

Low-cost labour or cultural exchange? Reforming the Working Holiday visa programme

The Economic and
Labour Relations Review
2015, Vol. 26(3) 474–489
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sagepub.co.uk/journalsPermissions.nav
DOI: 10.1177/1035304615598160
elrr.sagepub.com


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Abstract

The article considers the place of Working Holiday visas in Australia's migration policy and socio-economic planning. With the number of Working Holiday visa grants now topping 200,000 annually, Working Holiday Makers are significant participants in low-skilled work in Australia. The article argues that the programme is not adequately regulated to protect Working Holiday Makers in this work. In light of concerns around the exploitation of Working Holiday Makers, the article offers suggestions for reform to the programme. The article argues that the programme should be returned to its original conception of fostering a cultural experience for young migrants coming to Australia. It argues that work entitlements under the Working Holiday visa should be limited to work that is appropriate for young migrants on a brief cultural visit and that labour shortages should otherwise be filled using dedicated temporary labour migration visas which are properly designed to address labour shortages in the economy. Reform is necessary to protect the work conditions of local and migrant workers, to maintain Australia's reputation as a country with high employment standards and to maintain positive relations with countries in the Working Holiday programme.

JEL codes: K37, J21, K31

Keywords

Labour markets, labour rights, migrant workers, migration, vulnerable workers

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Introduction

The role played by Working Holiday Makers in the Australian labour market is currently under the spotlight. The Senate Standing Committee on Education and Employment is currently investigating ‘the impact of Australia’s temporary work visa programmes on the Australian labour market and on the temporary work visa holders’ with a report due on 19 August 2015. The national Fair Work Ombudsman (2014) is also reviewing ‘the entitlements of overseas visa-holders on working holidays’. On Monday 4 May 2015, the Australian Broadcasting Commission (ABC) national current affairs programme *Four Corners* presented an episode titled ‘Slaving away: the dirty secrets behind Australia’s fresh food’. The programme made a number of allegations concerning exploitation of migrant workers including gross underpayment of wages, excessive hours of work, sexual and other forms of harassment and sub-standard living conditions. In most cases, the workers were Working Holiday Makers who had been recruited through labour hire companies. It is timely, then, to consider the place of Working Holiday visas in Australia’s migration policy and socio-economic planning.

Since its inception in 1975, the Working Holiday visa has been framed as a cultural programme, facilitating the travel of young people to and from Australia to have a cultural experience (Department of Immigration and Border Protection (DIBP), 2014e; Joint Standing Committee on Migration (JSCM), 1997: xv), supplemented by a limited opportunity to work. So conceived, the Working Holiday visa scheme is not regulated as a labour migration programme, despite recognition of the important role played by Working Holiday Makers in industries such as horticulture (Tan and Lester, 2012) and tourism (Australian Tourism Export Council, 2012) and despite explicit encouragement for Working Holiday Makers to undertake low and unskilled work. A recent indication that the Working Holiday visa programme is not yet considered a labour market programme was its exclusion from a DIBP review into ‘Australia’s skilled migration and 400 series visa programmes’ (DIBP, 2014c: 5) which aims to develop ‘a new skilled migration visa framework’ (DIBP, December 2014c: 7). In its proposal paper of December 2014, this Department reiterated that the Working Holiday Maker programme was ‘primarily a cultural exchange programme’, and affirmed that ‘the Working Holiday Maker programme is not designed to fill on-going labour shortages’ (DIBP, 2014c). With the number of Working Holiday visas granted annually since 2011/2012 being over 200,000 (DIBP, 2014e, 2014b: 83–4) and with changes to the Working Holiday visa that encourage Working Holiday Makers to participate in specified industries in regional Australia, and that allow more extensive entitlements to work for a second year, this conception needs to be revisited.

There is a clear policy dilemma for the Working Holiday Maker programme. As tourists, Working Holiday Makers are significant contributors to the economy, and there is a strong incentive to change the policy settings of the Working Holiday Maker programme to attract as many participants as possible. One of the most effective ways to attract more Working Holiday Makers to Australia is to increase their entitlement to work. However, expanding work entitlements in the Working Holiday visa programme has the negative effect, if insufficiently targeted, of putting pressure on the domestic labour market. Furthermore, the greater the work entitlements of Working Holiday Makers, the more labour they will perform and the less they will contribute to the tourist economy. There

comes a point where their primary designation should be as workers rather than tourists, and their contribution assessed in these terms.

