

Trade Unions in Malaysia

- Trade Union Recognition Claim Process
- The Do's and Don'ts for Employers Dealing with Picketing
- Case Law Focus

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DISCLAIMER

These brief slides have been prepared for ease of reference and sections referred to in the Statute have been paraphrased.

You are advised to refer to the actual wording of the Statute for a complete appreciation of its legal implication.

Professional advice should be sought before making decisions based on this general presentation.

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Trade Union Recognition Claim Process

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Section 9 IRA: Claim for Recognition

(1) **No trade union** of workmen the majority of whose membership consists of workmen who are not employed in any of the following capacities that is to say—

- (a) **managerial capacity;**
- (b) **executive capacity;**
- (c) **confidential capacity;** or
- (d) **security capacity,**

may seek recognition or serve an invitation under section 13 in respect of workmen employed in any of the above-mentioned capacities.

(1A) Any **dispute** arising at any time, whether before or after recognition has been accorded, as to **whether any workman or workmen are employed in a managerial, executive, confidential or security capacity** may be referred to the **Director General** by a trade union of workmen or by an employer or by a trade union of employers.

(1B) The **Director General**, upon receipt of a reference under subsection (1A), may **take such steps or make such enquiries** as he may consider necessary or expedient to resolve the matter.

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(1D) Where the matter is not resolved under subsection (1B), the **Director General** shall give his **decision** as to **whether any workman or workmen are employed in a managerial, executive, confidential or security capacity and communicate in writing the decision** to the trade union of workmen, to the employer and to the trade union of employers concerned.

(2) Subject to subsection (1), a **trade union of workmen** may **serve** on an **employer** or on a trade union of employers **in writing** in the prescribed form a claim for recognition in respect of the workmen or any class of workmen employed by such employer or by the members of such trade union of employers.

(3) An **employer** or a trade union of employers upon whom a claim for recognition has been served shall, within **twenty-one days** after the service of the claim—

***(a) accord recognition** subject to the scope of membership of the trade union of workmen concerned as on the date of claim and in accordance with the constitution of the trade union of workmen making the claim; or

(b) if recognition is not accorded, notify the trade union of workmen concerned in writing the **grounds for not according recognition**.

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(3A) Upon according recognition to the trade union of workmen concerned under paragraph(3)(a), the **employer** or the trade union of employers concerned shall **notify** the **Director General**.

(4) Where the trade union of workmen concerned receives a notification under paragraph (3)(b), or where the **employer** or trade union of employers concerned **fails to comply** with subsection (3), the **trade union** of workmen may, within **fourteen days**—

(a) of the receipt of the **notification**; or

(b) after the **twenty-one day** period in subsection(3) has lapsed,

report the matter in writing to the **Director General**, failing which the claim for recognition shall be deemed to have been withdrawn.

(4A) Upon receipt of a report under subsection (4), the **Director General** may take such steps or make such enquiries to **ascertain**—

(a) ****the scope of membership** of the trade union of workmen concerned as on the date of claim, **whether it is in accordance with the constitution of the trade union** of workmen making the claim to represent any workmen or class of workmen in respect of whom the recognition is sought to be accorded; and

(b) by way of **secret ballot**, the **percentage of the workmen** or class of workmen, in respect of whom recognition is being sought, ****to indicate support** for the trade union of workmen making the claim.

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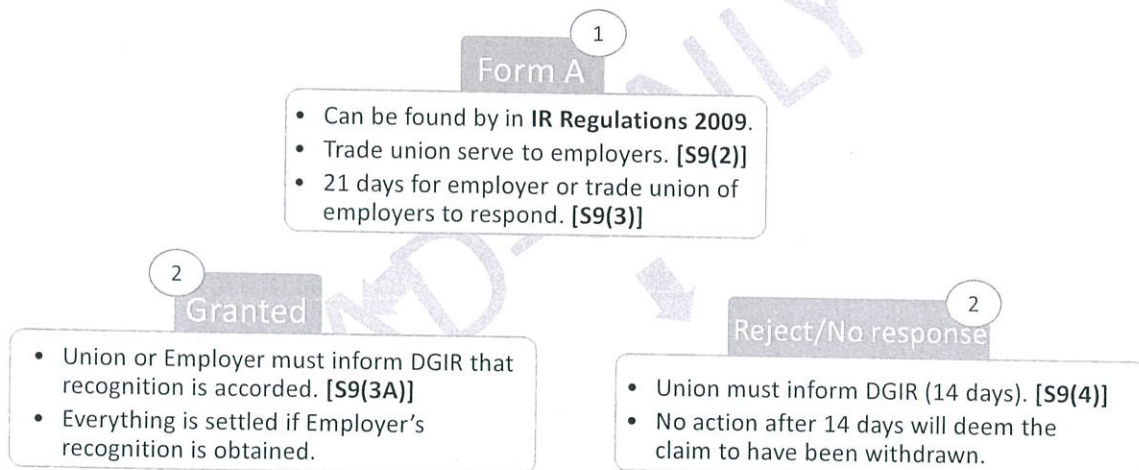
(4B) For the purpose of carrying out his functions under subsection (1B) or (4A) the **Director General**—

