Submission of the Australian Nursing Federation to the Not for profit Sector Tax Concession Working Group in response to the Discussion Paper: *Fairer, simpler and more effective tax concessions for the not-for-profit sector* (November 2012)

January 2013

Lee Thomas
Federal Secretary

Yvonne Chaperon
Assistant Federal Secretary

Australian Nursing Federation
PO Box 4239 Kingston ACT 2604
T: 02 6232 6533
F: 02 6232 6610
E: anfcanberra@anf.org.au
http://www.anf.org.au
The Australian Nursing Federation (ANF) welcomes the opportunity to comment on the Not for profit Sector Tax Concession Working Group’s November 2012 discussion paper: *Fairer, simpler and more effective tax concessions for the not-for-profit sector*

The ANF represents over 225,000 nurses, midwives and assistants in nursing nationally. Approximately 140,000 of these members are employed in public and NFP hospitals and over 20,000 members are employed in NFP aged care facilities around Australia.

As the largest union representing workers in health and aged care in Australia we have particular concerns in relation to two issues. We have a particular concern in respect to the issue of salary packaging and the treatment of Fringe Benefit Tax exemptions and rebates for public hospitals, not for profit and PBI institutions. In this response we have focused on the issues and consultation questions contained in Chapter 3. We also have a direct interest as an organization in the exemption of trade unions from income tax.

**Income Tax exemption for NFPs**

We note the ACTU letter/submission dated 21 December and agree with their comments in relation to maintenance of the exemption from income tax for certain NFPs, including trade unions and employer associations. Trade unions have been recognized as being a central feature of civil society for many decades, both in representing their nearly 2 million members (and the more than 2 million other workers who depend on the enterprise agreements unions achieve above the base level of the modern award). In addition trade unions:

- Advocate for the professional interests of their members
- Advocate for the interests of all workers by maintaining and advancing the modern award system through the Fair Work Commission
- Advocate for the broader economic, social and environmental interests of their members through participation in key national debates such as taxation, job security, social security and climate change. It was, after all, trade unions who won occupational superannuation, paid parental leave and the medicare system for all Australian workers.

Trade unions, such as the ANF, are not for profit organizations, with all income being used to advance the interests of members and their families. This extends to humanitarian and international work, including through our overseas aid agency APHEDA.

As indicated in the ACTU submission we are strictly regulated through the Fair Work (Registered Organisations) Act 2009 (FW(RO) Act) which has as one of its objectives that unions and employer associations are to be registered ‘to assist employers and employees to promote and protect their economic and social interests through the formation of employer and employee organisations.”

We believe that the public interest purpose is already effectively satisfied by registration under the FW (RO) Act 2009.
Q 1 What criteria should be used to determine whether an entity is entitled to an income tax exemption?

See below.

Q 2 Are the current categories of income tax exempt entity appropriate? If not, what entities should cease to be exempt or what additional entities should be exempt?

The current categories encompass most organisations that we would think would need to be included. However, from our experience there are organisations that the ANF has supported which find it difficult to fit within the definition of “charitable” purposes and the sole purpose test. We also have some difficulty with excluding organisations who are not for profit but have some part (or even a primary purpose) in advocacy or political lobbying (except than where they are private, commercial organisations). After all, part of the reason to support the NFP sector is not only to support direct community services and education but also to build a robust civil society which strengthens our democratic processes.

It may be better to have clearer, general criteria, rather than focus on types or categories of entity. For example, one criteria might be that the entity is not run for profit and that any surplus is not distributed, but retained and used to further the objectives of the members or objectives of the organisation. A further criteria might be that the primary purpose and demonstrated work of the NFP entity must include one or more of the following elements:

- deliver health, welfare, community or humanitarian services and support to the population or part of it, and/or
- deliver or promote education, research or science
- advance the social, sporting, cultural or economic interests of the population or part of it; and/or
- protect the environment or build heritage; and/or
- co-ordinate, advocate or lobby on behalf of organisations who have a primary purpose which includes those above.

Q 3 Should additional special conditions apply to income tax exemptions? For example, should the public benefit test be extended to entities other than charities, or should exemption for some types of NFP be subject to different conditions than at present?

