

An aerial view of a city skyline at sunset, with numerous skyscrapers and buildings. The sky is filled with soft, golden light from the setting sun, creating a hazy atmosphere. The city is densely packed with buildings, and a river or waterway is visible in the foreground.

P PRIMERUS

ASIA PACIFIC NEWSLETTER

AUGUST 2021

Relevant Information for the
Primerus Asia Pacific Region

LETTER FROM THE CHAIR

A top-down view of a desk with a wooden surface. In the center is a white envelope with a blue and red striped border, lying flat. To its right is a fountain pen with a dark brown barrel and a silver nib. Above the envelope, several other pens and pencils are scattered. In the background, there are some papers and a small decorative object. The overall scene is warm and professional.

**Written by: Caroline Berube -
HJM Asia Law & Co LLC
(Singapore & Guangzhou, China)**

Caroline Berube is the Managing Partner of HJM Asia Law, a boutique law firm with offices in China and Singapore. She is admitted to practice in New York and Singapore, holds a BCL (civil law) and an LL.B. (common law) from McGill University (Montreal, Canada) and studied at the National University of Singapore with a focus on Chinese law in the mid 1990's. Caroline worked in Singapore, Bangkok and China for UK and Chinese firms prior to establishing her own firm more than 14 years ago.

Welcome to the third issue of the Primerus APAC newsletter.

Whilst Asia Pacific is still weathering the economic uncertainty faced worldwide by the ongoing COVID-19 pandemic, economic outlooks for 2021 look to be on a continual steady rise.

Despite a negative contraction of 4% GDP at the end of 2020, Southeast Asia appears to be back on an upwards trajectory with estimates of GDP growth throughout 2021 of between 4-5%.

Countries who have rigorously and effectively enforced their vaccine rollout programs and border controls have also reaped the economic benefits this year. Take for example Australia, which has seen a sizeable growth in consumer/business financing to many sectors of its economy since Q1 2021.

Developing Asian countries are also set to return to growth in 2021, with the Asian Development Bank estimating a collective economic growth of these countries in 2021 of 7.1%.

According to Ernst & Young's Capital Confidence Barometer survey of 2021, Southeast Asia was voted the most likely region for accelerated growth and business opportunities in the next 3 years, followed by neighbouring Oceania, Japan and China. Interestingly, USA and Europe came further in the survey.


This appears to also reflect the reality on the ground with a sizeable surge in M&A transactions with the technology and manufacturing sectors accounting for a 28% proportion of all M&A transactions conducted in the Asia Pacific region, which in total amounted to USD 482.4 billion as in early June 2021.

In this issue, we have included selected articles from our contributors on the following topics:

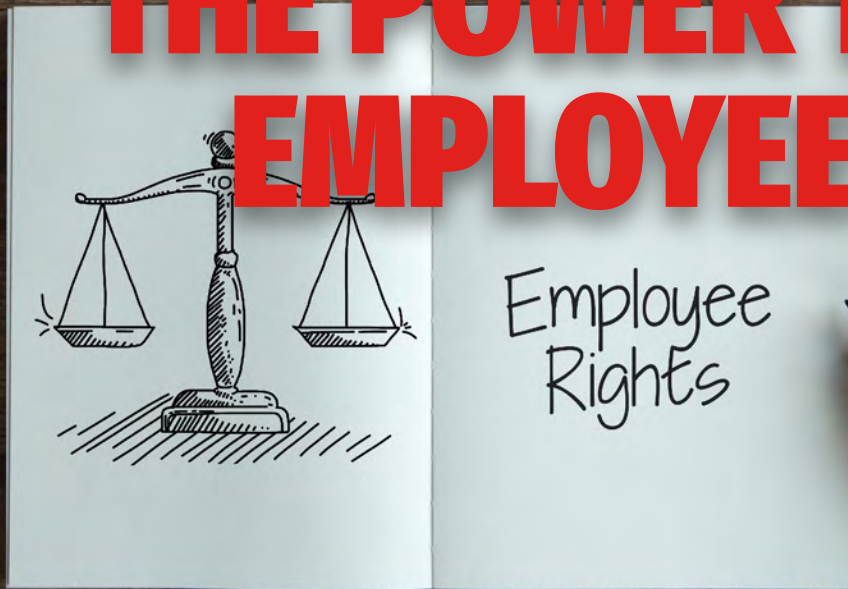
- 1. The Power to Direct Employees during COVID-19** (by Murray Thornhill, HHG Legal Group) - In this article, HHG Legal Group explain the powers and limits employers have when directing instructions to their employees in the context of guidelines/laws passed by the Australian Government due to COVID-19.
- 2. COVID-19: Employment Law Update: China and Singapore** (by Caroline Berube, Ralf Ho and Matthew Boyd from HJM Asia Law & Co LLC) - With the outbreak of the COVID-19 virus in parts of Asia, we provide an update on the latest Heightened Alert Measures Singapore has imposed on the workplace as well as China's latest revised measures from February 2021.
- 3. Global Whistle-blower Framework** (by Kengo Nishigaki and Shum Wai Keong, both from GI&T Law Office, Japan) Having assisted numerous clients in Japan and Asia Pacific with their compliance regulations and policies, GI&T Law Office outline the background and fundamentals to a company's whistle blowing policy.
- 4. Key changes to Australian immigration law: New Categories of visas that can be cancelled on biosecurity grounds** (by Yee Mei Chow, Maithri Panagoda & Wing Ho, Carroll & O'Dea Lawyers) - In the first part of the article on Australia's newly introduced immigration laws, Carroll & O'Dea Lawyers provide an update on offences under the Biosecurity Act 2015 and why visa applicants need to be aware of these. In the second part of the article on Australia's newly introduced immigration laws, Carroll & O'Dea highlights and outlines Australia's temporary measures, introduced on February 18th, 2021, which allow certain family members to be granted their family visas whilst onshore in Australia.
- 5. Australia's Long-Awaited Illegal Phoenix Activity Legislation is Passed** (by Murray Thornhill, HHG Legal Group) - HHG Legal Group explore Australia's newly passed law which targets companies who thrive off assets to new companies, often leaving creditors behind and what these new laws seek to achieve.
- 6. Getting to Know Our Members:** Mr. Michael Szeto (ONC Lawyers, Hong Kong), Mr. Kengo Nishigaki (GI&T Law Office, Japan) and Mr. Muhammad Ishtiaq (Ishtiaq Law Associates, Pakistan).

