4	0	0	0	0
BALANCE	1		5		1		6		4		4	

## SECTION 9 (CLAIM FOR RECOGNITION)

PARTICULAR	2013		2014		2015		2016		2017		2018	
	NO. OF CASES	%	NO. OF CASES	%	NO. OF CASES	%	NO. OF CASES	%	NO. OF CASES	%	NO. OF CASES	%
CASES BROUGHT FORWARD FROM PREVIOUS YEAR	65		57		38		34		41		33	
REPORTED IN CURRENT YEAR	92		99		127		97		84		125	
TOTAL DEALT	157		156		165		131		125		158	
TOTAL RESOLVED	100	<b>64</b>	118	<b>76</b>	131	<b>79</b>	90	<b>69</b>	92	<b>74</b>	99	<b>63</b>
a) *RECOGNITION ACCORDED VOLUNTARILY	9	<b>9</b>	15	<b>13</b>	6	<b>5</b>	2	<b>2</b>	10	<b>11</b>	10	<b>10</b>
b) *RECOGNITION ACCORDED BY DECISION OF THE MINISTER	30	<b>30</b>	25	<b>21</b>	18	<b>14</b>	18	<b>20</b>	18	<b>20</b>	16	<b>16</b>
c) *DECISION OF THE MINISTER NOT RECOGNIZED	15	<b>15</b>	29	<b>25</b>	30	<b>23</b>	19	<b>21</b>	29	<b>32</b>	20	<b>20</b>
d) *CLAIM REJECTED/WITHDRAWN	43	<b>43</b>	40	<b>34</b>	51	<b>39</b>	41	<b>46</b>	28	<b>30</b>	50	<b>51</b>
e) *OTHERS	3	<b>3</b>	9	<b>8</b>	26	<b>20</b>	10	<b>11</b>	7	<b>8</b>	3	<b>3</b>
BALANCE	57		38		34		41		33		59	

## SECTION 9(1A) (CAPACITIES ISSUE)

PARTICULAR	2013		2014		2015		2016		2017		2018	
	NO. OF CASES	%	NO. OF CASES	%	NO. OF CASES	%	NO. OF CASES	%	NO. OF CASES	%	NO. OF CASES	%
CASES BROUGHT FORWARD FROM PREVIOUS YEAR	41		19		33		132		28		382	
REPORTED IN CURRENT YEAR	40		143		189		60		961		5,382	
TOTAL DEALT	81		162		222		192		989		5,764	
TOTAL RESOLVED	62	<b>77</b>	129	<b>80</b>	90	<b>41</b>	164	85	<b>607</b>	61	1,429	<b>25</b>
BALANCE	19		33		132		28		382		4,335	



## SECTION 13 (DEADLOCK IN COLLECTIVE AGREEMENT NEGOTIATION)

PARTICULAR	2013		2014		2015		2016		2017		2018	
	NO. OF CASES	%	NO. OF CASES	%	NO. OF CASES	%	NO. OF CASES	%	NO. OF CASES	%	NO. OF CASES	%
CASES BROUGHT FORWARD FROM PREVIOUS YEAR	26		24		21		30		25		19	
REPORTED IN CURRENT YEAR	132		125		164		153		117		118	
TOTAL DEALT	158		149		185		183		142		137	
TOTAL RESOLVED	134	<b>85</b>	128	<b>86</b>	155	<b>84</b>	158	<b>86</b>	123	<b>87</b>	111	<b>81</b>
a) *RESOLVED THROUGH CONCILIATION	81	<b>60</b>	89	<b>70</b>	99	<b>64</b>	121	<b>77</b>	84	<b>68</b>	76	<b>68</b>
b) *THROUGH DECISION BY MINISTER:	53	<b>40</b>	39	<b>30</b>	56	<b>36</b>	37	<b>23</b>	39	<b>32</b>	35	<b>32</b>
i) *REFERRED TO INDUSTRIAL COURT	53	<b>40</b>	39	<b>30</b>	56	<b>36</b>	36	<b>23</b>	39	<b>32</b>	35	<b>32</b>
ii) *NOT REFERRED TO INDUSTRIAL COURT	0	<b>0</b>	0	<b>0</b>	0	<b>0</b>	1	<b>1</b>	0	<b>0</b>	0	<b>0</b>
BALANCE	24		21		30		25		19		26	

