

April 2020

## A Critique Towards Australian Work and Holiday Visa Subclass 462: Where Does It Leave Indonesian Citizen?

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### Recommended Citation

Dewi, Yetty Komalasari and Setiawati, Wenny wsetiawati@gmail.com (2020) "A Critique Towards Australian Work and Holiday Visa Subclass 462: Where Does It Leave Indonesian Citizen?," *Indonesian Journal of International Law*. Vol. 17 : No. 3 , Article 5.

DOI: 10.17304/ijil.vol17.3.792

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### **Cover Page Footnote**

This research is funded by Faculty of Law Universitas Indonesia Main Research Grant under the title of: "Penelitian Mengenai Work & Holiday Visa (Research on Work and Holiday Visa), of the Year 2019

# A CRITIQUE TOWARDS AUSTRALIAN WORK AND HOLIDAY VISA SUBCLASS 462: WHERE DOES IT LEAVE INDONESIAN CITIZEN?

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## Abstract

*Work and Holiday Visa (WHV) is one of the product outcomes from the agreement that Australia engaged with state partners. Initially, this visa aims for cultural exchange and then shifted to supply the needs of Australian industry. In essence, this visa granted the holder one year to spend time in Australia consisting of six months for working and six months for travelling. However, in its application, there are mistreatments on the WHV holder, and there is no sufficient labour protection towards the worker. This paper examines the position of WHV holder in Australia, protection for the worker, and the view of the Indonesian Government on the WHV. It also discusses the Indonesia – Australia Comprehensive Economic Partnership Agreement (IA-CEPA) on the WHV context since there is a provision regarding WHV in the agreement. The paper concludes that the WHV is not a mere cultural exchange program, but a type of labour migration. The fact that Government of Indonesia still considered WHV as a cultural program is not enough for the safety of Indonesian citizens which partakes the program, it should be governed by the labour law and provided by sufficient protection. The Government of Indonesia failed to see this as part of their scope of protection in IA-CEPA, and the Australian Government also did not set a clear context on WHV. Therefore, the GOI should shift its view on the WHV and take necessary measures to provide better labour protections under this scheme.*

**Keywords:** Australia, IA-CEPA, Labor, Law, WHV

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Submitted : 4 February 2020 | Revised : 28 March 2020 | Accepted : 16 April 2020

## I. INTRODUCTION

Globalization has shaped the world by changing the lives of the people and States interactions. Although there is no consensus on the definition of globalization, however, Castree managed to provide us with one, and that is an increase in the intensity, extensity, impact, and velocity of social, economic, cultural, political, and financial relationships between different places worldwide.<sup>1</sup> Within the economic globalization, five dimensions can characterize the process of globalization, and they are trade, finance, aid, migration, and ideas.<sup>2</sup> With these dimensions, countries move towards a different path in glo-

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<sup>1</sup> Noel Castree, Neil M. Coe, Kevin Ward, and Michael Samers, *Spaces of Work: Global Capitalism and the Geographies of Labour*, (London: Sage Publications Ltd., 2004), 256.

<sup>2</sup> Ian Goldin and Kenneth Reinert, *Globalization for Development: Trade, Finance, Aid, Migration and Policy*, (Washington DC: The International Bank for Reconstruction and Development/The World Bank, 2006), 5.

balization and the diversification of societies. The growth they experienced has resulted in the migration of persons, which happened for centuries and still exists until now.<sup>3</sup>

Migration has a strong connection with poverty, which is historically perceived as essential means for poor people to escape poverty.<sup>4</sup> Another connection migration has a connection is with the development, in which remittance inflows play a big part in the origin States development.<sup>5</sup> However, to see it in another perspective is that migration also supports the host States development. This development happened because the host country where these migrants come into also has a particular objective and derive benefit from the migrants. This practice has the same history as old as the migration itself, although there is the slightest difference in how host countries manage the migration system with the modern world as it is now.

In the context of labour, there are several types of labour migration: temporary and permanent; internal and external; legal and undocumented; skilled and unskilled; voluntary and forced.<sup>6</sup> Countries often regulate labour migrants in layered categories according to their needs. For example, Australia has three major types of long-term temporary migration schemes, namely:<sup>7</sup>

- 1) Business Long-Stay subclass 457 enables employers to sponsor a highly skilled worker for managerial, professional and some trade occupations;
- 2) Student Visa allows international students to work up to 20 hours per week and work full time in semester breaks;
- 3) Working Holiday Maker (WHM) enables young holidaymakers to work in primary industries in the regional areas of Australia on a short-term basis.

Australia established Working-Holiday Maker (WHM) in 1975 as a scheme known as working holidaymakers, and from 2008-2016 Australia is the largest receiver of migration of worker under this scheme among other countries:

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<sup>3</sup> *Ibid.*, 151.

<sup>4</sup> *Ibid.*, 14.

<sup>5</sup> *Ibid.*

<sup>6</sup> Noel Castree, Neil M. Coe, Kevin Ward and Michael Samers, *Spaces of Work: Global Capitalism and the Geographies of Labour*, 187.

<sup>7</sup> Yan Tan and Laurence H. Lester, "Labour Market and Economic Impacts of International Working Holiday Temporary Migrants to Australia," *Population Space Place* 18, (2012): 359-383.

**Table 1. OECD on Migration Worker<sup>8</sup>**

Destination	2008	2009	2010	2011	2012	2013	2014	2015	2016	2016/15
	Thousands									
<b>Seasonal workers</b>										
<b>Total OECD</b>	<b>(574.9)</b>	<b>(523.7)</b>	<b>(583.0)</b>	<b>(372.5)</b>	<b>(208.5)</b>	<b>(212.0)</b>	<b>362.6</b>	<b>527.2</b>	<b>685.4</b>	<b>+30</b>
Poland	..	..	73.2	..	..	..	176.1	321.0	446.8	+39
United States	64.4	60.1	55.9	55.4	65.3	74.2	89.3	108.1	134.4	+24
Canada	24.2	23.4	24.1	25.3	25.8	27.8	29.9	30.8	34.2	+11
Mexico	22.6	29.2	27.4	27.6	21.7	15.2	14.6	15.9	14.9	-6
Finland	12.0	12.5	12.0	12.0	14.0	14.0	14.0	12.0	14.0	+17
New Zealand	10.4	7.8	7.7	7.8	8.2	8.4	9.4	9.8	11.1	+14
France	11.6	7.0	6.2	6.3	6.4	6.1	6.6	6.7	6.8	+1
Austria	12.1	11.7	10.5	17.5	13.2	15.1	7.2	6.9	6.7	-3
Australia	0.1	0.1	..	0.4	1.1	1.5	2.0	3.2	4.5	+41
Italy	41.5	34.7	27.7	15.2	9.7	7.6	4.8	3.6	3.5	-1
Sweden	3.7	7.3	4.5	3.8	5.7	5.9	2.9	3.8	3.2	-15
Spain	42.2	6.3	8.7	4.5	3.8	3.1	3.1	2.9	2.9	-2
Norway	2.2	2.2	2.3	2.5	2.3	2.5	2.5	2.3	2.4	+5
<b>Working holidaymakers</b>										
<b>Total OECD</b>	<b>(426.6)</b>	<b>(423.8)</b>	<b>(421.2)</b>	<b>(409.7)</b>	<b>(429.5)</b>	<b>(478.8)</b>	<b>475.6</b>	<b>473.2</b>	<b>476.5</b>	<b>+1</b>
Australia	157.6	194.1	183.2	192.9	223.0	258.2	239.6	226.8	214.6	-5
United States	152.7	116.4	118.2	97.6	79.8	86.4	90.3	95.0	101.1	+6
New Zealand	39.5	40.1	43.3	43.1	48.7	54.7	61.3	65.2	69.7	+7
Canada	34.5	39.2	42.0	44.7	45.7	44.9	42.5	39.4	44.8	+14
United Kingdom	34.8	25.2	21.3	20.7	19.6	20.9	23.5	25.3	22.3	-12
Japan	5.9	7.4	10.1	7.5	9.3	9.1	8.1	10.4	10.9	+5
France	..	..	..	..	..	..	4.7	4.9	5.9	+20
Ireland	..	..	1.6	1.3	1.4	2.0	2.3	2.5	2.8	+10
Korea	0.3	0.3	0.5	0.8	1.0	1.2	1.3	1.4	1.6	+14
Denmark	0.4	0.3	0.3	0.4	0.4	0.4	0.6	0.8	1.2	+51

