



ashurst

# COVID-19: Impact on business

**INCLUDING CONTRACTUAL ISSUES,  
EMPLOYMENT AND DATA PROTECTION**

**WEBINAR**

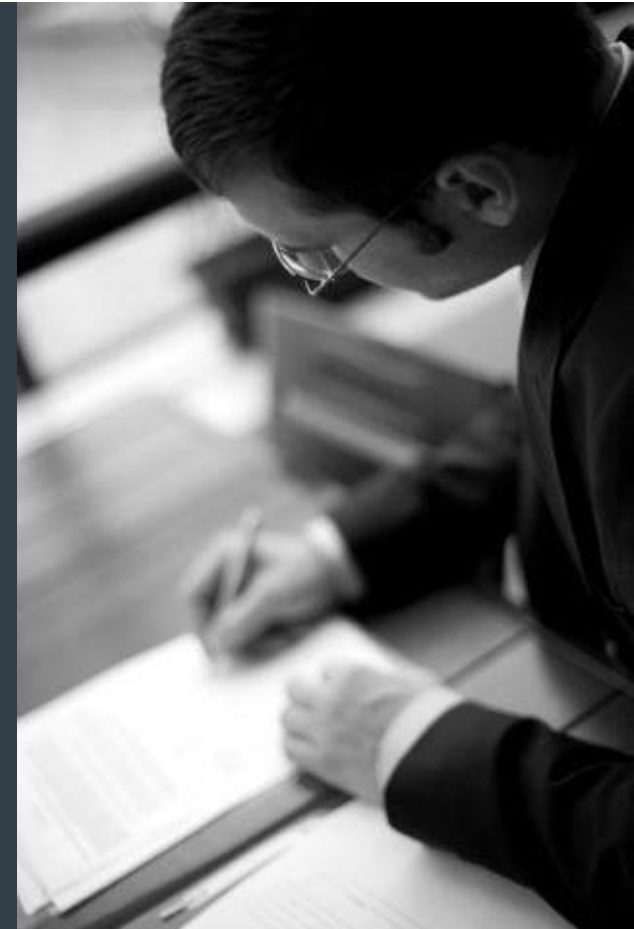
**WEDNESDAY, 8 APRIL 2020, 12:00PM JST**

# Overview

## WHAT WE ARE COVERING TODAY

---

- 1 Contractual issues
- 2 Employment law update
- 3 Data protection and privacy issues
- 4 Questions



## Before we begin...

Please send through any questions via either:

1. the **Zoom Chat function**, which can be accessed by clicking the “Chat” button at the bottom of your screen; or
2. via **Email** to **info@anzccj.jp**.

Questions can be sent at any time during the webinar, and will be answered at the end of the session.

ashurst



ashurst



**Ronnie King**  
Partner  
Tokyo



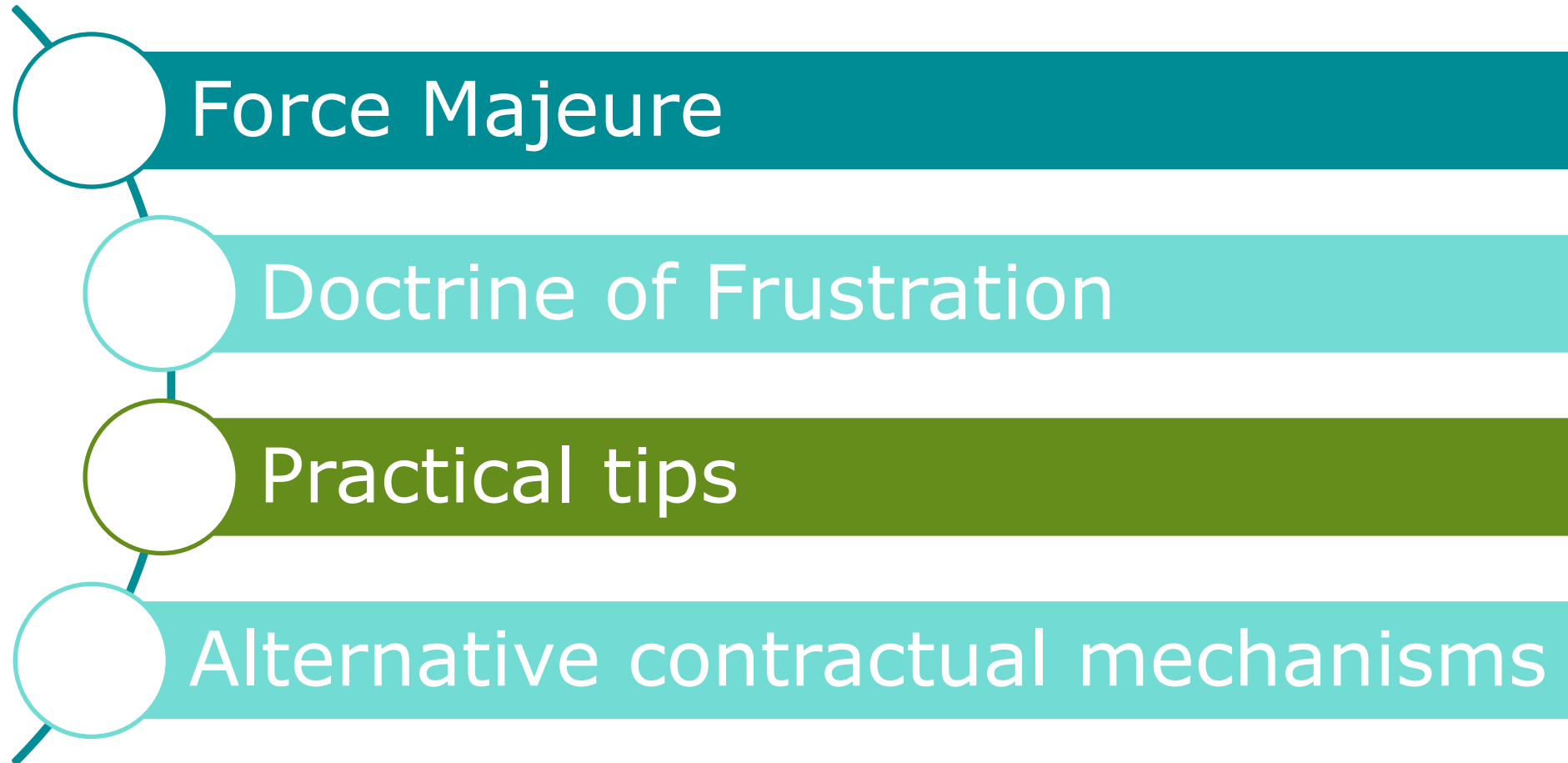
**Stephanie Cameron**  
Senior Associate  
Tokyo