In Part 1, the article examines the profile of Working Holiday Makers in Australia. It identifies a change in this profile from that of almost exclusively a British backpacker to that of a migrant worker from a wide range of countries, increasingly from Asia. In Part 2, the article tracks the changing complexion of the Working Holiday visa programme, noting in particular its increasing significance as a labour market programme. It analyses past reviews of the programme, noting a change in emphasis in its rationale and a changing conceptualisation of Working Holiday Makers across time. In Part 3, the article focuses on the profile of Working Holiday Makers as workers. Drawing on an emerging literature on precarious work, the article explains how Working Holiday Makers are particularly vulnerable in the labour market, fitting the profile of precarious workers. Part 4 briefly outlines inherent limitations in domestic labour law protections for Working Holiday Makers, which reinforce their vulnerability in the Australian workforce. Finally, in Part 5, the article proposes reforms to the Working Holiday Maker programme. It argues that the programme is not suited to filling gaps in the labour market and that it should be returned to its original conception of fostering a cultural experience for young migrants coming to Australia. It argues that work entitlements under the Working Holiday visa should be limited to work that is appropriate for young migrants on a brief cultural visit and that labour shortages should otherwise be filled using a dedicated low-skill work visa which is properly designed to address labour shortages in the economy.

Part I: The profile of Working Holiday Makers in Australia

The increased movement of people around the world challenges conventional notions of citizenship (Benhabib, 2004; Castles et al., 2014; Ong, 2004). Migrants occupy a range of statuses from enjoying secure residence and employment in their host country with protections akin to citizenship, to being designated illegal, without rights and subject to detention and removal at the discretion of the executive government. The conventional concepts of state citizenship cannot explain this diversity of statuses and have consequently been replaced by more nuanced notions of global or post-national citizenship, in which the formal legal status of citizen makes way for a citizenship based on the lived experience of residents (Benhabib, 2004; Bosniak, 2006; Carens, 1987).

Working Holiday Makers do not represent a homogeneous group of migrants. Within the body of global migrants, they straddle a range of identities including tourist, economic migrant and prospective citizen, and they have origins in both developed and developing nations. They can be variously empowered and vulnerable in these identities and origins, and their degree of empowerment and vulnerability can change throughout the term of their visa.

In a typology of travellers who combine work and tourism, Nathan Uriely (2001) identified two types of working holiday maker. First, there are young tourists who engage in work in unskilled and manual labour to facilitate their travel. For these young people, work is essential to finance their travel, and thus it might be categorised as a 'labour-oriented institution that include[s] a touristic component' (Uriely, 2001: 3–4). This type of work for travel has its origins in the tramping tradition, which was carried out by

working-class youth out of necessity to make a living (Adler, 1985; Uriely, 2001: 4). Uriely contrasts these 'travelling workers' with 'working-holiday tourists' who are less reliant on work. They treat work as a recreational activity and have a more relaxed attitude to wages, if not conditions, of employment. Working-holiday tourists are more leisure-oriented, and to the extent they engage in employment, it is as an extension of their touring experience. They will often participate in work that 'differs sharply from what they normally do in their daily life back home' (Uriely, 2001: 4).

Over the life of the Working Holiday Maker programme, the profile of Working Holiday Makers in Australia has shifted from the more leisure-oriented working holiday tourist to the more employment-oriented working tourist. This is evident in the countries of origin of Working Holiday Makers and in changes to the regulation of the programme. The programme was introduced in 1975 at the same time that a universal visa system was introduced to preserve a pathway for young UK citizens to enter Australia and to maintain a reciprocal arrangement whereby young Australians could enter the United Kingdom for working holidays. The Working Holiday visa (sub-class 417) was extended to Canada and then to the Republic of Ireland in the same year. At this time, then, the Working Holiday Maker was English-speaking and came exclusively from countries with similar cultures and levels of economic development to Australia.

Five years after the introduction of the Working Holiday Maker programme, the profile of designated Working Holiday Maker was already in transition, extending to non-English-speaking countries with much less developed socio-cultural ties to Australia. The programme was extended to Japan in 1980 and then to South Korea in 1995 and Malta in 1996. Until July 2000, the programme was also open to young people from 'non-agreement' countries as long as they satisfied additional eligibility criteria (Tan et al., 2009: 1). From 2000 to 2005, the programme was extended to a further 12 countries, mainly from Europe, but also Taiwan and Hong Kong.

