

Working Holiday Maker Visa Review

Department of Agriculture

**Submission by the Migration Law Committee of the Federal Litigation and Dispute
Resolution Section of the Law Council of Australia**

14 September 2016

Table of Contents

Introduction	4
Recommendation: abandon the 'backpacker tax' proposal.....	5
Recommendation: remove the regional work requirement for visa re-issue.....	6
Suggested amendments of the Migration Regulations 1994.....	9
Repeal the requirement for at least 3 months full-time designated work.....	9
Insert visa condition 8549 for holders of subclass 417 visas	9
Attachment A: Profile of the Law Council of Australia	11

Introduction

1. The Law Council of Australia welcomes the opportunity to provide comments on the Working Holiday Maker Visa review.
2. The Migration Law Committee (MLC) of the Law Council's Federal Litigation and Dispute Resolution Section has provided these comments. The MLC's members are specialists in immigration law. The Law Council is the national peak body for the legal profession. Further information about the Law Council is at [Attachment A](#).
3. In March 2016, the Senate Standing Committee on Education and Employment released the final report of its inquiry into the impact of Australia's temporary work visa programs on the Australian labour market and on temporary work visa holders. The report, [A National Disgrace: The Exploitation of Temporary Work Visa Holders](#) details the appalling conditions in which many holders of working holiday visas in subclasses 417 and 462 find themselves and, in many cases, the systematic exploitation of this transient source of unskilled labour.¹
4. Many working holiday visa holders are young adults aged 18–30 with limited work experience who have recently completed or are in the process of completing tertiary studies. The visa programme is intended to encourage cultural exchange and closer ties between participating partner countries. A visa holder can work and holiday in Australia for up to 12 months (including a period of study up to four months). Workers can only work with each employer for up to 6 months. If a second visa is granted, workers can return to the same employer for another 6 months.
5. Working holiday makers contribute in essential ways in rural sectors of the economy where there is a strong cyclical and seasonal demand for relatively low-skilled and low-paid labour. A number of submissions to the Senate Committee inquiry made by farmers, growers and tourism organisations drew attention to the difficulty many rural industries face in attracting local labour, and the high value that the Working Holiday Maker visa programme has to their industries.² As seasonal harvests tend to be of perishable produce, there is a limited window of opportunity for harvesting and transporting that produce from regional areas to domestic and international markets. Where sufficient harvest labour cannot be sourced, the National Farmers Federation reports that losses in the hundreds of thousands of dollars can be incurred due to unpicked produce.³
6. Nonetheless, there are compelling public policy grounds for reform of the Working Holiday Maker visa programme to ensure compliance with the *Fair Work Act 2009* (Cth). While these issues are appropriately addressed under employment law, we recommend a number of reforms in the visa programme to complement those efforts and assist with the protection of temporary visa holders. Any such reforms

¹ Parliament of Australia, Senate Standing Committee on Education and Employment, [A National Disgrace: The Exploitation of Temporary Work Visa Holders](#) (2016), 101.

² Adam Steen and Victoria Peel, 'Economic and Social Consequences of Changing Taxation Arrangements to Working Holiday Makers' (2015) 17(1) *Journal of Australian Taxation*.

³ National Farmers' Federation, *Submission on the impact of Australia's temporary work visa programs on the Australian labour market and on the temporary work visa holders*.
<http://www.aph.gov.au/DocumentStore.ashx?id=70d0b3fa-c81f-4978-900f-0decf83858bc&subId=350924>

should:

- not operate to the detriment to working holiday visa holders;
- discontinue the perverse incentive of accepting exploitative working conditions in order to qualify for the second working holiday visa;
- assist with protecting workers' rights under employment law; and
- not discourage working holiday makers from travelling to Australia.

7. The MLC recommends that:

- subclass 417 and 462 visa holders be classed as residents for tax purposes which would mean that the so-called 'Backpacker Tax' would not be implemented; and
- the requirement for 417 visa holders to perform three months of specified work in a regional area in order to be eligible for a second 417 visa be repealed.

8. Suggested amendments to the *Migration Regulations 1994* made under the *Migration Act 1958* (Cth) are provided at the end of this submission.