Contractual issues  
including force  
majeure



# Overview

---



# Common law and Civil law jurisdictions

---

## Common law countries

- Australia, New Zealand.
- Mixture of statute and law developed by judges.
- Common law courts apply precedent.

## Civil law countries

- Japan.
- Codified laws.
- No strict doctrine of precedent.

# Force Majeure

---

## Common law position

---

- Commonly included in commercial contracts.
- Question whether the event falls within those listed.
- May require a mitigation requirement.
- Express clauses are interpreted strictly.

## Civil law position

---

- Governing law may allow for implication.
- Doctrine of hardship.

# Frustration

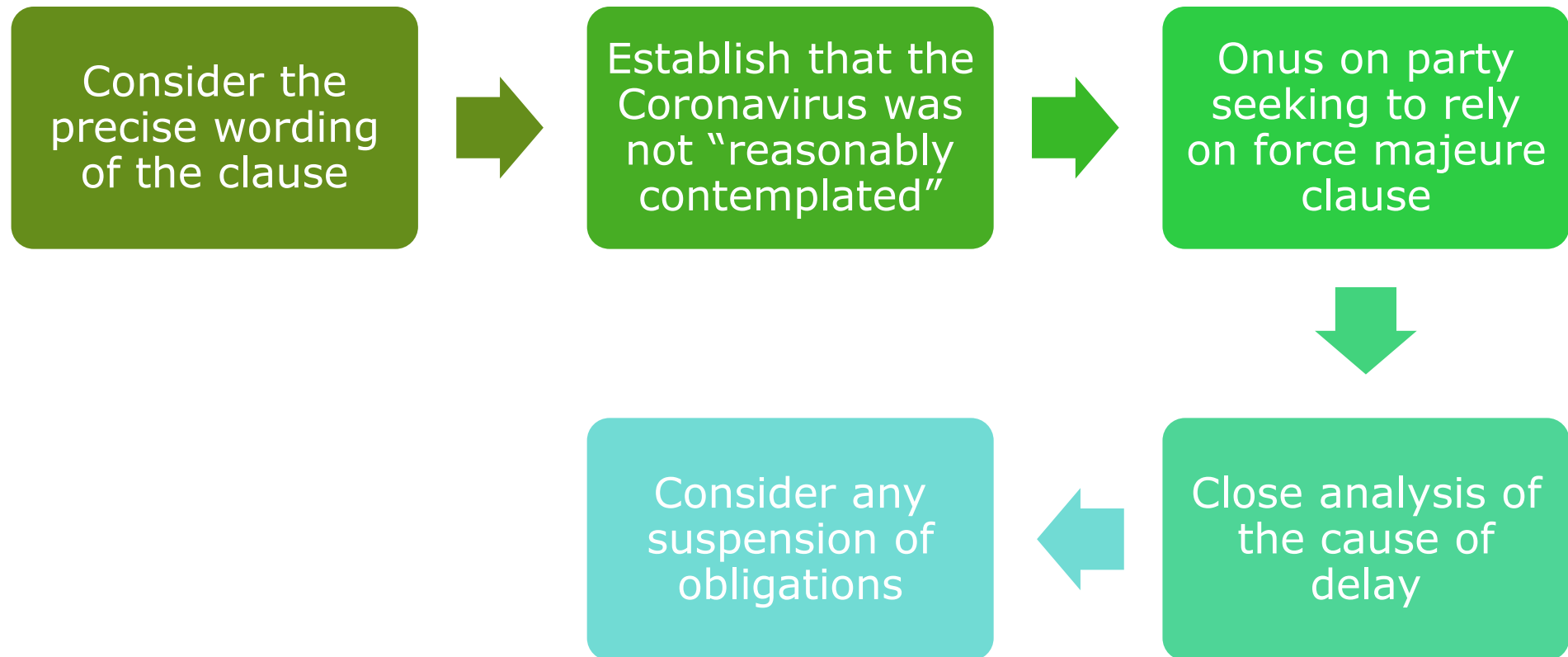
---

- Applies where events occur that result in a situation fundamentally or radically different from what was in the contemplation of the parties when the contract was made.