We are happy to showcase some of our members who share with us their motivation to become a lawyer, memorable legal experiences and surprising habits! We are pleased to introduce Michael Szeto from ONC Lawyers, Kengo Nishigaki from GI&T Law Office and Muhammad Ishtiaq from Ishtiaq Law Associates.

On behalf of the Primerus Asia Pacific Region, we wish to once again thank all members and contributors for their continued support and contributions. We hope this platform continues to provide a valuable opportunity to learn from our experts, network and support you with your day-to-day transactions.

Please visit the Primerus website for legal resources and to learn more about its upcoming projects and events that may be helpful to you. 

THE POWER TO DIRECT EMPLOYEES DURING COVID-19



During the pandemic, workforce management has been a changing and precarious environment for employers, implementing and enforcing a range of ever-evolving government directions as well as their own health and safety obligations.

What type of direction can an employer give its employees?

Employers across Australia have seen a substantial increase in the number of directions they have had to issue to their employees, due to government directions, business survival and continuity, or health & safety obligations. These directions include: mandatory COVID-testing; temperature checks of employees; increased disclosure of illness, travel and contact history; working from home; changes to work days, hours, location and duties; and imposition of hygiene regimes including mask-wearing and physical distancing measures.

As a result of these directions or, more likely, as a result of how these directions have been imposed upon employees, employers have consequently seen an increase in the number of challenges to those directions, on the basis that they are not reasonable nor lawful.

So, when is an employer's direction considered lawful and reasonable?

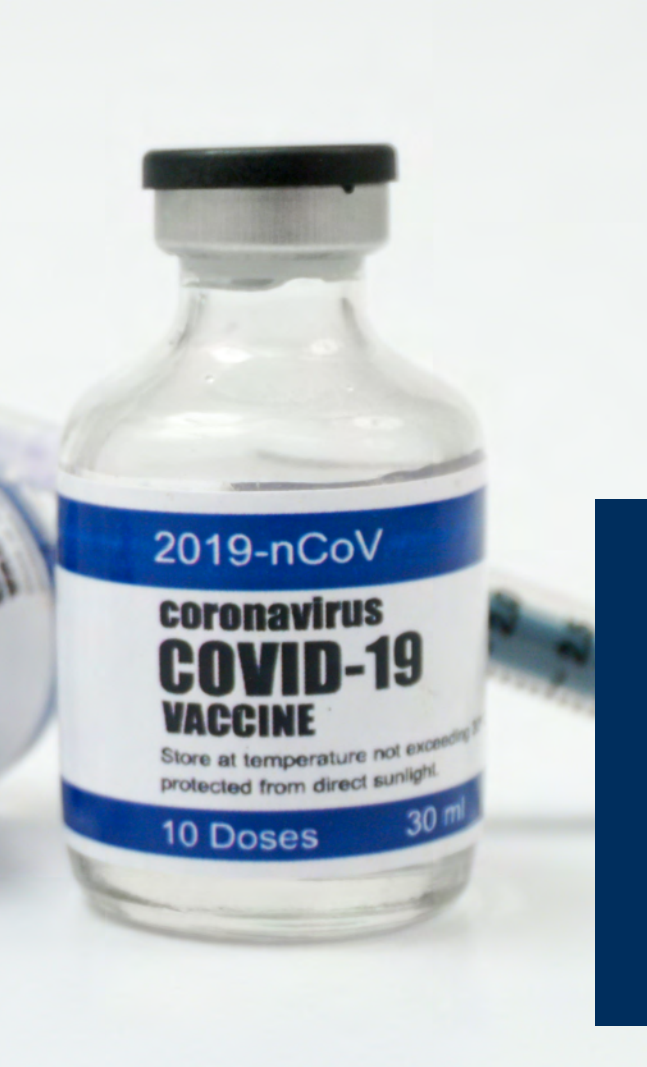
Where the government has issued a relevant direction or relevant legislation allows a direction to be made (for example the JobKeeper directions that are in place for certain employers until 28 March 2021), an employer may give a direction to an employee. For a direction to be considered lawful, the employer must follow any required process including any written notice to an employee and consider the specific circumstances of each direction.

