



NEW SOUTH WALES NURSES AND MIDWIVES' ASSOCIATION  
AUSTRALIAN NURSING AND MIDWIFERY FEDERATION NEW SOUTH WALES BRANCH



IN REPLY PLEASE QUOTE:

BH:MWH  
Ref:  
23 April 2021

Committee Secretary  
Joint Standing Committee on Treaties  
PO Box 6021  
Parliament House  
Canberra ACT 2600

**Via e-mail: [jsct@aph.gov.au](mailto:jsct@aph.gov.au)**

Dear Committee

**Re: Regional Comprehensive Economic Partnership (RCEP)**

The Australian Nursing and Midwifery Federation, NSW Branch (ANMF NSW Branch), is the registered industrial and professional body for nurses and midwives in NSW. We represent over 71,500 nurses and midwives within the public health services, aged care, the private sector, and other industries. This includes assistants in nursing, assistants in midwifery (who are unregulated), Registered Nurses (Division 1 and 2), and Midwives at all levels including direct clinical care, management, research, and education.

Our role is to protect and advance the industrial and professional interests of nurses and midwives. We are committed to improving the standards of patient/resident/client care in public, private, aged care, and other services.

We thank the Committee for the opportunity to raise our significant concerns regarding RCEP, with particular concern regarding potential impacts on much needed reform within the delivery of Aged Care services.

We note and endorse the submissions made by the ACTU and AFTINET, noting that we are active partners of these organisations.

Given the concerns outlined below, we call for an urgent amendment to the RCEP agreement. In the absence of the recommended amendments, we seek that the Committee recommend RCEP not be ratified by our parliament.

The NSWNMA's Position Statement on Fair and Ethical Trade informs our response and is attached as Annex 1.

## **Urgent Reform Needed in Delivery of Aged Care**

I refer the Committee to recommendations of the *Royal Commission into Aged Care Quality and Safety* (RCAC) and the ANMF's submissions related to the Inquiry<sup>1</sup>. In summary the key reforms sought by industry experts and widely supported by the community are:

1. Mandate staffing ratios – minimum staffing levels and skills mix
2. Legislate requirements for clinical governance, leadership and expertise
3. Legislate transparency and accountability measures
4. Guarantee workforce capacity and capability
5. Registration of unregulated care-workers

These recommendations are potentially threatened by the Australian Government's stance on the content of FTAs.

## **Impact of Free Trade Agreements on Aged Care Reform (and healthcare delivery in general).**

FTAs, like RCEP, the Comprehensive & Progressive Trans-Pacific Partnership (CPTPP), and others, seek to liberalise trade in services. RCEP's Article 1.3 (Objectives) makes this clear. RCEP requires signatories to increasingly open services, which currently includes aged care and health care, to:

1. Overseas investment – (increasing the number of foreign for-profit-providers),
2. Deregulation (how and where services are regulated), and
3. Reduced government investment (government run services or subsidies for local providers) in competition to for-profit-providers

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<sup>1</sup> <https://anmf.org.au/pages/royal-commission-into-aged-care-quality-and-safety>

These risks exist because Aged Care is not listed as a service that is excluded from trade liberalisation<sup>2</sup>; even though Child Care is. The decision not to list aged care may be based on the mistaken view that aged care is a “subsector” of “health”. Regardless, “Health” is limited within Australia’s FTAs, including the proposed RECP agreement, to only excluding Medicare and the Pharmaceutical Benefits Scheme.

This means that, at worst, aged care is exposed to RCEP, or at best, there is sufficient ambiguity to allow overseas companies to exploit loopholes. The impact of either of these is the potential chilling effect, and or delay, on reform as was witnessed through Phillip Morris attempting to sue the Australian Government for its decision to introduce plain packaging for cigarettes.

The assumption from here is that, should RCEP be ratified in its current form, the Australian Government accepts that there can be further trade liberalisation (de-regulation) in aged care, or, that current regulation is sufficient – there can be no other analysis of why they have done this.

### **Overseas Investment:**

#### RCEP quote:

##### Article 1.3: Objectives

The objectives of this Agreement are to...

(c) progressively liberalise trade in services among the Parties with substantial sectoral coverage to achieve substantial elimination of restrictions and discriminatory measures with respect to trade in services among the Parties; and

(d) create a liberal, facilitative, and competitive investment environment in the region, that will enhance investment opportunities and the promotion, protection, facilitation, and liberalisation of investment among the Parties.

The ANMF NSW Branch has significant concern that increasing the for-profit sector within aged care, under current regulatory processes, will only exacerbate many of the issues identified in the RCAC. Further, historical studies have shown that quality of care is higher in the not-for-profit sector than the for-profit sector<sup>3</sup>. It is unclear

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<sup>2</sup> Note that the states’ health care systems are not listed either.

<sup>3</sup> See:

why the Government would therefore seek further for-profit investment in this crucial public service.

Recent events linked to Covid-19 outbreaks in Victoria clearly demonstrate the effectiveness and safety of government run aged care services compared to that of non-government run services. The *Inquiry into the Victorian Government's Response to the Covid-19 Pandemic* reported significantly lower cases of infection and fatalities in government run aged care services compared to the private sector<sup>4</sup>. Clearly, opening up further market access to aged care is not in the national interest until stronger regulatory processes have taken effect.