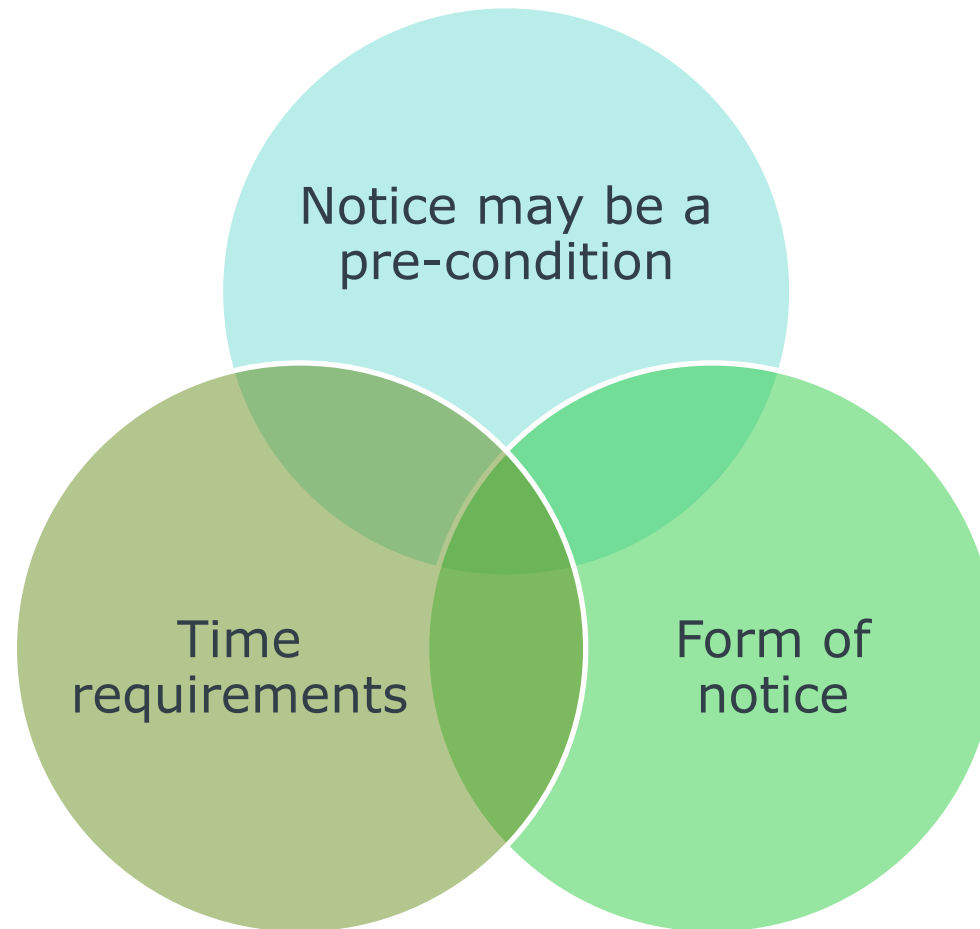
# Using the Force Majeure clause

---



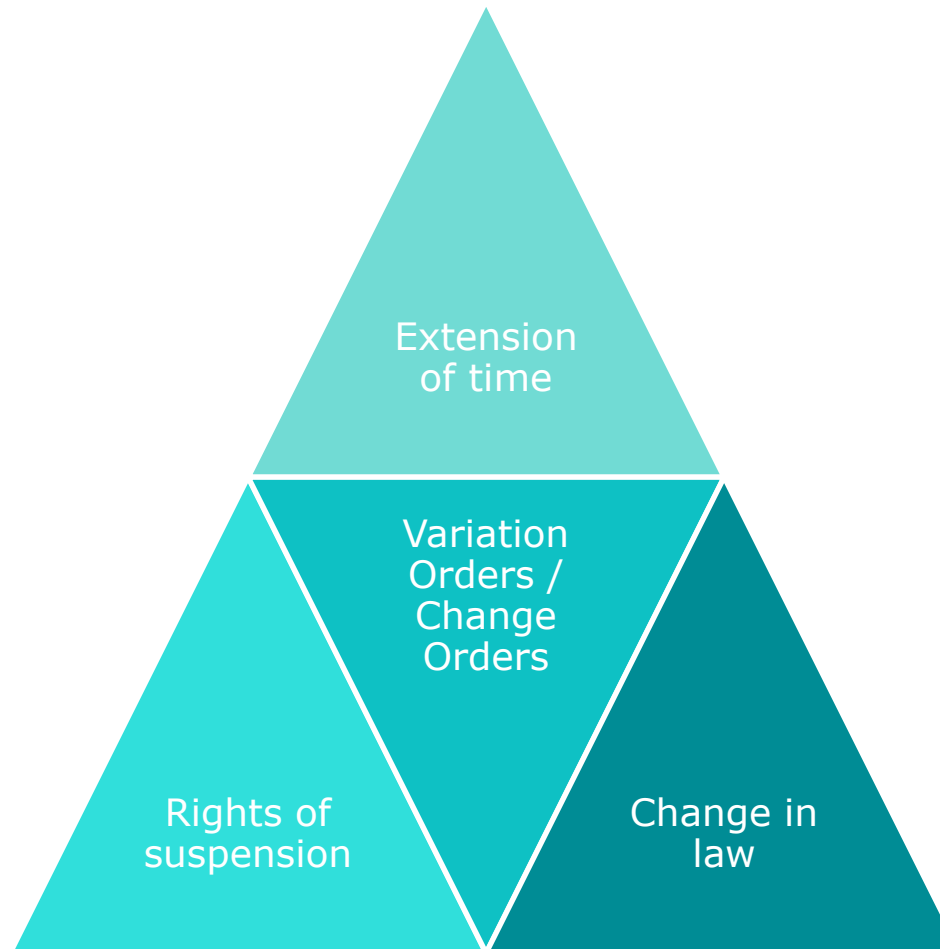
# Notice provisions

---



# Alternative contractual mechanisms

---



# Steps to mitigate risk

---



ashurst



**Kensuke Inoue**  
Partner  
Tokyo



**Karen Mitra**  
Senior Associate  
Singapore

# Employment law update



# Work health and safety - Australia

---



**General Duty:** An employer's duty is to eliminate risks to health and safety, and where not reasonably practicable, to minimise risks so far as is reasonably practicable.