Working holidaymakers in Australia mostly work in the tourism and agriculture sectors, and regions with a shortage of unskilled labour.<sup>9</sup> The working holidaymakers in Australia or known as Working-Holiday Maker (WHM) is not the only type of migration worker in agriculture. There are also Seasonal Workers from the Pacific in the Seasonal Worker Program (SWP); Annual workers from the Pacific in the Pacific Labour Scheme (PLS); and International students.<sup>10</sup>

Within the WHM, there are Working Holiday (subclass 417) visa and the Work and Holiday (subclass 462) visa granted for the migration worker.<sup>11</sup> The Programme offered to young individuals (aged 18–30 inclusive) to visit Australia for a holiday while supporting themselves during their stay with short-term employment.<sup>12</sup> Until December 2018, the purpose of the program is: “to foster closer ties and cultural exchange between Australia and partner countries”,<sup>13</sup> however, since 2019, the purpose was changed into: “to foster

<sup>8</sup> OECD, *International Migration Outlook 2018*, 42<sup>nd</sup> Edition, OECD Publishing, Paris, 28.

<sup>9</sup> *Ibid.*, 29.

<sup>10</sup> Joanna Howe, Stephen Clibborn et al., “Towards A Durable Future: Tackling Labour Challenges in the Australian Horticulture Industry,” The University of Adelaide, January 2019, see <https://www.sydney.edu.au/content/dam/corporate/documents/business-school/research/work-and-organisational-studies/towards-a-durable-future-report.pdf>, accessed 23 August 2020, p. 4.

<sup>11</sup> See <https://immi.homeaffairs.gov.au/what-we-do/whm-program>, accessed 23 August 2020.

<sup>12</sup> Joanna Howe and Irene Nikoloudakis, “A Critique of the Australian Working Holiday Programme; Options for Reform,” Report for the Consulate-General of the Republic of Korea, The University of Adelaide, December 2017, 9.

<sup>13</sup> Department of Home Affairs Australia “Working Holiday Maker visa program report (A)”, 31 December

people-to-people links between Australia and partner countries.”<sup>14</sup> There is no explanation in the report on the reason for changing the purpose of the WHM Program. However, there might be an answer to this, and this will be explained in this paper.

For so long, there have been many changes in Australian policy regarding WHM; this is an effort to protect WHV workers, although the WHV holder’s position is still not equal to other workers in Australia. Meanwhile, as one of the partner countries with Australia in the WHV program, Indonesia always sees this type of migrant worker as a cultural exchange program and fosters people-to-people links.<sup>15</sup> This issue raises numbers of questions; first, whether the WHV can be considered as a cultural exchange program or should it be considered as migrant labour scheme. Another issue is whether there is sufficient protection towards the WHV holder, especially the Indonesian citizen. The final issue is, what the Government of Indonesia (GOI) needs to do to improve the protection towards WHV holder.

This paper resolves the above questions by first discussing the existence of WHM in Australia, including the variations under the WHM program and the difference between subclasses. Then it elaborates the shifting of both international and Australia perspectives on WHM and the policy adjusting it. The discussion will then be followed by presenting the problems in the WHV as provided by reports and other sources in this regard. The next section discusses on how Indonesia involved in this program, including the legal text bounds Indonesia to the program, i.e. Indonesia-Australia Comprehensive Economic Partnership Agreement (IA CEPA), and the conformity of WHV to the national law. Finally, this paper discusses the urgency of better protection for Indonesian WHV holders and measures on this matter that could be taken by GOI.

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2018, See <https://www.homeaffairs.gov.au/research-and-stats/files/working-holiday-report-dec-18.pdf>, accessed 23 August 2020, 3.

<sup>14</sup> Department of Home Affairs Australia, “Working Holiday Maker visa program report (B),” 30 June 2019, See <https://www.homeaffairs.gov.au/research-and-stats/files/working-holiday-report-jun-19.pdf>, accessed 23 August 2020, 3.

<sup>15</sup> “Rekomendasi Visa Bekerja dan Berlibur [Work and Holiday Visa],” Kantor Wilayah DKI Jakarta Kementerian Hukum dan HAM Republik Indonesia [Ministry of Law and Human Rights of the Republic of Indonesia, Jakarta Regional Office], See <https://jakarta.kemenkumham.go.id/layanan-publik/layanan-keimigrasian/layanan-untuk-wni/rekomendasi-visa-bekerja-dan-berlibur-work-and-holiday-visa>, accessed 23 August 2020.

## II. WORKING HOLIDAY MAKER IN AUSTRALIA

After the immigration liberalization in the 1970s, Australia started experiencing the intensify of economic pressure caused by increasing unemployment levels.<sup>16</sup> To solve this issue, Australia started to reduce the planned migration quota. Hence, working holiday schemes were established in 1975.<sup>17</sup> This scheme is vital for the economies of rural Australian because the objective was to get temporary labour without having to granted permanent immigration, and to achieve this there are 44 partner countries under bilateral arrangements with Australia, the 25 among them is for the Work and Holiday Visa (subclass 462).<sup>18</sup> At first, the WHM scheme was offered to young people from Britain, Ireland, and Canada; however, Australia started to expand the partner countries until it reaches 44 partner countries.<sup>19</sup>

Administered by the Department of Home Affairs, in 2005, the Work and Holiday Visa (subclass 462) was introduced.<sup>20</sup> Then the WHM split into two subclasses visa: Working Holiday (subclass 417) and Work and Holiday Visa (subclass 462).<sup>21</sup> Both subclasses have eligibility requirements as:<sup>22</sup>

- 1) Be aged 18-30 (inclusive) at the time of application. For Canada, France, and Ireland, the age is 18 to 35 (inclusive)
- 2) hold a passport from an eligible partners countries
- 3) not to be accompanied by dependent children during their stay in Australia
- 4) meet financial, health and character requirements.

For subclass 462 there are additional requirements, namely:<sup>23</sup>

- 1) functional English
- 2) successful completion of at least two years of undergraduate university study (except Israel and USA)
- 3) a letter of home country/government support in association with their visa application (except Argentina, Austria, Chile, China, Israel, Portugal, Spain, Singapore, and the USA)

Employer sponsorship is not required for both subclasses, and its holder

<sup>16</sup> Department of Immigration and Border Protection, "A History of the Department of Immigration: Managing Migration to Australia," Commonwealth of Australia, 2017, see <https://www.homeaffairs.gov.au/news-subsite/files/immigration-history.pdf>, accessed 20 August 2020, 56.

<sup>17</sup> *Ibid.*, Department of Immigration and Border Protection, 82.

<sup>18</sup> *Ibid.*, Department of Home Affairs Australia (B).

<sup>19</sup> *Ibid.*, Department of Immigration and Border Protection, 82.

<sup>20</sup> Alexander Reilly, "Low-cost labor, or cultural exchange? Reforming the Working Holiday visa programme," *The Economic and Labour Relations Review* 26, No. 3 (2015): 477. 474-489,

<sup>21</sup> *Ibid.*, Department of Home Affairs Australia (B), 3.

