
Dr Hazel Ferguson
Social Policy Section
Helen Portillo-Castro
Foreign Affairs, Defence and Security Section
Paula Pyburne
Law and Bills Digests Section

Contents

The Bills Digest at a glance ........................................... 4
Purpose of the Bills ..................................................... 6
Structure of the Fund Bill.............................................. 6
Structure of the Consequential Amendments Bill .......... 6
Background................................................................. 7
Disaster resilience—policy framework ...................... 7
  Relief and recovery—policy and legislative
  arrangements ......................................................... 7
Financial assistance .................................................... 7
Government announcement ...................................... 8
The Education Investment Fund ................................ 9
Initial transfers to fund the EIF ................................... 9
Ongoing funding from investments ............................ 10
Account financials ...................................................... 10
Table 1: EIF financials since inception to
  30 June 2019 .......................................................... 10
Table 2: EIF annual performance results ................. 11
EIF funded projects .................................................. 11
The effectiveness of the EIF ...................................... 11
History of the proposed abolition of the EIF ........... 12
Committee consideration ........................................... 13
Finance and Public Administration Committee ...... 13
Senate Standing Committee for the Scrutiny of
  Bills ........................................................................... 13

Date introduced: 11 September 2019
House: House of Representatives
Portfolio: Finance

Commencement: Emergency Response Fund Act 2019 on the earlier of proclamation or six months after Royal Assent; Emergency Response Fund (Consequential Amendments) Act 2019 commences at the same time

Links: The links to the Emergency Response Fund Bill 2019, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page.

The links to the Emergency Response Fund (Consequential Amendments) Bill 2019, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page.

Both Bills can be accessed through the Australian Parliament website.

When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the Federal Register of Legislation website.

All hyperlinks in this Bills Digest are correct as at October 2019.
<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Policy position of non-government parties/independents</td>
<td>13</td>
</tr>
<tr>
<td>Australian Labor Party</td>
<td>13</td>
</tr>
<tr>
<td>Centre Alliance</td>
<td>14</td>
</tr>
<tr>
<td>Independents</td>
<td>14</td>
</tr>
<tr>
<td>Position of major interest groups</td>
<td>14</td>
</tr>
<tr>
<td>Tertiary education institutions</td>
<td>14</td>
</tr>
<tr>
<td>Insurers</td>
<td>15</td>
</tr>
<tr>
<td>Financial implications</td>
<td>15</td>
</tr>
<tr>
<td>Fund Bill</td>
<td>15</td>
</tr>
<tr>
<td>Consequential Amendments Bill</td>
<td>15</td>
</tr>
<tr>
<td>Statement of Compatibility with Human Rights</td>
<td>16</td>
</tr>
<tr>
<td>Parliamentary Joint Committee on Human Rights</td>
<td>16</td>
</tr>
<tr>
<td>Key issues and provisions</td>
<td>16</td>
</tr>
<tr>
<td>Establishing the Emergency Response Fund</td>
<td>16</td>
</tr>
<tr>
<td>Investments of the Fund</td>
<td>17</td>
</tr>
<tr>
<td>Emergency Response Investment Mandate</td>
<td>17</td>
</tr>
<tr>
<td>Establishing the Investment Mandate</td>
<td>17</td>
</tr>
<tr>
<td>Key issue—non-disallowable instrument</td>
<td>17</td>
</tr>
<tr>
<td>Limitations on the Investment Mandate</td>
<td>18</td>
</tr>
<tr>
<td>Obligation to comply with Investment Mandate</td>
<td>18</td>
</tr>
<tr>
<td>Formulating investment policies</td>
<td>19</td>
</tr>
<tr>
<td>Establishing the Special Accounts</td>
<td>19</td>
</tr>
<tr>
<td>Credits to the ERF Special Account</td>
<td>20</td>
</tr>
<tr>
<td>Delegation of power</td>
<td>20</td>
</tr>
<tr>
<td>Debiting the ERF Special Account</td>
<td>20</td>
</tr>
<tr>
<td>Main purposes—ERF Special Account</td>
<td>20</td>
</tr>
<tr>
<td>Other purposes—ERF Special Account</td>
<td>21</td>
</tr>
<tr>
<td>Credits to the Home Affairs ERF Special Account</td>
<td>21</td>
</tr>
<tr>
<td>Amounts for arrangements</td>
<td>21</td>
</tr>
<tr>
<td>Amounts for grants</td>
<td>21</td>
</tr>
<tr>
<td>Delegation of power</td>
<td>22</td>
</tr>
<tr>
<td>Other credits</td>
<td>22</td>
</tr>
<tr>
<td>Purpose of the Home Affairs ERF Special Account</td>
<td>22</td>
</tr>
<tr>
<td>Arrangements and grants to a person or body</td>
<td>22</td>
</tr>
<tr>
<td>Scrutiny of Bills Committee comments</td>
<td>23</td>
</tr>
<tr>
<td>About making grants</td>
<td>24</td>
</tr>
<tr>
<td>Publication of information</td>
<td>24</td>
</tr>
<tr>
<td>Delegation of power</td>
<td>24</td>
</tr>
<tr>
<td>Key issue—right of review</td>
<td>25</td>
</tr>
<tr>
<td>Limits on the exercise of power</td>
<td>25</td>
</tr>
<tr>
<td>Constitutional limits</td>
<td>25</td>
</tr>
</tbody>
</table>
The Bills Digest at a glance

This Bills Digest is about the establishment of the Emergency Response Fund and the movement of monies out of the Fund into certain Special Accounts which have been established for specific purposes.

The Special Accounts created by these Bills are established in accordance with section 80 of the Public Governance, Performance and Accountability Act 2013 (PGPA Act). Under the PGPA Act the statute that establishes a special account must specify:

- the types of receipts that may be credited to increase the balance of the special account and
- the purposes for which the special account may be debited.

In this way the Emergency Response Fund Bill creates a legislative framework for the expenditure of monies by way of grants and arrangements in response to natural disasters.

Purpose of the Emergency Response Fund Bill

The Emergency Response Fund Bill 2019 (the Fund Bill) establishes:

- the Emergency Response Fund
- the Emergency Response Fund Special Account and
- the Home Affairs Emergency Response Fund Special Account.

Investing the Emergency Response Fund

The Future Fund Board, which is established under the Future Fund Act 2006 is responsible for deciding how to invest the Emergency Response Fund. Investments of the Emergency Response Fund will be held in the name of the Future Fund Board.

In making investment decisions, the Future Fund Board is bound by the Emergency Response Fund Investment Mandate given to it by the Treasurer and the Minister for Finance.

Payments into the Emergency Response Fund Special Account

The initial credit to the ERF Special Account will come from the transfer of the balance of the Education Investment Fund, which is estimated to be $4 billion.

Debits from the Emergency Response Fund Special Account

There are only three purposes for which an amount may be debited from the ERF Special Account:

- transferring amounts to the Home Affairs Emergency Response Fund Special Account (Home Affairs ERF Special Account)
- paying amounts which are exclusively related to the investments of the Emergency Response Fund—for example, paying the costs of, or incidental to the acquisition of financial assets by the Future Fund Board and
- paying amounts which are not exclusively related to the investments of the Emergency Response Fund—for example paying part of the remuneration and allowances of the Future Fund Board members.