All entities exempt from income tax should have to satisfy some public benefit criteria. However, we would submit that trade unions and employer associations already meet the requirements because they have achieved registration under the FW (RO) Act 2009. By virtue of their being the creatures of legislation, local government bodies, statutory bodies, government or not for profit hospitals already meet standards and a public interest test. It may be that trade unions could be required to meet a more general public interest test such as that described above, but given the legislative framework we need to meet we do not believe this to be necessary. The public interest benefit test could apply to all organisations who are not created and/or regulated by specific legislation that provides a public interest framework.
Q 4  Does the tax system create particular impediments for large or complex NFPs?

Not that we are aware of. There is potentially some confusion in respect to related entities that are partly owned by the NFP or act as trustees for property owned by the NFP. However, our view is that the rules governing income tax exemption are reasonably clear in that the related entity must be fully owned by the NFP.

Q 5  Should other types of NFPs also be able to claim a refund of franking credits?

No.

Q 6  Should the ability of tax exempt charities and DGRs to receive refunds for franking credits be limited?

Yes, it should be capped.

Q 7  Should the ATO endorsement framework be extended to include NFP entities other than charities seeking tax exemption?

We can appreciate the logic of this proposal, especially in having a uniform list of all entities which have income tax and other exemptions. However, we would be concerned if such a proposal where to impose a further compliance or regulatory workload on organisations such as trade unions which are already subject to substantial legislative and reporting requirements.

Fringe Benefit tax Exemption

In 2011 the nursing workforce nationally was 285,000 with approximately 174,000 employed in hospitals (of which we estimate that around 75% would be employed by eligible entities). A further 22,500 nurses are employed by community health services which are run by public hospital networks or are NFP bodies that may be eligible entities [see AIHW Nursing and Midwifery Workforce 2011, Cat No. HWL 48, tables 2.3, 3.4 and 3.5 in particular].

It is estimated that in 2011 there were approximately 300,000 workers (RNs, ENs, carers, support staff and allied health) in aged care services: 200,000 workers (30,000 nurses) employed in residential aged care and just under 100,000 in home and community care (12,000 nurses) with that number growing rapidly due to an aging population. We estimate that approximately 60% (180,000) would be employed by eligible entities.

The options mooted and subsequent proposals for change therefore will have a significant potential impact on large numbers of aged care and health sector workers. In most cases these workers are only modestly remunerated. In some cases they are technically low paid, particularly in aged care.
For many in this sector the benefits provided by the FBT exemptions and the concessional caps for employees of eligible entities provide a significant boost to their remuneration. While we have some sympathy for addressing areas of concern (we note the example at paragraph 150 concerning a doctor accessing multiple caps through employment at 3 public hospitals), we also note that many low income earners would be considerably affected if the current system was changed without adequate replacement remuneration. This in turn would affect attraction and recruitment in a number of sectors and potentially the ability to offer services or maintain the quality of services.

For example, if RNs and ENs left the aged care sector to seek higher wages in other parts of the health sector, then quality of care in aged care may be compromised, especially with the accelerating trend to increased frailty, age and acuity of residents. Or, if even 2% of current RNs/ENs in public hospitals were persuaded to retire or seek employment outside the health sector because of adverse changes to, or abolition of, concessional caps, then the crisis in providing a nursing workforce becomes even more of a challenge. It should be noted that almost 40% of the current nursing workforce nationally is 50 years or older [AIHW AIHW Nursing and Midwifery Workforce 2011, table 3.1].

**Acute Health Sector**

We note the concern in respect to competitive neutrality in section 3.3.2. However, we believe this is issue is misconceived.

In the case of both the acute hospital system and provision of aged care there is very little ‘competition’ as we would normally understand it. In the case of the acute system, private hospitals (including NFP providers) account for approximately 33% of all beds. When the NFP hospitals are removed this figure is reduced significantly. In any event there is little competition between the for-profit and NFP/public sectors. The for-profit providers largely target a particular demographic, particular illness/injury types and clearly those with private health insurance. The public hospital system is the back-bone of the acute health system, providing complex care to all sections of society and patients who often have co-morbidities.

