

# THE EMERGENCE OF COWORKING SPACES AND ITS IMPLICATIONS

Coworking spaces have increased in popularity as a result of growth in the freelancing economy, and advancements in technology. This trend not only impacts how people work and collaborate with each other, but also to the real estate industry in general, including landlords, developers and real estate agents. Competition to secure tenants has become more intense, and many are turning to the coworking concept and business model to offer a more attractive, affordable, and flexible alternative to the traditional office space. In this article, Jeyakuan S K Jeyasingam, Partner in the Dispute Resolution Practice of Zaid Ibrahim & Co. (a member of ZICO Law) discusses the emergence of coworking spaces in Malaysia, and implications under existing legislation.

SEPTEMBER 2019



## COWORKING SPACES A GAME CHANGER

Brad Neuberg is credited with starting the coworking movement in 2005 with the idea of combining the independence of freelancing with the structure and community of an office space. Coworking spaces are essentially shared working spaces that offer a suite of amenities such as hotdesks, meeting rooms, kitchen, coffee and beverages, and other shared resources. This provides an affordable solution for those who want to take advantage of a flexible space.

Some coworking places were developed by nomadic internet entrepreneurs seeking an alternative to working in coffee shops and cafes, or in isolation at home. Once the domain of freelancers, this concept is becoming more mainstream, with larger organisations looking to innovate the way they do business also jumping onto the

bandwagon. Employees in some organisations have the liberty to use any seating area in their office through a hot-desking system. The economies of scale derived from coworking spaces also enable organisations to have a presence at prestigious addresses at more competitive costs.

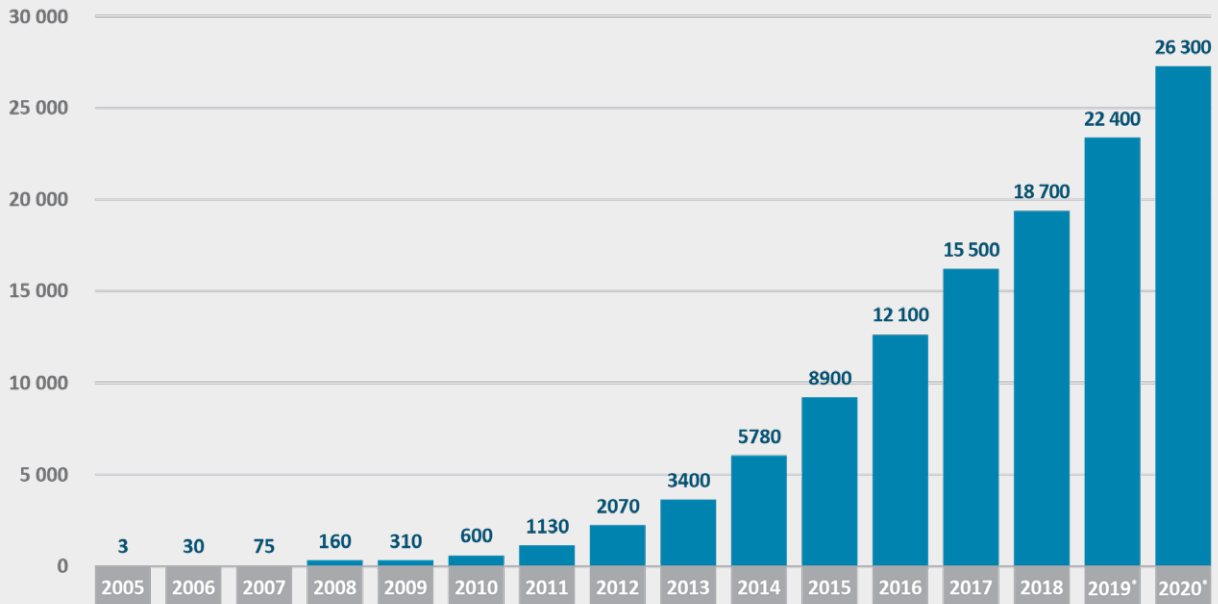
The advent of coworking spaces has been a game changer to the traditional leasing and rental of office spaces. As the landscape for office space rentals becomes more competitive, landlords and service providers are leveraging on the coworking concept to offer a more affordable, flexible and attractive solution compared to the traditional office space.

