
THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

HIGHER EDUCATION ENDOWMENT FUND BILL 2007

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Education, Science and Training, the Honourable Julie Bishop MP)
HIGHER EDUCATION ENDOWMENT FUND BILL 2007

OUTLINE

The Higher Education Endowment Fund Bill 2007 (the Bill) gives effect to the Government's announcement, made in the 2007-08 Budget, to establish a perpetual endowment fund to generate earnings for capital expenditure and research facilities in higher education institutions.

The Bill:

- Establishes the Higher Education Endowment Fund (HEEF) which, like the Future Fund, is a financial asset fund consisting of cash and investments.
- Grants the Treasurer and the Finance Minister, as the responsible Ministers, the power to credit cash amounts to the HEEF through a Special Account (also established by the Bill).
- Grants the Future Fund Board of Guardians (the Board) statutory responsibility for managing the investments of the HEEF. These powers are the same as provided for in the Future Fund Act 2006 (Future Fund Act).
- Expands the Future Fund Management Agency’s (the Agency) operational activities to include its functions under the Bill but its role will remain the same – to provide executive support for the Board and will be responsible for the operational activities associated with the investment of the HEEF.
- Requires responsible Ministers to issue an Investment Mandate – a collection of Ministerial directions – to the Board regarding the investment of the HEEF. The purpose of the Investment Mandate is the same as provided for in the Future Fund Act.
- Requires the responsible Ministers to determine rules for the maximum level of payments from the HEEF. The Education Minister is responsible for authorising grants of financial assistance to eligible higher education institutions consistent with these rules.
- Establishes the Higher Education Endowment Fund Advisory Board to advise the Education Minister on matters related to the making of grants to eligible higher education institutions.
FINANCIAL IMPACT

- Transfers to the HEEF will not impact on the budget bottom line since the Government is merely exchanging one form of financial assets (cash) for another (such as domestic and overseas equities).

- The Government committed to providing the HEEF with an initial investment of $5 billion funded from the 2006-07 surplus.

- It is intended that capital contributions made to the HEEF will grow, over time, a fund which will finance the building of first class institutions in the Australian higher education sector.

- HEEF earnings will increase the underlying cash balance (UCB) and the fiscal balance but this will be offset by the annual distributions to higher education institutions which will reduce the UCB and the fiscal balance.

- Under the Bill, the Board is eligible to receive a refund of imputation credits. Due to the treatment of HEEF earnings, the refund of imputation credits will reduce the UCB by the amount of the refund each year. Although the refund involves a reduction in the UCB, it is effectively only a transfer of resources from one part of the General Government Sector to another. Therefore, there is no impact on the fiscal balance or the headline cash balance.

- All expenses associated with the investment and administration of the HEEF by the Board, including funds manager’s fees, will be met from the HEEF. There is also an intention to allow common costs of the HEEF and the Future Fund to be apportioned.
NOTES ON CLAUSES

Introduction

The provisions of the Higher Education Endowment Fund Bill (the Bill) have been closely modelled on the provisions of the Future Fund Act 2006 (Future Fund Act), given that the Bill will provide the Future Fund Board of Guardians (the Board) with statutory powers to manage the investments of the Higher Education Endowment Fund (HEEF). The Bill also provides that, as per the Future Fund Act, the Treasurer and the Minister for Finance and Administration (the Finance Minister) are the responsible Ministers, and in this capacity will issue directions to the Board about the performance of its investment functions.

However, because the HEEF and the Future Fund have been established for different purposes, a different approach is required for some matters in this Bill. For example, the Education Minister, not the responsible Ministers, is responsible for authorising grants of financial assistance to eligible higher education institutions and for appointments to the HEEF Advisory Board.

As mentioned, the Treasurer and the Finance Minister will issue directions to the Board about the performance of its HEEF investment functions. The Board is therefore accountable to the Treasurer and the Finance Minister for meeting its obligation to manage the HEEF in accordance with the requirements of the Act and directions.

The Finance Minster has administrative responsibility for the operations of the Future Fund Management Agency (the Agency), which will be responsible for the operational activities associated with the investment of the HEEF. As with the arrangement for the Future Fund, the Agency will act on HEEF investment decisions and provide secretariat support to the Board.

The responsible Ministers will make the determination to credit the government’s initial contribution (of $5 billion) to the HEEF and any subsequent Government contributions to the HEEF.

The Board is responsible for preparing reports and keeping the nominated Minister (as defined in clause 54) informed. The nominated Minister is in turn responsible for providing copies of those reports and the annual report to the Education Minister.

The responsible Ministers are also responsible for setting rules to determine the maximum amount available for payments from the HEEF. The Education Minister is responsible for authorising grants of financial assistance to eligible higher education institutions. The HEEF Advisory Board (the Advisory Board) will be established to provide advice to the Education Minister on grants.
Part 1 – Introduction

Clause 1 – Short Title

Provides for the Act to be cited as the Higher Education Endowment Fund Act 2007.

Clause 2 – Commencement

Provides for the Act to commence on the day on which the Act receives the Royal Assent.