### Deregulation:

RCEP quote (emphasis added):

#### Article 8.15: Domestic Regulation

5. With a view to ensuring that measures relating to qualification requirements and procedures, technical standards, and licensing requirements do not constitute **unnecessary barriers to trade in services**, while recognising the right to regulate and to introduce new regulations on the supply of services in order to meet its policy objectives, each Party shall endeavour to ensure that any such measures that it adopts or maintains are: (a) based on objective and transparent criteria, such as competence and the ability to supply the service; **(b) not more burdensome than necessary to ensure the quality of the service**; and (c) in the case of licensing procedures, not in themselves a restriction on the supply of the service.

Modern FTAs, like RCEP, are less about tariffs, and more about non-tariff barriers to trade; Australia has some of the lowest (zero) tariffs on the broadest range of goods. We have little to give up in this respect. Instead, modern FTAs seek to reduce other

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Forder, J., & Netten, A. (2000). The price of placements in residential and nursing home care: the effects of contracts and competition. *Health Economics*, 9(7), 643-657. doi:10.1002/1099- 1050(200010)9:7

Comondore, V. R., Devereaux, P. J., Zhou, (et al) (2009). Quality of care in for-profit and not-for-profit nursing homes: systematic review and meta- analysis. *British Medical Journal (Overseas & Retired Doctors Edition)*, 339(b2732), 1-15.

Harrington, C. (2013). Understanding the relationship of nursing home ownership and quality in the United States. In G. Meagher & M. Szebehely (Eds.), *Marketisation in Nordic eldercare: a research report on legislation, oversight, extent and consequences* Stockholm Studies in Social Work 30 Stockholm Studies in Social Work. Stockholm: Stockholm University.

<sup>4</sup> [https://www.parliament.vic.gov.au/images/stories/committees/paec/COVID-19 Inquiry/Report/PAEC 59-08 Vic Gov response to COVID-19 pandemic.pdf](https://www.parliament.vic.gov.au/images/stories/committees/paec/COVID-19%20Inquiry/Report/PAEC%2059-08%20Vic%20Gov%20response%20to%20COVID-19%20pandemic.pdf)

forms of “barriers” to trade that occur through government regulation and acts of parliaments.

The argument for the restriction on further regulation is that creates certainty for business; i.e., it ensures consistent profit regardless of changes to government, or government policy. The way FTAS do this is known as *Standstill and Ratchet* clauses.

*Standstill and Ratchet* clauses require that no new regulation is introduced, and that over time, regulation is decreased. Standstill and ratchet clauses in RCEP that could prevent governments from implementing regulation include:

Article 8.15.5 of RCEP which says:

*“With a view to ensuring that measures relating to qualification requirements and procedures, technical standards, and licensing requirements do not constitute **unnecessary barriers to trade in services**”, while recognising **the right to regulate and to introduce new regulations** on the supply of services in order to meet its policy objectives,”*

It is not clear, because aged care is not listed, as to whether aged care is captured by this clause which sees regulation as a barrier to trade.

Article 8.10 seeks to ensure that governments do not limit the number of persons employed in a service and refers to numerical quotas. There is uncertainty as to whether this could frustrate the implementation of mandated minimum nurse to resident ratios in aged care facilities. Whilst most readings of this clause suggests companies don’t want a cap, profit is derived from decreasing staffing in aged care, not expanding it. Again, the uncertainty is not helpful.

Article 8.15 contains detailed obligations for governments relating to domestic regulation of services to ensure that regulations for licensing, qualifications and technical standards are objective, **not more burdensome than necessary**, and are not barriers to entry.

With reference again to the Covid-19 outbreaks in Victorian aged care facilities, it is noted that the state-run facilities have mandated staffing levels, where the private sector has no such obligation<sup>5,6</sup>. These staffing levels, and the superior skill mix, are recognised as a significant contributing factor to the difference in outcomes. New providers may argue that complying with staffing and skill mix requirements are burdensome to recruit to when entering the “market”.

The government must act to ensure that there is no ambiguity as to whether providers can be required to provide mandated staffing levels at mandated qualification levels, and that companies cannot claim such a regulation to be burdensome.

Article 8.10 prevents government from requiring foreign investors to have physical presence (“head office”) in Australia – this raises serious and significant doubt in the governments’ capacity to hold corporations accountable, limiting the improvements needed in governance and transparency within aged care provision.

A number of reports have shown that aged care providers have questionable taxation practices<sup>7</sup>. Considering the majority of aged care industry financing in Australia is taxpayer funded, this is not acceptable. Government funding must be traceable and accountable to care provision. Transparency and accountability can be limited if a company is not required to have a head office in the country where the service is being provided. A company could argue that transparency and accountability requirements are burdensome and is therefore a barrier to trade/profit.