## GROWTH OF COWORKING SPACES

Globally, there were about 18,700 coworking spaces in 2018. This figure is expected to rise, with the Asia-Pacific region being one of the fastest growing, followed by Europe, the Middle East and Africa. Studies have shown the number of coworking spaces have roughly doubled each year (see Figure 1 below). It is widely believed that

a common concern of many employees centers upon the feelings of isolation and the loss of human interaction if they were to telecommute. While it can be said that traditionally coworking spaces are mainly for freelancers, start-ups and commuters, larger organisations are now hopping on board.

Figure 1: Number of coworking spaces worldwide from 2005 to 2020



Source: <https://www.statista.com/statistics/554273/number-of-coworking-spaces-worldwide/>

The versatility of office space solutions brings with it exciting possibilities for service providers to generate more revenue and profits. When Neuberg hatched his initial idea, one would scarcely be able to fathom the emergence of such a massive global market. The

rapid-fire speed in which it has engulfed commercial, and in certain jurisdictions, even residential property markets has far outstripped current legislative frameworks.

## IS COWORKING CAPABLE OF BEING REGULATED?

The concept of shared working spaces has largely been untested in a court of law. Many coworking spaces are emerging in regulatory voids left by outdated policies. However, some countries are stepping up, and have introduced or are planning to introduce regulations for coworking.

**Indonesia** has been very proactive in promoting the growth of these coworking spaces. In Jakarta, the local government had subsidised two coworking spaces which are currently located in the Casablanca and the Melati Reservoir respectively.

Further to the west, both Australia and North America have been working constantly to identify the regulatory framework to address the rapid growth of coworking spaces. In **North America**, coworking space owners must comply with local regulations such as the Occupational Health and Safety Act and the Accessibility for Ontarians

with a Disability Act to ensure that coworking spaces hold similar standards of compliance as the local corporate offices.

In **Australia** on the other hand, the use of space is regulated. It has been reported that many coworking spaces identify regulatory frameworks, including land use permission controls, as significant barriers to establishing these spaces. For instance, a shared working space where people repair furniture or make jewellery could be considered as being used for manufacturing.

Despite more countries moving forward to encourage the idea of coworking spaces, there are still a few that are still hesitant and cautious. In **Beijing**, coworking spaces are currently banned to prevent the market for virtual offices from becoming unruly. New regulations in parts of Beijing require companies to provide physical addresses that correspond with property ownership.

## COWORKING IN MALAYSIA

The demand for coworking spaces is booming in Malaysia, in line with global trends. A quick Google search will find you a list of coworking spaces to fit your needs. Many conventional office owners in Malaysia are creating coworking spaces in their developments either by venturing into the business and creating their own brand or through joint ventures with established coworking space providers. Coworking spaces in Malaysia include WeWork, Regus, Colony, CoLabs The Starling, Impact Hub, Common Ground, and the new kid on the block, Wotso. Shopping malls with ample spaces and lifestyle elements are ideal for coworking spaces as there are already established amenities available at their disposal.

Many companies are making the move into coworking spaces. Mamee Double Decker (M) Sdn Bhd, Malaysia's largest snack company, is

moving its Kuala Lumpur office to a new luxury coworking space by Colony called Colony@Mutiar Damansara, and Carsome Malaysia, a regional start-up, will also be moving its headquarters to Colony@ Mutiar Damansara.

According to Knight Frank Malaysia, the three main factors for companies to take up coworking spaces are flexibility, hassle-free and cost efficiency. The lease arrangement offered by coworking spaces allows for less commitment and more flexibility, especially for start-ups who are unsure if their venture will work out. Another advantage of coworking spaces is that it could open doors to more business opportunities as those sharing the space may be from different businesses, allowing for greater networking capabilities.

## WHAT ARE MALAYSIAN LAWS THAT ARE RELEVANT TO COWORKING?

In Malaysia, the leasing or letting of space has predominantly been the domain of estate agents and the concept of shared working spaces could very well be an independent industry on its own.