(a) shall have the **power to require** the **trade union** of workmen, the employer, or the trade union of employers concerned to **furnish such information** as he may **consider necessary** or relevant within the period specified in the requirement

(c) may **enter** any **place of employment** where any workmen in respect of whom a claim for recognition is sought to be accorded are being employed to examine any records or documents or to **conduct secret ballot**.

(5) Upon ascertaining the matter under subsection (4A), the **Director General shall give his decision**. Where the Director General decides that recognition is to be accorded, such recognition shall be deemed to be accorded by the employer or trade union of employers concerned, as the case may be, from such date as the Director General may specify.

Trade Union Recognition Process



SCHEDULE
FORM A
[Subregulation 3(1)]
NOTICE OF CLAIM FOR RECOGNITION

To _____
(name of employer or trade union of employers)

address at _____

Postcode _____ Town/City _____

We _____
(name of trade union of workmen)

address at _____

Postcode _____ Town/City _____

hereby serve this claim for recognition pursuant to subsection 9(2) of the Industrial Relations Act 1967 in respect of—

2. A copy of the rules of our trade union is enclosed

Date: _____

Signature : _____
Name : _____
(Block Letters)
Designation : _____

c.c.
Director General for Industrial Relations

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Possible Considerations For the Employer

- There's not enough employee where a Trade Union is justified.
- The membership scope for the union does not match the particular group of workers that they want to represent.

“A trade union of employees is bound by their constitution in respect of the scope of representation. A union can only represent the category or class of workmen specified in their constitution. It must be an association of workmen in similar trades, occupations or industries”
Paragraph 10
Marulee (M) Sdn Bhd v Menteri Sumber Manusia & Anor [2007] 6 MLJ 222

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Trade Union Recognition Process

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DGIR

- DGIR resolves disputes when employers refuse to recognize trade unions.

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Competency Check

- DGIR may refer to DGTU to ascertain competence of the trade union.
- DGIR may determine whether the union has the majority support through **Secret Ballots** and request for documents. [S9(4A)]

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Competency Check

DGIR checks:

1. Trade union's **scope and membership**
2. **Compliance** with union's constitution
3. **Workmen's support** for the union

DGIR can: [S9(4B)]

- **Request documents and information**
- Visit the workplace to review records and conduct the **secret ballot**

Employer must provide details of workmen for **Form B**

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FORM C
[Subregulation 9(3)]
NOTICE OF SECRET BALLOT

To:

(name of employer or trade union of employers)

address at.....

Postcode Town/City

(name of trade union of workmen)

address at.....

Postcode Town/City

TAKE NOTICE that pursuant to paragraph 9(4a)(b) of the Industrial Relations Act 1967 a secret ballot will be conducted as follows:

VENUE :

DATE :

TIME :

The workmen who are eligible to vote are as in Appendix A1 of Form B.