In 2005, a second type of Working Holiday visa was introduced, the Work and Holiday programme (sub-class 462). This visa had additional eligibility requirements, including functional English, successful completion of 2 years of university study and a letter of support from the Working Holiday Maker's home government in the visa application. These additional requirements are not necessarily related to the development status of the nations involved, with high-income (USA), middle-income (Argentina, Chile and Malaysia) and low-income nations (Indonesia, Bangladesh and Papua New Guinea (PNG)) all being represented. Working Holiday Makers in the Work and Holiday programme are not eligible for a second visa, and the numbers of participants in this programme from all countries, except the USA, are capped.

In June 2014, Australia had agreements with 31 countries, from all continents except Africa: 19 in the Working Holiday programme (sub-class 417) and 12 in the Work and Holiday programme (sub-class 462). The identity of agreement countries is essentially arbitrary. There is no clear pattern to the development status of agreement countries in each programme and no direct correlation between a country's participation in the programme and their visitor numbers to Australia. For example, China had the highest number of visitors to Australia in 2013–2014, with 551,942 (DIBP, 2014d), but Australia has no Working Holiday Maker agreement with China.

The changing profile of Working Holiday Makers is not only reflected in the increasing diversity of agreement countries but also in the numbers in the programme overall

and the changing proportion from different countries. In 1975–1976, there were 1855 designated Working Holiday Makers. This grew tenfold to 18,365 in the 1981–1982 financial year. In 1995–1996, there were 40,273 Working Holiday Makers in Australia, with over 50% (20,526) from the UK. The next largest number was from Japan with 5590 (JSCM, 1997: 21). In 1995–1996, non-agreement countries contributed 3202 Working Holiday Makers to the programme. Since 1995–1996, numbers have grown steadily. Numbers increased from 40,273 in 1995–1996 to 78,642 in 2000–2001. Numbers of Working Holiday Maker visa grants peaked at 258,248 in 2012–2013, falling to 239,592 in the 2013–2014 financial year (DIBP, 2014b; see also DIBP, 2014e). In 2013–2014, 18.9% were from the UK, 15.8% from Taiwan and 12.6% from South Korea.

It is notable that Australia has a substantially larger Working Holiday Maker programme than countries with comparable migration profiles and who are partners in the Working Holiday Maker visa programme. The United Kingdom has Working Holiday partner relationships with eight countries, including Australia, under its Tier 5 Youth Mobility visa scheme (Home Office, 2014). In 2013, there were 20,857 participants in the scheme, 10,845 (52%) from Australia (Salt, 2013: 86). In May 2014, Citizenship and Immigration Canada forecast that numbers in the International Experience Canada Programme would reach 20,000, which is a sharp increase on previous years (Work Permit, 2014). At the same time, the UK and Canada have pathways for migrant workers to enter each country for low-skilled work. In the UK, there are 2.1 million low-skilled workers. Before 2004, the majority were from non-European Union (EU) countries, in particular India, Pakistan and Bangladesh. Since 2010, with EU expansion, most low-skill workers have been from Eastern Europe (Migration Advisory Council, 2014). Since 1973, Canada has filled shortages in the local labour market through its Temporary Foreign Worker Programme (Citizenship and Immigration Canada, 2014a). In 2013, there were 176,000 permit holders (Citizenship and Immigration Canada, 2014b). Indeed in a 2013 report on labour migration programmes in 46 nations around the world, Martin Ruhs (2013) found only Australia, Sweden and Denmark did not have dedicated low-skill worker programmes (pp. 201–202). There is little doubt that the Working Holiday Maker programme in Australia is substantially filling a demand for low-skill work in the domestic economy (Tan et al., 2009).

There has been a rapid increase in the proportion of Working Holiday Makers from Asian countries. Korean applicants jumped from 1769 in 1998–1999 to 34,780 in 2009–2010, falling to 26,842 in 2013–2014. Nevertheless, Australia remains by far the most popular destination for Koreans, ahead of Japan, Canada and New Zealand (Lee and Lee, 2013: 457–459). The role of work for Working Holiday Makers from Asian countries is highlighted by the proportion of Taiwanese among second Working Holiday visas: In 2013–2014, 11,295 (24.6%) of the 45,950 second Working Holiday visa holders were from Taiwan (DIBP, 2014e). The next highest country of origin was the UK with 8430 (18.3%).

A qualitative study of 60 Taiwanese backpackers in New Zealand and Australia found that the most commonly cited reason for pursuing a working holiday was to ‘share the local lifestyle’ (Ho et al., 2012: 12, 18). The second most common response was to ‘travel and work’, using work to pay for travel (Ho et al., 2012: 12). The increased participation of young people from Taiwan, South Korea and also Hong Kong, and the importance of participation in work for these Asian Working Holiday Makers reflect

changes in global mobility in Asia (Asia Development Bank Institute, 2014; Castles and Miller, 2009: 125–135).