# Directions to employees - Australia

---



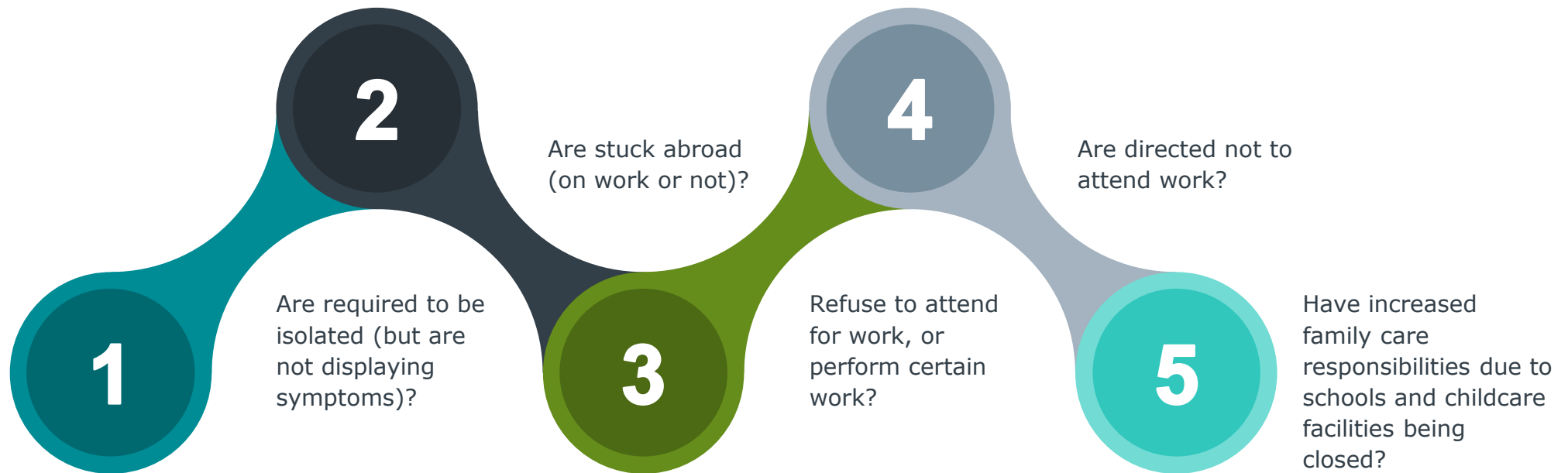
## Directing employees

- Work from home or not attend work
- Take annual, long service or personal leave
- Attend a medical assessment, temperature tested or COVID-19 clearance
- Not undertake certain non-work related travel or take other precautions outside the workplace

# Leave and pay - Australia

---

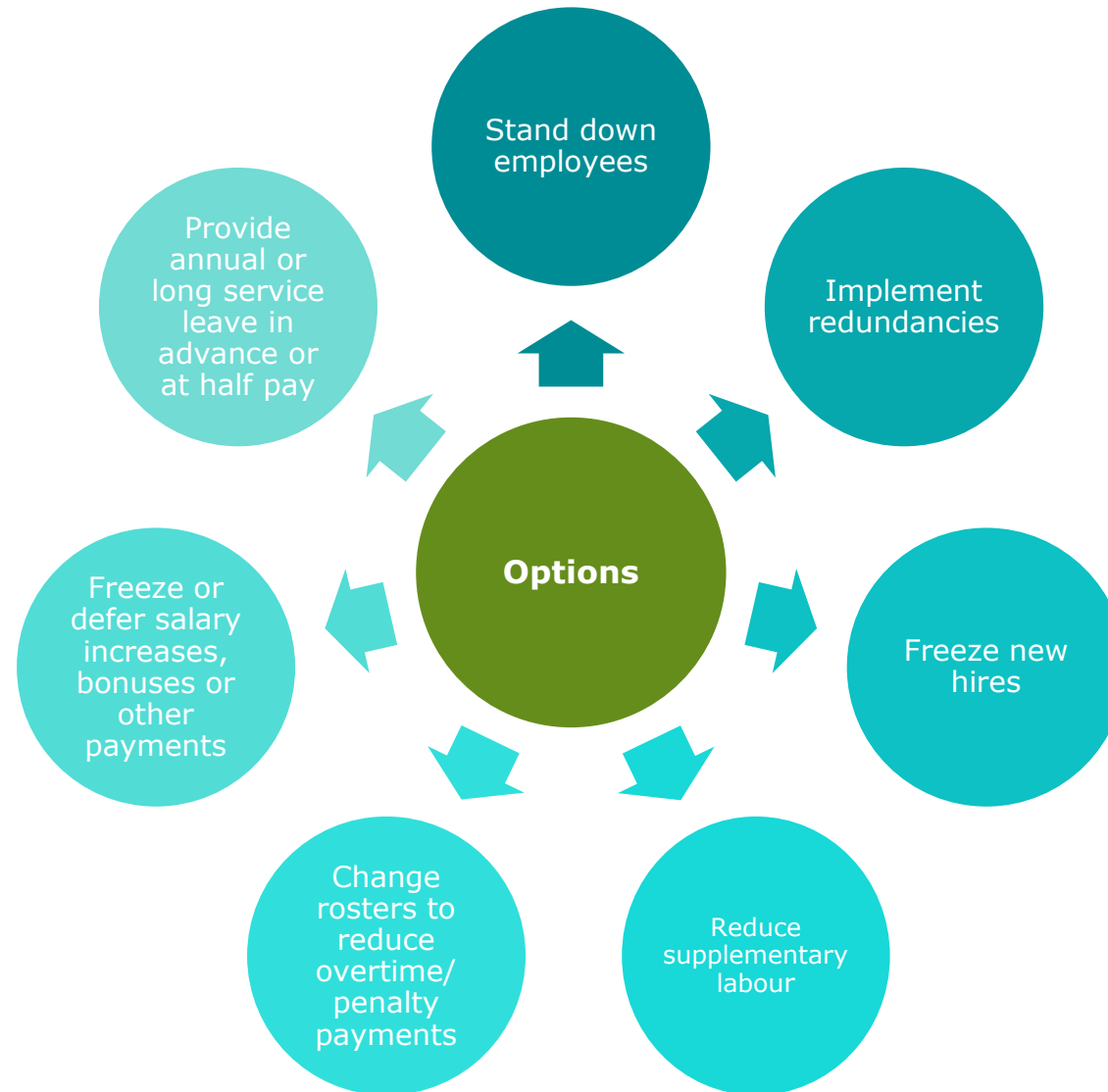
What leave/pay arrangements will apply if employees:





# Scaling down – options for employers

---



# Standing down employees - Australia

---

**Test:** Do you need to stand down employees because they cannot be usefully employed? If so:

Consider whether you have a right to do so under legislation, an enterprise agreement or a contract of employment

Consider whether an enterprise agreement or contract of employment impose additional requirements before you can stand down employees (eg consultation or notice)

# Implementing redundancies - Australia

---

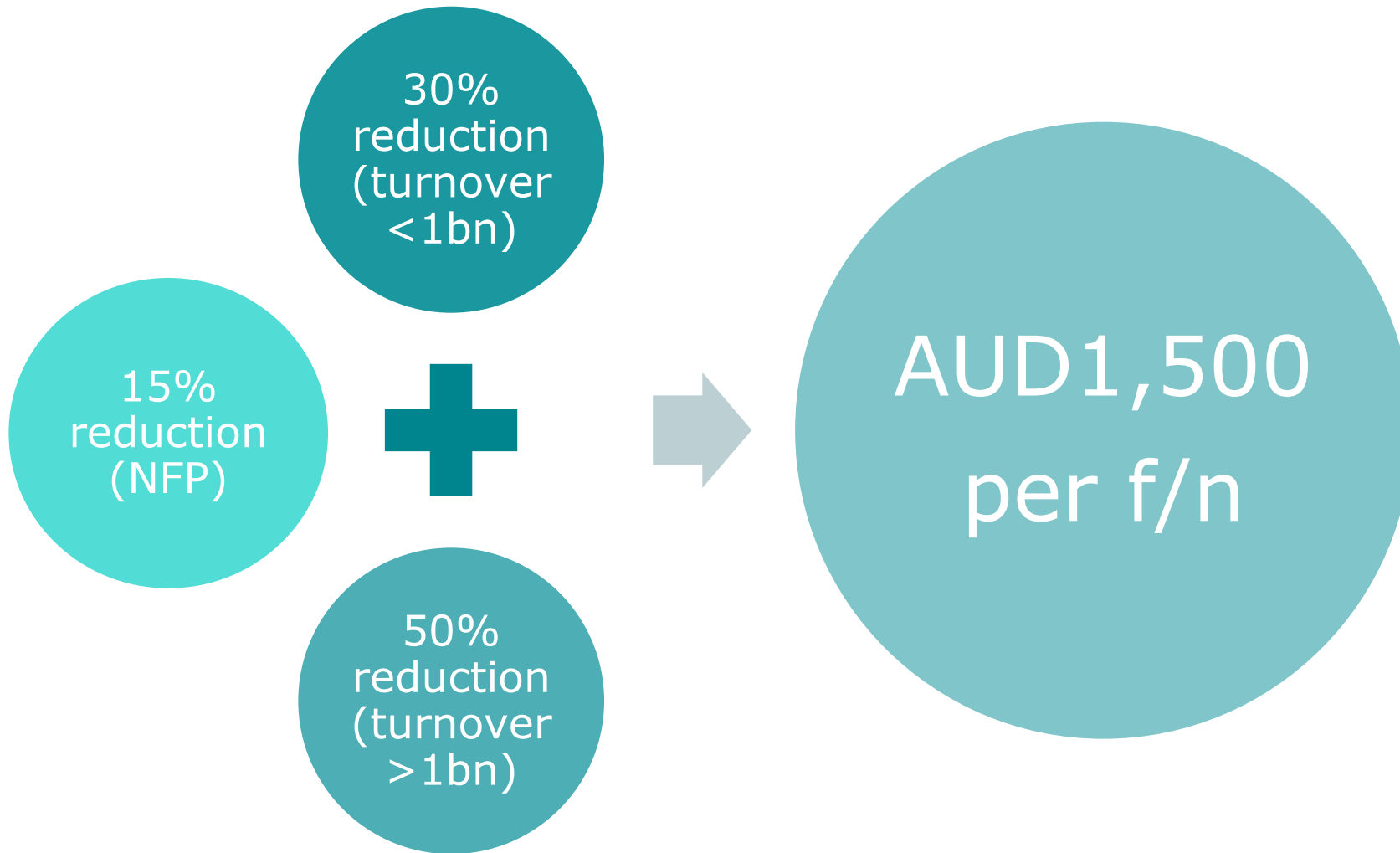
**Redeployment:**  
consider whether  
there are any  
options for  
redeployment  
within the business  
or associated  
entities