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.*

may work for 12 months stay in Australia but cannot remain with any one employer for longer than six months. They can work for the same employer for a combined total of more than six months, provided that the work is undertaken in a different location and work in any one location does not exceed six months. Other terms to be considered is that working in a different position in the same work would be considered employment with the same employer.<sup>24</sup> There is a possibility for extension of the six-month employment in certain circumstances for visa holder who have carried out work: as an au pair anywhere in Australia, on eligible industries in northern Australia, and in plant and animal cultivation anywhere in Australia.<sup>25</sup> Other benefit offered to WHM holder is the possibility of studying for up to four months during the 12-month stay in Australia.<sup>26</sup>

Subclass 417 holder who completes three months work in agriculture, mining and construction industries in regional Australia including rural and regional area will acquire eligibility to apply for a renewal of the same visa. For Subclass 462 holder the eligibility is after completion of three months' work in agriculture, tourism and hospitality in a designated area in northern or regional Australia.<sup>27</sup> The third WHM visa is available for the six months of work completed under the second visa.<sup>28</sup>

In 2019, 36,617 WHMs were granted a second-year extension on their visa, with a likely 90% extension granted for 88 days work in the horticulture industry.<sup>29</sup> It is also important to note that WHM makes up 50–80% of the seasonal workforce' in the horticulture sector.<sup>30</sup> As previously stated, there are four types of temporary migration within the agriculture sector, including WHM. The other three types will be explained as follows:

#### A. SEASONAL WORKERS FROM THE PACIFIC IN THE SEASONAL WORKER PROGRAM (SWP)

Commenced on 1 July 2012, the SWP visa, namely subclass 416, is a particular program available for citizens from specific countries and targeted unskilled and low-skilled workers. They are administered by the Department of Jobs and Small Business. The purpose of this program is to contribute to

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<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid.*

<sup>29</sup> Joanna Howe, Stephen Clibborn, et.al., "Towards A Durable Future: Tackling Labour Challenges in the Australian Horticulture Industry," 4.

<sup>30</sup> Joanna Howe and Irene Nikoloudakis, "A Critique of the Australian Working Holiday Programme; Options for Reform," 21.



economic development in partner countries by providing employment opportunities, remittances, and opportunities for up-skilling. In doing so, the SWP will also offer benefits to the Australian economy and to Australian employers who can demonstrate that they cannot source suitable Australian labour.<sup>31</sup>

This program applies to the following industries: horticulture (all locations), tourism (accommodation; limited locations), sugarcane (limited locations), cotton (limited locations), aquaculture (limited locations).<sup>32</sup> The requirements for the applicants of this visa are as follows:<sup>33</sup>

- a) standardized health and character criteria;
- b) signing an Australian Values Statement;
- c) an invitation to participate in the SWP by an Australian organization approved as Temporary Activities Sponsor;
- d) minimum age of 21 at the time of visa application;
- e) a citizen from the participating country;
- f) a genuine intention to comply with the conditions of the visa and return to their home country after employment ceases.

The holders of this visa must do as follows:<sup>34</sup>

- a) able to work in Australia for 9-12 months
- b) permitted multiple travels to Australia during this period
- c) may return to work in future years, if they comply with visa conditions.
- d) limited to working with the Special Program Sponsor
- e) must maintain private health insurance during their stay
- f) not permitted to apply for another visa while in Australia
- g) pay for their living expenses, other incidentals and part of their international and domestic travel
- h) not able to bring dependants with them.

## B. ANNUAL WORKERS FROM THE PACIFIC IN THE PACIFIC LABOUR SCHEME (PLS)

This scheme started on 1 July 2018, under the Department of Foreign Affairs and Trade (DFAT) authority, and administered by Pacific Labour Fa-

<sup>31</sup> Seasonal Worker Programme Implementation Arrangements, see [https://docs.employment.gov.au/system/files/doc/other/implementatn\\_arrangement\\_5\\_november\\_2018.pdf](https://docs.employment.gov.au/system/files/doc/other/implementatn_arrangement_5_november_2018.pdf), accessed 20 August 2020.

<sup>32</sup> The Law Library of Congress, Guest Worker Program, , Global Legal Research Center, February 2013, see <https://www.loc.gov/law/help/guestworker/2013-008925%20FINAL091013.pdf>, accessed 25 August 2020, p. 13.

<sup>33</sup> Seasonal Worker Programme Implementation Arrangements, *Ibid.*

<sup>34</sup> *Ibid.*, 14.

cility.<sup>35</sup> As in visa subclass 403, the PLS aims to enable citizens of participating countries to take up low and semi-skilled work opportunities in rural and regional Australia for up to three years.<sup>36</sup> This scheme focuses on sectors with projected employment growth in Australia, although the sector is unrestricted; however, the focus is on non-seasonal agriculture, accommodation, tourism, and social assistance.<sup>37</sup>

The eligibility of the PLS employees are:<sup>38</sup>

- a) meet the health and character requirement
- b) verified identity
- c) meet mandatory offshore periods
- d) have functional English unless Australian licensing mandates a higher standard

For PLS visa to be granted, there are several additional requirements:<sup>39</sup>

- a) aged 21-45 at the time of visa application
- b) a citizen of a participating country
- c) must have a Temporary Activities Sponsor who is approved to participate in this scheme
- d) managed their health insurance, the employer may arrange health insurance and facilitate payment through a payroll deduction
- e) genuine intention to enter Australia temporarily for work under the PLS and depart Australia after their employment ceases
- f) have paid back any debts to the Australian Government
- g) have a compliant immigration history
- h) are not able to bring dependants with them
- i) only employed and worked for the approved sponsor.

### C. INTERNATIONAL STUDENTS

For international students, the eligibility to work is as long as the student visa (subclass 500 for international student and subclass 485 for Post-Study Graduate)<sup>40</sup> is still valid, where they will have rights for minimum wage and get a payslip.<sup>41</sup> However, the working hours are limited up to 40 hours every

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<sup>35</sup> Department of Foreign Affairs and Trade, Policy Handbook Pacific Labour Scheme, November 2019, See <https://pacificlabourmobility.com.au/wordpress-content-dir/uploads/2019/11/PLS-Policy-Handbook.pdf>, accessed 20 August 2020, 3.

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*, 4.

<sup>38</sup> *Ibid.*, 14.

<sup>39</sup> *Ibid.*, 14-15.

<sup>40</sup> Andrew Stewart, Jim Stanford and Tess Hardy, eds., *The Wages Crisis in Australia; What it is and what to do about it*, (Adelaide: University of Adelaide Press, 2018),188.

<sup>41</sup> "Your Work Rights Explained," Australia Government, <https://www.studyinaustralia.gov.au/English/>

two weeks during term time, and unlimited hours during holiday breaks. They are also obligated to pay taxes depending on the earning.<sup>42</sup>

### III. THE EVOLVING PERSPECTIVE OF WORK AND HOLIDAY VISA

As previously explained, until 2018, the objective of WHM is: “to foster closer ties and cultural exchange between Australia and partner countries”.<sup>43</sup> In this context, the WHM was designed for cultural exchange or education.<sup>44</sup> Further explained, the focus of the cultural aim is to foster understanding about Australia and encourage young Australians to learn more about their host countries. Such a program enables young people to develop their understanding of Australian people.<sup>45</sup> Following this statement, Tsaur and Huang summarized in their article: that working holiday scheme has many benefits, such as learning from friends, adapting to cross-cultural situations, strengthening geospatial recognition, improving employability, and learning to speak up for labour rights.<sup>46</sup> Another benefit from the cultural aim of the WHM Programme is that migrants have brought with them new culinary tastes along with new approaches to leisure, arts, and society.<sup>47</sup>

However, looking at the pattern of Australian policy regarding WHM seems different along the way. When the WHM was established in 1975, it was only open to citizens from the United Kingdom, Canada, and the Republic of Ireland.<sup>48</sup> With these partner countries, the cultural aim of the WHM is understandable, because these countries have similar cultures and levels of economic development to Australia. However, this policy changed five years later when Australia decided to expand partner States which made this program available to non-English speaking States. The expansion also includes less developed socio-cultural ties with Australia such as Japan, Netherlands,

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Live-in-Australia/Work/your-work-rights-explained, accessed 20 August 2020.

<sup>42</sup> *Ibid.*

<sup>43</sup> Department of Home Affairs (A), 3.

<sup>44</sup> Andrew Stewart, Jim Stanford and Tess Hardy, eds., *The Wages Crisis in Australia; What it is and what to do about it*, 188.

<sup>45</sup> Glenys Harding and Elizabeth Webster, *The working Holiday Maker Scheme and The Australian Labour Market*, (Australia: Melbourne Institute of Applied Economic and Social Research, University of Melbourne, 2002), 11-12.