In summary, RCEP may restrict regulations that seek to:

- limit the number of service providers in an area
- require companies to provide the service in certain geographical areas<sup>8</sup>,
- regulate the staffing requirements (numbers) and or skill mix requirements,

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<sup>5</sup> [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(20\)32206-6/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(20)32206-6/fulltext)

<sup>6</sup> <https://www.abc.net.au/news/2020-08-01/why-more-covid-19-cases-in-private-aged-care-than-public-sector/12503212>

<sup>7</sup> <https://cictar.org/research/>

<sup>8</sup> A government cannot require a multinational to provide their service in a targeted geographic area. This leads to services being provided to a community based on profit decisions, not need. For public services, this leaves the government as responsible for service delivery in non-profitable areas (think geography, but also type of care required).



- restrict anything that requires a company to have a head office located in the country where the service is being provided.

Relevant recommendations made by the RCAC that we believe are threatened by RCEP, and other existing free trade agreements (FTAs) are:

- Recommendation 77: National Registration Scheme
- Recommendation 78: Mandatory Minimum Qualification for Personal Care Workers
- Recommendation 86: Minimum Staff Time Standard for Residential Care
- Recommendation 87: Employment Status and Related Labour Standards as Enforceable Standards
- Recommendation 88: Legislative Amendments to Improve Provider Governance
- Recommendation 89: Leadership Responsibilities and Accountabilities
- Recommendation 90: New Governance Standard
- Recommendation 122: Reporting of Staffing Hours
- Recommendation 133: More Stringent Financial Reporting Requirements
- Recommendation 135: Continuous Disclosure Requirements in Relation to Prudential Reporting

Further, RCEP may prevent government stepping in to fix a broken system.

Governments are required to further de-regulate, and not re-regulate, public services unless supplied in the exercise of government. A service supplied in the exercise of government is defined in RCEP as;

“any service which is supplied neither on a commercial basis nor in competition with one or more service suppliers;”

Aged Care does not fit this definition in Australia (nor does health care). Only Medicare and the PBS are excluded in RCEP. The TAFE sector in Australia is a chilling example of market failure and governments being hindered in re-nationalising the system despite its social and economic impact.

### **Closing Comments:**

Although existing FTAs have the same clauses, the timing of the RCEP agreement is noteworthy because of the recommendations of the RCAC and strong community expectation arising from the evidence presented at the RCAC that significant change will occur.

The agitating question is that if the Government is committed to meaningful change in aged care delivery, then why did it not exempt Aged Care from RCEP as it did Child Care? Does the government think further de-regulation of the aged care sector is warranted? If the government does not think this, then the government needs to act by including Aged Care onto the negative list.

The NSWNMA considers implementation of the RCAC recommendations, including those identified as requiring new regulation in order to be implemented, is vital to ensure safe and quality care for elderly Australians accessing aged care services. We would be extremely concerned if any potential barrier to implementing the recommendations was established by adopting the RCEP in its current form.

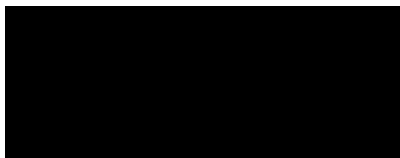
### **Recommendations:**

We submit that the Committee should make the following recommendations:

1. In order to remove ambiguity Aged Care must be added to the negative list
2. All previous FTAs should be reviewed to add Aged Care to negative lists
3. All FTAs to be reviewed to ensure State and Territory Public Health Care Systems, however named, are also included in any negative lists
4. In the absence of Recommendation 1 being adopted, that RCEP not be ratified by the Australian Parliament

We thank the Committee for the opportunity to comment. Should the Committee seek clarification ANMF NSW Branch is available for further comment. Please contact ANMF NSW Branch Officer Michael Whaites via e-mail at [GenSec@nswnma.asn.au](mailto:GenSec@nswnma.asn.au) in the first instance.

Yours sincerely



**BRETT HOLMES**

Branch Secretary

Australian Nursing and Midwifery Federation NSW Branch



## ANNEX 1

### NSWNMA Position Statement on Fair and Ethical Trade<sup>9</sup>

The NSW Nurses and Midwives' Association recognises that international trade is vital to Australia's long term economic interests and can be a tool for economic growth, improved social conditions, environmental protection and adherence to human rights conventions and democratic values.

However, it is a matter of concern that the benefits of trade liberalisation are not shared equitably. Sustainable development requires that governments retain the capacity to regulate labour, product and capital markets in ways most appropriate for their particular economic circumstances. Various forms of public intervention and regulation have an important role to play in establishing fair and ethical trade arrangements

#### **The NSW Nurses and Midwives' Association adopts the position that:**

- International trading arrangements must respect fair wages, safe working conditions, support collective labour rights and sustainable environmental practices.
- Trade agreements should contain commitments to monitor, enforce and improve core labour rights.
- Any changes to the Pharmaceutical Benefits Scheme (PBS) that reduce access to affordable medicines or extension of patent rights or that delay availability of generic drugs are not acceptable.
- Trade agreements must be subject to democratic oversight and meaningful public consultation.
- Trade agreements should not include Investor State Dispute Settlement clauses as such clauses undermine our democratic right to legislate in the interests of health, education and the environment to the benefit of private corporations.

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<sup>9</sup> <http://www.nswnma.asn.au/publications/policies-and-procedures/>