Recommendation: abandon the 'backpacker tax' proposal

9. In his 2015 budget speech, the then-Treasurer, the Hon Joe Hockey MP, announced that 'anyone on a working holiday in Australia will have to pay tax from their first dollar earned, rather than enjoying a tax-free threshold of nearly \$20,000. This will save the Budget \$540 million.'⁴ The proposed changes were due to come into effect from 1 July 2016 and would result in working holiday makers being treated as non-residents for tax purposes, and no longer able to access the tax-free threshold and the lower tax rate of 19% for income just above the tax free threshold. These changes have been postponed pending the outcome of the current review.
10. The result of classifying working holiday makers as non-residents for tax purposes is that they will be liable to pay 32.5% tax on each dollar they earn which is 'more tax than Australians earning a higher income.'⁵
11. As noted above, the purpose of the Working Holiday Maker visa programme is to allow young people to travel to Australia on an extended holiday and to provide them with the opportunity to experience Australian culture. An essential element of being able to undertake an extended holiday, travelling the length and breadth of Australia for up to 12 or even 24 months, is having the funds to do so. If the proposed tax increases are imposed, these young travellers will need to work longer hours to earn enough money to support themselves on their travels. This is not consistent with the primary purpose of the visa programme, which is to allow people to travel to Australia for a holiday. Imposing a high tax rate on their income suggests that there is an expectation that they will perform a significant amount of work while in Australia, while not directly addressing the concerns around the

⁴ The Hon J B Hockey MP, Treasurer of the Commonwealth of Australia, '[Budget Speech 2015](#)', 12 May 2015.

⁵ Adam Steen and Victoria Peel, above n 2, 242.

manner in which they are engaged in work.

12. According to the Department of Agriculture,⁶ working holiday makers only earn an average of \$13,300 while in Australia, which brings their earnings under the tax-free threshold. However, under the proposed arrangement the visa holders would be left with net earnings of \$8,977.50. This is quite a significant reduction given that these young travellers are earning a low income and need these funds to cover travel costs, accommodation, food and tourism-related activities, exacerbating rather than alleviating any incentive to perform more work in below par employment conditions.
13. It is also our submission that imposing a high tax rate on working holiday makers will act as a disincentive for young people to travel to Australia on a working holiday. This is particularly the case given that other key destination countries are generally closer to source countries and offer working holiday visas at significantly lower prices and with more flexibility. For example, the visa application fees for a Canadian work permit that allows the holder to undertake a working holiday is CA\$ 150, compared to AU\$440 for a working holiday maker visa. A recent survey conducted by Monash University's National Centre for Australian Studies revealed that 60% of current working holiday makers would not have travelled to Australia if they were taxed at the rate of 32.5%.⁷
14. If a review of the Working Holiday Visa programme is warranted to address the concerns regarding exploitation of working holiday makers, then imposing additional tax on the visa holders would seem to be a rather indirect way of solving the problem. Regardless of whether tax reform results in fewer working holiday makers travelling to Australia, it does not do anything to protect the working holiday makers who are currently onshore or those fewer numbers who decide to travel to Australia. Employers who do exploit working holiday makers tend to engage in other unscrupulous business practices that do not comply with Australian laws such as double book-keeping and paying cash in hand (if only to conceal that exploitation). It is unlikely that the tax reform will encourage these employers to change their practices or lead to the actions of these employers coming to the attention of the Australian Taxation Office.
15. For these reasons, the MLC sees no public policy benefit in the imposition of higher taxes, aside from the additional revenue that they would generate. The likely reduction in the number of Working Holiday visa holders as a result of the new tax would then erode the very tax base it was designed to create. On that basis, we recommend that working holiday visa holders should continue to be classed as residents for tax purposes.

Recommendation: remove the regional work requirement for visa re-issue

16. The extent of the exploitation of young and vulnerable working holiday makers that

⁶ Australian Government Department of Agriculture, [Working Holiday Maker Visa Review](#), 18 August 2016.