Payments into the Home Affairs ERF Special Account

The Home Affairs ERF Special Account is also a special account established in accordance with the PGPA Act. Amounts will be debited from the ERF Special Account and credited to the Home Affairs ERF Special Account only when the Government determines there is a need for additional support following a natural disaster.
Debits from the Home Affairs ERF Fund Special Account

There are only two purposes for which an amount may be debited from the Home Affairs ERF Special Account.

The first is to pay amounts under an arrangement or to make grants of financial assistance to a person or body for the following:

- the carrying out of a project that is directed towards achieving either, or both, recovery from a natural disaster or post-disaster resilience in relation to an area that has been affected (whether directly or indirectly) by a natural disaster
- the provision of a service that is directed towards achieving either, or both, recovery from a natural disaster or post-disaster resilience in relation to an area that has been affected by a natural disaster
- the adoption of technology that is directed towards achieving either, or both, recovery from a natural disaster or post-disaster resilience in relation to an area that has been affected by a natural disaster
- a matter that is incidental or ancillary to the matters specified above.

The second arises where a grant is to be made to a state or territory. In that case the relevant amount is to be transferred to the COAG Reform Fund and expended for that purpose.
Purpose of the Bills
The purpose of the Emergency Response Fund Bill 2019 (the Fund Bill) is to establish the Emergency Response Fund which includes the Emergency Response Fund Special Account (ERF Special Account), and the Home Affairs Emergency Response Fund Special Account (Home Affairs ERF Special Account) to fund emergency response and recovery following those natural disasters in Australia that have a significant impact.

The purpose of the Emergency Response Fund (Consequential Amendments) Bill 2019 (the Consequential Amendments Bill) is to make consequential amendments to a number of existing statutes to:

- extend the Future Fund Board’s duties to include managing the Emergency Response Fund and
- allow for amounts to be transferred between the Emergency Response Fund and the Future Fund
- repeal the Nation-building Funds Act 2008 once the funds from the Education Investment Fund have been transferred to the Emergency Response Fund.

Structure of the Fund Bill
The Fund Bill comprises six Parts:

- Part 1 sets out preliminary matters including relevant definitions
- Part 2 establishes the Emergency Response Fund. It also sets out matters relating to the credit of amounts to the ERF Special Account and those relating to the debit of funds from the Emergency Response Fund
- Part 3 concerns the making of arrangements and grants relating to natural disasters; and establishes the Home Affairs ERF Special Account
- Part 4 relates to the investment of the Emergency Response Fund
- Part 5 contains relevant reporting obligations and
- Part 6 sets out miscellaneous matters including the delegation of powers of the Treasurer, the Minister for Finance and the Emergency Management Minister.

Structure of the Consequential Amendments Bill
The Consequential Amendments Bill comprises two Schedules.

Schedule 1 contains general amendments to the following:
- the Aboriginal and Torres Strait Islander Land and Sea Future Fund Act 2018
- the COAG Reform Fund Act 2008
- the DisabilityCare Australia Fund Act 2013
- the Future Drought Fund Act 2019
- the Future Fund Act 2006; and
- the Medical Research Future Fund Act 2015.

Schedule 2 has three Parts:
- Part 1 repeals the Nation-building Funds Act 2008
- Part 2 contains further amendments to the statutes which are amended by Schedule 1 and
- Part 3 inserts transitional provisions.
Background

Disaster resilience—policy framework

The National Disaster Risk Reduction Framework was launched in April 2018. It sets out the domestic basis for reducing disaster risks associated with natural hazards through domestic policy settings for the period up to 2030. The framework identifies initial strategic outcomes, over the five-year period 2019–23, to inform decision-making across various sectors in the areas of:

• investment and spending
• public policy
• development/land use
• legislation and regulation and
• program design and resource allocation.

The initial strategic outcomes are intended to align with Australia’s commitment to the Sendai Framework for Disaster Risk Reduction 2015–2030, endorsed by the United Nations General Assembly as an international agreement on targets and priorities for action.

Relief and recovery—policy and legislative arrangements

Each state and territory has in place legislation dealing with emergencies and disaster response within their own borders. It is under this legislation that authorised officials—for example, the Premier, Chief Minister or State Emergency Coordinator—can declare a ‘state of emergency’ or disaster. Response coordination and planning for any emergency or disaster within any jurisdiction falls to the state or territory government. As a result, the financial burden of disaster recovery and relief falls principally and in the first instance on state and territory governments. However, arrangements exist for the Commonwealth to provide both financial and non-financial assistance.

Financial assistance

According to the National Disaster Risk Reduction Framework, ‘federal and state government spending on direct recovery from disasters is already around $2.75 billion per year; with indirect costs ‘borne by many sectors across multiple years’. Economic costs are anticipated to more than double by 2050, and to significantly increase over the coming decades.
The Disaster Recovery Funding Arrangements (DRFA) is the principal mechanism for Commonwealth financial assistance to state and territory governments;\(^8\) whereas the Social Security Act 1991 (Cth) is also relevant to assistance for individuals. Alternatively or additionally, funding may be provided:

- under Federal Financial Relations payments for specific purposes, as arranged from time to time (such as the National Disaster Resilience Program\(^9\) or the National Partnership on disaster risk reduction)\(^10\)
- in the form of grants payments to local government and non-government organisations that provide community services (for example, Financial Assistance Grants accessible to local government councils allow for those bodies to direct the untied grant funding to local priorities, including disaster-affected assets)\(^11\) or
- via tax concessions or exemptions (such as those attached to grants for primary producers affected in early 2019 by the north and far north Queensland monsoon trough).\(^12\)

**Government announcement**

As part of the 2019–20 Budget, the government declared its intention to establish a $3.9 billion Emergency Response Fund in the 2019–20 financial year:

> The [Education Investment Fund] will be abolished on establishment of the ERF. Potential disbursements from the ERF will be up to $150 million from 2019-20 to 2023-24 following a significant and catastrophic natural disaster in Australia. The ERF will only be drawn down in this way where the Government determines there is a need for additional support in parallel with existing national disaster response programs. From 2023-24, the maximum potential disbursements from the ERF would be restricted to the average value of the annual net realised earnings of the Fund over the previous five years.\(^13\) [emphasis added]

In a further announcement about the proposed Emergency Response Fund on 11 September 2019 the Government stated:

> Disaster-hit communities will be back on their feet faster, with the Government introducing legislation for a new $4 billion future fund. The Emergency Response Fund will grow to up to $6.6 billion over the next decade.

...

---

10. Commonwealth funding under the National Disaster Resilience Program was matched by state and territory governments under the National Partnership on national disaster resilience through to 2018–19. Commonwealth funding for this National Partnership was not allocated in the 2019–20 Budget forward estimates: see Australian Government, *Federal financial relations: budget paper no. 3: 2019–20*, p. 61.
11. Commonwealth assistance to local governments through Financial Assistance Grants is a general purpose expense provided for in the Budget under the ‘General purpose inter-government transactions’ sub-function, for which half of the expected 2019–20 allocation was ‘brought forward to enable the immediate use of these funds in 2018–19, particularly in areas affected by severe or unexpected weather events’: Australian Government, *Budget strategy and outlook: budget paper no. 1: 2019–20*, pp. 543. The DRFA do not apply to these general purpose expenditures.

Warning: All viewers of this digest are advised to visit the disclaimer appearing at the end of this document. The disclaimer sets out the status and purpose of the digest.