Most employment contracts require an employee to comply with the employer's reasonable and lawful directions. Reasonable and lawful directions are those that are reasonable in all the circumstances and do not breach any relevant law.

Under the current health and safety legislation in Western Australia it is an employer's obligation to provide and maintain, as far as practicable, a safe working environment for its employees. A similar obligation exists under the new legislation that will come

**Written by: Murray Thornhill -
HHG Legal Group (Perth,
Australia)**

As one of two Directors of HHG Legal Group, Murray is a leader in dispute resolution and litigation, and has led the business and government division of HHG Legal Group since 2003. Murray is an experienced, skilled and efficient commercial dispute resolution lawyer. He leads and co-ordinates our litigation, commercial and property teams. Murray's practice focuses on dispute resolution for SME's and individuals in construction, insolvency, employment, and trusts and estate litigation.



consequences of any direction, including whether an employee is entitled to payment where they are directed not to attend work or required to participate in an investigation or assessment of fitness for work. It is also prudent to consider any suggestions made by an employee as to alternative solutions to the direction being given.

So what about the COVID-19 Vaccine – can I mandate it?

With vaccinations commencing in WA on 22 February 2021, employers across all industries are considering whether they can mandate vaccination for their employees. The Fair Work Ombudsman and Safe Work Australia provided updated guidance on this issue on 19 February 2021 and will likely continue to do so as the roll-out continues.

Where a government direction or legislation makes it mandatory, employers will need to ensure their employees comply and can direct their employees to do so.

Where no government direction is in place (which is currently the situation), there are likely to be limited circumstances where an employer can require mandatory vaccinations. If an employer intends to do so, they must carefully consider whether their workplace is one where a mandatory vaccination policy is appropriate and implement processes to ensure employees are aware of the relevant policies and any directions related to vaccinations.

Employers will also need to consider whether the employee has reasonable grounds to refuse to be vaccinated, for example health, political, or religious grounds.

What are the consequences if an employee refuses vaccination?


Whether or not disciplinary action can be taken on the basis that an employee cannot or will not be vaccinated will depend on the specific circumstances of the individual employment and the unique requirements of a workplace.

Where an employer improperly terminates an employee's employment, or otherwise injures their employment, it risks damage to reputation and employee morale, and claims for breach of contract, discrimination, unfair dismissal or adverse action.

Where to from here?

Communication is key to avoid legal risk and ensure a positive ongoing relationship between employees and employers.

Employers should consider how, if and for whom they are considering mandating a vaccine and update their policies and procedures to address workplace health and safety obligations, including vaccinations.

It is important to get tailored and practical guidance on your rights and obligations as an employer, including preparation of customised employment contracts, an in-depth review of your policies and procedures and practical advice on implementing those documents. HHG Legal Group's employment lawyers are available to provide quality advice and representation from our Perth, Joondalup, Bunbury, Albany or Mandurah offices. Go to hhg.com.au to find out more. 

into effect later this year, being the *Work Health and Safety Act 2020* (WA) and its regulations. Therefore, an employer's direction to its employees in order to meet its duty of care to its employees and others that may be impacted is likely to be considered reasonable and lawful.

However, before issuing a direction related to health and safety obligations, an employer should consider the specific needs of its employees and customers (for example, vulnerable persons such as children and elderly people, transport and aged care workers) and the impact of any such direction on its employees.

Common directions that are likely to be considered reasonable include: mandatory PPE and safety processes; requiring employees to undertake a COVID-19 test or medical examinations to assess fitness for work; requesting unwell employees to stay away from work to prevent the spread of illness; directing an employee to participate in a workplace investigation; or requiring an employee to undertake tasks within their job description, level and skillset.

Employers will need to carefully consider the

COVID 19: EMPLOYMENT LAW UPDATE (CHINA & SINGAPORE)



From May 16th, 2021, Singapore was placed into so called Phase 2 (Heightened Alert) measures in an effort to curb the spread of COVID-19.