⁷ Jennifer Nichols, 'Survey signals 'backpacker tax' would turn away travellers', [ABC Rural \(online\)](#), 24 August 2016.

has been uncovered by recent investigations⁸ has highlighted the way in which the requirement to undertake three months of specified work in a regional area in order to be eligible for a second subclass 417 (working holiday) visa⁹ acts as a perverse incentive to accept employment situations that result in exploitation.¹⁰

17. It is our submission that the regional work requirement should be removed and that subclass 417 visa holders be permitted to apply for a second working holiday visa without needing to demonstrate that they have worked in a regional area performing designated work.
18. The removal of this requirement would lower the eligibility threshold for a second working holiday visa, and remove the compulsion for working holiday makers to perform designated work. In our submission, despite these effects, there will remain an inherent benefit to Australia of allowing working holiday makers a second year in Australia. At the very least, there is a net economic benefit to Australia: over \$1.8 billion spent by working holiday makers annually,¹¹ and net employment growth of one full-time job for an Australian for every 10 working holiday makers. It also assists with ensuring that Australia remains an attractive host country for this type of tourism.¹²
19. It is also submitted that the application for a second working holiday visa provides an opportunity for the Department of Immigration and Border Protection to revisit the visa applicant's evidence of funds to support their continued stay in Australia. Where it is desirable to add additional eligibility criteria, applicants for the second visa could be asked to demonstrate a genuine intention to work in a regional area. This could include evidence such as a copy of their proposed travel itinerary for the second year, as well as evidence of any travel, accommodation or activities that have been booked.
20. We acknowledge that the original purpose of the second working holiday visa was to 'help alleviate serious and persistent specific seasonal labour shortages in primary industry.'¹³ Removing the requirement to perform specified work in a regional area in the first year of a Working Holiday Maker visa may result in a in an initial reduction in the number of visa holders who choose to perform the activities that currently form 'specified work' of the type that would fall under the purview of the Department of Agriculture. However, any such reduction is likely to be offset by the implementation of the reforms that respond to the 2016 report by the Joint Standing Committee on Migration, [Seasonal Change: Inquiry into the Seasonal Worker Programme](#), and particularly those that expand the scope of the programme and ease the administrative burden it places on farmers and other

⁸ Senate Standing Committee on Education and Employment, above n 1.

⁹ *Migration Regulations 1994* (Cth) [Schedule 2 reg 417.211\(5\)](#).

¹⁰ See also: Peter Mares, *Not Quite Australian: How Temporary Migration is Changing the Nation* (The Text Publishing Company, 2016), 234.

¹¹ Yan Tan, Sue Richardson, Laurence Lester and Lulu Sun, '[Evaluation of Australia's Working Holiday Maker \(WHM\) Program](#)', (National Institute of Labour Studies Flinders University, 2009).

¹² Glenys Harding and Elizabeth Webster, '[The working holiday maker scheme and the Australian labour market](#)', Workplace Relations and Small Business and the Department of Immigration and Multicultural Affairs (Cth) (2002).

¹³ Procedures and Advice Manual 3 > [Home](#) > [Migration](#) > [2016](#) > [21/08/2016](#) - > [P. 21/08/2016](#) - > [PAM3 - MIGRATION REGULATIONS - SCHEDULES](#) > PAM - Sch2 Visa 417 - Working Holiday > About the Working Holiday visa program > The second Working Holiday visa initiative.

sponsors.¹⁴ A viable, flexible and efficient Seasonal Worker Programme is a more appropriate mechanism for supporting agricultural labour demands in regional areas than a visa stream whose primary purpose is to encourage visitors to pursue a working holiday.

21. If it is desirable to encourage working holiday makers to engage in regional work, consideration could be given to imposing a condition on the second working holiday visa that restricts the visa holder to working in regional Australia for the period of that visa. Given the purpose of the visa programme is to allow young people to explore Australia, offering an incentive to spend more time in regional Australia would seem to fit the purpose of the program.
22. The advantages of this proposal are:
 - the subclass 417 visa holders will still have the option to apply for a second working holiday visa and spend an additional 12 months exploring Australia;
 - subclass 417 visa holders will receive greater encouragement to travel and work in regional Australia without the added risk of being exposed to short term exploitation as a means to an immigration outcome;
 - employers in regional areas will have more opportunities to employ working holiday visa holders; and
 - employers in metropolitan areas would have more opportunities to employ local Australian workers.
23. A further possible benefit is the interruption to the business model of labour hire companies who recruit working holiday makers directly from overseas to work in regional areas with the promise of helping obtain a second working holiday visa. Rather than being whisked from the airport straight to a regional worksite, working holiday visa holders would be able to spend their first 12 months becoming familiar with Australia and Australian work conditions, which may then make it harder for labour hire companies to recruit into exploitative situations.
24. Moving the regional work requirement from an eligibility criterion to a visa condition would require a change to the Department's assessment of working holiday visa holders' engagement in regional work. Whereas under current regulations completion of the three month prescribed work is assessed as part of the second visa application, a visa condition would require Departmental monitoring for compliance on an ongoing basis.
25. In its mission statement, the Australian Border Force considers the border "not to be a purely physical barrier separating nation states, but a complex continuum stretching offshore and onshore, including the overseas, maritime, physical border and domestic dimensions".¹⁵ Part of that approach has seen the redoubling of 'border control' onshore, through compliance detection, investigation and enforcement. In our view, to the extent that the Department considers it necessary to take a strict approach to enforcement of a 'regional work' condition on working