Returns from the fund could go into better infrastructure or improving planning for when disaster hits. This is a sustainable way to fund rebuilding from bushfire, flood or cyclone. The fund will be in place by summer and can help Commonwealth agencies provide tailored assistance to local communities recovering from severe natural disasters.14

The Fund Bill establishes the proposed Emergency Response Fund. The initial transfer of monies into the Emergency Response Fund will be from the Education Investment Fund (EIF) which is to be abolished.

**The Education Investment Fund**

The EIF was established on 1 January 2009 by section 131 of the *Nation-building Funds Act 2008* (*NBF Act*), to provide dedicated ongoing capital funding for tertiary education and research infrastructure, including for universities, vocational education and training providers and other non-university organisations.15

The EIF was intended to provide a large-scale funding source for transformational projects which would allow Australian research and tertiary education institutions to compete effectively with international counterparts.16

Unlike many other tertiary education infrastructure funding programs, the EIF was not limited to supporting research infrastructure, but instead funded a wide range of investments, including learning and teaching spaces.17

**Initial transfers to fund the EIF**

Initial funding for the EIF was around $6.5 billion from the balance of the Higher Education Endowment Fund (HEEF).18 The HEEF had been established by the Howard Government in 2007, and was replaced by the EIF.19 Then Treasurer Peter Costello stated in his 2007–08 Budget speech, that the HEEF would ‘put our Institutes of Higher Learning on a secure footing forever’.20

Designed as an **$11 billion fund**, ongoing funding for the EIF was intended to come from Commonwealth Budget surpluses and investments.21

$7.5 billion from the 2007–08 Budget surplus was credited to the Building Australia Fund, one of the other Nation-building Funds.22 However, no budget surplus was credited to the EIF, and with

---

17. Ibid., p. 39.
19. *Nation-building Funds Act 2008* (as made), section 133; *Nation-building Funds (Consequential Amendments) Act 2008*.
the Budget going into deficit from 2008–09, 2007–08 was the only year that funds from surpluses were credited to any of the Nation-building Funds.\textsuperscript{23}

**Ongoing funding from investments**

EIF investments are overseen by the Future Fund Board of Guardians (the Board).\textsuperscript{24}

The EIF investments are managed in accordance with the rate of return specified in the Education Investment Fund Investment Mandate Directions 2009 (the Directions), given under subsection 154(1) of the NBF Act.\textsuperscript{25}

Section 5 of the Directions sets a benchmark return for the EIF:

1. The Board is to adopt a benchmark return on the Fund of the Australian three month bank bill swap rate + 0.3 per cent per annum, calculated on a rolling 12 month basis (net of fees).

2. In targeting this benchmark return, the Board should invest in such a way as to minimise the probability of capital losses over a 12 month horizon.

**Account financials**

According to the latest Department of Finance (DoF) Nation-building funds investment performance and financials to 30 June 2019, the current uncommitted balance of the EIF is $3.952 billion, with no remaining commitments (that is, none the projects funded from the EIF are still waiting on any funds).\textsuperscript{26}

**Table 1: EIF financials since inception to 30 June 2019**

<table>
<thead>
<tr>
<th></th>
<th>$millions\textsuperscript{1}</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total Credits</td>
<td>6,484</td>
</tr>
<tr>
<td>(Plus) Net Actual Earnings\textsuperscript{2}</td>
<td>1,665</td>
</tr>
<tr>
<td>(Equals) Total Credits</td>
<td>8,148</td>
</tr>
<tr>
<td>(Less) Cash Debits (Withdrawals)</td>
<td>4,196</td>
</tr>
<tr>
<td>(Equals) Cash Balance</td>
<td>3,952</td>
</tr>
<tr>
<td>(Less) Remaining commitments</td>
<td>0</td>
</tr>
<tr>
<td>(Equals) Uncommitted Balance</td>
<td>3,952</td>
</tr>
</tbody>
</table>


Notes: 1) Data may not sum due to rounding; 2) Earnings are after investment and administration fees incurred by the Future Fund.

\textsuperscript{23} Ibid.


\textsuperscript{26} Ibid.
### Table 2: EIF annual performance results

<table>
<thead>
<tr>
<th>Year</th>
<th>Nominal returns (per cent per annum)</th>
<th>Benchmark rate (^1)</th>
<th>Cash balance of fund as at 30 June ($millions)</th>
</tr>
</thead>
<tbody>
<tr>
<td>2008–09(^2)</td>
<td>3.5</td>
<td>-</td>
<td>6,490</td>
</tr>
<tr>
<td>2009–10</td>
<td>4.6</td>
<td>4.2</td>
<td>5,516</td>
</tr>
<tr>
<td>2010–11</td>
<td>5.6</td>
<td>5.3</td>
<td>4,904</td>
</tr>
<tr>
<td>2011–12</td>
<td>5.3</td>
<td>5.0</td>
<td>4,298</td>
</tr>
<tr>
<td>2012–13</td>
<td>4.2</td>
<td>3.6</td>
<td>3,920</td>
</tr>
<tr>
<td>2013–14</td>
<td>3.1</td>
<td>3.0</td>
<td>3,798</td>
</tr>
<tr>
<td>2014–15</td>
<td>2.9</td>
<td>2.9</td>
<td>3,686</td>
</tr>
<tr>
<td>2015–16</td>
<td>2.5</td>
<td>2.5</td>
<td>3,721</td>
</tr>
<tr>
<td>2016–17</td>
<td>2.4</td>
<td>2.1</td>
<td>3,787</td>
</tr>
<tr>
<td>2017–18</td>
<td>2.1</td>
<td>2.1</td>
<td>3,864</td>
</tr>
<tr>
<td>2018–19</td>
<td>2.3</td>
<td>2.3</td>
<td>3,952</td>
</tr>
</tbody>
</table>


Notes: 1) The quoted benchmark rate of return follows the Education Investment Fund Investment Mandate Directions 2009; 2) Investment mandate was issued after the reporting period on 14 July 2009.

### EIF funded projects

Funding rounds for the EIF were held between 2008 and 2011 to resource a range of projects according to need and government priorities. A list of funding rounds is provided at Appendix 1.

Responsible Ministers made recommendations for funding projects to the Prime Minister based on advice from the EIF Advisory Board against the EIF Evaluation Criteria.\(^{27}\)

The EIF provided **$4.2 billion** for infrastructure projects through competitive funding rounds held between 2008 and 2011.\(^{28}\)

Funded projects included the transformation of Central Queensland University into a dual sector institution,\(^{29}\) and a Joint Health Education Facility at Port Macquarie.\(^{30}\)

### The effectiveness of the EIF


---

27. Ibid.
29. Central Queensland University Australia (CQU), *Dual sector university decision will transform Central Queensland*, CQU News, 7 December 2012.
• most institutions were in a good financial position to fund infrastructure from operating surpluses
• there were a minority of smaller institutions that were not in a good position to fund infrastructure from operating surpluses, and which relied more heavily on capital grants and
• government funding of university infrastructure in the form of the EIF played a vital role in ensuring the international competitiveness of Australian universities, leveraging co-investment, fostering economic growth and jobs, and assisting regional and multi-campus outer suburban universities which may not otherwise be able to fund necessary operational infrastructure.31

**History of the proposed abolition of the EIF**

The abolition of the EIF has been government policy since 2014. The report of the 2014 National Commission of Audit suggested ‘the Government may wish to re-examine the need for the Nation-building funds in their current form’, because:

> A weakness in current infrastructure funding arrangements between the Commonwealth and the States is that Commonwealth funding is generally focused on investing in new projects.