.....
Director General for Industrial Relations
Department of Industrial Relations Malaysia
Date:

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FORM D
(Regulation 12)
NOTIFICATION OF THE RESULT OF SECRET BALLOT

The result of the secret ballot conducted on are as follows:
(date)

A.	TOTAL NUMBER OF VOTERS (Appendix A1)	
B.	TOTAL NUMBER OF BALLOT PAPERS ISSUED	
VOTES CAST		
C.	TOTAL NUMBER OF SPOILT VOTES	
D.	TOTAL NUMBER OF VOTES WHO ARE MEMBER OF THE UNION	
E.	TOTAL NUMBER OF VOTES WHO ARE NOT MEMBERS OF THE UNION	

Formula for ascertaining percentage is $D/A \times 100\%$
PERCENTAGE OF MEMBERSHIP =

.....
Director General for Industrial Relations
Department of Industrial Relations
Date:

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Secret Ballot

Kelab Lumba Kuda Perak v Menteri Sumber Manusia, Malaysia & Ors [2005] 5 MLJ (COA)

- **Unjust Dismissal:** The DGTU dismissed the appellant's request for a secret ballot due to the absence of a joint request from both parties, which was deemed a perverse exercise of discretion (para 18).
- **Legitimate Expectation:** The first respondent's agreement with the DGTU violated the appellant's legitimate expectation that a secret ballot would be conducted to determine the membership of the second respondent (para 21).
- **Employee Rights:** It is vital to allow affected employees to express their choice regarding union membership through a secret ballot, ensuring fair representation (para 22).

Trade Union Recognition Process

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DGIR

- If the DGIR finds that the Trade Union ought to be given recognition, DGIR will order for union to be recognised.
- DGIR decision is final (Pursuant to 2020 IRA Amendments) [S9(5)]

*The authority of the Minister is effectively transferred to the DGIR under Section 9. With the 2020 amendments, the DGIR, rather than the Minister, will make the decision and will then communicate this decision to the relevant trade union, employer, or employers' trade union.

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Judicial Review

- Party dissatisfied with the DGIR's decision may request the High Court for a judicial review.

The Do's and Don'ts for Employers Dealing with Picketing

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Introduction to Picketing

“Picketing is the action of one or more workmen in attending at or near the place where the workman works, and where a trade dispute involving such workman exists for the purposes of peacefully obtaining or communication information or persuading or inducing any workman to work or abstain from working ... The IR Act does not define “picketing”, but it does protect it.”

Asrul Ismail & Ors v Sinora Sdn Bhd [2009] 4 ILR 203



Malaysian Airlines and AirAsia scrap share swap deal

31 May 2011

Example of Major Picketing in Malaysia

In 2011, the Malaysian Airline System Employees Union (MASEU) picketed against the MAS collaboration with AirAsia, fearing job losses and the impact on workers' welfare.

AirAsia and Malaysian Airline System (MAS) have scrapped their proposed share swap deal amid pressure from the workers' union at MAS.

The deal was expected to reduce competition and help MAS, the national carrier, return to profitability.

However, it had proven unpopular with the union amid concerns that the tie-up may lead to restructuring and job cuts.

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5 Requirements of a Lawful Picketing

Section 40(1) IRA provides that lawful picketing needs to be:

- 1) Carried out *peacefully*.
- 2) Aimed at *advancing* the *resolution of a trade dispute*.
- 3) Carried out *at or near* the place where workman works.
- 4) Aimed to *obtain/communicate information* or to *persuade any workman to work or abstain them from working*.
- 5) Conducted in a *form and manner* that is *not intimidating or obstructing the entry or exit*.

Important time frames which prohibit Picketing

It is unlawful picketing if it is done:

- 1) *Pending* and *within 7 days after the conclusion* when a board of inquiry has been appointed by the Minister under Part VIII, to investigate any trade dispute. [S.40(2A)]
- 2) *After* the relevant trade dispute has been referred to the court and the parties have been notified on such reference. [S.40(2A)]
- 3) *After* YDPA or State authority has refused to refer a government service-related dispute to the Court, and the parties have been notified. [S.40(2A)]
- 4) *During* recognition claim proceedings. [S.10(1)]

Place of picketing: At or Near the place and not “in”

Deciding this is *a question of fact*

In **Hariato Effendy bin Zakaria & Ors v Mahkamah Perusahaan Malaysia & Anor [2014] 4 ILJ (FC)**, the picket was within the Bank’s premise as CCTV showed picketers entered the bank’s lobby and head towards the banking hall.

A locality in immediate proximity to a house or place of business and not within it.

[Dr V Anantharaman]

Gleneagles Hotel Ltd v Wong Jue Whee

“At or near” cannot mean “in”

*Employers should obtain proofs of the picket taking place in the workplace (CCTV etc) , identify the alleged picketers and issue cause letters to them.