On July 10th, 2020, the Ministry of Human Resources and Social Security and the Supreme Court jointly issued the first batch of typical labour and personnel disputes, mainly covering the performance of the employment contracts related to the epidemic, double wage payment, the discharge of competition restrictions, the right of the employer to adjust the employee's job title and etc.

This article provides an update on key aspects of the latest COVID-19 measures within China and Singapore and, in particular, how they affect employment in the workplace.

China

Updated Quarantine Measures

- If the employee refuses to comply with the measures on quarantine and medical treatment which constitutes a crime and is prosecuted for criminal responsibility, the employer has the right to terminate the employment contract.
- If the employee's behaviour does not constitute a crime, but he fails to cooperate when the relevant authority takes medical measures, or prevents the governmental employees from performing their duties which violates the rules and regulations of the employer, the employer still has the right to terminate the employment contract.
- During the pandemic period, if the employee's job duties are in relation to the anti-epidemic and/or epidemic prevention, the cap of overtime (1-3 hours per day and 36 hours per month) will not be applicable.
- If the employer has issued the offer letter (hiring notice) to the employee, the employer cannot cancel the offer on the grounds of anti-epidemic and/or epidemic prevention. If the employer does so, it may be responsible for the liability of culpa in contrahendo.

**Written by: Caroline Berube -
HJM Asia Law & Co LLC
(Singapore & Guangzhou, China)**

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- If the employee fails to perform his/her job duties due to the quarantine or medical treatment in relation to anti-epidemic and/or epidemic prevention, it shall not be deemed as absenteeism.

Singapore

Updated Workplace Measures

From May 9th, 2020 the Singapore Ministry of Manpower – the Singapore Government agency responsible for regulating the Singapore/foreign workforce – has created rules which all employers must follow. These are known as the *Requirements for Safe Management Measures at the Workplace*. [1]

Following the Singapore Government’s decision to tighten its measures to curb the spread of COVID-19 by introducing the Phase 2 (Heightened Alert) rules [2], the Singapore Ministry of Manpower also updated the *Requirements for Safe Management Measures at the Workplace* on May 14th, 2021 [3] which provide for, amongst other things:

1. Employers must ensure that *all* employees who are able to work from home do not return to the workplace;
2. For employees who are required by the nature of their job to work within the workplace, the employers should ensure start times are staggered and there are in place flexible workplace hours;
3. Social gatherings (for example tea/lunch breaks) must be held in isolation;
4. All individuals in the workplace (including guests and visitors) must wear masks at all times [4];
5. The employer should appoint an employee as a Safe Management Officer whose responsibility is to ensure the employer/employees comply with the above workplace safe management measures.

In addition to the above requirements, since May 9th, 2020 all employers have been required to install software known as TraceTogether for employees to record their entry and exit from an employers workplace for the purposes of contact tracing.

Employee Vaccination Requirements

Whilst employers/employees are not under a legal obligation to obtain a COVID-19 vaccination [5], employers are advised to encourage their workforce to make arrangements for the vaccination.

There is therefore no current requirement for an employee to be vaccinated before being able to return to the workplace.

For those workers who choose to take their COVID-19 vaccination, the employee will be permitted to immediately return to the workplace unless the employee is unwell in which case the employer must permit the employee to rest at home and otherwise seek medical attention.

For Singaporeans and foreign workers on a suitable work pass/visit pass [6], vaccinations are administered free-of-charge [7].


Returning Overseas Employees

On May 7th, 2021, the Singapore Ministry of Manpower announced that new applications for entry approval of overseas work pass holders would be suspended until further notice [8].

In addition, all previous entry applications from high-risk countries which were approved on or before July 5th, 2021 will be cancelled [9].

High risk countries include all countries with the exception of: Australia, Brunei Darussalam, Mainland China, New Zealand, Taiwan, Hong Kong and Macao.

Excluded from the above restrictions are Malaysians entering Singapore by land for a period of at least ninety (90) days for employment under the Malaysian/Singapore Periodic Commuting Arrangement [10].

Equally excluded from the above restrictions on entry approval into Singapore, will be overseas employees required for key strategic projects and infrastructural works [11]. 

[1] <https://www.mom.gov.sg/covid-19/requirements-for-safe-management-measures>

[2] <https://www.gov.sg/article/additional-restrictions-under-phase-2--heightened-alert>

[3] Which took effect from May 16th, 2021.

[4] There are limited exceptions to this rule where, for example: the nature of the task or equipment to be worn necessitates the taking off of a mask (e.g. riding a motorcycle).

[5] <https://www.mom.gov.sg/covid-19/frequently-asked-questions/covid-19-vaccination-for-work-pass-holders>

[6] Including: work pass, S-Pass, Employment Pass, Personalised Employment Pass, Dependant’s Pass and Long Term Visit Pass.