... 

The current arrangements for the three Nation-building Funds, with funding only able to be directed to capital expenditure, leads to an undue emphasis on ‘ribbon cutting’ opportunities generally associated with new projects, at the expense of periodic maintenance and of small-scale improvements that could postpone or even avoid the need for costly asset expansions.32

In the subsequent 2014–15 Budget, the Government announced the EIF would be abolished and the unallocated funds transferred to an Asset Recycling Fund (ARF), with existing EIF projects to continue to receive funding according to their funding agreements.33 Accordingly, the Asset Recycling Fund Bill 2014 was introduced into the House of Representatives on 29 May 2014. However, the Bill lapsed when the Parliament was prorogued on 15 April 2016.

The second piece of legislation proposing to abolish the EIF, the Nation-building Funds Repeal (National Disability Insurance Scheme Funding) Bill 2017, aimed to do so with the intention of transferring the uncommitted balance to the National Disability Insurance Scheme (NDIS) Savings Fund Special Account. However, the Government announced it intended not to go ahead with the package of bills in April 2018, and this Bill lapsed at the end of Parliament on 1 July 2019.34

The 2019–20 Budget committed to redirect the remaining uncommitted EIF funds to the establishment of a new Emergency Response Fund from 1 October 2019.35

32. National Commission of Audit, Towards responsible government, Phase 2, section 2.4 Commonwealth funding to state and local governments for infrastructure, 31 March 2014, pp. 31–32.
34. D Tehan (Minister for Social Services), A fully funded NDIS, media release, 26 April 2018.
Committee consideration

Finance and Public Administration Committee

The Bills were referred to the Finance and Public Administration Committee (the Committee) for inquiry and report by 10 October 2019. The Committee received 21 submissions from relevant stakeholders. Stakeholder comments are canvassed below.

The committee recommended that the Senate pass the Bills.

Senate Standing Committee for the Scrutiny of Bills

The Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills Committee) had no comments in relation to the Consequential Amendments Bill.

However, the Scrutiny of Bills Committee made a number of comments in relation to the Fund Bill which are canvassed under the heading ‘Key issues and provisions’ below.

Policy position of non-government parties/independents

Australian Labor Party

Australian Labor Party (Labor) member, Lisa Chesters agreed that there is a need for ‘an Emergency Response Fund and that the government needs to be doing more to support communities affected by emergencies and disasters and to support preparedness and work on mitigation’. However she decried the abolition of the EIF:

The Education Investment Fund was established by Labor in 2009, and it provided important capital to transform our education and research infrastructure to enable our universities to compete internationally. We need to continue to do that. We are falling behind the rest of the world. We should be ensuring that there is adequate funding available for our universities so that they can innovate and build the facilities that we need, particularly when we start to talk about natural disaster recovery and mitigation.

Additional comments by Labor Senators, provided as part of the Finance and Public Administration Committee’s report on the Bills, state:

The Productivity Commission found that Australia spends 97 per cent of disaster funding on clean-up and recovery, with only three per cent spent on prevention and reducing the risk of natural disasters.

This bill falls short of the Productivity Commission recommendations, by continuing to prefer spending on clean-up or recovery costs, rather than mitigation. This is compounded by only allowing for spending on mitigation, after a disaster has hit.

The Labor Senator’s comments also reiterate that they:

36. The terms of reference of the inquiry, submissions to the Financial and Public Administration Committee and the Committee’s final report are available on the inquiry homepage.
38. Senate Standing Committee for the Scrutiny of Bills, Scrutiny Digest, 6, 2019, The Senate, 18 September 2019, p. 23.
40. Ibid., p. 3234.
... continue to have reservations about the mechanism the government has chosen to establish the Emergency Response Fund. In particular, the decision to resource the Emergency Response Fund with money taken from the nation building Education Infrastructure Fund.42

Centre Alliance

Whilst Centre Alliance member Rebekha Sharkie supported the purpose and intent of the Bills, her support was qualified by concerns about ‘both the source of the funds used for the initial credit and how the funds will be distributed in practice’.43 In particular Ms Sharkie expressed a desire:

... to ensure that an appropriate portion of the annual distributions are allocated to preventative measures to lessen the impact of natural disasters on our communities. While providing financial assistance to individuals in the immediate aftermath of a disaster is a priority, we must also ensure that our communities are adapting to an ever-changing and drying climate and invest in resilience-building measures—whether that be weirs or whether it be a whole range of ways that we can ensure we can reduce our risk of natural disaster.44

Independents

Independent member Zali Steggall supports ‘the government's initiative in establishing an Emergency Response Fund that will help fund emergency responses and recovery following catastrophic natural disasters’.45 However, Ms Steggall expressed concern that the Bill goes:

... to the symptoms of a much greater problem. The effect of climate change in these disasters is plain to see for everyone. As the CSIRO has reported, Australia has already warmed by one degree, and the effects are drastic. We’re now seeing longer fire seasons, worse droughts, floods, storms and cyclones, and these are projected to compound and get greater in severity.

... According to our peak industry bodies, the most cost-effective response is prevention. This means more than the government providing funding after the event; instead, it must mean addressing the key exacerbating factor of extreme events, which is global warming.46

Position of major interest groups

Submitters to the Finance and Public Administration Committee unanimously supported the establishment of an Emergency Response Fund.

Tertiary education institutions

However, the majority of submitters were tertiary education institutions which strongly rejected the proposal that the EIF should be abolished with the remainder of its funds repurposed for the Emergency Response Fund.47 Many outlined the positive outcomes resulting from the

42. Ibid.
44. Ibid.
46. Ibid.
Government’s contribution to infrastructure spending from the EIF. Others expressed concern about the future absence of any dedicated tertiary education infrastructure fund.

Insurers
The Insurance Council of Australia expressed its support for ‘recovery funding to help communities rebuild after a natural disaster’. However it urged the government to develop a ‘stronger focus ... on spending for disaster mitigation’.

According to Suncorp:

By substantially increasing natural hazard resilience funding, post-disaster resources could be reduced. Australia is currently stuck in a vicious cycle of disaster, rebuild, repeat. This Bill provides an opportunity to reset priorities focused on better protecting communities.

Financial implications

Fund Bill
According to the Explanatory Memorandum for the Fund Bill:

The initial credit of the balance of the funds from the EIF to the Emergency Response Fund will not have a direct impact on the underlying cash and fiscal balances, as it will represent the transfer of financial assets between funds.

Positive interest earnings of the Fund will have a positive impact on the underlying cash and fiscal balances. Costs incurred by the Future Fund Board have a negative impact on the underlying cash and fiscal balances. Payments for the purposes of emergency response and natural disaster recovery will have a negative impact on the underlying cash and fiscal balances.

Consequential Amendments Bill
The Explanatory Memorandum for the Consequential Amendments Bill states that the Bill ‘has no financial impact’.