<sup>46</sup> Sheng-Hsiung Tsaur and Chung-Ching Huang, “Working Holiday Tourist Learning: Scale Development and Validation,” *Journal of Travel & Tourism Marketing* 33, no. 4 (2016): 547. 535-550

<sup>47</sup> Lisa Thomson, “Migrant Employment Patterns in Australia: post Second World War to the Present,” AMES Research and Policy Unit, October 2014, see <https://www.ames.net.au/-/media/files/research/history-of-migrant-employment-final.pdf?la=en>, accessed 25 August 2020, 5.

<sup>48</sup> Joanna Howe and Irene Nikoloudakis, “A Critique of the Australian Working Holiday Programme; Options for Reform,” 10.

South Korea, Malta, and Germany.<sup>49</sup> Then from 2000 to 2005, Australia entered into agreements with more countries, and it was in 2005 the Work and Holiday visa or the subclass 462 was initiated, which included until recent agreements.<sup>50</sup> Until 2019, the most agreements Australian entered with partner countries was the subclass 462 visa, which accounted for 25 from all 44 agreements Australian have with partner countries.<sup>51</sup>

In 2005, when the subclass 462 was introduced, there was also a new policy introduced, which allows first time working holiday visa holders to apply for a second visa after undertaking 88 days of work in the agricultural, mining, or construction industries in regional Australia.<sup>52</sup> This policy purpose was to support the tourism industry and the Australian economy by providing short-term casual workers for those industries.<sup>53</sup> However, the background of this policy was that the second-year visa extension would direct WHMs toward industries under the pressure of labour shortages and where employee recruitment difficulties are particularly acute.<sup>54</sup>

The recent significant change in WHM policy was in August 2018. The Federal Government introduced a cascade of employer-friendly measures that continued the previous trend of liberalization.<sup>55</sup> This policy applies for both subclasses 462 and 417. However, for subclass 462 there was a relaxation of regional restriction placed before, the introduction of a possibility of a third-year visa for both 417 and 462 visa holders, an extension of the time allowed with one agricultural employer in one location, and a promise of higher annual caps for some 462 visa countries.<sup>56</sup>

These changes in WHM policy basically can be read as an Australian effort to meet the demands from local industries, thus the supposedly WHM designed was for cultural objective has shifted into work visa and primarily for employment.<sup>57</sup> Therefore, it is a possible reason why the objective of WHM then changed into: “to foster people-to-people links between Australia and partner countries.”<sup>58</sup> However, this new objective of WHM is still not clearly stating the employment connection within the program, as it is already shown

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<sup>49</sup> *Ibid.*

<sup>50</sup> *Ibid.*

<sup>51</sup> Department of Home Affairs (A), 3.

<sup>52</sup> CFMEU, “Tough Jobs: The Rise of An Australian Working Underclass,” CFMEU Research Paper, September 2016.

<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid.*, 21.

<sup>55</sup> Iain Campbell, “Harvest Labour Markets in Australia: Alleged Labour Shortages and Employer Demand for Temporary Migrant Workers,” *Journal of Australian Political Economy* no. 8: 46-88,

<sup>56</sup> *Ibid.*, 62.

<sup>57</sup> CFMEU, “Tough Jobs: The Rise of An Australian Working Underclass.”

<sup>58</sup> Department of Home Affairs (B), 3.

by the facts that WHM regards employment and labour. Meanwhile, there is a need to clarify WHM position for partner countries, such as Indonesia, as the GOI still recognizes this program as a cultural program, not an employment program. As Howe and Clibborn affirmed that the performance of work could no longer be characterized as merely ‘incidental’ to the WH Programme’s cultural exchange purpose<sup>59</sup> and the Indonesian policy could be different if the WHM program is clearly regarding employment and labour.

#### IV. PROBLEMS IN WORK AND HOLIDAY VISA SUBCLASS 462

In Australia, migrant workers’ immigration status and employment rights are governed by a combination of national laws and the laws and court systems of each Australian state or territory.<sup>60</sup> There are several regulations at the national level, such as:<sup>61</sup>

- 1) The *Migration Act 1958* is the Australian immigration regulatory framework,
- 2) The *Migration Regulations*, which governs each visa categories including the rights and conditions that are attached to those visas,
- 3) The *Fair Work Act 2009* regulates employment and the relationship between employer and employee.

Furthermore, each state and territory also has its regulation governing labour and migrant, for example, the Work Health and Safety (‘WHS’) legislation, *Discrimination Act*, *Fair Work Act*, the *Sex Discrimination Act 1984*, *The Racial Discrimination Act*.

However, those regulations are to govern labour, and the WHM worker seems not fully protected by this set of legal products because problems still occur in the WHM. There are many reports and critiques regarding the WHM and its subclasses. Even there were television coverages regarding this issue back in 2015, thus raising the awareness of structural risk in WHM holder.<sup>62</sup> After the television coverages on the working condition of the WHM in the

<sup>59</sup> Joanna Howe and Irene Nikoloudakis, “A Critique of the Australian Working Holiday Programme; Options for Reform,” 14.

<sup>60</sup> UNSW Human Rights Clinic, *Temporary Migrant Workers in Australia*, Issues Paper, 15 October 2015, 1.

<sup>61</sup> *Ibid.*

<sup>62</sup> Caro Meldrum-Hanna and Ali Russell, “Slaving Away,” *Four Corners*, 4 May 2015, see <http://www.abc.net.au/4corners/stories/2015/05/04/4227055.htm>, accessed on 23 August 2020; Adele Ferguson and Klaus Toft, “7-Eleven: The Price of Convenience,” *Four Corners*, 31 August 2015, see <http://www.abc.net.au/4corners/stories/2015/08/30/4301164.htm>, accessed 23 August 2020.

farms, there were media reports, government inquiries, and academic studies on the issue, which then followed by The Fair Work Ombudsman report in November 2018, which identifies wage underpayments, and other non-compliance.<sup>63</sup>

## A. VIOLATION OF LABOUR STANDARD IN WHM

In October 2015, University of New South Wales (UNSW) Human Rights Clinic issued a paper which identified the mistreatment encountered by migrant workers, and they are:<sup>64</sup>

- 1) wage defrayal, both in the form of wages below minimum requirement and entitlements, or deductions.
- 2) excessive work hours
- 3) work conditions
- 4) physical and sexual abuse
- 5) discrimination and unfair dismissal
- 6) housing, living condition and cost
- 7) access to state-provided services
- 8) forced labour and human trafficking

For all temporary worker types, categories are entitled to the same wages and conditions under Australian law. However, the different regulatory frameworks for each of these labour sources produce a segmented horticulture labour market where growers can maximize profits by selecting a source of labour that is more vulnerable to exploitation.<sup>65</sup> There are also reports on some workers involved in sham contracting and accepted lower wages for tax evasion purposes.<sup>66</sup> Another case is when a worker did a 15-hour shift, and the employer gave fake timesheets and no payslip to the employee, or none of them and just handed cash.<sup>67</sup> The result for the worker is that they were unable to secure enough hours, whereas the local workers get paid correctly.<sup>68</sup> The possibility for visa extension also become a factor that supports the exploitative treatment of the employer, since one of the requirements for an extension

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<sup>63</sup> Joanna Howe, Stephen Clibborn et.al., "Towards A Durable Future: Tackling Labour Challenges in the Australian Horticulture Industry," 5.

<sup>64</sup> UNSW Human Rights Clinic, "Temporary Migrant Workers in Australia, Issues Paper," 12.

<sup>65</sup> Joanna Howe, Stephen Clibborn et.al., "Towards A Durable Future: Tackling Labour Challenges in the Australian Horticulture Industry," 9.

<sup>66</sup> Australasian Meat Industry Employees Union, The Impact of Australia's Temporary Work Visa Programs on the Australian Labour Market and on the Temporary Work Visa Holders, Submission to the Senate Education and Employment Committees, April 2015, 1.

<sup>67</sup> The Senate Education and Employment References Committee, A National Disgrace: The Exploitation of Temporary Work Visa Holders, March 2016, ISBN: 978-76010-397-2, p. 177.