¹⁴ Parliament of Australia, Joint Standing Committee on Migration, [Seasonal Change: Inquiry into the Seasonal Worker Programme](#), 5 May 2016.

¹⁵ <https://www.border.gov.au/australian-border-force-abf/protecting>

holiday visas, this should be achievable through a continuation of current monitoring activity in concert with other government agencies such as:

- the active approach of the Fair Work Ombudsman to employment conditions in labour supply chains;
- the ongoing operations and investigations of Taskforce Cadena;
- enhanced data matching between the ATO, the Fair Work Ombudsman and the Department; and
- a more targeted approach to identifying regions and business for monitoring and inspection.

26. In addition to encouraging compliance by the visa holder, imposing a visa condition would make it an offence under [s 245AC](#) of the *Migration Act 1958*¹⁶ for a person to employ a Working Holiday Visa holder if the person is not in a designated regional area.

Suggested amendments of the Migration Regulations 1994

27. Our recommended reforms would not require the passage of new legislation. In this section we set out the recommended amendments to the *Migration Regulations 1994*.

Repeal the requirement for at least 3 months full-time designated work

28. We recommend that sub-regulation 417.211(5)(a) of Schedule 2 to the Regulations be repealed. It currently provides:

(5) If the applicant is, or has previously been, in Australia as the holder of a Subclass 417 visa, the Minister is satisfied that:

(a) the applicant has carried out (whether on a full-time, part-time or casual basis) a period or periods of specified work in regional Australia as the holder of the visa; and

(b) the total period of the work carried out is, or is equivalent to, at least 3 months full-time work; and

(c) the applicant has been remunerated for the work in accordance with relevant Australian legislation and awards.

Insert visa condition 8549 for holders of subclass 417 visas

29. We recommend that an additional clause 417.612 be inserted into [sub-regulation 417.6 of Schedule 2 to the Regulations](#) as follows:

417.6 Conditions

417.611 *Conditions 8547 and 8548.*

417.612 *If the applicant is, or has previously been, in Australia as the holder of a subclass 417 visa, Condition 8549.*

¹⁶ Under s. 245AC, a person is liable for civil and criminal penalties if they “allow, or continue to allow, another person to work...in breach of a work-related condition”.

417.613 Any 1 or more of conditions 8106, 8107, 8301, 8303, 8501, 8502, 8503, 8516, 8522, 8525, and 8526 may be imposed.

30. [Condition 8549](#) provides:

(1) Unless subclause (2) applies, while the holder is in Australia, the holder must live, study and work only in a designated area, as in force:

(a) when the visa was granted; or

(b) if the holder has held more than 1 visa that is subject to this condition — when the first of those visas was granted.

31. *Designated area* is defined by a current Legislative Instrument to mean anywhere outside the Sydney and Brisbane metropolitan areas.

32. Alternatively, an additional clause could be inserted into subregulation 417.6 of Schedule 2 to the Regulations and a separate Legislative Instrument could be created prescribing the regional areas relevant to the second working holiday visa:

417.6 Conditions

417.611 Conditions 8547 and 8548.

417.612 *If the applicant is, or has previously been, in Australia as the holder of a subclass 417 visa, the holder must work only in an area specified in an instrument in writing while the holder is in Australia.*

417.613 Any 1 or more of conditions 8106, 8107, 8301, 8303, 8501, 8502, 8503, 8516, 8522, 8525, and 8526 may be imposed.

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

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