## SECTION 18 (TRADE DISPUTES)

PARTICULAR	2013		2014		2015		2016		2017		2018	
	NO. OF CASES	%	NO. OF CASES	%	NO. OF CASES	%	NO. OF CASES	%	NO. OF CASES	%	NO. OF CASES	%
CASES BROUGHT FORWARD FROM PREVIOUS YEAR	28		59		48		43		32		54	
REPORTED IN CURRENT YEAR	187		251		216		223		186		207	
TOTAL DEALT	215		310		264		266		218		261	
TOTAL RESOLVED	156	<b>73</b>	262	85	<b>221</b>	84	234	<b>88</b>	164	<b>75</b>	213	<b>82</b>
a) *RESOLVED THROUGH CONCILIATION	104	<b>67</b>	200	76	<b>173</b>	78	164	<b>70</b>	128	<b>78</b>	166	<b>78</b>
b) *THROUGH DECISION BY MINISTER:	52	<b>33</b>	62	24	<b>48</b>	22	70	<b>30</b>	36	<b>22</b>	47	<b>22</b>
i) *REFERRED TO INDUSTRIAL COURT	25	<b>16</b>	46	18	<b>42</b>	19	51	<b>22</b>	28	<b>17</b>	46	<b>22</b>
ii) *NOT REFERRED TO INDUSTRIAL COURT	27	<b>17</b>	16	6	<b>6</b>	3	19	<b>8</b>	8	<b>5</b>	1	<b>0</b>
BALANCE	59		48		43		32		54		48	

## SECTION 20 (REPRESENTATIONS ON DISMISSALS)

PARTICULAR	2013		2014		2015		2016		2017		2018	
	NO. OF CASES	%	NO. OF CASES	%	NO. OF CASES	%	NO. OF CASES	%	NO. OF CASES	%	NO. OF CASES	%
CASES BROUGHT FORWARD FROM PREVIOUS YEAR	1,117		586		953		5,148		4,745		1,475	
REPORTED IN CURRENT YEAR	4,372		3,494		10,124		4,224		3,986		4,840	
TOTAL DEALT	5,489		4,080		11,077		9,372		8,731		6,315	
TOTAL RESOLVED	4,903	89	3,127	77	5,929	54	4,627	49	7,256	83	5,196	82
a) *RESOLVED THROUGH CONCILIATION	2,475	50	1,769	57	2,791	47	2,846	62	1,977	27	2,545	49
b) *THROUGH DECISION BY MINISTER:	2,428	50	1,358	43	3,138	53	1,781	38	5,279	73	2,651	51
i) *REFERRED TO INDUSTRIAL COURT	1,562	32	1,001	32	2,768	47	1,388	30	1,654	23	2,395	46
ii) *NOT REFERRED TO INDUSTRIAL COURT	866	18	357	11	370	6	393	8	3,625	50	256	5
BALANCE	586		953		5,148		4,745		1,475		1,119	

## 11 – IC Registration of Cases 2013–2018

### REGISTRATION OF CASES AT THE INDUSTRIAL COURT

**2013–2018**

No	Type of case	Year						Total
		2013	2014	2015	2016	2017	2018	
1	Non-compliance with an award/collective agreement	83	88	74	89	82	118	534
2	Collective agreement	48	44	66	35	30	52	275
3	Industrial dispute	25	49	51	35	29	62	251
4	Dismissal	1,288	872	1,106	1,668	1,550	2,880	9,364
5	Legal issue/question	0	1	1	0	0	2	4
6	Interpretation of award/collective agreement	5	6	3	4	1	6	25
7	Variation of award/collective agreement	7	2	2	1	3	2	17
8	Amendment of award/collective agreement	0	0	0	0	0	0	0
<b>Total</b>		1,456	1,062	1,303	1,832	1,695	3,122	10,470