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Form and Manner that Employers should not tolerate

Asrul Ismail & Ors v Sinora Sdn Bhd [2009] 4 ILR 203 (IC)

- Unruly manner (shouting, booing & cursing management & workers)
- Insensitive religious and cultural tolerance (coffins)

Amounts to intimidation

Muhammed Sukeri bin Mahudin v Hicom Automotive Manufactures [2019] 1 LNS 2161 (IC)

- Assembled at car park (caused traffic congestion)
- Assembled in large number (110)

Held the actions brought disrepute to the company’s reputation

Hariato Effendy bin Zakaria & Ors v Mahkamah Perusahaan Malaysia & Anor [2014] 4 ILJ (FC)

- Bullhorns, balloons, air horns, whistles
- Entered lobby and banking hall when customers were dealings at the counter

Action brought the bank into disrepute. Banking industry is special and requires high standard of care and conduct.

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Form and Manner that can be tolerated

Cableview Services Sdn Bhd v Mazlam Salim [2004] 1 ILR 1262 (IC)

- The presence of the claimant was **not proven** to be intimidating, blocking entry or exit, or causing a disturbance.
- It is evident from the **company's actions** that by **not filing a police report or calling the police** to disperse the claimant, they **demonstrated that the claimant did not cause any public disturbance**.
- Therefore, the company has **failed to prove** that the claimant was engaging in an **illegal strike** or picket under S.40 of the IRA 1967.
- This court also concludes that the dismissal is unlawful for the purpose of S.20 of the IRA, as it was done **without valid and reasonable cause**.

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Current Issue: NUBE and Maybank

What was it about?

- Nationwide picketing sparked by **sexual harassment case** at the Bercham branch, Ipoh.
- The case centers on a **female employee** who was sexually harassed by her **superior**.

How it started?

- Sexual harassment since **2021**.
- First **formal complaint** made to Maybank in **October 2021**.
- **Picketing** began after the employee was suspended on **August 20, 2024**.
- **Protests** initiated in early **August 2024**, ongoing for **6+ weeks**.

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Actions Taken

Maybank

- **No disciplinary action** taken against the perpetrator.
- The **female employee** was **suspended** for reporting harassment.
- Bank failed to engage in negotiations with NUBE.
- Maybank's denial of unfair treatment while legal proceedings were ongoing.
- Lack of communication with NUBE

NUBE

- Claimed that Maybank mishandled the case and suspended the victim instead.
- Stated that the picketing would continue until Maybank takes appropriate action against the alleged harasser

Consequences

- Employers' Inaction escalated the Issues
- Individual issue becomes larger union and public issues.
- Failure to act promptly harmed the Maybank's reputation and lead to legal battles.



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Key Takeaways for Employers

What Employers Should Do:

- **Take immediate action** on harassment complaints.
- **Avoid escalation** by **addressing issues immediately** with clear communication.
- **Keep the process transparent and fair** for both parties.
- Engage in **open dialogue** with employees and unions.

What Employers Should Avoid:

- **Delaying action** on harassment complaints.
- **Suspending or punishing** the victim **without proper investigation**.
- **Ignoring union** input or **failing to adhere** to the laws.

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Kesatuan Pekerja-Pekerja Bukan
Eksekutif Maybank Bhd v
Kesatuan Kebangsaan Pekerja-
Pekerja Bank & Anor [2017] 4 CLJ

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PARTIES

Appellant:

Kesatuan Pekerja-Pekerja Bukan Eksekutif Maybank Bhd

First Respondent:

Kesatuan Kebangsaan Pekerja-Pekerja Bank (NUBE)

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FACTS OF THE CASE

3 January 2011

DG registered the appellant as a trade union for MBB's non-executive employees

8 February 2011

NUBE filed for judicial review, challenging DG's decision

28 January 2011

- NUBE filed an appeal to the DG under s. 71A TUA 1959 to cancel the registration
- NUBE's reasons for the appeal:
 - DG failed to allow NUBE to be heard before registration
 - Overlapping membership between the appellant and NUBE