Several studies indicate the importance of work to Working Holiday Makers. Harding and Webster reported that in 1999–2000, 85% of Working Holiday Makers engaged in paid employment during their visit to Australia (Harding and Webster, 2002: 6). A report by the National Institute of Labour Studies in 2009 noted that about half of Working Holiday Makers listed work as a ‘principal reason for coming to Australia’ (Tan et al., 2009: 13). It also noted that 40% of Working Holiday Makers spent the whole of their time in Australia in one urban location, suggesting that work rather than travel was their primary motivation for coming to Australia. In an article analysing the results of the report, Tan and Lester focused on the labour market impact of Working Holiday Makers in Australia. They concluded that the ‘Working Holiday Maker programme has played, and will continue to play, an important role as an integral component of the Australian labour force’ (Tan and Lester, 2012: 377).

There is a strong economic dividend from the Working Holiday visa programme. In 2001, the Australian Tourism Export Council estimated that the Working Holiday Makers boosted the Australian gross domestic product (GDP) by AUD320 million and boosted expenditure on goods and services by about AUD630 million. (Australian Tourism Export Council, 2012: 3). Tan et al. (2009) estimated that each Working Holiday Maker spent AUD13,218 in Australia over an average 8-month period. In addition, Working Holiday Makers contribute significantly to labour shortages in some industries, in particular horticulture and tourism. As a result of this contribution to the economy, industry bodies have called for an expansion of the programme. For example, in 2011, the Australian Tourism Export Council recommended that the age limit for Working Holiday Makers be increased from 30 to 35, that applicants be allowed to apply for more than one Working Holiday visa, that Working Holiday agreements be established with more source countries and that eligibility be expanded for a second Working Holiday visa to Working Holiday Makers who have worked in a regional tourism business (Australian Tourism Export Council, 2012).

Working Holiday Makers make their most obvious contribution to the economy through their work in horticulture. Working holiday makers ‘consistently make up about 50%–85% of the seasonal workforce’ in this industry (Tan and Lester, 2012: 373–374). In a study of Working Holiday Makers in Mildura, Jarvis and Peel found that 93%–95% of Working Holiday Makers were in the town for the purpose of work, and in 2010, 77% intended to apply for a second Working Holiday visa (Jarvis and Peel, 2013: 118). Furthermore, 97% in 2009 and 95% in 2010 nominated employment as their primary motivation for visiting Mildura. The study highlighted that there are locations such as Mildura, in which the tourist aspect of Working Holiday Makers’ identity was almost entirely obscured by the desire to work (Jarvis and Peel, 2013: 122).

Working Holiday Maker statistics suggest that programme participants are highly sensitive to changing economic conditions in their home countries. Coinciding with the impact of the global economic crisis in Ireland and France, for example, Working Holiday Makers from these countries rose steeply (DIBP, 2014e).

There is also a significant number of Working Holiday Makers who move to other visas to prolong their stay in Australia. They predominantly move to 457 (temporary

skilled migration) visas, but also partner visas (Birrell and Healy, 2012: 25). This trend means that many Working Holiday Makers do not necessarily perceive their participation in the programme as limited to ‘cultural exchange’ but see it also as a pathway to further work, or even permanent settlement, in Australia.

We are left with a profile of the contemporary Working Holiday Maker as a complex global traveller, who combines travel and work in a variety of ways that are influenced by (among other things) country of origin, the prevailing economic climate both globally and regionally, family circumstances, existing connections to Australia and migration intentions. This contemporary Working Holiday Maker is highly responsive to changes in the regulation of the Working Holiday visa, factoring these changes into his or her designs for travel and work.

Part 2: The increased focus on work in the Working Holiday Maker programme

In the early years of the Working Holiday visa programme, the number of those taking part was so small that they had very little impact on the labour market (Harding and Webster, 2002: Appendix C). At this time, Working Holiday visas were a maximum of 1 year in length, and Working Holiday Makers could work for a maximum of 3 months with any one employer.

As numbers grew in the programme, a cap of 42,000 was placed on the number of off-shore applicants for the first time in 1995–1996, out of concern for the impact of the Working Holiday visa on the employment opportunities for young Australians. In 1997, the Joint Standing Committee on Migration affirmed the imposition of the cap to ensure that the programme did not affect the work opportunities of Australians (JSCM, 1997: 51–60). The Committee stated that it was ‘adamant that [the programme] should not be used as a basis for solving labour market problems in Australia ... In the Committee’s view labour market issues should be addressed through appropriate labour market programs’ (JSCM, 1997: 49). However, the cap did not remain.