**Consultation:**  
make sure you  
comply with  
consultation  
obligations under  
any enterprise  
agreements,  
modern awards,  
policies and  
procedures

**Challenge:**  
Redundancies are  
likely to be  
scrutinised and  
should be  
implemented as a  
last resort.

# Government assistance - Australia

---



# Employer rights - Japan

---



Direction to work remotely

Direction not to work

Request to take annual leave

Request not to travel



Cease salary payments

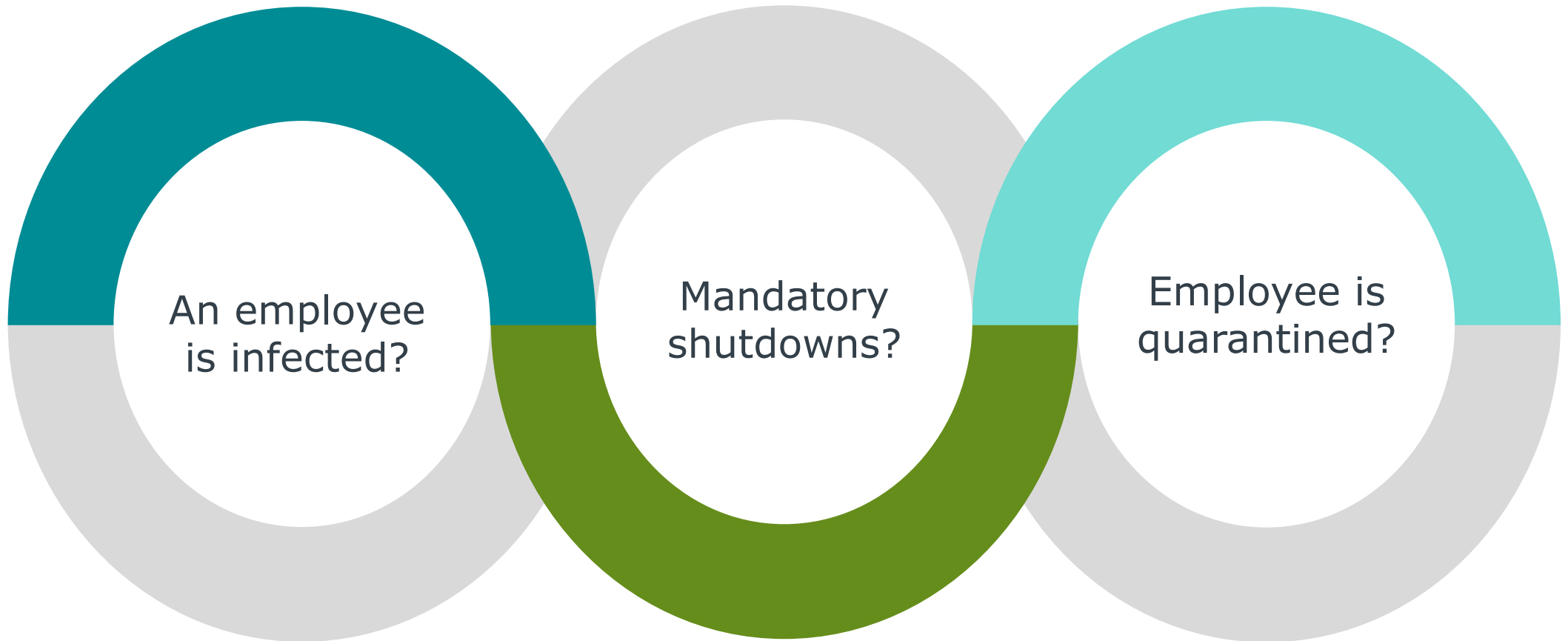
Direction to take annual leave

Direction not to travel

Must always comply with the employment contract