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Previous Court Decisions

High Court

- NUBE's application for judicial review **dismissed**.
- Court focused on s. 12(2) of TUA 1959
 - DG has wide discretion to register unions.
 - No consultation required before registration.
- No overlap in membership: Appellant (MBB in-house union) represents MBB non-executive employees. NUBE represents non-executive employees of all commercial banks in Malaysia
- Registration was allowed

Court of Appeal Decision

- NUBE appealed, COA **allowed** the appeals.
- S.12 of TUA 1959 requires an investigative role by the DG before registration
 - DG must consult all interested parties.
 - Failure to comply with natural justice renders the decision null and void.
- Registration of appellant set aside
- Appellant applied for leave to appeal to a higher court

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MAIN ISSUE:

Whether the *Director-General*,
under Section 12 of the Trade Union Act 1959,
must *consult* with *existing unions representing workmen* before
registering a new union in an establishment?

Interpretation of Section 12 TUA

- *Section 12* has three subsections, and they should all be *read together*.
- Reading only subsection (1) by itself could lead to a misunderstanding of the law.

Section 12 of Trade Unions Act 1959 [TUA]

- (1) The **Director General** may, upon receiving any application under section 10, and subject to this section, **register** the trade union in the prescribed manner.
- (2) The **Director General** may **refuse** to register a trade union in respect of a particular establishment, trade, occupation or industry if;
- He is **satisfied** that there is **in existence a trade union representing the workmen** in that particular establishment, trade, occupation or industry and
 - It is **not in the interest of the workmen concerned** that there be **another trade union** in respect thereof.

Section 12 of Trade Unions Act 1959 [TUA]

- (3) The **Director General** shall **refuse** to register a trade union if—
- (a) he is of the opinion that the trade union is likely to be used for **unlawful purposes** or for **purposes contrary to or inconsistent with its objects and rules**;
 - (b) any of the **objects** of the trade union is **unlawful**;
 - (c) he is **not satisfied** that the trade union has **complied** with **this Act** and of the **regulations**;
 - (d) he is **satisfied** that the **objects, rules, and constitution of the trade union conflict** with any of the **provisions of this Act** or of any **regulations**; or
 - (e) the **name** under which the **trade union** is to be registered is—
 - (i) **identical** to that of any other existing trade union, or so **nearly resembles** the name of such other trade union as, in the opinion of the Director General, is likely to deceive the public or the members of either trade union; or
 - (ii) in the opinion of the Director General, **undesirable**,**unless** the trade union **alters its name** to one **acceptable** to the Director General.

Consultation: Is it required or not

The word “*may*” in the subsections 1 & 2 means there is some discretion, but it *doesn't mean* the Director General has an *absolute discretion*.

The DG has to make a decision about whether to register something. There's no easy formula for this decision; it *requires careful consideration* of various factors

Subsection (2) implies that the DG needs to be sure about certain facts before making a decision. To be sure, the DG needs to *consult* with the relevant *parties* who are applying or who might be *affected by the decision*.

The DG can't make an informed decision without getting more information and talking to the relevant parties. This means engaging with the relevant parties to understand the situation better.

Paragraph 70

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Consultation: Duty to Consult

When a decision-making body has to consult, it means they must give a *hearing to the people affected* and *give their reasons*. These two duties goes hand in hand.

If someone has a *right, interest, or legitimate expectation*, they *should not be deprived* of it without a *hearing* or an *explanation*. This means people should be given a chance to be heard and understand the reasons behind decisions affecting them. [Lord Denning in Breen]

Paragraph 74

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The Discretion of the Director General (DG)

Under S.12, the Federal Court acknowledged that the *DG* has the power to make decisions by its own *discretion*. **HOWEVER**, such *discretion* must be exercised carefully and *cannot be used without proper checks and balances*.

This stand however is a *clear contradiction* to the Raja Azlan Shah's and Lord Denning's remarks in decided cases.

Paragraph 75, 77, 78 & 79

In this case, the *DG* took the stand that he made the decision on the grounds that he has an *absolute* and *unfettered discretion*.

The duty to hear a party should be done in a "proper case". In this case, the Federal Court decided that the opportunity to be heard should be given to NUBE

Absence of Provision requiring consultation

If the law doesn't specifically require a formal inquiry, then the *DG* just needs to make a *fair* and *reasonable* decision based on their discretion. According to S.12 of the Trade Unions Act (TUA) 1959, a fair and reasonable decision should involve giving the parties a chance to be heard.