In the first 20 years of the programme, for young people from agreement countries aged between 18 and 25 years, migration officers need to be satisfied that the principal purpose of a Working Holiday Maker’s visit to Australia was for a holiday and that work was only incidental to this purpose (JSCM, 1997: 15). Applicants aged 26–30 years from agreement countries, and all applicants from non-agreement countries, had to satisfy a ‘benefit’ test. Department advice to decision makers in relation to this test stated that they were to take into account whether or not applicants were likely to ‘assume a position in life in their home country for which they could use an enhanced knowledge and understanding of Australia to work to Australia’s benefit into the future’. Decision makers were to look for ‘[a]pplicants with personal qualities of self-reliance, adaptability, resourcefulness and open-mindedness’ (Department of Multicultural Affairs, 1996). These high-level qualities desired of Working Holiday Makers were not what would be expected of unskilled workers who could plug gaps in the labour market, but of potential ambassadors for their country who could foster links with Australia.

While the regulatory framework for the Working Holiday visa programme remained steady for its first 30 years, in 2005 a series of amendments occurred which significantly

changed the complexion of the programme. The most significant reform was the creation of a second Working Holiday visa in 2005. To be eligible to apply for a second Working Holiday visa, Working Holiday Makers must have completed 3 months' full-time employment in a regional area in 'seasonal work'. The Migration Regulations 1994 were amended in 2008 to change 'seasonal work' to 'specified work', to more accurately reflect which industries Working Holiday Makers could work in to be eligible for a second Working Holiday visa. These industries now include plant and animal cultivation, fishing and pearling, tree farming and felling, mining and construction.

The opportunity to remain on a Working Holiday visa for a second year has a significant impact on the whole complexion of the Working Holiday programme. There is a fundamental change in the rationale for a second visa, both in terms of how it is structured and in terms of Working Holiday Maker expectations. The second year is about work, and as a concomitant of this, it is about earning and saving money. Furthermore, Working Holiday Makers who stay for a second year increase their connection to Australia and may have higher expectations for moving into a migration stream that facilitates permanent settlement.

The express rationale for adding the option of a second Working Holiday visa was 'to provide an incentive to Working Holiday Makers to work in the harvest industry which is experiencing severe labour shortages' (DIBP, 2014a). The Regulatory Impact Statement (RIS) accompanying changes to the Migration Regulations in 2005 stated (Commonwealth Parliament, 2005),

Government and the industry need to make seasonal work in regional areas more attractive to the groups best suited to cater for this important market, including the young mobile unemployed and Working Holiday Makers. While young Australians are being strongly targeted by the Harvest Trail initiatives, little has been done to likewise encourage more Working Holiday Makers to undertake harvest work.

The RIS ran through six options for responding to the shortage of labour in horticulture, including expanding the Temporary Business visa, a seasonal or guest worker scheme, and a Labour agreement pathway. It rejected a temporary business visa because it was considered unreasonable to expect employers to 'demonstrate a satisfactory training record or use of new or improved technology'.

The Statement also rejected a seasonal or guest worker scheme because (Commonwealth Parliament, 2005)

The experience of other countries suggests that low-skill guest worker schemes fail to provide long-term benefits for either sending or receiving countries. While the temporary entry of unskilled guest workers may be seen to provide a short-term economic benefit by meeting labour needs during exceptional peaks in demand, long-term use may have undesirable consequences for receiving countries. Some of those issues include a structural dependence on foreign labour; removing incentives for rationalisation and technological change; and postponing improvements in education and training. Semi and unskilled guest workers are also open to exploitation and abuse.

This list of 'undesirable consequences' is equally applicable to Working Holiday Makers. Indeed, the rejection of guest worker schemes provides compelling arguments for severely restricting the Working Holiday visa programme.

The RIS accepted that labour agreements were a potential means of addressing labour shortages in horticulture, but doubted their attractiveness given the ‘sponsorship obligations and training and monitoring requirements’. Again, it is reasonable to ask, ‘if these obligations are required in a labour agreement, why are they not required in the employment of Working Holiday Makers?’

Finally, the RIS rejected alternative labour migration pathways because of their potential impact ‘on access to employment of Australian citizens and permanent residents’ (Commonwealth Parliament, 2005). It seems to perceive the impact of Working Holiday Makers on the labour market to be fundamentally different from that of other labour migration visas, and yet no justification is given for this perception.