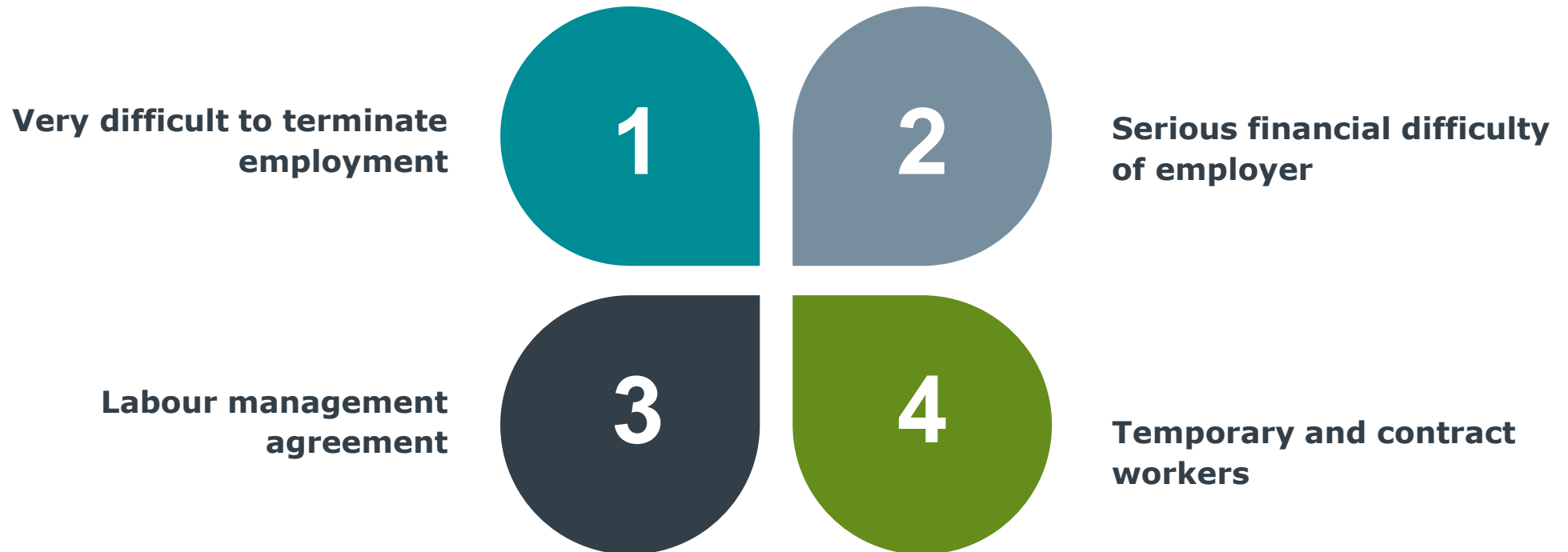
# What are the employer's rights in Japan if?

---



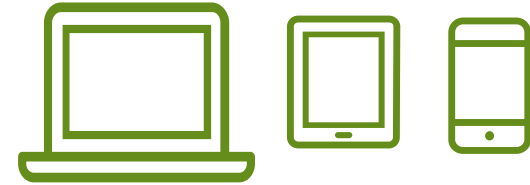
# Implementing redundancies - Japan

---



# Working from home - Japan

---



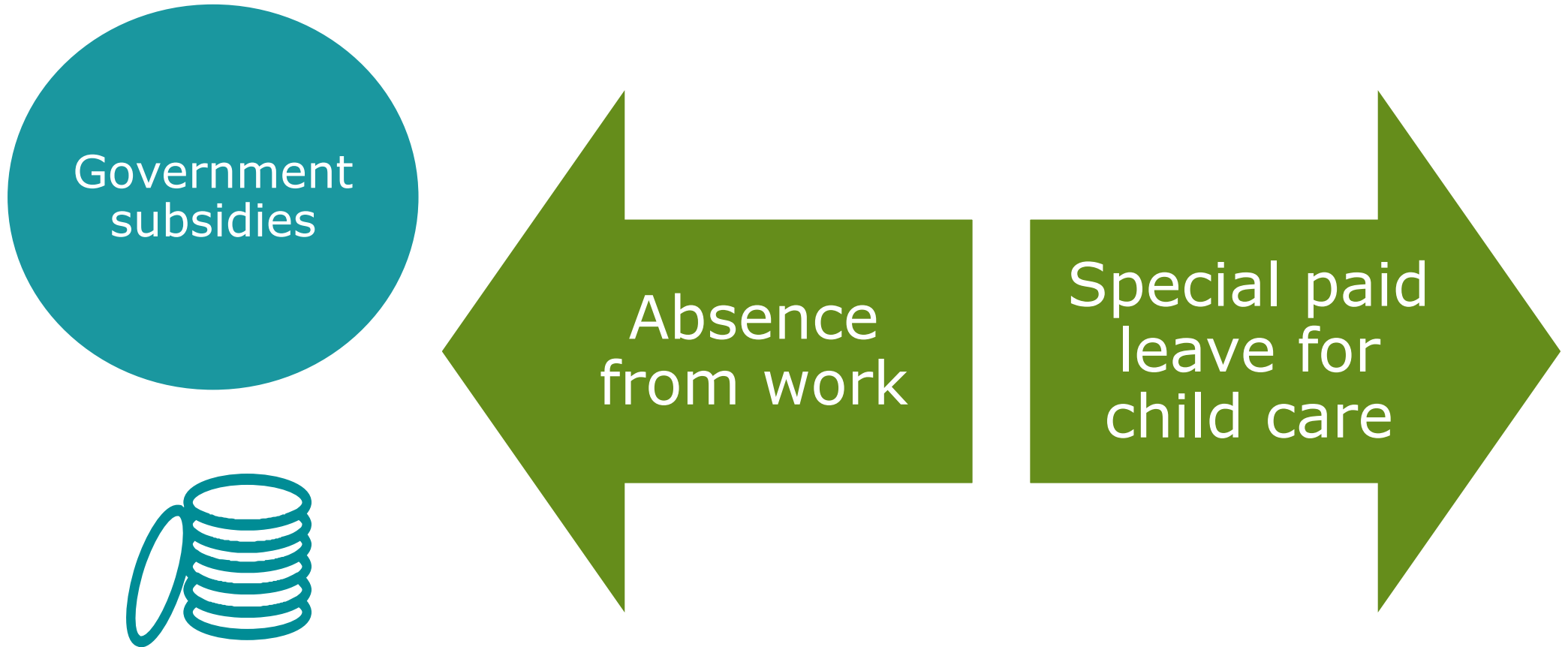
Employer's  
liability

Working  
from home



# Government assistance - Japan

---



ashurst



**Lucy Spencer**  
Associate  
Hong Kong



**Yudai Nagaishi**  
Associate  
Tokyo

Data protection and  
privacy issues



# COVID-19 and data privacy – what are the key issues for employers?

---

Can employers request and collect relevant personal data from employees?