[7] <https://www.gov.sg/article/what-you-should-know-about-the-covid-19-vaccine>

[8] <https://www.mom.gov.sg/covid-19/actions-for-companies-to-bring-pass-holders-into-singapore>

[9] <https://www.mom.gov.sg/newsroom/press-releases/2021/0705-work-pass-holders-who-have-already-obtained-approval-to-enter-to-be-rescheduled>

[10] <https://safetravel.ica.gov.sg/pca/overview>

[11] Please see 8 above.



GLOBAL WHISTLEBLOWER FRAMEWORK

GI&T has recently been helping a number of Japanese MNCs establish their global whistleblower framework. This includes ensuring that the whistleblower systems are also implemented in compliance with the laws of every country that our clients operate in. We have helped our clients implement whistleblower policies in over 30 countries across the globe.

A whistleblower policy sets out a framework for individuals to report any improprieties which they observe in a company without the fear of retaliation. The framework generally sets out how a company's whistleblower system operates. This is generally decided by the company but there is often national whistleblowing legislation that dictates certain requirements that should be included in a whistleblower framework. The highlights of a sound whistleblower policy includes the following:

- **Who are whistleblowers.** Employees and former employees are usually in scope but suppliers and vendors are often included.
- **The types of concerns or issues that may be raised.** This typically includes corruption, bribery, fraud and unlawful conduct.
- **Mode of reporting.** A mechanism is usually set out where the whistleblower may report to specific persons designated by the

Written by: Kengo Nishigaki and Wai Keong Shum - GI&T Law Office (Tokyo, Japan)

Kengo Nishigaki founded GI&T Law Office LC in 2020. Before that, he worked at Baker & McKenzie from 2000 to 2020, being a partner of the dispute resolution group for more than 10 years. From 2004 to 2005, he worked at Baker & McKenzie's Chicago office where he worked on matters related to compliance with the US Foreign Corrupt Practices Act. He is admitted to practice in Japan and New York. Kengo was partially seconded to ZimmerBiomet at its Japanese subsidiary, a global medical device company to support their in-house work from 2016 to 2017.

Wai Keong Shum joined the firm in February 2021. Prior to this, he was an in-house counsel at a Fortune Global 500 IT and management consultancy company, where he led the regulatory and compliance team for Southeast Asia and South Korea. Wai Keong advised on a broad range of issues including anti-corruption & bribery, competition law, data privacy, cybersecurity, artificial intelligence, immigration & employment, and responsible business & corporate transparency matters such as human rights, modern slavery, inclusion & diversity and environmental sustainability.



law, the board of directors or the local leadership team.

- **Protection for whistleblowers.** That one should have no fear of retaliation is a hallmark of any good whistleblower system. This is pertinent as it incentivizes individuals to come forward to raise reports of what they have witnessed. This often involves considerations in the data protection and confidentiality realms.
- **Treatment of whistleblower reports.** It is important to set out a roadmap on how a report would be investigated. Some whistleblowers expect to be updated and this would have a bearing on how a company manages its whistleblower system.

What is interesting, though at times tedious, is the localisation of global whistleblower policies in countries where a company operates outside its headquarters. This is not only to ensure that they are compliant with national laws but also to observe the nuances in local customs and culture. It is usually an intricate process of weaving local and global to ensure that both systems are consistent and congruent with each other. A successful whistleblower system is certainly one where its leadership and corporate headquarters are always being apprised of what's going on within the legally allowed parameters. After all, compliance starts with the tone from the top!

Feel free to connect with us if you would like to chat further about this. **P**

A composite image featuring a blue passport with 'PASSPORT' visible on the cover, a white calculator with a grid of numbers, and a colorful world map. The text 'KEY CHANGES TO AUSTRALIAN IMMIGRATION LAW IN 2021' is overlaid in large, bold, red capital letters.

KEY CHANGES TO AUSTRALIAN IMMIGRATION LAW IN 2021

Part #1 – New categories of visas that can be cancelled on biosecurity grounds

2021 has brought with it key changes in immigration law which took effect on New Years' Day, including the addition of new categories of visas that can be cancelled – even during immigration clearance – for a range of breaches of biosecurity controls.

From 1 January 2021, more temporary visa holders face the risk of visa cancellation if they breach certain sections of the Biosecurity Act 2015 (Cth). The prescribed biosecurity contraventions include: failure to answer questions asked by a biosecurity officer and knowingly provide false or misleading information to a biosecurity officer. The visa can be cancelled while the holder is still in immigration clearance.