<sup>68</sup> *Ibid.*, 178.

is the completion of the 88 days of paid work.<sup>69</sup>

This problem is worsened by the business model of labour hired in the horticulture sector that workers are not employed by the company to whom they provide their labour (host organization) but by a third party specified in hiring labour.<sup>70</sup> The labour-hiring firm is responsible for meeting the legal minimum wages and conditions of the workers since they have a direct relationship with the worker. However, the Productivity Commission recently observed that labour-hiring companies figure prominently in cases of migrant exploitation, particularly in industries such as horticulture and food processing.<sup>71</sup> All these factors are what caused the WHM worker to accept all the mistreatment happened to them, not because they like it, but because they were in pursuit of the visa extension which potentially could result in permanent residency.

Since 2006, there were several reports regarding prostitution and human trafficking in Australia, and the perpetrators are a network consisting of entrepreneur from Asia are investing and operating in Australia, tour organizer and operators that source women and going into Australia by utilized the student visa or WHM.<sup>72</sup> The perpetrators paid all the expenses before departure. After arrival, the women will be located in the business, and they have to work in prostitution to pay the debt of the expenses.<sup>73</sup> What worse, in this case, is that there was deregulation in this industry. Moreover, restrictions on the focus of trafficking, which only related to exploitation happening outside the commercial sex industry contribute to this worsening.<sup>74</sup>

Another issue on WHM beside the aforementioned is regarding undocumented worker, which could occur because of these reasons:<sup>75</sup>

- 1) visa overstayers – when a visa is no longer valid because it has expired;
- 2) visa holders without a right to work – typically, these involve migrants on tourist visas that do not contain a right to work in Australia;
- 3) visa holders in breach of a visa condition allowing a limited right to work – these are usually international students in breach of the restric-

<sup>69</sup> Joanna Howe, Andrew Stewart and Rosemary Owens, “Temporary Migrant Labour and Unpaid Work in Australia,” *Sidney Law Review* 40, No.183 (2018): 209.

<sup>70</sup> Joanna Howe and Irene Nikoloudakis, “A Critique of the Australian Working Holiday Programme; Options for Reform,” 22.

<sup>71</sup> *Ibid.*

<sup>72</sup> Collective Shout, “Inquiry Into Human Trafficking,” Australia Parliament, 4 March 2017, see <https://www.parliament.nsw.gov.au/lcdocs/submissions/57323/0027%20Collective%20Shout.pdf>, accessed 25 August 2020, 21

<sup>73</sup> Collective Shout, “Inquiry Into Human Trafficking,” 22.

<sup>74</sup> *Ibid.*, 7.

<sup>75</sup> Joanna Howe, Stephen Clibborn et.al., “Towards A Durable Future: Tackling Labour Challenges in the Australian Horticulture Industry,” 5.

tion preventing them from working for more than 40 hours a fortnight during the semester.

The terminology of an undocumented worker comes from the violation of the Migration Act 1968 thus making them liable for deportation, and this only adds the worker dependence towards the employer over the threat for reporting the said worker to the immigration authorities.<sup>76</sup>

## B. BARRIERS TO ACCESSING REMEDIES

The requirement for 'functional English' only exist in subclass 462 and not for subclass 417. However, it only covers functional English, which means only necessarily English for basic daily life. With a complicated system in WHM Program, the worker limited English experienced difficulties in obtaining information about complaint mechanisms, access support services and drew attention to their exploitation at work.<sup>77</sup> Besides, the WHM worker is placed in the rural areas of Australia; they have no means of transportation or even needed document (as in payslip) to confront the employer regarding the mistreatment.<sup>78</sup>

This matter concerning the rural location also discouraged the ability of Fair Works Ombudsman (FWO) as the authorities to enforce the labour law, added to the trouble is the difficulties locating the labour-hire contractors.<sup>79</sup> Also, an issue important to note is that there are three main visa programs aimed at channelling temporary migrants into the horticulture industry and a different government department leads each one. All of them are focussing on horticulture labour supply. However, this system does not mean better management for all types of the temporary worker, especially the horticulture worker. Because there is no central point of coordination for all these initiatives, means each initiative runs on a different path, resulted in the degradation of labour standards and insecure and fragile labour supply.<sup>80</sup>

The last issue relating to the concept of cultural exchange in WHM is that because it is a cultural exchange, scheme, there is no proper record-keeping maintained by the authorities. For example, employment contracts between farmers and the workers are concluded individually, no registered sponsorship arrangements and no licensing or registration schemes controlling the

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<sup>76</sup> Iain Campbell, "Harvest Labour Markets in Australia: Alleged Labour Shortages and Employer Demand for Temporary Migrant Workers," 57.

<sup>77</sup> Joanna Howe, Andrew Stewart and Rosemary Owens, "Temporary Migrant Labour and Unpaid Work in Australia," 20.

<sup>78</sup> Joanna Howe, Stephen Clibborn et.al., "Towards A Durable Future: Tackling Labour Challenges in the Australian Horticulture Industry," 10.

<sup>79</sup> *Ibid.*, 10.

<sup>80</sup> *Ibid.*, 130.



employment. Not only that, the issue has caused difficulty for the enforcers to monitor pay and conditions of WHMs effectively, and also detrimental for the workers' protection in the end.<sup>81</sup>

## V. INDONESIA'S INVOLVEMENT IN WORK AND HOLIDAY VISA AND ITS CONFORMITY WITH NATIONAL LAWS

### A. THE MEMORANDUM OF UNDERSTANDING BETWEEN INDONESIA AND AUSTRALIA 2009

The possibility to apply to any kind of the visas under the WHM Program depends on the country of origin of each visitor based on the agreement Australia concluded with each country; Indonesia is one of the countries eligible to apply of a Work and Holiday Visa.<sup>82</sup> Indonesia entered the agreement with Australia on 3 March 2009 for establishing Work and Holiday Visa or known as subclass 462 under WHM Program.<sup>83</sup> The agreement placed requirements for WHV Visa are:

- 1) intend primarily to holiday in Australia or Indonesia, as the case may be, for a specific period;
- 2) are aged from eighteen (18) to thirty (30) years inclusive at the time of application for the visa;
- 3) hold tertiary qualifications, or have completed at least two years of undergraduate university study;
- 4) provide a letter from the relevant government bodies which selected them to participate in the program to confirm that they satisfy all the eligibility requirements;
- 5) for Indonesian nationals, have a level of proficiency in English which is assessed as at least functional; and for Australian nationals, have a level of proficiency in the Indonesian language which is assessed as at least functional;
- 6) applicants are a person who is not accompanied by dependent children;
- 7) have not previously taken part in the 'Work and Holiday' or the 'Working Holiday' program;
- 8) possess a passport of minimum one (1) year validity and a return travel ticket or sufficient funds with which to purchase such a ticket;

<sup>81</sup> *Ibid.*, 99.

<sup>82</sup> *Ibid.*

<sup>83</sup> Article 2 a Memorandum of Understanding Indonesia – Australia Relating Work and Holiday Visa, 2009, see <http://www.aiya.org.au/wp-content/uploads/2013/06/MoU-Work-Holiday-English.pdf>, accessed 25 August 2020.

- 9) possess reasonable funds for their maintenance during the period of initial stay in Australia or Indonesia, as the case may be; and
- 10) have good health and a sound background, as required by the domestic laws and regulations of the relevant party.

Meanwhile, the implementation of the work and holiday arrangements is set as follows:<sup>84</sup>

- 1) in both Australia and Indonesia, the principal purpose of visits under the ‘Work and Holiday’ arrangement is a holiday with work being incidental to the holiday;
- 2) in both Australia and Indonesia, ‘Work and Holiday’ visa holders must not be employed by any employer for more than six (6) months;
- 3) in both Australia and Indonesia work and holiday visa holders will not be permitted to engage in any studies or craning for more than four (4) months;
- 4) in both Australia and Indonesia, a ‘Work and Holiday’ visa will automatically entitle the visa holder to work and reside temporarily in Australia or Indonesia as the case may be;
- 5) applications for ‘Work and Holiday’ visas must be lodged in Australia by Australian Nationals and in Indonesia by Indonesian Nationals;
- 6) the applicants of either party may be interviewed when necessary by representatives of the other party to determine their eligibility for the grant of a visa;
- 7) both Australian and Indonesian ‘Work and Holiday’ visa holders are expected to leave Australia or Indonesia, as the case may be, at the end of the authorized period of stay of 12 months on that visa, and may be subject to removal action by the relevant Party if they do not.