How can employers use and store any collected personal data?

## Most important point...

---

Employers need to balance the following obligations:

Maintain a safe workplace for staff  
and visitors


Data privacy

Data privacy rights are not absolute – they interlink with employers' wider responsibilities, including pursuant to:

- employment / OH&S / discrimination laws;
- employment contracts; and
- government guidance/regulations regarding COVID-19.

Can employers request and collect relevant personal data from their employees?

---



**Yes** – subject to privacy laws and employment contract/policies

# Australian Privacy Principles (APPs) under the Australian Privacy Act 1988 (Cth)

---

Australian Privacy Principle	Summary
APP1: Open and transparent management of personal information	Regulated entities must manage personal information in an open and transparent way through a clear and up-to-date privacy policy.
APP2: Anonymity and pseudonymity	Data subjects must be allowed to provide personal information anonymously or through a pseudonym.
APP3: Collection of solicited personal information	Solicited personal information may only be collected in certain circumstances
APP4: Dealing with unsolicited personal information	Unsolicited personal information received must be destroyed or de-identified as soon as practicable.
APP5: Notification of the collection of personal information	Regulated entities must take reasonable steps either to notify the individual of certain matters or to ensure the individual is aware of those matters relating to collection
APP6: Use or disclosure of personal information	Personal information may only be used or disclosed for a purpose for which it was collected or a secondary purpose if an exception applies.

# Australian Privacy Principles (APPs)

---

Australian Privacy Principle	Summary
APP7: Direct marketing	Personal information can only be used for direct marketing where certain conditions are met. Subjects must be allowed to opt out of marketing.
APP8: Cross-border disclosure of personal information	Regulated entities must take steps to protect personal information before disclosing it overseas.
APP9: Adoption, use or disclosure of government related identifiers	Government identifiers may only be used in limited circumstances.
APP10: Quality of personal information	Reasonable steps must be taken to ensure data collected is accurate, up-to-date and complete.
APP11: Security of personal information	Reasonable steps must be taken to secure collected data.
APP12: Access to personal information	Regulated entities have certain obligations when subjects request personal data.
APP13: Correction of personal information	Regulated entities are responsible for correcting personal data where inaccurate, outdated or incomplete.

# Best practices for collecting personal data

---

- Prior to collecting personal information, employers should advise their employees (if not advised previously) of, at a minimum:
  - the employer's identity and contact details
  - the fact and circumstances of collection
  - whether the collection is required or authorised by law
  - the purposes of collection e.g. to manage the health and safety of all employees;
  - the consequences if personal information is not collected
  - other entities or bodies of persons to which the personal information is usually disclosed
  - information about the entity's Privacy Policy
  - whether the entity is likely to disclose personal information to overseas recipients, and if practicable, the countries where they are located



# How can employers use personal data collected from their employees?

---

A regulated entity can only use or disclose personal information for a purpose for which it was collected (known as the 'primary purpose'), or for a secondary purpose if an exception applies.

# Storing COVID-19 related personal data – what are employers' obligations?

---

- A regulated entity must take reasonable steps to protect personal information it holds from misuse, interference and loss, and from unauthorised access, modification or disclosure. An entity has obligations to destroy or de-identify personal information in certain circumstances.
- Where a regulated entity no longer needs personal information for any purpose for which the information may be used or disclosed under the APPs, for example – determining whether an employee poses a health risk to the workplace, the entity must take reasonable steps to destroy the information or ensure that it is de-identified.

# Office of the Australian Information Commissioner

## Guidance on COVID-19:

---

Key Points noted by the Commissioner for understanding your privacy obligations to your employees:

- Personal information should be used or disclosed on a 'need to know' basis
- Only the minimum amount of personal information reasonably necessary to prevent or manage COVID-19 should be collected, used or disclosed
- Consider taking steps now to notify staff of how their personal information will be handled in responding to any potential or confirmed case of COVID-19 in the workplace
- Ensure reasonable steps are in place to keep personal information secure, including where employees are working remotely.

# Key data privacy takeaways

---

- Ensure compliance with data privacy obligations within the entire legal framework relevant to the COVID-19 outbreak (including employment laws and government guidelines)
- Provide employees with all required information (the purpose for which their data will be collected, how it will be used, who to contact to make any changes etc.)
- Ensure that data collected is kept safe
- Always limit the data collected to what is absolutely necessary in the circumstances and dispose of data once it is no longer needed
- Balance the obligation to provide a safe workplace to your employees against legitimate business interests and employees rights

# Overview of the Japanese position

---

- Act on Protection of Personal Information and associated rules
- The basic position is that an employer may request any information from an employee, however the employer must only use that information for the purpose upon which the employer has notified the employee it will be used for.

# Exceptions to the basic position in Japan

---

- If the employer is going to use the information for one of the "excepted purposes", it must first do what it can to get the consent of the employee.
- Two exceptions:
  1. Cases in which there is a need to protect a human life.
  2. Cases in which there is a special need to enhance public hygiene or promote the fostering of healthy children.



Questions?

# Questions?

---



**Ronnie King**  
Partner  
Tokyo



**Kensuke Inoue**  
Partner  
Tokyo



**Tracy Whiriskey**  
Partner  
Tokyo



**Stephanie Cameron**  
Senior Associate  
Tokyo



**Karen Mitra**  
Senior Associate  
Singapore



**Lucy Spencer**  
Associate  
Hong Kong



**Yudai Nagaishi**  
Associate  
Tokyo





ashurst