As a result of the legislative change, the Department of Home Affairs will have the power to cancel following temporary visas on biosecurity grounds:

- (i) a Subclass 400 (Temporary Work (Short Stay Specialist)) visa;
- (ii) a Subclass 403 (Temporary Work (International Relations)) visa;
- (iii) a Subclass 407 (Training) visa;
- (iv) a Subclass 408 (Temporary Activity) visa;
- (v) a Subclass 417 (Working Holiday) visa;
- (vi) a Subclass 457 (Temporary Work (Skilled)) visa;
- (vii) a Subclass 462 (Work and Holiday) visa;
- (viii) a Subclass 476 (Skilled—Recognised Graduate) visa;
- (ix) a Subclass 482 (Temporary Skill Shortage) visa;
- (x) a Subclass 485 (Temporary Graduate) visa;
- (xi) a Subclass 500 (Student) visa;
- (xii) a Subclass 590 (Student Guardian) visa;

Written by: Yee Mei Chow, Maithri Panagoda & Wing Ho - Carroll & O'Dea Lawyers (Sydney, Australia)

Yee Mei Chow practises in Immigration Law, including handling Australian Visa Applications, Skills Assessment, State Sponsorship, and Migration Review Applications.

Educated in both Sydney and Sri Lanka, **Maithri** has over 35 years experience in litigation and dispute resolution. Maithri is regularly invited to present seminars to lawyers and university students.

Wing works on a diverse range of matters spanning across immigration, employment and personal injury law. Her broad legal knowledge enables her to provide holistic advice to clients.

- (xiii) a Subclass 600 (Visitor) visa;
- (xiv) a Subclass 601 (Electronic Travel Authority) visa;
- (xv) a Subclass 651 (eVisitor) visa;
- (xvi) a Subclass 676 (Tourist) visa;
- (xvii) a Subclass 771 (Transit) visa; and
- (xviii) a Subclass 988 (Maritime Crew) visa.

Visa holders should be aware that visa cancellation brings very serious consequences, in particular a three-year ban from applying for most types of temporary visas.

Part #2 – COVID concession for certain family visa applicants unable to depart Australia due to border closures

We published an earlier [article](#) advising that the Australian Government would introduce concessions for certain family visa applicants in early 2021.

On 18 February 2021, the Government introduced regulations which amend the current Migration Regulations and effectively allow for these concessions.

Onshore visa grant available for certain family visas

From 27 February 2021, applicants for the following visas may have their visa granted while they are in Australia:

- Child (subclass 101) visa
- Adoption (subclass 102) visa
- Dependent Child (subclass 445) visa
- Prospective Marriage (subclass 300) visa
- Partner (subclass 309) visa

Extension of validity period of Subclass 300 (Prospective Marriage) visa

The new amendments also allow for Subclass 300 visas to be granted for a period of up to 15 months. Prior to the change, these visas could only be granted for up to 9 months.

Take away

These concessions have been introduced in the context of the global COVID-19 pandemic. Visa applicants should take care to remember that the regulations can be changed at any time, and therefore we cannot assume that the concessions will remain available indefinitely.

Part #3 – Labour Market Testing requirement for subclass 186 Employer Nomination Scheme (ENS) visa?

The legislative instrument (LIN18/036) on labour market testing requirements for Temporary Skills Shortage subclass 482 (temporary) visa and subclass 494 (provisional) visa has been amended to include an additional requirement to advertise vacancies on the Government's 'Jobactive' [website](#) from 1 October 2020.

Around the same time, the Australian migration agent services industry regulator also notified registered migration agents that the Government expects Nominators/Sponsors seeking to nominate an overseas worker for a permanent employer sponsored visa (subclass 186 or 187) to advertise the position on Jobactive first, in order to demonstrate that there is a genuine need for an overseas worker to fill that position.

On 24 November 2020, the Department published a revised policy document relating to the ENS and Regional Sponsored Migration Scheme nomination instructing decision-makers to consider whether the employer has made attempts to recruit local workers through Jobactive or other national advertisements. At this stage, changes to the legislation have not been implemented, however, prospective Sponsors/Nominators for the subclass 186 and 187 visa programs are advised to consider advertising the position on Jobactive.

Part #4 – Upfront sponsorship approval required before making partner visa application

In 2018 the Australian Government passed legislation to create a new family sponsorship framework which requires upfront formal sponsorship approval before a prospective applicant can apply for the relevant visa.

The framework has been imposed on the subclass 870 Sponsored Parent (Temporary) visa and the Government has indicated that the family sponsorship framework will extend to the partner visas.

As a result, Australian citizen or permanent resident Sponsors for a partner visa will be assessed against sponsorship obligations and character will need sponsorship approval first before a visa application can be made.

It is likely that a separate sponsorship application fee will be payable, in addition to the partner visa application fee which is already approaching \$8000 as at the time of writing. This change to sponsorship requirements may also affect the processing time and the ability of an onshore visa applicant to lodge a partner visa application on time before his/her temporary visa expires. It is expected that subordinate legislation will be introduced to facilitate implementation of the upfront sponsorship approval from November 2021 onwards. 



AUSTRALIA'S LONG-AWAITED ILLEGAL PHOENIX ACTIVITY LEGISLATION IS PASSED

After two false-starts, the long-awaited *Treasury Laws Amendment (Combating Illegal Phoenixing) Act 2020 (Cth)*, Australia's illegal phoenix activity legislation, has passed through both Houses of Federal Parliament and most of its provisions have now come into effect.