Despite the changes to the programme in 2005, the official description of the programme has continued to focus on its cultural significance. The 2013–2014 report summarises the rationale of the programme as being (DIBP, 2014b: 78)

to provide opportunities for people aged 18 to 30 to holiday in Australia and to supplement their travel funds through short-term employment. The working holiday and work and holiday programmes encourage cultural exchange and closer ties between arrangement countries by allowing young people to have an extended holiday supplemented by short-term employment.

Part 3: Vulnerable migrants and precarious work

The concept of ‘precariousness’ has been used to describe types of work that are inherently insecure (Campbell, 2010; Vosko et al., 2009) and categories of workers who are inherently vulnerable (Anderson, 2010; Marsden, 2012; Reilly, 2012). Working Holiday Makers possess many of the characteristics of vulnerable workers, and they are often found in work that is inherently precarious. Working Holiday Makers are young workers, mostly working in jobs in which they have no previous employment experience and in which they do not have adequate training. Many Working Holiday Makers will be employed in jobs requiring hard manual labour that they have not previously encountered. An increasing proportion comes from non-English-speaking backgrounds, which makes it difficult for them to understand safety requirements or to ascertain employment protections. They do not have secure residence status, and as non-citizens, they have limited social and political power.

The vulnerability of Working Holiday Makers is increased as a result of the types of work in which they engage. They work in casual, short-term, labour-intensive employment, in industries highly sensitive to the cost of labour. The majority of Working Holiday Makers end up in metropolitan areas where they compete with young Australians for jobs in a tight job market (Birrell and Healy, 2012). In such industries where the supply of labour is greater than its demand, employers are particularly powerful in the employment relationship. Many other Working Holiday Makers work in remote, regional locations (and indeed are encouraged to work in such locations to be eligible for a second Working Holiday visa) where conditions of work, including the physical climate, the facilities and the culture, are completely foreign to anything they have previously experienced. The Federal Magistrates Court has recognised that Working Holiday Makers ‘represent a particular class of employee who are potentially vulnerable to improper practices by their employer’.¹

While there is no doubt that Working Holiday Makers have many of the characteristics of vulnerable workers, it is important to acknowledge that many have characteristics that reduce their vulnerability. Tan et al. (2009) found that 54% of Working Holiday Makers had completed university degrees, and only 1.9% had not completed high school (p. 11). Education increases the likelihood that Working Holiday Makers will know, and be able to defend, their rights in the workplace. However, their education is of little protection in unfamiliar employment that is not related to their qualifications.

Also, while youth is a marker of precariousness in the workforce for some reasons, it is also associated with a capacity for flexibility and adaptation. Young workers tend to have a lower level of investment in and reliance on their employment and greater mobility in relation to the location and type of employment in which they engage. There are multiple possibilities for crossing and re-crossing national boundaries. To extend their time in Australia, there are various family and skilled migration pathways open to them. On the other hand, the mobility of Working Holiday Makers is also associated with a lack of support networks. Mobility might provide a path out of employment, but not protection within it.

The opportunity for a second Working Holiday visa increases the vulnerability of the Working Holiday Maker in a number of ways. First, the requirement to work for 88 days in regional Australia in the first year in order to be eligible for a second Working Holiday visa encourages Working Holiday Makers to move to regional areas for employment when they might not otherwise have done so, given their experience and capacities. Second, Working Holiday Makers rely on employers to verify their employment. The Fair Work Ombudsman (2014) has reported allegations that the requirement of 88 days' work in a designated regional area 'is being exploited by some unscrupulous operators to attract free labour'.

There is a risk that Working Holiday Makers' investment in Australia and intention to remain will increase after a second year of work and travel as they deepen their connections in Australia, strengthening the desire to transfer to an alternative visa stream, such as a sponsored sub-class 457 visa. To be eligible for a 457 visa, Working Holiday Makers rely on their employers to act as sponsors, again increasing the power differential in the employment relationship. It is not surprising, then, to find that Working Holiday Makers are disproportionately represented in incidences of exploitation in the workplace. In their 2009 study, Tan et al. found that 36% of Working Holiday Makers were paid below the national minimum wage (Tan et al., 2009; Tan and Lester, 2012: 368). In 2014, the Fair Work Ombudsman recognised that the vulnerability of Working Holiday Makers can be increased by 'dependence on the employer to obtain eligibility for a second-year visa.' The Fair Work Ombudsman has responded by devoting increased resources to addressing exploitation, including a program in the horticultural industry called the Harvest Trail, which aims to ensure seasonal workers receive their lawful minimum entitlements (Fair Work Ombudsman, 2014).