In any case we are not convinced that provision of FBT exemption to public hospitals in some jurisdictions acts as an advantage to those hospitals. In some jurisdictions private acute hospital wages and conditions have moved ahead of the public sector, which indicates that there is considerable capacity within the private sector to compete.

**Aged Care**

Similarly, in aged care the NFP sector provides the majority of the residential and home and community care services. The draft Aged Care Workforce 2012 survey and report (prepared by the National Institute of Labour Studies and funded by the Department of Health and Ageing each 4 years) indicates that 56% of employees are employed in not for profit facilities. This proportion is higher in most states, but lower in Victoria.
It is suggested that FBT exemption for NFP operators might provide an unfair advantage and impede competition. However, the NILS report indicates that there has been gradual but steady decline in NFP share of the residential aged care beds and workforce from 62% in 2003. So, it would appear that the capacity of the NFP sector to offer salary packaging because of FBT exemption does not prevent investment and expansion of private provision in aged care. Other factors, such as economies of scale, business models and ability to raise capital are much more relevant to the success of private providers in aged care, as against NFP providers. If there is an issue with equity or competition neutrality in a crucial area such as aged care, which struggles to recruit and retain labour, we would advocate that FBT exemption be extended to the whole sector, regardless of status.

In saying that we do share the concern that most aged care workers (whether skilled or unskilled) are relatively low paid. We acknowledge that it is difficult to justify why one aged care worker should have the benefit of salary packaging to the $30,000 concessional cap because they work for a NFP provider whereas an age care worker who works for a for-profit provider does not. However, removing the concessional cap will not benefit either workers or providers in aged care. In our submission removing the exemption and moving the subsidy to NFP providers through projects or targeted recruitment will:

1. Make a significant and deleterious change to the remuneration of a majority of the aged care workforce; and
2. Make even more difficult the ability to attract and retain workers, especially skilled Registered Nurses and Enrolled Nurses within the aged care sector.

Given that is estimated that there are currently approximately 200,000 workers employed in residential aged care and just under 100,000 in home and community care (with that number growing rapidly due to an aging population) any changes to FBT exemption will have a large impact across tens of thousands of workers.

The Productivity Commission report into aged care in August 2011 (Caring for Older Australians) concluded that:

- The supply of workers is problematic. The formal aged care system currently faces difficulties in attracting and retaining workers. These difficulties are expected to intensify due to increasing competition for workers as the overall labour market tightens in response to population ageing.
- A comprehensive aged care workforce strategy needs to be independently developed to identify and address ongoing and future workforce issues.
- Workforce strategies should include:
  - paying fair and competitive wages, improving access to education and training, developing well articulated career paths and better management, extending scopes of practice, and reducing regulatory burdens
  - ensuring that the pricing of services recommended by the proposed Australian Aged Care Commission takes into account appropriate staffing levels, skills mix and remuneration arrangements
  - providing more training opportunities including professional development for staff, particularly those in remote locations.
Recommendation 14.1 said:

The Australian Aged Care Commission, when assessing and recommending scheduled care prices, should take into account the need to pay fair and competitive wages to nursing and other care staff delivering approved aged care services and the appropriate mix of skills and staffing levels for the delivery of those services.

In the summary of issues accompanying the report the Commission said, "The payment of fair and competitive remuneration for aged care workers should reduce the lack of parity, especially with the acute health care system, and enhance the attractiveness of the aged care sector to employees."

In April 2012 the Commonwealth responded to the Productivity Commission recommendations by releasing the *Living Longer. Living Better* aged care reform package. As part of that package the Commonwealth committed $1.2 billion as part of an aged care Compact with industry to boost wages. However, the Government admitted that this money was only the first step and that ultimately further investment in providing competitive wages would have to be determined by the recently established Aged Care Financing Authority.