The new laws are intended to combat the practice of stripping a company of its assets, officers and directors, by moving them, without any or adequate compensation or remuneration, to another entity being run by the same directors, officers and/or management team. The stripped company, left only with liabilities to its creditors without any assets or revenue to pay them, is then wound up in insolvency with the result that the rights of creditors, having no recourse to the assets moved to the new entity, are defeated.

Various and creative ways have been employed to give effect to these phoenixing schemes which often involve true management and control of phoenixed entities being placed in the hands of "shadow" officers and directors: i.e. individuals other than those officially appointed to such roles who exercise effective control of the phoenixed company "in the shadows". Such an arrangement constitutes classic phoenixing where the power-brokers of the wound-up entity and the new entity are substantially the same.

Phoenixing has a substantial impact on Australia's economy, estimated to cost Australia's corporate creditors, including the Tax Office, more than \$5 billion annually. The measures enacted to try and stem the tide of illegal phoenixing include:

1. civil and criminal penalties, including substantial fines and jail terms of up to 10 years, for those who engage in or facilitate such activities;
2. empowering ASIC, liquidators and company creditors to take certain legal action against those involved in phoenixing activities;

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3. entitling a company that has become insolvent as a result of, or in circumstances of, phoenixing, to recover assets of which it has been unlawfully divested, and/or their monetary value, from the persons or entities that have acquired those assets for less than either their “market value” or “best price reasonably obtainable”;
4. in the alternative, where the divested assets have been sold to a third party purchaser without notice of any phoenixing activity, entitling the insolvent company to be compensated for the amount of value lost as a result of the divestment from those that did the divesting; and
5. allowing for withholding of tax refunds, including GST credits, to be withheld in


certain circumstances related to phoenixing.

Concerns have been expressed about the new legislation’s potential to interfere with lawful corporate restructuring arrangements. However, there would in our view seem to be sufficient provision for courts to intervene where necessary to open the way for legitimate restructuring, even where it might involve the actual or apparent movement of assets from a company in distress to related persons or entities for less than what may, on the available evidence, be regarded as its market value or “best price reasonably obtainable”.

Of course, one seeking to justify activity that might otherwise legitimately raise suspicions of phoenixing would need sufficient records and documentation regarding its restructuring efforts. But proper record-keeping is in any event a fundamental part of the duties of all company officers such that the need to rely on a well-kept paper trail should, it is suggested, be of little concern to responsible officers.

Provisions that empower ASIC to make findings of fact as to suspected phoenixing conduct and impose penalties based on those findings without involving the courts could potentially invite challenge on constitutional grounds.

How can we assist? Every business and enterprise face commercial stress and difficulty when outstanding bills cannot be, or are not, paid. Our insolvency, restructuring and debt recovery team are skilled and experienced in advising insolvency practitioners, as well as directors and companies, in all aspects of insolvency law, and provide independent, practical advice on all issues. HHG Legal Group’s Restructuring, Insolvency & Debt Recovery Team provide real expertise and experience to manage the process and help guide you through the other side. Contact us today should you require advice or representation in this area – visit hgg.com.au to find out more.

*This is general information only and does not constitute specific legal advice. Please consult one of our experienced Legal Team for specific advice relevant to your situation. 



MEMBER PROFILE

Muhammed Ishtiaq

Ishtiaq Law Associates (Lahore, Pakistan)

What was your motivation to become a lawyer?

I am the first ever family member who joined this profession. This is my nature to help needy people therefore this my natural habitat and is absolutely compatible with requirements/demands of the profession. Hence, I feel comfortable in this profession because it matches my personality. Since I have adopted this profession I've never thought to leave this profession and join anything else.

What are the most memorable experiences you have had thus far as a lawyer?

In my initial years of my professional life, I was a member of a team who challenged the Military Coup in Pakistan before the Supreme Court of Pakistan. I am the third person in all of Pakistan who has been listed as Counsel of International Criminal Court in The Hague. I am a group

member of Advocates who properly understand Public International Laws. It is my honor that my law firm has a liaison/partnership with law firms almost in every country in the world.

What are your interest and/or hobbies?

I love travelling and seeing people from different cultures of the world. I like to discover new things especially related to the profession of law. It is my interest to take on challenges and to achieve them successfully.

Share with us something that Primerus members would be surprised to know about you.

My law firm is a full service office in Pakistan and we also deal with certain areas of law in western countries. It is my honor that my office has liaison/partnership with law firms almost in every country in the world.

Do you have any special messages for Primerus members?

I have always found Primerus as supporting, encouraging, providing opportunities to learn new trends in the law according to circumstances, and providing an opportunity to see legal personalities of law firms from all over the world. This is a great opportunity for a true and professional lawyer. I think that what position I am enjoying as lawyer is because of Primerus.