## B. INDONESIA-AUSTRALIA COMPREHENSIVE ECONOMIC PARTNERSHIP AGREEMENT (IA-CEPA)

A more recent set of provisions on immigration between Indonesia and Australia are also present in the recently promulgated Indonesia-Australia Comprehensive Economic Partnership Agreement (“**IA-CEPA**”) under Chapter 12 IA-CEPA on the Movement of Natural Persons.<sup>85</sup> In line with the primary purpose of the IA-CEPA, which is to establish a framework for economic cooperation between businesses and communities in Indonesia and Australia,<sup>86</sup> the insertion of the provision in Chapter 12 of the IA-CEPA is

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<sup>84</sup> Article 2 b Memorandum of Understanding Indonesia – Australia Relating Work and Holiday Visa.

<sup>85</sup> Indonesia-Australia Comprehensive Economic Partnership Agreement, Chapter 12: Movement of Natural Persons

<sup>86</sup> Australian Government Department of Foreign Affairs, “Why has the Australian Government Negotiated

primarily aimed to improve the labour-capital for both states. Indonesia benefits a rare opportunity to ease learning and transferring new skills by working in Australia, a more developed country than Indonesia.<sup>87</sup>

The IA-CEPA allows temporary entry for natural persons from each state to enter the length of stay permissible under the IA-CEPA ranges up to 2 years of stay in respective states depending on the purpose of visit and the regulations on respective states.<sup>88</sup> The IA-CEPA does not prohibit respective states from enacting additional rules or applying measures on immigration if deemed necessary; however, it should not impair the benefits each state could receive with the enactment of the IA-CEPA.<sup>89</sup> The IA-CEPA allows for each state to specify its commitments under Annex 12-A IA-CEPA, which essentially comprises of existing provisions of the local visa regulations of each respective country. (i.e. conditions and limitations of work in Indonesia based on the Indonesian Standard Industrial Classification (“KBLI”).) Thus, although IA-CEPA aims to increase natural person mobility between Indonesia and Australia, it does not add provisions to expand mobility channels between Indonesia and Australia significantly.<sup>90</sup>

On the other hand, the domestic laws in Indonesia aim to improve the social welfare of Indonesians through workforce as an integral part of national development.<sup>91</sup> For these reasons, Indonesian legislations prioritize recruiting and developing the skills of Indonesian workers compared to foreign workers.<sup>92</sup> According to Law No. 13 of 2003 on Manpower (“Manpower Law”), any foreign workers must acquire a permit from the Minister of Manpower and is prohibited from working for individual employers, e.g. foreign workers must work in a legal entity.<sup>93</sup> All foreigners must hold a Limited Residence Visa (*Visa Tinggal Terbatas*) (“Vitas”) to work in Indonesia legally. The Manpower Law also includes comprehensive rules on the protection of the rights of workers against employers to prevent unfair treatment.

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a Comprehensive Economic Partnership Agreement with Indonesia?”, see <https://dfat.gov.au/trade/agreements/not-yet-in-force/iacepa/Pages/why-has-the-australian-government-negotiated-a-comprehensive-economic-partnership-agreement-with-indonesia.aspx>, accessed on 29 August 2020.

<sup>87</sup> Hugo Toledo, “The IA-CEPA and Sector Adjustments: A Specific—Factors Model of Production”, *International Review of Economics and Finance* 48 (March 2017): 208.

<sup>88</sup> Indonesia-Australia Comprehensive Economic Partnership Agreement, Art. 12.4 (1); see also Annex 12-A and Annex 12-B

<sup>89</sup> Indonesia-Australia Comprehensive Economic Partnership Agreement, Art. 12.2 (3)

<sup>90</sup> Asa Odin Ekman and Samuel Engblom, “Expanding the Movement of Natural Persons Through Free Trade Agreements? A Review of CETA, TPP and ChAFTA” *International Journal of Comparative Labour Law and Industrial Relations* 35 (2019):163-200.

<sup>91</sup> Law No. 13 of 2003 on Manpower, State Gazette No. 39, Supplement of State Gazette No. 4279, General Elucidation.

<sup>92</sup> See President Regulation No. 20 of 2018, State Gazette No. 39, Art. 4.

<sup>93</sup> See Law No. 13 of 2003 on Manpower, Art. 3 and Art. 4, see also President Regulation No. 20 of 2018, General Elucidation.

The purpose of Indonesian domestic provisions on foreign workers compared to the provisions in both the IA-CEPA and the WHV is different. The former aims to improve Indonesian lives by providing jobs for local workers with many legal requirements for foreign workers whereas the latter aims on inviting as many foreign workers as possible.<sup>94</sup> The MoU signed between Australia, and Indonesia contains provisions for foreign workers. The requirements under the MoU does not contain any prior work experience to apply for a WHV. This results in visitors entering Australia without sufficient work experience is one of the factors that result in WHV holders to attain low paying jobs with little skills required usually.<sup>95</sup> Also, WHV holders must often commit to their work for most of the time that many do not have the privilege ‘travel’ anymore, therefore defeating the purpose of the ‘holiday’ part in a WHV.<sup>96</sup>

### C. GOVERNING LAWS FOR INDONESIAN MIGRANT WORKER

In 2004, the initial law regulating Indonesian labour to work abroad was passed, namely Law No. 39 of 2004 regarding Placement and Protection Indonesian Labor for Working Abroad (‘39/2004’).<sup>97</sup> On 22 November 2017, Law No. 18 of 2017 regarding Protection for Indonesian Migrant Worker (‘18/2017’) was issued as a replacement for Law No. 39 of 2004.<sup>98</sup> Both laws have a similar provision, and the primary purpose of the laws is to protect Indonesian labour which pursuing employment in a foreign country.

In both laws, there is provision stipulates that Indonesian worker can only seek employment abroad if the said country already entered an agreement with Indonesia regarding labour placement.<sup>99</sup> The Law 39/2004 was passed before the MoU between Indonesia and Australia in 2009. Moreover, the provision of the law was inapplicable to the WHV, since the stipulation of the Article 2 b of the MoU stated that “the principal purpose of visits under the ‘Work and

<sup>94</sup> see also Australian Government Department of Foreign Affairs, “Why has the Australian Government Negotiated a Comprehensive Economic Partnership Agreement with Indonesia?” <https://dfat.gov.au/trade/agreements/not-yet-in-force/iacepa/Pages/why-has-the-australian-government-negotiated-a-comprehensive-economic-partnership-agreement-with-indonesia.aspx>, accessed 27 August 2020.

<sup>95</sup> Yan Tan and Laurence H. Lester, “Labour Market and Economic Impacts of International Working Holiday Temporary Migrants to Australia,” 24.

<sup>96</sup> Christopher Brennan, “Backpackers or Working Holiday Makers? Working Tourists in Australia”, *Qualitative Sociology Review* (July 2014): 111.

<sup>97</sup> See [http://apmigration ilo.org/resources/indonesian-republic-act-no.-39-2004-regarding-placement-and-protection-for-indonesian-overseas-workers/at\\_download/file2](http://apmigration ilo.org/resources/indonesian-republic-act-no.-39-2004-regarding-placement-and-protection-for-indonesian-overseas-workers/at_download/file2), accessed 27 August 2020.

<sup>98</sup> Law No. 18 Year 2017 regarding Protection for Indonesian Migrant Worker, See <https://migrantcare.net/2017/12/undang-undang-no-18-tahun-2017-tentang-pelindungan-pekerja-migran-indonesia/>, accessed 28 August 2020.

<sup>99</sup> Article 11 Law 39/2004 and Article 31 Law 18/2017.

Holiday’ arrangement is a holiday, with work being incidental to the holiday.” Hence, there was no exact definition of employment within the provisions. Although, the fact that all WHV holder has all the intention to work in Australia, and indeed they worked there, has not changed the Indonesian policy in slightest regarding WHV. Even when the new law established, there is no provision whatsoever to adapt the WHV labour version into the law.