## 12 – IC Timeframe for Resolution of Cases 2013–2018

### TIMEFRAME FOR THE RESOLUTION OF CASES AT THE INDUSTRIAL COURT

**2013-2018**

Year	Time frame (expressed in years and months)											Total
	From registration of case to final dissolution											
	1 year		2 years		3 years		4 years		5 years		5 years	
	1-6	7-12	13-18	19-24	25-30	31-36	37-42	43-48	49-54	55-60	>60 m	
2013	675	424	209	124	89	60	37	14	9	9	145	<b>1,795</b>
2014	305	209	183	243	108	40	62	44	32	10	85	<b>1,321</b>
2015	573	203	108	145	150	114	57	41	42	24	66	<b>1,320</b>
2016	532	244	94	104	69	54	56	41	31	8	21	<b>1,254</b>
2017	629	247	193	219	104	61	33	27	39	33	70	<b>1,655</b>
2018	1,333	584	320	410	197	99	52	34	37	23	92	<b>3,181</b>

## 13 – IC Case Settlement Rates 2013–2018

### CASE SETTLEMENT RATES AT THE INDUSTRIAL COURT

**2013–2018**

No.	Type of case	Year						Total
		2013	2014	2015	2016	2017	2018	
1	Total of cases settled	1,795 (44.5%)	1,321 (39.9%)	1,320 (39.9%)	1,254 (32.7%)	1,655 (36.4%)	3,181 (55.1%)	10,526

\* Percentage of cases settled is based on total number of cases handled.

\* Total of cases handled = cases brought forward from last year + cases registered during the current year.

## 14 – IC Evaluation Data Report 2018

### EARLY EVALUATION DATA REPORT INDUSTRIAL COURT 2018

MATTER	TOTAL
No. of early evaluation cases carried out	67
No. of cases resolved through early evaluation	35
No. of cases failed at early evaluation	23
No. of cases in which early evaluation was postponed	9

## 15 – IC Mediation Report 2005–2018

### MEDIATION REPORT INDUSTRIAL COURT

**2005–2018**

MATTER	YEAR													
	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018
<b>No. of mediations carried out</b>	186	107	109	85	11	42	92	212	299	187	331	350	454	1,044
<b>No. of cases resolved through mediation</b>	93	31	52	45	5	20	22	88	125	64	141	121	159	374
<b>Reference for trial</b>	93	76	57	40	6	14	34	39	63	67	70	79	124	292
<b>Success rate (%)</b>	50	29	48	53	45.5	47.6	23.9	41.5	42	34.2	42.6	34.5	34.3	35.82



## 16 – IC Categories of Dismissal Awards 2013–2018

### CATEGORIES OF DISMISSAL AWARDS AT THE INDUSTRIAL COURT

2013–2018

No.	Type of case	Year						Total
		2013	2014	2015	2016	2017	2018	
1	In favour of company	690	568	574	615	833	1,651	4,931
2	In favour of claimant	658	489	479	390	434	540	2,990
3	In favour of both parties	187	86	76	88	187	580	1,204
4	In favour of neither party	79	26	17	37	0	0	159