By and large, the Valuers, Appraisers, Estate Agents and Property Managers Act 1981 ("VAEAPMA") governs the real estate business

and one has to be associated with an estate agency practice to carry out realty work. In the context of letting and leasing, section 22B(1A) VAEAPMA defines "Estate Agency Practice" as:

*"A person undertakes estate agency practice if he acts as an agent or holds himself out to the public or to any individual or firm as ready to act for a commission, fee, reward or other consideration –*

- (a) ...*
- (b) ...*
- (c) in respect of any **leasing or letting of land and buildings** and of any interest therein;*
- (d) in **making known of the availability of land, building, or any interest therein** for such sale or disposal, purchase or acquisition, or **leasing or letting** referred to in paragraph (a), (b) or (c), as the case may be; and*
- (e) in respect of any **tenancy administration including rental collection**, payment of outgoings, arrangement for minor repairs and handing over and taking over the possession of a property of any land or buildings and of any interest therein."*

Typically, the property owner will make an agreement with the service provider for the owner’s property to be used for the shared working space business. The owner will be required to fit-out the property in line with the service provider’s specifications. After that, the owner steps out of the picture. The service provider then takes over the entire scheme, from securing the tenants or coworkers, to maintaining the upkeep of the premises. These arrangements may differ between service providers.

Section 22 of the VAEAPMA restricts the business of estate agency practice to only registered estate agents and failure to abide by the VAEAPMA is an offence, which upon conviction can make one liable to

a fine not exceeding RM3,000 or imprisonment not exceeding three years or both (section 30 of VAEAPMA). This has led to several case precedents over the years that have established the difference between habitual/repetitive course of conduct in carrying on business and single/isolated transactions [*Matad Sdn Bhd v Ng Chee Keong* [2004] 2 CLJ 99 (CA); *Teh Swee Lian v Teh Eng Peng* [1998] 1 CLJ Supp 504 (HC); *S.R.K. Trading Sdn. Bhd. v City One Sdn. Bhd. & Anor* [1993] 4 CLJ 617 (HC)]. The coworking business model that is commonly run would very possibly come within the former i.e. a habitual/repetitive conduct of business that falls within the meaning of an estate agency practice.

## ELEMENTS OF COWORKING UNDER VAEAPMA

A coworking space business may typically have the following elements in their business model. Stakeholders would do well to thread carefully and be mindful of potential implications, including those set out below:

<p><b>Membership Fees</b></p>	<p>“Membership fees” paid by the property owners to the coworking space provider for the use of the premises could amount to “commission, fee or reward” for estate agents. This is because such membership fees are collected in the course of doing business, and it is a consistent and on-going repeated business, as opposed to an isolated act.</p> <p>Thus, it would fall within the ambit of an estate agency practice under section 22B of VAEAPMA.</p>
<p><b>Brokerage fees</b></p>	<p>Under section 22B(1A) of VAEAPMA, an “estate agency practice” may include the public, any individual or firm. Therefore, even if the coworking space provider’s services are limited to serviced office and coworking solutions only, it still falls within this ambit.</p>
<p><b>Short term licences</b></p>	<p>These solutions are packaged office solutions which are issued under a licence rather than a lease, usually never exceeding 12 months. The terms of agreement provided by the coworking space provider to an end user may appear to be granting a licence rather than a rental agreement.</p> <p>However, the courts will look at the relationship of the parties to determine the law and not by the label the parties choose to put on it (see <i>Facchini v Bryson</i> [1952] 1 TLR 1386).</p>
<p><b>Lead referral only</b></p>	<p>Even if the serviced office brokerage is fully automated with their role mainly that of a lead referral rather than active brokerage, it will still fall under the definition of an estate agency practice in section 22B(1A) of the VAEAPMA.</p>
<p><b>Generalised Terminology</b></p>	<p>If the coworking space provider only lists serviced office and coworking solutions and does not list tenancies/licenses with pure real estate solutions, any membership fees collected under this scenario will still fall under the definition of “commission, fee, reward or other consideration” in an “Estate Agency Practice”, thus infringing section 22B of VAEAPMA.</p>

## CAN COWORKING BE REGULATED IN MALAYSIA?

What can the government do to actually regulate or provide clarity on coworking space? As observed, Malaysia does not have a specific regulatory framework to govern coworking spaces as we now have for e-hailing services. However, there are some existing laws that have a bearing on this industry.

The Personal Data Protection Act 2010 (“PDPA”) plays a major role in the coworking space ambit. It is common practice for young entrepreneurs to have projects or discussions in their working space. The sharing of computer networks and other office electronic devices may result in possible breaches of personal data. Thus, ensuring

that coworking spaces are subjected to the PDPA would afford some protection for young entrepreneurs and the coworking proprietor.