One of the three elements of the Aged Care Compact is:

- Additional funding to deliver higher wages, targeted to areas of greatest workforce pressure, through enterprise bargaining in the short term, while longer term arrangements are considered by the Aged Care Financing Authority (p.53 LL.LB aged care reform package)

That process of achieving competitive wages in the aged care sector will take many years to achieve. Part of the remuneration of a significant number of aged care workers currently is access to salary packaging and the tax benefits of the concessional cap. Removing access to the exemption will undermine the objective of improving wages and conditions in the aged care sector and make the already difficult task of recruiting and retaining labour considerably harder.

**Eligibility**

**Q 28** Assuming that the current two tiered concessions structure remains (see Part B), what criteria should determine an entity’s eligibility to provide exempt benefits to its employees?

The current eligibility criteria work effectively.

**Q 29** Also assuming that the current two tiered concession structure remains (see Part B), what criteria should determine an entity’s eligibility to provide rebateable benefits to its employees? Should this be restricted to charities? Should it be extended to all NFP entities? Are there any entities currently entitled to the concessions that should not be eligible?

Yes, it should be extended to all NFPs, not just charities.

**Q 30** Should there be a two tiered approach in relation to eligibility? For example, should all tax exempt entities be eligible for the rebate, but a more limited group be eligible for the exemption?

No. See above.
Short Term Reform Options

Q 31 Should salary sacrificed meal entertainment and entertainment facility leasing benefits be brought within the existing caps on FBT concessions?

No. The ANF notes the example used by the Productivity Commission but does not believe there is evidence of widespread use or abuse of the salary sacrificed meal entertainment and entertainment facility leasing benefits. If there is concern that this is occurring as indicated in paragraph 147 then one option would be to set a limit on salary sacrifice as a percentage of salary (as occurs with superannuation).

Q 32 Should the caps for FBT concessions be increased if meal entertainment and entertainment facility leasing benefits are brought within the caps? Should there be a separate cap for meal entertainment and entertainment facility leasing benefits? If so, what would be an appropriate amount for such a cap?

If the recommendation is to bring meal entertainment and venue leasing benefits within the single cap then we would argue that the cap should be lifted. The ANF suggests it would be reasonable to lift the caps by 10-15% (to $33,000/34,500 and $18,700/19,550 per year). We understand that, if included in the current cap, an individual could claim meals or venue leasing up to the current cap. However, many individuals have allocated the current cap and utilise the uncapped arrangements separately. Increasing the current caps enables an individual to still claim some entertainment or venue leasing where their current cap is fully allocated, but allow tighter controls on the use of this benefit.

Q 33 Are there any types of meal entertainment or entertainment facility leasing benefits that should remain exempt/rebateable if these items are otherwise subject to the relevant caps?

No.

Multiple Caps

Q 34 Should there be a requirement on eligible employers to deny FBT concessions to employees that have claimed a concession from another employer? Would this impose an unacceptable compliance burden on those employers? Are there other ways of restricting access to multiple caps?

The ANF supports a limitation on access to multiple caps. We agree that this can be achieved either by restricting access to one employer only or by providing one concessional cap to an employee that can be split proportionally between a maximum of 2 employers (similar to the suggestion in paragraph 152). The latter option is our preference.

The size of this issue is unclear. In aged care the NILS study referred to above indicates that “approximately 10% of direct care employees hold more than one job. This is nearly double the level in the Australian population more generally which is 5.4 per cent.” However, it is unclear how many of these would be a second job with another eligible entity. It is not uncommon for a nurse to work in aged care and have a part-time job in the acute sector. It is also not uncommon for a personal care worker or nurse to work for two aged care providers. In any case there are good policy reasons why access should be restricted to a single cap, accessed through one or, at most, two employers.
Alignment

Q 35 Should the rate for FBT rebates be re aligned with the FBT tax rate? Is there any reason for not aligning the rates?
Yes.

Q 36 Should the limitation on tax exempt bodies in the minor benefits exemption be removed? Is there any reason why the limitation should not be removed?
Yes to Q.1 and No to Q. 2.

Long Term Reform Options

Q 37 Is the provision of FBT concessions to current eligible entities appropriate? Should the concessions be available to more NFP entities?
See below.