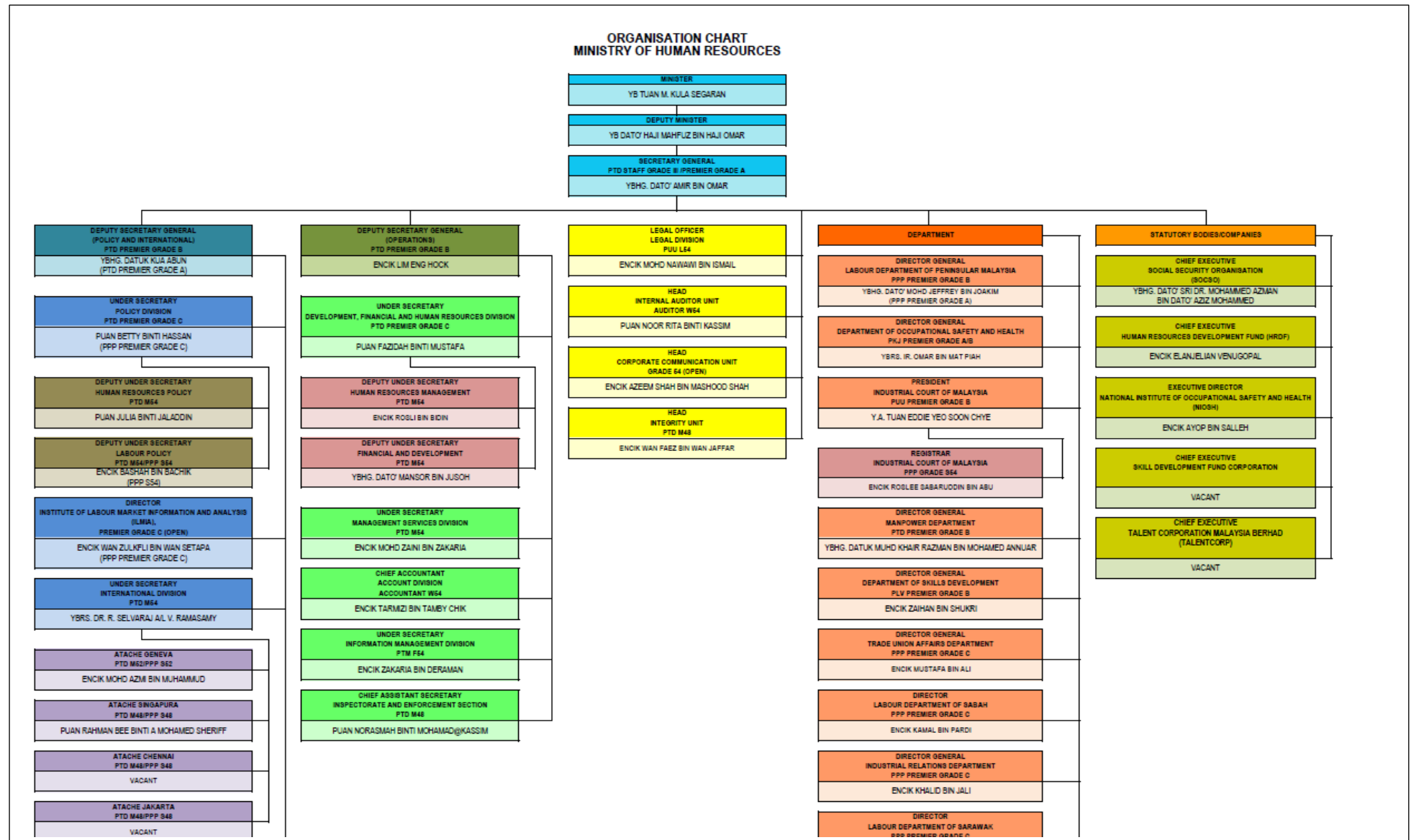
## 17 – IC Chairpersons Positions 2013–2018

### CHAIRPERSONS POSITIONS AT THE INDUSTRIAL COURT

2013–2018

No	Type of case	Year					
		2013	2014	2015	2016	2017	2018
1	<b>Legal officers from the Judicial and Legal Service</b>	16 (1 vacant)	16 (1 vacant)	16 (1 vacant)	16 (2 vacant)	16 (1 vacant)	16 (3 vacant)
2	<b>Contract officers</b>	6 (1 vacant)	6 (1 vacant)	6 (1 vacant)	6 (2 vacant)	6 (2 vacant)	6
3	<b>Task force</b>	4	4	0	0	0	10
<b>Total</b>		<b>26</b>	<b>26</b>	<b>22</b>	<b>22</b>	<b>22</b>	<b>32</b>

# 18 – Ministry Organigram



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