---


51. Ibid.


Statement of Compatibility with Human Rights

As required under Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth), the Government has assessed the Bill’s compatibility with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act. The Government considers that the Bill is compatible. 55

Parliamentary Joint Committee on Human Rights

The Parliamentary Joint Committee on Human Rights (Human Rights Committee) noted that Article 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) protects the right to education: 56

> It specifically requires, with a view to achieving the full realisation of the right to education, that “[h]igher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education”. Australia has obligations to progressively introduce free higher education by every appropriate means and has a corresponding duty to refrain from taking retrogressive measures, or backwards steps, in relation to the realisation of the right to education. 57

The Human Rights Committee considered that it was unclear whether the repeal of the Education Investment Fund and its investment mandates might result in reduced availability of funds for higher education. Accordingly, the Human Rights Committee sought the Minister’s advice as to:

- whether the repeal of the Education Investment Fund and the transfer of its balance into the proposed Emergency Response Fund may reduce the availability of funding for higher education and
- if so, whether this is compatible with the right to education. 58

At the time of writing this Bills Digest, the Minister had not responded to that request.

Key issues and provisions

Establishing the Emergency Response Fund

Clause 9 of the Fund Bill establishes the Emergency Response Fund. It consists of:

- the Emergency Response Fund Special Account (ERF Special Account) and
- the investments of the Emergency Response Fund.

The financial assets of the Education Investment Fund will become an investment of the Emergency Response Fund. 59 The Fund Bill incorporates the definition of the term financial asset from the Future Fund Act. 60

---


58. Ibid.

59. Clause 11 of the Fund Bill.

**Investments of the Fund**

The Future Fund Board\(^{61}\) is responsible for deciding how to invest the Emergency Response Fund.\(^{62}\) The Fund Bill empowers the Future Fund Board to invest amounts standing to the credit of the ERF Special Account in any financial assets.\(^{63}\) Any income derived from an investment of the Emergency Response Fund is to be credited to the ERF Special Account.\(^{64}\)

---

**Operation of the Consequential Amendments Bill**

**Items 13–36** of the Schedule 1 to the Consequential Amendments Bill amend the *Future Fund Act* to insert references to the **Emergency Response Fund** and the **Emergency Response Fund Special Account**. The effect of the amendments is:

- to allow amounts to be transferred from the Future Fund to the Emergency Response Fund
- to allow investment managers (on behalf of the Future Fund Board of Guardians) to invest the monies of more than one Fund at the same time and
- to expand the role of the Future Fund Board of Guardians to include responsibility for the investment of the Emergency Response Fund.

---

**Emergency Response Investment Mandate**

**Establishing the Investment Mandate**

**Clause 39** of the Fund Bill empowers the responsible Ministers to give the Future Fund Board written directions about the performance of its Emergency Response Fund investment functions, and provides that they must give at least one such direction. These directions are known as the **Emergency Response Fund Investment Mandate**.\(^{65}\)

In giving such a direction the responsible Ministers must have regard to:

- the need to maximise the return earned on the Emergency Response Fund over the long term (consistent with international best practice for institutional investment)
- the need to enhance the Commonwealth’s ability to make payments under arrangements and grants for recovery from natural disaster and for post-disaster resilience (see the discussion below under the heading ‘Debiting the ERF Special Account’) and
- such other matters as the responsible Ministers consider relevant.\(^{66}\)

Such a direction takes effect from the 15th day on which it is given.\(^{67}\)

---

**Key issue—non-disallowable instrument**

Although the **Emergency Response Fund Investment Mandate** is a legislative instrument, the notes to clause 39 specify that it is neither disallowable nor subject to sunsetting in accordance with the *Legislation Act 2003*. According to the Explanatory Memorandum to the Fund Bill:

> The Government considers it is appropriate that a direction under subclause 39(1) of the Bill is not subject to disallowance. The Bill would provide adequate scrutiny of directions comprising the

---

61. The Future Fund Board of Guardians is established by Part 4 of the *Future Fund Act 2006*.
62. **Clause 37** of the Fund Bill.
63. **Subclause 37(1)** of the Fund Bill. Note that **clause 37** does not authorise the acquisition of a derivative.
64. **Clause 38** of the Fund Bill.
65. **Subclause 39(3)** of the Fund Bill.
66. **Subclause 39(2)** of the Fund Bill.
67. **Subclause 39(6)** of the Fund Bill.
Emergency Response Fund Investment Mandate through mandated consultation with the Future Fund Board (clause 42). Exemption from disallowance together with consultation would give the Future Fund Board necessary certainty when investing through the Emergency Response Fund. While it would be possible to provide that a direction under subclause 39(1) does not come into effect until disallowance periods have expired, this approach would significantly impede the ability of Government to make urgent changes to the Emergency Response Fund Investment Mandate in the national interest. 68

The Scrutiny of Bills Committee acknowledged that explanation but did not consider that it provided sufficient justification ‘for leaving significant elements of the emergency response funding scheme [in the Bill] to legislative instruments that are not subject to disallowance or sunsetting’. 69 The Committee has asked the Minister for advice:

... as to the appropriateness of amending the Bill to provide that the directions making up the Emergency Response Fund Investment Mandate are subject to disallowance but only come into force once the disallowance period has expired, unless the minister certifies that there is an urgent need to make changes and it is in the national interest that a specified direction not be subject to disallowance. 70

Limitations on the Investment Mandate

The Bill inserts a limitation on the powers of the responsible Ministers in making the Emergency Response Fund Investment Mandate (Investment Mandate). The responsible Ministers must not give a direction under subclause 39(1) that has the purpose, or has or is likely to have the effect, of directly or indirectly requiring the Future Fund Board to:

• invest an amount standing to the credit of the ERF Special Account in a particular financial asset 71
• acquire a particular derivative 72 or
• allocate financial assets to a particular business entity, a particular activity or a particular business. 73

Obligation to comply with Investment Mandate

Clause 43 of the Fund Bill requires the Future Fund Board to take all reasonable steps to comply with the Investment Mandate. If the Future Fund Board becomes aware that it has not done so it must, as soon as practicable after becoming so aware, give the responsible Ministers a written statement:

• advising of the failure to comply with the Investment Mandate and
• setting out the action that it proposes to take in order to comply with the Investment Mandate. 74

Alternatively, if the responsible Ministers are satisfied that the Future Fund Board has failed to comply with the Investment Mandate, they may direct the Board, in writing:

70.  Ibid., p. 10.
71.  Paragraph 41(1)(a) of the Fund Bill.
72.  Paragraph 41(1)(b) of the Fund Bill. See also, paragraph 47(1)(d) of the Fund Bill which does not allow the acquisition of a derivative for the purpose of speculation or leverage.
73.  Paragraph 41(1)(c) of the Fund Bill.
74.  Subclause 43(2) of the Fund Bill.
• to give the responsible Ministers, within a specified period, a written explanation for the failure to comply with the Investment Mandate and
• to take action in the time specified in the notice, in order to comply with the Investment Mandate. 75

Formulating investment policies

Consistent with the requirement to comply with the Investment Mandate, clause 46 of the Fund Bill requires the Future Fund Board to formulate and periodically review written policies in relation to the Emergency Response Fund including the relevant investment strategy, benchmarks and standards for assessing the performance and risk management for the Fund.