Q 38 Should FBT concessions (that is, the exemption and rebate) be phased out?
No. We believe that the FBT concessions work well, that employees understand them and generally make use of them in industries where employers would otherwise have difficulty in recruiting and retaining staff. For example, most enterprise agreements in aged care have a clause providing for salary packaging as an industrial entitlement with agreement coverage at about 70-97% of workers depending on the state/territory. To withdraw the concessions would lower the remuneration available for workers involved in the delivery of key services.

The Discussion paper is very abstract about the fact that what is effectively proposed is to lower the wages of several hundred thousand workers by thousands of dollars, to be replaced by some support for eligible entities which will be used entirely at the discretion of management.

We note that in paragraph 147 in relation to meals and venue leasing the statement is made that “the value of these concessions could be better directed to achieve the community and altruistic purposes of the NFP sector generally.” In that specific case there may be an argument about the use of public money. However, to take the whole of the approximately $2.5b in exemptions out of the pockets of workers and redirect to eligible entities, either by way of tax offsets (para. 163/4) or grants on application (para. 160/161) ignores the fact that the current system has become a direct support for the employees of eligible entities.

If the Commonwealth wants to improve the viability of NFP organisations in respect to technology, training, infrastructure or other matters it should do so by new funding, not by diverting existing support/concessions from employees (many of whom would not work for the eligible employer but for the provision of the concessional rebate).
Q 39 Should FBT concessions be replaced with direct support for entities that benefit from the application of these concessions?

No. The ANF experience in sectors such as aged care is that direct subsidies for employers will not necessarily find their way into better wages and conditions for employees, even if that is a key issue for the sector as it is currently. Effectively reducing the remuneration of employees and providing direct support for entities will have a significant impact on the capacity of the majority of the aged care industry to recruit and retain staff.

Q 40 Should FBT concessions be replaced with tax based support for entities that are eligible for example, by refundable tax offsets to employers, a direct tax offset to the employees or a tax free allowance for employees?

ANF does not support replacing FBT concessions at all. However, should this be recommended we would only support replacement of FBT concessions with the last two options outlined in the paper; i.e. a tax free offset directed to employees or a tax free allowance for each employee. Our preference is for the latter.

In respect to tax offsets calculated per employee but directed to the employer we note the commentary in paragraph 164 that “A direct payment of an amount, per employee, to each PBI to replace FBT concessions would …also allow eligible entities to allocate the funding to where they believe it would do the most good in achieving their purposes, which might include in remunerating all or certain employees.”

With respect to the Working Group, we have seen this mistake made in the past where the Commonwealth has provided subsidies (e.g. the introduction of the Conditional Adjustment Payment in aged care in 2003/4) and the money has not been distributed to areas of greatest need. The purposes of the eligible entity may not include providing a benefit to the all or part of the workforce, no matter how necessary that might be. Indeed, part of the reason the Commonwealth has insisted that the $1.2b workforce package in aged care (under the LL.LB reform package) be delivered through enterprise agreements is that in the past the money has been diverted for infrastructure or to boost retained earnings and not the purpose for which it was designed – improving wages. There has been no legal or contractual obligation on employers to pass the money on.

In this regard we do see some sense in declaring a whole industry sector e.g. aged care or disability support, as worthy of additional Commonwealth support irrespective of whether the provider is NFP or for-profit. This might mean a lower tax free allowance (compared to what they would currently receive as a benefit under the FBT concessional cap) to some individuals in part of that ‘declared’ sector, if the benefit was spread to employees of currently ineligible entities.
Q 41 Should FBT concessions be limited to non remuneration benefits?

No. Whatever the original intention of policy makers, the advantages of salary packaging and their application to a wide variety of remuneration benefits is now embedded in the health and aged care industries. To now restrict FBT concessions to work-related matters such as parking would be difficult and undermine the income support role of current salary packaging arrangements. It would also have its own problems of consistency e.g. many aged care facilities can provide parking on site or in local streets at no cost so low paid workers in this sector would receive no benefit, while acute sector workers who are generally much better paid but work in CBD locations would receive the benefit.

Q 42 If FBT concessions are to be phased out or if concessions were to be limited to non remuneration benefits, which entity types should be eligible to receive support to replace these concessions?

ANF does not support change of this type.