Until now, the WHV is entirely governed under the Directorate General of Immigration Ministry of Law and Human Rights<sup>100</sup>, and there is no information regarding WHV from the Ministry of Manpower and Transmigration. This authority comes from the requirement within the MoU that stated “provide a letter from the relevant government bodies which selected them to participate in the program to confirm that they satisfy all the eligibility requirements”, and since this program is ‘cultural’ and not about employment, hence, the Immigration’s authority over the WHV visa. It is the Immigration that issues The Letter of Government Support (Surat Rekomendasi Pemerintah Indonesia/SRPI) for the WHV applicant. Before issuing the letter, Immigration will interview the applicant and verify the fulfilment of the WHV requirements.<sup>101</sup> In the entirety of the required procedures, there is no involvement from the Ministry of Manpower and Transmigration. However, the Law 18/2017 mandates the Ministry to protect Indonesian migrant worker from pre-departure, employment, and return after employment.<sup>102</sup>

The Law 18/2017 regulates protection for the migrant worker by monitoring the activity of the person and making sure the validity of the employment and the legal relation created between employee and employer, or between employee and the intermediary, until dispute resolution and authority assistance is regulated. It is too bad the law did not govern WHV because otherwise, it will provide the GOI protection to the WHV holder other than dependent on the protection from Australian alone.

## **VI. THE URGENCY TO IMPLEMENT LABOR PROTECTION TOWARD WORK AND HOLIDAY VISA**

It has been generally accepted that Australian WHM is aimed for employment. The ILO Director-General stated that “traditional permanent immigration countries such as Australia, Canada and New Zealand have come to rely increasingly on temporary schemes to fill immediate gaps in the labour

<sup>100</sup> See <http://jogja.imigrasi.go.id/47629-2/#toggle-id-1>, accessed 27 August 2020.

<sup>101</sup> *Ibid.*

<sup>102</sup> Article 7 Law 18/2017.

market.”<sup>103</sup> The WHM is all about employment and not about holidays anymore or even cultural objectives; therefore, GOI needs to change its perspective regarding this issue and formulate a better policy to protect the WHV holder.

There is an urgency for the GOI to identify the issue since there are many mistreatments experienced by WHV labourers. Australian authorities also experienced difficulties in tackling all those violations. Furthermore, when the dependence of the worker is placed highly towards the employer, it will give more power to the employer. Australian scholars have warned about the condition with what they called as ‘a race to the bottom’ in Labor Standards, whereby firms compete to reduce costs by paying the lowest wages or giving workers the worst conditions.<sup>104</sup> The GOI must remember that many Indonesian citizens also participate in this program. Until now, there are no reports regarding the mistreatment of Indonesian workers; however, no reports do not mean there is no case. As previously mentioned, even the Fair Work Ombudsman having problems in keeping track of all WHM worker.

When it comes to worst, the Indonesian worker will face a bad situation with no one helping them, no protection, and no assistance from Australian authorities and Indonesian. This kind of situation is mentioned in Anna Szörényi as ‘slavery’.<sup>105</sup> It is modern slavery indeed, and with all the international conventions regarding abolishing slavery, then here is the new form of slavery. With GOI perceived WHV, not as employees, then it can be said that GOI also participates in the existence of slavery, not because GOI did not know the reality of WHV, but the GOI choose to ignore the fact.

Furthermore, the utilization of WHM program for human trafficking is a “red alert” for GOI and Australia since this is an international crime, and both countries are the signatories of the United Nation Convention Against Transnational Organized Crime.<sup>106</sup> Both countries should put maximum effort to eradicate this crime. Suppose the GOI is still not accepting this WHV as labour employment. In that case, there will be no cooperation between both countries to fight against human trafficking, mainly when it is carried out by utilizing the WHM channel.

<sup>103</sup> *Ibid.*, 6.; Also see ILO, Fair Migration: Setting an ILO agenda, International Labour Conference, 103<sup>rd</sup> Session, International Labour Office, Geneva, 2014, p. 13

<sup>104</sup> Iain Campbell, “Harvest Labour Markets in Australia: Alleged Labour Shortages and Employer Demand for Temporary Migrant Workers,” 72.

<sup>105</sup> R Andrijasevic and N Mai, ‘Editorial: Trafficking (in) representations: Understanding the recurring appeal of victimhood and slavery in neoliberal times’, *Anti-Trafficking Review*, issue 7, 2016, pp. 1—10, [www.antitraffickingreview.org](http://www.antitraffickingreview.org)

<sup>106</sup> See [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-12&chapter=18&clang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12&chapter=18&clang=en), accessed 27 August 2020.

Alternatively, in light of the more recently concluded IA-CEPA between Indonesia and Australia, the provisions on the temporary entry of a foreigner in the IA-CEPA could be referred to foreign labour protection. Similar to the WHM program, the IA-CEPA also aims to ease exchanges of manpower between Indonesia and Australia to benefit both states. However, the IA-CEPA provides more comprehensive provisions concerning the protection of Indonesian and Australian citizens when crossing borders, as it also opens the possibility of the government to impose measures deemed to protect its people without sacrificing the desire of better cooperation between the two nations.

## VII. CONCLUSION

Work and Holiday Visa is not a cultural exchange program, and therefore, it should be governed under labour law and the WHV holder to be treated with the same treatment as normal labour. The fact that there were many mistreatments towards the WHV holders showed the underdog status of this category. There are many difficulties for the Australian authorities in keeping track of the WHV worker to enforce the legal protection towards them. Even worse, when Australia is starting to treat WHV holders as labour, GOI still perceives them as cultural exchange program participants.

The GOI should change its perspective towards WHV as it should be, as the labour it is, then to take a necessary policy change and measure to protect Indonesian citizens in this program. The GOI's objective should change in the WHV program, then fulfil the mandate promulgated within the national laws in protecting Indonesian migrant workers. The violation and mistreatment towards the WHV holder are extreme; the Australian domestic problem has not promised a bright future for the WHV holder. It is the GOI obligation to take necessary measures to protect Indonesian citizens in the WHV program. Otherwise, this program does not leave substantial benefit for Indonesian citizens, moreover to the country.

The IA-CEPA provides that the domestic regulations of each respective state must be adhered to in the application of the IA-CEPA; thus, the provisions on WHV in the IA-CEPA should include Indonesian regulations as well. However, the MoU signed between Indonesia and Australia did not meet the requirements stipulated in Indonesian labour laws concerning foreign workers. Several requirements for foreign workers to enter and work in Indonesia are excluded from the MoU (i.e. foreigners may only work in Indonesia if they hold a Vitas as regulated in the Manpower Law). Meanwhile, for WHV, the agreement is unclear on the status of the WHV, and GOI also did not imple-

ment the national labour law for the overseas worker within the text. Suppose this situation persists and there is no acknowledgement of WHV holder as labour. In that case, both Australia and GOI are accountable in breaching their commitment to abolish slavery practice and to eradicate human trafficking. The neo-slavery issue will become a worldwide issue, and it will nullify all the GOI efforts in improving its labour protection regimes.

## **ACKNOWLEDGEMENT**

This research is funded by Faculty of Law Universitas Indonesia Main Research Grant under the title of: “Penelitian Mengenai Work & Holiday Visa (Research on Work and Holiday Visa), of the Year 2019.