The Future Fund Board must publish those policies on the internet. 76

Establishing the Special Accounts

About special accounts

A special account is a limited special appropriation that notionally sets aside an amount that can only be expended for listed purposes. The amount of the appropriation that may be drawn from the Consolidated Revenue Fund (CRF) by means of a special account is limited to the balance of each special account at any given time. Special accounts are not bank accounts. Amounts forming part of the balance of a special account may be held in various ways, such as in the Official Public Account, an entity’s official bank account, or partly in both. 77

Establishing special accounts

A special account can be established either by the Finance Minister making a determination under section 78 of the Public Governance, Performance and Accountability Act 2013 (PGPA Act), or by legislation as recognised under section 80 of the PGPA Act. The appropriation authority to draw money from the CRF is section 78 or 80 of the PGPA Act, as relevant—rather than the determination or the legislation. 78

Requirements of a special account

Special accounts may be established when it is clear that other types of appropriations are not suitable. For example, there may be a need for specific transparency. The Act that establishes a special account specifies both the purposes for which the special account may be debited and the types of receipts that may be credited to increase the balance of the special account. 79

The Fund Bill establishes two special accounts in accordance with section 80 of the PGPA Act:

• clause 12 of the Fund Bill establishes the Emergency Response Fund Special Account (ERF Special Account) and
• clause 27 of the Fund Bill establishes the Home Affairs Emergency Response Fund Special Account (Home Affairs ERF Special Account).

Accordingly, the Fund Bill specifies the main purposes of each of the special accounts. Amounts credited to a special account can only be spent for the specified purposes.

75. Subclause 43(3) of the Fund Bill.
76. Subclause 46(3) of the Fund Bill.
77. Department of Finance (DoF), ‘Special appropriations: special accounts’, DoF website, last updated 16 July 2019.
78. Ibid.
79. Ibid.
Credits to the ERF Special Account

As soon as practicable after the establishment of the ERF Special Account, the balance of the Education Investment Fund Special Account will be credited to the new Special Account. \(^{80}\) Item 1 of Schedule 2 to the Consequential Amendments Bill is then able to repeal the National-building Funds Act in its entirety.

In addition to those amounts which will be credited to the ERF Special Account on its establishment, clause 13 of the Fund Bill provides that the responsible Ministers—being the Treasurer and the Minister for Finance—may determine in writing that an amount is to be credited to the ERF Special Account on a specified day or in specified instalments on specified days. \(^{82}\)

Delegation of power

Under clause 59 of the Fund Bill, the Finance Minister may delegate any or all of his, or her, powers under clause 13 to the Secretary of the Department of Finance or a Senior Executive Service (SES) employee (or acting SES employee) of that Department. Similarly, under clause 60 of the Fund Bill, the Treasurer may delegate any or all of his, or her, powers under clause 13 to the Secretary of the Treasury Department or an SES employee (or acting SES employee) of that Department.

Debiting the ERF Special Account

Main purposes—ERF Special Account

The main purpose of the ERF Special Account is to transfer amounts to:

- the Home Affairs ERF Special Account so that the Emergency Management Minister, on behalf of the Commonwealth, may pay amounts under an arrangement with a person or body, or pay amounts by way of a grant to a person or body in relation to a natural disaster and
- the COAG Reform Fund to make grants to the States and Territories in relation to a natural disaster.

The term natural disaster is defined as a natural disaster in Australia. \(^{88}\)

---

80. Clause 10 of the Fund Bill.
81. Clause 4 of the Fund Bill.
82. Although the determination is a legislative instrument under the Legislation Act 2003, it is not subject to disallowance by the Parliament (see subclause 13(2) of the Fund Bill).
83. Clause 4 of the Fund Bill provides that the term Emergency Management Minister means: (a) if there is a Minister whose title includes “Emergency Management”—that Minister; or (b) otherwise—the Minister declared by the Prime Minister, by notifiable instrument, to be the Emergency Management Minister for the purposes of the Emergency Response Fund Act.
84. Clause 4 of the Fund Bill defines an arrangement as a contract, agreement or deed—but not a ‘securities lending arrangement’.
85. Clause 20 of the Fund Bill.
86. The COAG Reform Fund is established by section 5 of the COAG Reform Fund Act 2008.
87. Clause 32 of the Fund Bill sets out the method by which the Emergency Management Minister may channel State and Territory grants through the COAG Reform Fund. Note that under clause 61 of the Fund Bill, the Emergency Management Minister may delegate any or all of his, or her, powers under clause 32 to the Secretary of the Home Affairs Department or an SES employee (or acting SES employee) of that Department.
88. Clause 4 of the Fund Bill.
Other purposes—ERF Special Account

Clause 15 of the Fund Bill sets out additional purposes of the ERF Special Account, being:

- paying the costs of, or incidental to, the acquisition of financial assets
- paying expenses of an investment of the Emergency Response Fund
- paying the costs of, or incidental to, the acquisition of derivatives
- paying or discharging the costs, expenses and other obligations incurred by the Future Fund Board under a contract between the Board and an investment manager
- paying or discharging the costs, expenses and other obligations incurred in connection with the establishment, maintenance or operation of a bank account of the Future Fund Board if the bank account relates exclusively to the Emergency Response Fund
- paying a premium in respect of a contract of insurance entered into by the Future Fund Board exclusively in connection with the Emergency Response Fund
- paying or discharging any other costs, expenses, obligations or liabilities incurred by the Future Fund Board exclusively in connection with the Emergency Response Fund.

Clause 16 of the Bill lists the purposes for which the funds in the ERF Special Account may be expended. These relate to expenses incurred by the Future Fund Board that are not related exclusively to the Emergency Response Fund.

The amounts specified under clauses 15–16 may be transferred to the Future Fund Special Account in accordance with clause 18 of the Fund Bill. Importantly, subclause 59(2) of the Fund Bill allows the Finance Minister to delegate any or all of his, or her, powers under clause 18 to the Secretary or an SES employee of the Department of Finance, to the Chair of the Future Fund Board or to an SES employee of the Future Fund Management Agency.

Credits to the Home Affairs ERF Special Account

The Secretary of the Home Affairs Department is responsible for the Home Affairs ERF Special Account.

Amounts for arrangements

If one or more arrangements have been made under clause 20 and the Emergency Management Minister is satisfied that one or more amounts (called committed amounts) will be payable in a financial year, the Emergency Management Minister may request the Finance Minister to transfer an amount which is equal to the committed amount from the ERF Special Account to the Home Affairs ERF Special Account.

Amounts for grants

Similarly, if one or more grants are to be made under clause 20 to a person other than a State or Territory, the Emergency Management Minister may request the Finance Minister to transfer an amount which is equal to the amount of those grants from the ERF Special Account to the Home Affairs ERF Special Account.

---

89. The Future Fund Board is empowered to enter into such an engagement by clause 50 of the Fund Bill.
90. The Future Fund Management Agency is established by Part 5 of the Future Fund Act.
91. Subclause 27(3) of the Fund Bill.
92. Subclause 28(1) of the Fund Bill.
93. Subclause 28(4) of the Fund Bill.
In either circumstance, provided that the transfer will not be more than a total of $150 million\(^94\) in any financial year, the Financial Minister must direct in writing that the specified amount is to be debited from the ERF Special Account and credited to the Home Affairs ERF Special Account. This may be by way of a lump sum on a specified day or by instalments on specified days.\(^95\)

**Delegation of power**

Under **clause 59** of the Fund Bill, the Finance Minister may delegate any or all of his, or her, powers under clause 28 to the Secretary of the Department of Finance or a Senior Executive Service (SES) employee (or acting SES employee) of that Department. Similarly, under **clause 61** of the Fund Bill, the Emergency Management Minister may delegate any or all of his, or her, powers under clause 28 to the Secretary of the Home Affairs Department or an SES employee (or acting SES employee) of that Department.