Exploitation of Working Holiday Makers is not a recent phenomenon. In its 1997 report, the Joint Standing Committee on Migration noted evidence that 'employers often pay less than award wages to Working Holiday Makers, putting pressure on locals to accept the same conditions to secure the relevant job' (JSCM, 1997: 45). Working Holiday Makers were more likely to agree to payment by cash, were less likely to know their work entitlements (including minimum wage rates) and, if problems developed in

the employment relationship, were more likely simply to move on than to insist on their entitlements (JSCM, 1997: 46–7). This Committee concluded that if the work conditions of Working Holiday Makers could not be better regulated, it might be necessary to consider ‘more radical solutions, such as prohibiting [Working Holiday Makers] from working in particular industry sectors’ (JSCM, 1997: 139).

Part 4: Limitations to existing workforce protection for Working Holiday Makers

Given their vulnerability in the workplace, it is of great importance that Working Holiday Makers are protected by robust labour law regimes. Like all workers, Working Holiday Makers are protected by State and Territory workers compensation and unfair dismissal laws. However, there is a question of whether these laws effectively protect Working Holiday Makers as a result of their temporary and insecure residence in Australia. Although in theory the rights and protections of Working Holiday Makers are the same as other workers’ under domestic labour law, the particular conditions in Working Holiday visas increase Working Holiday Makers’ vulnerability in the workplace in a number of ways. There are employment conditions (described below) which do not cover some temporary and part-time workers, and other conditions that are difficult to enforce due to the temporary migrant status of Working Holiday Makers. The time limit on Working Holiday visas means that Working Holiday Makers must leave the country at a predetermined time or become illegal, a status that increases their vulnerability significantly (Robertson, 2014: 16).

One issue affecting all migrant workers with limited work rights is whether they are still covered by workers compensation laws if they are employed illegally. For Working Holiday Makers, work is ‘illegal’, for example, if they work for the same employer for more than 6 months. The case law is mixed and not entirely resolved on the impact of illegality on the applicability of workers compensation legislation (Guthrie, 2004; Reilly, 2012). Workers compensation legislation in NSW and WA specifically address the issue. Section 192 of the *Workers Compensation and Injury Management Act 1981* (WA) allows illegal contracts of employment to be treated as valid if the arbitrator thinks it proper to do so after taking into account all the circumstances. Section 24 of the *Workers Compensation Act 1987* (NSW) allows recovery of workers compensation even where the contract under which the injured person was engaged was illegal.

A protection gap exists in relation to unfair dismissal laws. Under Sections 382 and 383 of the *Fair Work Act 2009* (Cth), workers are only protected against unfair dismissal if they have been employed for at least 6 months. Working Holiday visas limit employment with any one employer to a maximum of 6 months, thus excluding them from the protection of unfair dismissal laws.

Another potential protection gap arises due to the limited duration of Working Holiday Makers’ residence in Australia. If Working Holiday Makers are found to be entitled to workers compensation, what is required for this entitlement to continue once they leave Australia? Workers compensation legislation in most jurisdictions places an evidentiary burden of some kind on the worker for compensation payments to continue.² The rationale for placing these burdens on workers who leave Australia to reside overseas is clear

enough. When a worker is outside the country, it is difficult to monitor whether their disability continues and very difficult to recoup monies in the case of a fraudulent claim. Although there may be no alternative to these laws, they highlight once again how the temporary residence of Working Holiday Makers renders them particularly vulnerable.

Finally, it is a characteristic of vulnerable workers that they do not complain about conditions of work (Weil and Pyles, 2005). When workers feel tied to their employers, for example, in order to satisfy the criteria for a second Working Holiday visa, or if they are working illegally, they will tolerate exploitation without complaint.

Part 5: Reframing the Working Holiday visa programme – A return to the original concept for the visa and a new pathway for unskilled migrant labour

The original justifications for the Working Holiday Maker programme remain compelling. As the Joint Standing Committee on Migration outlined them in 1997, these justifications focused on the personal development of Working Holiday Makers:

... providing them with a cultural and lifestyle experience in a new country which expands their life experience and deepens their understanding of Australia. These Working Holiday Makers will, if they have a positive experience, become ambassadors for Australia, possibly seeking to migrate themselves. (JSCM, 1997: 32–35)

The reciprocal nature of the programme means that young Australians have the potential for the same benefit from visiting a partner country in the Working Holiday Maker programme. In a submission to the Joint Standing Committee on Migration in 1997, the Department of Immigration and Multicultural Affairs suggested that, alongside this cultural focus, a key objective of the programme was to enhance long-term prospects for trade and cooperation between Australia and Working Holiday Maker source countries and to develop further Australia's tourism industry (JSCM, 1997: 9).