MEMBER PROFILE

Kengo Nishigaki

GI&T Law Office (Tokyo, Japan)

What was your motivation to become a lawyer?

I wanted to be independent.

What are the most memorable experiences you have had thus far as a lawyer?

A few years ago, I represented one of the largest pharmaceutical companies in Japan, for an ICC arbitration against a US bio-tech company. I was able to secure a very favorable settlement, which made the client very happy.

What are your interest and/or hobbies?

Meditation and stone collection.

Share with us something that Primerus members would be surprised to know about you.

I spent 20 years at Baker & McKenzie Tokyo, being a partner for 12 years. I founded GI&T Law Office in April 2020. 95% of my clients at BM followed me.

Do you have any special messages for Primerus members?

We specialize in compliance investigation, litigation, and arbitration; however, we also deal with general corporate matters such as establishment of corporations. If you have any questions about Japanese law, please feel free to contact us.



MEMBER PROFILE

Michael Szeto

ONC Lawyers (Hong Kong)

What was your motivation to become a lawyer?

My mum used to be a court prosecutor. When I was a kid, I used to come home from school and tell mum “true” stories that I heard from my schoolmates that day. My mum would say, “Hearsay. Where is your evidence?” every time, without fail. By 7, I decided enough is enough, and I had to do law and put a stop to this.

What are the most memorable experiences you have had thus far as a lawyer?

There are a lot of memorable moments in my 20+ years of legal career thus far. I have had the pleasures of being involved in cases that became (and continued to be) legal authorities in Hong Kong. But my most

memorable experience has to be moving my mum’s admission as a solicitor of the High Court of Hong Kong.

What are your interest and/or hobbies?

I love watching movies, tai chi and qigong. I also serve as a volunteer at Ronald McDonald House Charities Hong Kong.

Share with us something that Primerus members would be surprised to know about you.

Since COVID-19, I have unlocked cooking achievement. I have created my “style” of Hong Kong-style curry fish balls (a classic Hong Kong street food) and become the firm’s go-to guy for curry fish balls.

Do you have any special messages for Primerus members?

Do look us (**ONC Lawyers**) up when you are in Hong Kong. We will be more than happy to meet in person and make new friends.

FIRM UPDATES



恒即名亚洲律师事务所

TM 1. HJM as Silver Sponsor of ACC Singapore Chapter

HJM Asia Law & Co LLC, founded by Managing Partner, Caroline Berube, is the official Silver Sponsor of the Association of Corporate Counsel (ACC) Singapore Chapter for year 2021. The ACC Singapore Chapter serves more than 400 in-house lawyers through networking, knowledge sharing, and continuing legal education to support the profession (www.acc.com/chapters-networks/chapters/singapore).

HJM's first webinar in collaboration with the ACC Singapore was held

virtually on May 11th, 2021 on the topic of "Due Diligence Pitfalls in China, Hong Kong, Australia and Europe." Moderated by Caroline who spoke on China, the webinar also had a panel of experts in each jurisdiction: Riccardo Cajola (Cajola & Associates, Italy), Michael Szeto (ONC Lawyers, Hong Kong), and Selwyn Black (Carroll & O'Dea, Australia). HJM was happy to invite Michael and Selwyn's firms to be part of the panel as they are Primerus members too.

2. Caroline Berube as President of CanCham Singapore

Caroline Berube, Managing Partner of HJM Asia Law & Co LLC, was elected President of The Canadian Chamber of Commerce (CanCham) in Singapore after serving as an Executive Director, Secretary for more than a decade. CanCham Singapore is a chamber of commerce making contacts and developing trade and investment opportunities between Singapore, Canada and the Asian region. (www.cancham.org.sg).



1. Ludwig Ng (Senior Partner) and Sherman Yan (Managing Partner, Head of Litigation & Dispute Resolution) of **ONC**

Lawyers co-authored "A Practical Guide to Resolving Shareholder Disputes" that was published by LexisNexis in

February 2021. The book gives a detailed and practical synopsis of the procedural hurdles that practitioners will encounter when advising clients, and analyses the applicable principles in derivative actions under both the common law and statutory regime, shareholders' personal rights, shareholders' agreement, the twin statutory remedies of unfair prejudice petition and winding-up petitions on just and equitable grounds from a practitioner's perspective.

2. Joshua Chu (Consultant) and Michael Szeto (Partner) co-authored an article entitled "Love, Cybersecurity & Hacked-Robots" on issues of robots and cybersecurity for The Hong Kong Lawyer (the official journal of the Law Society of Hong Kong) February 2021 edition and Lexology. The article has since gone viral overseas and has been cited and reported in a number of international news outlets (including The Week, The Daily Star, The Nation Online, Buss the World, The Big World Tale, UK News Today and News Tide 24/7) with many calling for greater attention upon the subject of cybersecurity in product design.