**Other credits**

In addition, certain amounts paid to the Commonwealth by way of damages or compensation for a breach of a clause 20 arrangement or by way of repayment of all or part of a clause 20 grant may be credited to the Home Affairs ERF Special Account.\(^96\)

**Purpose of the Home Affairs ERF Special Account**

Amounts may only be **debited** from a special account to meet the purposes of the account as stipulated in the establishing legislation. In this case, the relevant purposes of the Home Affairs ERF Special Account are set out in **clause 30** of the Fund Bill—that is, to pay amounts under an arrangement or to make grants. Both of these matters are explained in **clause 20** of the Fund Bill.

**Arrangements and grants to a person or body**

Under **clause 20**, the Emergency Management Minister may, on behalf of the Commonwealth make an arrangement with, or make a grant of financial assistance to, a **person or body** for the following:

- the carrying out of a project that is directed towards achieving either, or both, recovery from a natural disaster or post-disaster resilience in relation to an area that has been affected (whether directly or indirectly) by a natural disaster\(^97\)
- the provision of a service that is directed towards achieving either, or both, recovery from a natural disaster or post-disaster resilience in relation to an area that has been affected (whether directly or indirectly) by a natural disaster\(^98\)
- the adoption of technology that is directed towards achieving either, or both, recovery from a natural disaster or post-disaster resilience in relation to an area that has been affected (whether directly or indirectly) by a natural disaster\(^99\) or
- a matter that is incidental or ancillary to the matters specified above.\(^100\)

---

\(^94\). **Clause 34** of the Fund Bill provides that the maximum amount to be debited from the Emergency Response Fund Special Account during a financial year must not be more than $150 million.

\(^95\). **Subclauses 28(7) and (8)** of the Fund Bill. The direction of the Finance Minister is not a legislative instrument.

\(^96\). **Clause 29** of the Fund Bill.

\(^97\). **Paragraph 20(1)(c)** of the Fund Bill.

\(^98\). **Paragraph 20(1)(d)** of the Fund Bill.

\(^99\). **Paragraph 20(1)(e)** of the Fund Bill.

\(^100\). **Paragraph 20(1)(f)** of the Fund Bill.
For the purposes of the Fund Bill, an arrangement or a grant may be made by way of the reimbursement, or partial reimbursement, of costs or expenses.\textsuperscript{101} Importantly, however, clause 20 does not authorise the acquisition of shares in a company or the \textit{making of a loan}.\textsuperscript{102}

The term \textit{post-disaster resilience} in relation to an area that has been affected by a natural disaster includes:

- resilience to, preparedness for and reduction of the risk of a future natural disaster of that kind that could affect that area and
- the long-term sustainability of a community or communities in that area.\textsuperscript{103}

The Explanatory Memorandum to the Fund Bill provides examples of activities that could be funded under this provision including:

- tailored financial assistance to help persons or bodies recover from, and build economic sustainability and resilience to withstand, the impacts from a catastrophic natural disaster
- additional recovery grants to help primary producers or small business owners re-establish their enterprises/businesses
- economic aid packages to help areas affected, either directly or indirectly, to recover and transition from a natural disaster
- training and information for individuals, primary producers, small businesses or non-government organisations on strategies to help with long-term recovery, including post-disaster mitigation
- tools to better understand local climate variability and advice on climate risk applied to specific locations for future land-use planning
- financial management advice for persons or bodies to improve their ability to manage through lower income periods caused by a natural disaster
- improving data on the effects and consequences of natural disasters
- supporting industry to recover and develop post-disaster future risk mitigation measures
- support and development of alternative solutions for supply chain operations and
- infrastructure built to withstand future natural disasters.\textsuperscript{104}

\textbf{Scrutiny of Bills Committee comments}

The Scrutiny of Bills Committee was of the view that, where it is proposed to allow the expenditure of a potentially substantial amount of Commonwealth money, the expenditure should be subject to at least some level of Parliamentary scrutiny.

In that case, the Committee expressed its concern that the Bill ‘... contains only very limited guidance on its face as to the terms and conditions that would attach to financial assistance granted in accordance with clause 20’.\textsuperscript{105}

As the Explanatory Memorandum does not provide a rationale for conferring such broad powers on the Minister, the Scrutiny of Bills Committee:

\begin{flushright}
101. Subclauses 20(2) and (3) of the Fund Bill.
102. Subclause 20(5) of the Fund Bill.
103. Subclause 20(6) of the Fund Bill.
\end{flushright}
... requested the Minister’s advice as to why it is considered necessary and appropriate to confer on the Emergency Management Minister a broad power to make grants of financial assistance, in the absence of clear guidance on the face of the Bill as to how this power is to be exercised.  

At the time of writing this Bills Digest, the Minister had not responded to the Committee’s request.

**About making grants**

**Clause 21** of the Fund Bill is ancillary to clause 20. Where financial assistance has been provided by way of grant (rather than under an arrangement), the terms and conditions of the grant must be contained in a written agreement between the Commonwealth and the grant recipient.

Section 105C of the *PGPA Act* empowers the Finance Minister, by written instrument, to make provision about grants by the Commonwealth. Accordingly, the *Commonwealth Grants Rules and Guidelines 2017* (CGRGs) establish the Commonwealth grants policy framework. The CGRGs contain the key legislative and policy requirements—including how they apply to Ministers.  

According to the CGRGs:

> Achieving value with relevant money should be a prime consideration in all phases of grants administration. Grants administration should provide value, as should the grantees in delivering grant activities. This requires the careful comparison of the costs and benefits of feasible options in all phases of grants administration, particularly when planning and designing grant opportunities and when selecting grantees. It is also a means by which officials can assure the entity’s accountable authority, Ministers and the Parliament that resources are deployed in an efficient, effective, economical and ethical manner, while not imposing overly burdensome requirements on grantees.

**Publication of information**

**Clause 26** of the Fund Bill requires the Emergency Management Minister to ensure that the following information is published on the Home Affairs Department’s website:

- each amount (including the total amount) paid by the Commonwealth under a clause 20 arrangement or grant
- the total of the amounts payable, but not yet paid, by the Commonwealth in respect of an arrangement or grant and
- in respect of each arrangement and grant with a person or body:
  - the name of the person or body
  - the purpose of the arrangement or grant and
  - the date of the most recent amount paid by the Commonwealth.

**Delegation of power**

Importantly, under **clause 61** of the Fund Bill, the Emergency Management Minister may delegate any or all of his, or her, powers under clauses 20 and 21 to the Secretary of the Home Affairs Department, an SES employee (or acting SES employee) of that Department or to a person who is an official of a Commonwealth entity who is not employed by the Home Affairs Department but who has appropriate expertise.

106. Ibid., p. 7.
108. Ibid., p. 29.
According to the Explanatory Memorandum to the Fund Bill:

This delegation power is required to enable grants made under section 20 to be administered by Commonwealth officials employed in the Australian Government Community Grants Hub (for example, the Community Grants Hub, managed by the Commonwealth Department of Social Services). 109

**Key issue—right of review**

As clause 20 of the Fund Bill provides only a framework of the arrangements and grants into which the Emergency Management Minister may enter, the question arises as to whether a review process will be available to unsuccessful applicants. 110 Currently the Fund Bill makes no provision for such a process.