It should be noted that coworking spaces like WorQ, Common Ground and Co-labs Coworking provide in their terms and conditions, that the regulation of personal data in regard to how it can be collected, processed and used when it comes to information of their employees, suppliers, and customers is in accordance to the PDPA.

Pursuant to the Personal Data Protection (Class of Data Users) Order 2013, there are classes of data users who must be registered under the PDPA, and real estate (particularly, licensed housing developers) is one of the said classes. While it is noted that coworking space does not fall under the class of users, perhaps in Malaysia it should be recognised as a concept of commercial real estate. Therefore, it will be advantageous to clearly define as to whether “coworking space” falls within the ambit of the class of users who should adhere to the PDPA.

## CONCLUSION

Coworking spaces are emerging in regulatory voids left by outdated policy frameworks. To exist, they rely on the forward thinking of local innovators seeking to revitalise urban centres. Legal details such as subletting clauses and restrictions on business use can hamper the establishment of successful coworking spaces. Issues that could arise during the leasing of coworking spaces includes property rights, allocation of responsibility for unexpected costs and liability issues. Landlords tend to utilise licensing or membership arrangements for people using their coworking space, but this often dilutes the control a landlord enjoys over his tenant population. A landlord, however, who uses leasing arrangements to maintain too tight a hold over his coworking tenants may find that the coworking environment fails.

Without clear regulations and provision, it can be very problematic for both the service provider (the owner of the coworking space business) as well as the members and users. As the coworking concept is a new and emerging industry, it is suggested that clear provisions define the type of licence or permit that the coworking space industry needs, to provide protection to those in the said industry, and avoid crossing

Another major concern for coworking spaces would be whether occupiers are subject to the Employment Act 1955 and also other regulations concerning employee/employer rights and liabilities. Potential issues that may arise include whether the affected person will be considered as an employee or employer in a particular situation, and whether the court has jurisdiction.

At common law an employer owes a duty of care towards his employees to ensure as far as reasonably possible the good health and safety of the employees. The Occupational Safety and Health Act 1995 (“**OHS 1994**”) provides the framework to secure the safety, health and welfare among workforce and to protect others against risks to safety or health in connection with the activities of persons at work. It specifies the general duties of employers, manufacturers, suppliers and employees. For example, employers with more than five employees are required to formulate a written safety and health policy. Coworking space should not be an exception.

into the real estate industry. For instance, clear provisions on whether a coworking space is permitted to be set up in a particular location, so that there is a balance between the real estate and coworking industry.

Although coworking space is currently subjected to the state authority and operators are required to obtain a business license, it is still insufficient since the business specification lacks the particulars as to what business category should coworking space fall under. Therefore, specifications should be made to ensure that rising coworking spaces possess a certain legal identity as to their business nature.

Just like how e-hailing rides has made its way into Malaysia and much of ASEAN despite transportation laws on commercial and private vehicles, necessity is the mother of invention as they say. A juggernaut in its own right, necessity will pave the way for the establishment of shared working spaces to be a mainstay in not just Malaysia, but possibly the whole of Asia-Pacific.

If you have any questions or require any additional information, you may contact the following person or the ZICO Law Partner you usually deal with.



**Jeyakuhan S K Jeyasingam**  
Partner

jeyakuhan.jeyasingam@zicolaw.com  
t. +603 2087 9999

**Jeyakuhan Jeyasingam** has over 22 years of experience in Property, Probate and Strata Management Law. He provides commercial litigation services for testamentary and inheritance claims as well as for disputes in stratified and landed property concerning common property, facility management, real estate acquisition, sales and leasing sectors.

He also regularly advises on local and cross-border legal claims against freight forwarders, hauliers/transporters, shipping lines and logistics providers and has represented clients on various civil and labour law matters as well. Jeyakuhan has also advised on corporate law documentation for international projects including those in the oil and gas, manufacturing, telecommunication, construction, education, media, plantation, timber, railway and plastics industries.

This article was edited by ZICO Knowledge Management.

All rights reserved. No part of this document may be reproduced or distributed in any form or by any means, or stored in a database or retrieval system, without our prior written permission.

This article is updated as at 21 August 2019. The information in this article is for general information only and is not a substitute for legal advice. If you require any advice or further information, please contact us.

**ASEAN INSIDERS,**  
by origin and passion