Conceived in this way, the primary economic benefit of the programme is Working Holiday Makers' contributions to tourism. Working Holiday Makers are a unique type of tourist, travelling more extensively, particularly in regional Australia, and thus spreading their contribution to the economy more widely (JSCM, 1997: 36). The tourism industry will understandably be greatly concerned by any changes to the Working Holiday programme that lead to a decrease in this lucrative stream of backpacker tourists.

The influx of Working Holiday Makers prepared to work temporarily in low-skilled, casual work is a clear benefit to the economy. However, the benefit comes at considerable cost to local and migrant workers as described in Parts 3 and 4. For industries experiencing a shortage of workers, such as the horticultural industry, it makes no sense to limit the supply of workers to young people from countries with which Australia has a Working Holiday agreement. Temporary work opportunities should be open to workers from all countries with which Australia has positive diplomatic relations, as is the case with temporary work programmes such as the 457 visa.

On the other hand, in industries with an over-supply of workers and in which the competition for employment is high – such as in relation to many types of graduate employment and retail work in urban areas – there is a strong case for preventing Working Holiday

Makers from participating in the labour market at all. This can be done by placing specific limitations on the entitlement of Working Holiday Makers to work or by specifying that they are only entitled to work in specific industries such as horticulture and tourism.

Working Holiday visas provide a ready supply of young workers for a range of industries and provide a positive dividend for the Australian economy. However, they are vulnerable workers in need of strong workplace protections. Stronger workplace protections include better tracking of Working Holiday Makers in the workforce, stronger obligations on employers to formalise and report on the employment agreements they enter with Working Holiday Makers and more resources dedicated to the compliance monitoring work of bodies such as the Fair Work Ombudsman. Under current visa conditions, it is almost impossible to provide adequate protection given the large numbers of Working Holiday Makers and the lack of sponsorship obligations on employers. One alternative is to reinstate restrictions to the work rights of Working Holiday Makers, such as removing the second Working Holiday visa, and in its stead, introducing a dedicated regional worker visa to cater for any unmet demand for workers in industries in regional Australia that have traditionally relied on Working Holiday Makers. Such a dedicated work visa, modelled on the 457 visa, offers a better regulatory model (Howe and Reilly, 2014). Labour market testing and employer sponsorship obligations in the sub-class 457 visa offer protections for workers that are not available to Working Holiday Makers.

These changes are likely to reduce the size of the programme, making it easier to regulate the working conditions of Working Holiday Makers and reducing the chance of their exploitation in the workplace. If the work entitlements of Working Holiday Makers are restricted to industries with a demonstrated shortage of labour, such as horticulture and tourism, there will be a more equal level of demand and supply of labour, reducing the power differential between employers and Working Holiday Makers. It will also allow for the concentration of efforts of regulators to protect workers from exploitation. Of course, it does not eliminate the possibility of exploitation. The remoteness of many workplaces, particularly in horticulture, means that effective regulation is an on-going concern.

Conclusion

The Working Holiday visa has shifted considerably from its original conception as a cultural exchange programme. With the number of working holiday visa grants now topping 200,000 annually, and reforms to the visa conditions which provide for more extensive work rights, the programme is a significant contributor to the labour market. In light of on-going concerns around the exploitation of young Working Holiday Makers, the programme is in need of urgent reform. The programme is not appropriately designed as a labour market programme, leaving Working Holiday Makers vulnerable to exploitation in the workplace. It should be reformed to reduce the work entitlements of Working Holiday Makers, and any shortages of low-skilled workers should be addressed by labour migration programmes properly targeted to addressing these shortfalls.

Acknowledgements

The author wishes to thank the anonymous referees and ELRR editorial committee for their assistance with preparing the article.

Funding

Research for the article was supported by an Interdisciplinary Research Fund grant at the University of Adelaide. The author did not receive any external research funding to support the writing of this article.

Notes

1. Fair Work Ombudsman v Go Yo Trading Pty Limited & Anor [2012] FMCA 865, [15].
2. Workers Compensation Act 1987 (NSW), s 53; Workers Injury Rehabilitation and Compensation Act 2013 (Vic), s 175; Workers Compensation and Injury Management Act 1981 (WA), s 69; Workers Rehabilitation and Compensation Act 1988 (Tas) s 83; Workers Rehabilitation and Compensation Act 1986 (SA) s36(1) and s 41; Workers Compensation Act 1951 (ACT) s44; Workers Rehabilitation and Compensation Act (NT) s 64B.

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