## REFERENCES

### Articles in journals and periodicals

- Andrijasevic, Rutvica and Nicola Mai. “Trafficking (in) representations: Understanding the recurring appeal of victimhood and slavery in neoliberal times.” *Anti-Trafficking Review* 7 (2016): 1—10.
- Campbell, Iann. “Harvest Labour Markets in Australia: Alleged Labour Shortages and Employer Demand for Temporary Migrant Workers.” *Journal of Australian Political Economy*, No. 84. (2019): 46-88.
- Ekman, A.O. and Samuel, E. “Expanding the Movement of Natural Persons Through Free Trade Agreements? A Review of CETA, TPP and ChAFTA.” *International Journal of Comparative Labour Law and Industrial Relations* 35, (2019): 163-200.
- Howe J, Stewart A and Owens R. “Temporary Migrant Labour and Unpaid Work in Australia,” *Sidney Law Review* 40, (2018): 183.
- Reilly, A. “Low-cost labour, or cultural exchange? Reforming the Working Holiday visa programme.” *The Economic and Labour Relations Review* 26, No. 3. (2015): 474-489.
- Stewart, Andrew, Jim Stanford and Tess Hardy, eds. *The Wages Crisis in Australia: What it is and what to do about it*. Adelaide: University of Adelaide Press, 2018.
- Tan, Y. and Lester L. “Labour Market and Economic Impacts of International Working Holiday Temporary Migrants to Australia.” *Population Space Place* No.18 (2012): 359-383.
- Toledo, H. “The IA-CEPA and Sector Adjustments: A Specific—Factors Model of Production.” *International Review of Economics and Finance* 48, (2017).
- Tsaur, S. and Huang C. “Working Holiday Tourist Learning: Scale Development and Validation.” *Journal of Travel & Tourism Marketing* 33, No.4. (2016): 535-550.

### Books and book chapters

- Castree N, M. Coe N, Ward K and Samers M. *Spaces of Work: Global Capitalism and the Geographies of Labour*. London: Sage Publications, 2004.
- Harding G, and Webster E, *The working Holiday Maker Scheme and The Australian Labour Market*. Melbourne Institute of Applied Economic and Social Research, University of Melbourne, 2002.

### Legal Documents

- Indonesia-Australia Comprehensive Economic Partnership Agreement.  
Memorandum of Understanding Indonesia – Australia Relating Work and Holiday Visa, 2009. Available at: <http://www.aiya.org.au/wp-content/uploads/2013/06/MoU-Work-Holiday-English.pdf> (accessed 25 August 2020).
- Law No. 13 of 2003 on Manpower, State Gazette No. 39, Supplement of State Gazette No. 4279.
- Law No. 39 of 2004 regarding Placement and Protection of Indonesian Overseas Worker, State Gazette No. 133.
- Law No. 18 of 2017 regarding Protection for Indonesian Migrant Worker, State Gazette No. 242.
- President Regulation No. 20 of 2018, State Gazette No. 39.

United Nations, Depository Convention against Transnational Organized Crime. Available at [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-12&chapter=18&clang=\\_en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12&chapter=18&clang=_en) (accessed 27 August 2020).

### Other Sources

Australasian Meat Industry Employees Union. “The Impact of Australia’s Temporary Work Visa Programs on the Australian Labour Market and on the Temporary Work Visa Holders.” Submission to the Senate Education and Employment Committees, 2015.

Australian Government Department of Foreign Affairs, “Why has the Australian Government Negotiated a Comprehensive Economic Partnership Agreement with Indonesia?”. Available at: <https://dfat.gov.au/trade/agreements/not-yet-in-force/icepa/Pages/why-has-the-australian-government-negotiated-a-comprehensive-economic-partnership-agreement-with-indonesia.aspx> (accessed on 29 August 2020).

Australian Government, Your work rights explained. Available at: <https://www.studyinaustralia.gov.au/English/Live-in-Australia/Work/your-work-rights-explained> (accessed 20 August 2020).

CFMEU. “Tough Jobs: The Rise of An Australian Working Underclass.” CFMEU Research Paper, 2016.

Collective Shout, “Inquiry Into Human Trafficking.” Australia Parliament, 4 March 2017. Available at: <https://www.parliament.nsw.gov.au/lcdocs/submissions/57323/0027%20Collective%20Shout.pdf> (accessed 25 August 2020).

Department of Foreign Affairs and Trade, “Policy Handbook Pacific Labour Scheme.” November 2019. Available at: <https://pacificlabourmobility.com.au/wordpress-content-dir/uploads/2019/11/PLS-Policy-Handbook.pdf> (accessed 20 August 2020).

Department of Home Affairs (A). “Working Holiday Maker visa program report,” 31 December 2018. Available at <https://www.homeaffairs.gov.au/research-and-stats/files/working-holiday-report-dec-18.pdf> (accessed 23 August 2020).

Department of Home Affairs (B). “Working Holiday Maker visa program report” 30 June 2019 Available at: <https://www.homeaffairs.gov.au/research-and-stats/files/working-holiday-report-jun-19.pdf> (accessed 23 August 2020).

Department of Home Affairs, “Working Holiday Maker (WHM) program,” available at <https://immi.homeaffairs.gov.au/what-we-do/whm-program> (accessed 23 August 2020).

Department of Immigration and Border Protection. “A History of the Department of Immigration: Managing Migration to Australia.” Commonwealth of Australia, 2017. Available at: <https://www.homeaffairs.gov.au/news-subsite/files/immigration-history.pdf> (accessed 20 August 2020).

Ferguson, A. and Toft, K. “7-Eleven: The Price of Convenience.” *Four Corners*, 31 August 2015. Available at: <http://www.abc.net.au/4corners/stories/2015/08/30/4301164.htm> (accessed 23 August 2020).

Goldin, I. and Reinert, K. “Globalization for Development: Trade, Finance, Aid, Migration and Policy.” Washington, DC: The International Bank for Reconstruction and Development/The World Bank, 2006.

Howe, J. and Nikoloudakis, I. “A Critique of the Australian Working Holiday Pro-

- gramme; Options for Reform, Report for the Consulate-General of the Republic of Korea.” The University of Adelaide, December 2017.
- Howe, J., Clibborn S, et al. “Towards A Durable Future: Tackling Labour Challenges in the Australian Horticulture Industry.” The University of Adelaide, January 2019. Available at: <https://www.sydney.edu.au/content/dam/corporate/documents/business-school/research/work-and-organisational-studies/towards-a-durable-future-report.pdf>, (accessed 23 August 2020).
- ILO. “Fair Migration: Setting an ILO agenda.” International Labour Conference, 103rd Session, International Labour Office, Geneva, 2014.
- Kantor Wilayah DKI Jakarta Kementerian Hukum dan HAM Republik Indonesia [Ministry of Law and Human Rights of the Republic of Indonesia, Jakarta Regional Office], Rekomendasi Visa Bekerja dan Berlibur (Work and Holiday Visa). Available at: <https://jakarta.kemerkumham.go.id/layanan-publik/layanan-keimigrasian/layanan-untuk-wni/rekomendasi-visa-bekerja-dan-berlibur-work-and-holiday-visa> (accessed 23 August 2020).
- Kantor Wilayah Yogyakarta Kementerian Hukum dan HAM Republik Indonesia [Ministry of Law and Human Rights of the Republic of Indonesia, Yogyakarta Regional Office], Rekomendasi Visa Bekerja dan Berlibur (Work and Holiday Visa). Available at <http://jogja.imigrasi.go.id/47629-2/#toggle-id-1> (accessed 27 August 2020).
- Meldrum-Hanna, C. and Russell, A. “Slaving Away.” *Four Corners*, 4 May 2015. Available at <http://www.abc.net.au/4corners/stories/2015/05/04/4227055.htm> (accessed on 23 August 2020).
- OECD, International Migration Outlook 2018, 42nd Edition, OECD Publishing, Paris, 2018.
- Seasonal Worker Programme Implementation Arrangements, See [https://docs.employment.gov.au/system/files/doc/other/implementatn\\_arrangement\\_5\\_november\\_2018.pdf](https://docs.employment.gov.au/system/files/doc/other/implementatn_arrangement_5_november_2018.pdf), accessed 20 August 2020.
- The Law Library of Congress. “Guest Worker Program.” Global Legal Research Center, February 2013. Available at: <https://www.loc.gov/law/help/guestworker/2013-008925%20FINAL091013.pdf> (accessed 25 August 2020).
- The Senate Education and Employment References Committee. “A National Disgrace: The Exploitation of Temporary Work Visa Holders.” March 2016. ISBN: 978-76010-397-2.
- Thomson, L. “Migrant Employment Patterns in Australia: post Second World War to the Present.” AMES Research and Policy Unit, October 2014. Available at: <https://www.ames.net.au/-/media/files/research/history-of-migrant-employment-final.pdf?la=en> (accessed 25 August 2020).
- UNSW Human Rights Clinic, “Temporary Migrant Workers in Australia.” Issues Paper, 15 October 2015.