Unless there is a clear provision saying no explanation or consultation is needed, the *DG* should still *provide reasons* for their decisions to the relevant parties which in this case is NUBE

Paragraph 81 & 87

Just because there is an *absence of any provision* in the statute *requiring the DG to give reasons*, that *does not mean* there is *no such duty*.

The *absence of such provision* should *not* be used as an *excuse* to keep its rationale in the decision making to be a mystery to the interested parties or the public

Natural Justice & Fairness

Natural justice is a **fundamental principle** that should be followed at all levels, especially when someone or an organization has the authority to make decisions affecting others' rights.

In accordance with settled public law principle and principle of natural justice, **public decision-making bodies must provide reasons for their decisions due to the concept of fairness**. Providing reasons is also among the essentials of good administration.

Not only was it common sense that NUBE's views should be considered. It's also a **requirement of natural justice**, which includes the **right to be consulted**.

Paragraph 72 & 86

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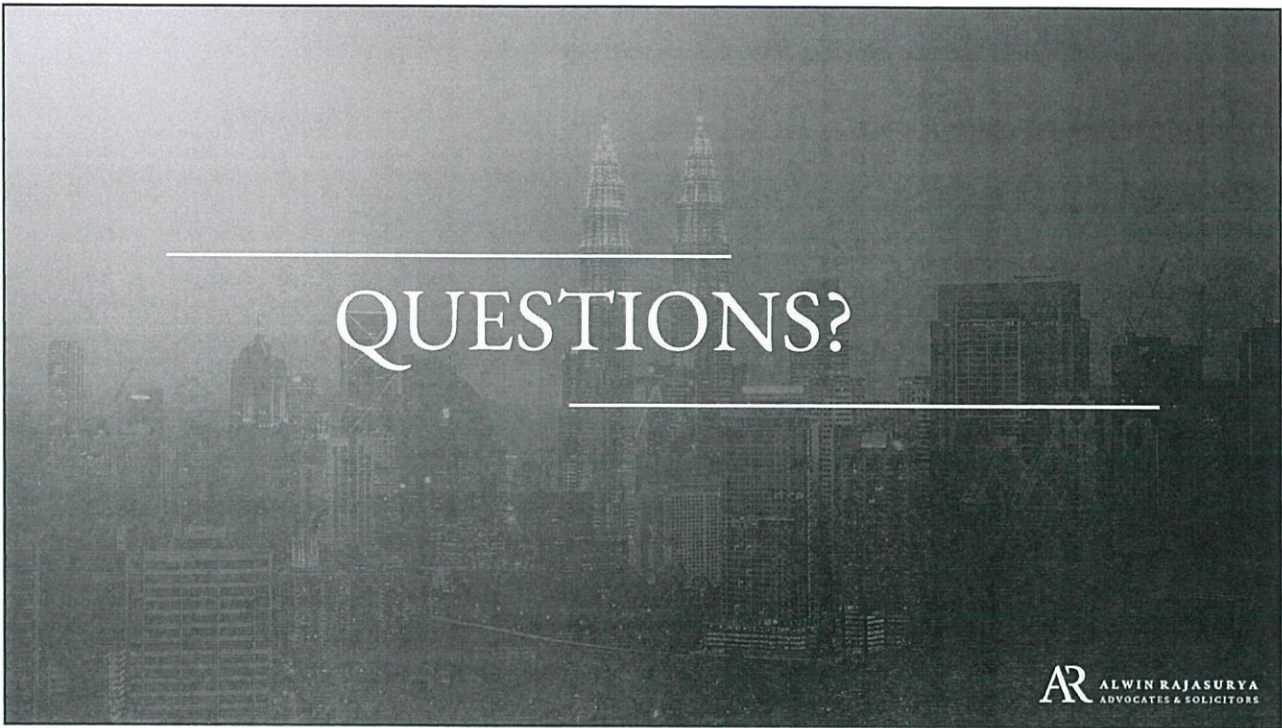
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Decision: Appeal dismissed & COA decision affirmed

The **Director-General**, under Section 12 of the Trade Union Act 1959, must **consult** with **existing unions representing workmen** before **registering a new union** in an establishment.

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