The Scrutiny of Bills Committee expressed its concerns about this aspect of the Fund Bill as follows:

> It appears to the Committee that the provision of grants and the making of arrangements pursuant to clause 20 may involve discretionary decisions on the part of the Minister or his or her delegate. Moreover, such decisions have the potential to affect the interests of the persons and entities to which grants may be provided and arrangements made. It therefore appears that decisions under clause 20 may be suitable for independent merits review. However, the Committee notes that neither the Bill nor the Explanatory Memorandum indicates whether merits review would be available.

Additionally, it is unclear to the Committee how the relevant grants and arrangements would be made ... 111

Accordingly, the Scrutiny of Bills Committee has requested the Minister’s advice about a range of matters including the processes by which granted would be provided and arrangements entered into. 112

**Limits on the exercise of power**

**Constitutional limits**

The Fund Bill empowers the Emergency Management Minister, on behalf of the Commonwealth, to make an arrangement with, or make a grant of financial assistance to, a person or body in relation to natural disasters in Australia. In order to be constitutionally valid, such an arrangement or grant must be consistent with one or more of the powers which are set out in the Australian Constitution. For that reason the Fund Bill lists each and every power on which the Minister may rely when making an arrangement or grant. 113

Essentially the powers that are relied on either individually, or in combination, are:

- the implied power to make laws with respect to nationhood 114
- the grants power under section 96 of the Constitution 115

---

111. Senate Standing Committee for the Scrutiny of Bills, Scrutiny digest, op. cit., p. 8.
112. Ibid.
113. Clause 24 of the Fund Bill.
114. Paragraph 24(a) of the Fund Bill.
115. Paragraph 24(b) of the Fund Bill.
• the Territories power under section 122 of the Constitution

• the external affairs power under section 51(xxxix) of the Constitution, which is the basis for implementing Australia’s obligations under the Covenant on Economic, Social and Cultural Rights

• the corporations power which relates to foreign corporations, and trading and financial corporations formed within the limits of the Commonwealth under section 51(xx) of the Constitution

• the power to make laws in respect of a Commonwealth place in accordance with the Commonwealth Places (Application of Laws) Act 1970

• the power to make laws with respect to trade and commerce with other countries, and among the states under section 51(i) of the Constitution

• the postal, telegraphic, telephonic powers under section 51(v) of the Constitution

• the power relating to the development of patents of inventions under section 51(xviii) of the Constitution

• the statistics power under section 51(xi) of the Constitution

• powers with respect to meteorological observations under section 51(viii) of the Constitution

• the insurance power under section 51(xiv) of the Constitution and

• powers in relation to incidental matters under section 51(***xix). Arrangements and grants to a State or Territory

Where a grant of financial assistance under clause 20 is to be made to a state or territory, the Emergency Management Minister must, by writing, direct that, on a specified day, an amount that is equal to the amount of the grant is to be:

• first, debited from the ERF Special Account and

• then, credited to the COAG Reform Fund.

About the COAG Reform Fund

The COAG Reform Fund is established by the COAG Reform Fund Act 2008. The COAG Reform Fund is a special account for the purposes of the PGPA Act. The sole purpose of the COAG Reform Fund is to make grants to the states and territories.

---

116. Paragraph 24(c) of the Fund Bill.
117. Paragraph 24(d) of the Fund Bill.
119. Paragraph 24(e) of the Fund Bill.
120. Paragraph 24(f) of the Fund Bill.
121. Paragraph 24(g) of the Fund Bill.
122. Paragraph 24(h) of the Fund Bill.
123. Paragraph 24(i) of the Fund Bill.
124. Paragraph 24(j) of the Fund Bill.
125. Paragraph 24(k) of the Fund Bill.
126. Paragraph 24(l) of the Fund Bill.
127. Paragraph 24(m) of the Fund Bill.
128. Subclause 32(1) of the Fund Bill.
129. COAG Reform Fund Act, section 5.
A direction by the Emergency Management Minister to credit the COAG Reform Fund must not contravene the annual limit of $150 million.\textsuperscript{132}

Where an amount has been credited to the COAG Reform Fund for a purpose in relation to a grant of financial assistance to a state or territory, the Treasurer must ensure that the COAG Reform Fund is debited for that purpose as soon as practicable.\textsuperscript{133}

\textbf{Statutory review}

\textbf{Clause 63} of the Fund Bill requires the responsible Ministers to conduct a review of the operation of the Act before the tenth anniversary of the Act. The responsible Ministers must cause a copy of the terms of reference for the review and the review report to be tabled in each House of the Parliament within 15 sitting days of that House after the tenth anniversary of the commencement of the \textit{Emergency Response Fund Act 2019}.

\textbf{Concluding comments}

The Emergency Response Fund is intended to provide an \textit{additional} source of funding for emergency response and recovery from natural disasters in Australia that have a significant or catastrophic impact.

According to the Minister for Water Resources, Drought, Rural Finance, Natural Disaster and Emergency Management, David Littleproud, ‘it will only be accessed when the Government determines that existing programs are insufficient to meet the scale of the response required’.\textsuperscript{134}

---

\textsuperscript{130} Item 4 of Schedule 1 to the Consequential Amendments Bill amends the \textit{COAG Reform Fund Act} to ensure that an amount originating in the Emergency Response Fund may be transferred to the COAG Reform Fund.

\textsuperscript{131} \textit{COAG Reform Fund Act}, section 6.

\textsuperscript{132} Subclause 32(3) of the Fund Bill.

\textsuperscript{133} Clause 33 of the Fund Bill.

Appendix 1—Education Investment Fund rounds

The following EIF funding rounds were held between 2008 and 2011:

- round one competitive funding of $580 million announced in 2008
- a Teaching and Learning Fund of $500 million announced in 2008, distributed to eligible universities based on domestic student load for building and upgrades of teaching and learning spaces
- round two competitive funding of $934.2 million announced in 2009
- the Super Science Initiative, which provided non-competitive funding of $989.4 million announced in 2009 to address space science and astronomy, marine and climate science, and future industries, three of the priorities identified in the Strategic Roadmap for Australian Research Infrastructure
- round three competitive funding and the competitive Sustainability Round, totalling $550 million in 2010
- a $300 million contribution to the Clean Energy Initiative to support the Solar Flagship and Carbon Capture and Storage Flagship programs launched in 2009
- a Structural Adjustment Round launched in 2010, which allocated $200 million for infrastructure projects associated with adaptation to the demand driven funding system for domestic undergraduate university places
- a Regional Priorities Round of $500 million competitive funding to support regional institutions, launched in 2011.\(^{135}\)

---

\(^{135}\) Summarised from ANAO, *Administration of Grants from the Education Investment Fund*, Audit report, 37, 2012–13, ANAO, Barton, ACT, 22 May 2013, p. 114. The 2008 round was funded from the EIF, and is often referred to as the first round of EIF funding, however the round was launched and assessed under the predecessor *Higher Education Endowment Fund Act 2007*. A full account of the EIF funding components prepared by the Department of Finance is available at DoF, "*Education investment fund – approved projects*", DoF website, last updated December 2013.