Clause 3 – Objects

Sets out the objects of the Act, which are to enhance the Commonwealth’s ability to:

- make grants of financial assistance to eligible higher education institutions in relation to capital expenditure; and
- make grants of financial assistance to eligible higher education institutions in relation to research facilities.

Clause 4 – Simplified outline

Clause 4 is an information provision which provides an overview of the Act to assist with readability. The main provisions of the Act are:

- to set up the Higher Education Endowment Fund which consists of the Higher Education Endowment Fund Special Account and the investments of the Higher Education Endowment Fund;
- to make grants of financial assistance to eligible higher education institutions in relation to capital expenditure;
- to make grants of financial assistance to eligible higher education institutions in relation to research facilities;
- to establish the Higher Education Endowment Fund Advisory Board to advise the Education Minister about grants;
- to ensure that the total amount of grants authorised by the Education Minister during a financial year must not exceed the maximum grants amount calculated in accordance with the Maximum Grants Rules;
- to make the Education Minister responsible for authorising grants and specify that the terms and conditions on which financial assistance is granted are to be set out in a written agreement between the Commonwealth and the eligible higher education institution concerned;
to provide that the Board is responsible for deciding how to invest the Higher Education Endowment Fund which will consist of financial assets;

• to clarify that the Board is bound by a Higher Education Endowment Fund Investment Mandate given to it by the responsible Ministers.

A note at the end of the simplified outline has been inserted to assist the reader by referring the reader to the Future Fund Act. The Future Fund Act provides that the Agency is responsible for assisting and advising the Board.

The purpose of this note is to clarify that, in relation to expansion of the Board’s functions under the HEEF Act, the functions of the Agency as specified in section 75 of the Future Fund Act, are also expanded.

Clause 5 – Definitions

Clause 5 provides definitions of the terms and expressions used in the Act.*

*Note: The clauses in the Bill will become sections of the Act on Royal Assent. In this Explanatory Memorandum only the first reference to a clause or subclause uses that terminology. Subsequent references use the terms “section” or “subsection” as appropriate.

Clause 6 – Financial assets

Clause 6 provides a definition of financial asset, which is intended to be widely read, consistent with the definition of financial asset used for budget reporting purposes. This definition is derived from the Australian Bureau of Statistics (‘the ABS’) manual of concepts and classification principles used for publishing government finance statistics. The ABS publication is based on a similar manual produced by the International Monetary Fund.

Consistent with the HEEF being a financial asset fund, the Board can only invest the Fund in financial assets. Allowing the Board to invest directly in non-financial assets would be inconsistent with the objectives of the policy and the Government’s broader fiscal policy and budget management.

This restriction extends to investing directly in infrastructure, property, jewellery or artwork, for example. However, the Board will be able to gain exposure to these types of assets through pooled property or other investment vehicles (listed and unlisted).

Regulations may also be made to clarify that an asset specified in the regulations is a financial asset for the purposes of this Act. It is not intended that these regulations would contradict the definition of a financial asset in the ABS publication — merely that it would provide the Board with certainty in relation to whether certain assets would fit within this definition. For the same reason, the regulations may also clarify that an asset is not a financial asset.

A reference in this Act to a financial asset is a reference to:
• an asset that, in accordance with GFS Australia, is treated as a financial asset for the purposes of the GFS system in Australia; or
• an asset specified in regulations made for the purposes of this paragraph;

but does not include a reference to an asset that, under the regulations, is taken to be a non-financial asset for the purposes of this Act.

A note at the end of clause 6 has been inserted to assist readers by referring them to subsection 13(3) of the *Legislative Instruments Act 2003* in respect of any specification of an asset under the regulations. Subsection 13(3) provides that where an instrument requires identification (by way of specification, declaration or prescription) of matters or things, the rule-maker may identify those matters or things by referring to a class or classes.

**Clause 7 – Crown to be bound**

Provides that this Act binds the Crown in each of its capacities but does not make the Crown liable to be prosecuted for an offence.

**Clause 8 – Extension to external Territories**

Provides that the Act extends to every external Territory, including Norfolk Island.

**Clause 9 – Extra-territorial application**

The geographical reach of this Act is very wide — applying both within and outside of Australia — because it is expected the HEEF will be invested in overseas markets. This section overrides paragraph 21(1)(b) of the *Acts Interpretation Act 1901* by extending application of this Act outside Australia.
Part 2—The Higher Education Endowment Fund

Division 1—Introduction

Clause 10 – Simplified outline

Clause 10 is an information provision which provides an overview of Part 2 to assist with readability.

Division 2—Establishment of the Higher Education Endowment Fund etc.

Clause 11 – Establishment of the Higher Education Endowment Fund

Clause 11 establishes a financial asset fund — the Higher Education Endowment Fund — consisting of amounts credited to a Higher Education Endowment Fund Special Account (see below) and investments of the Fund. The distinction between the cash and asset components of the Fund relates to the need for cash to be duly appropriated rather than a desire to distinguish between cash held and other types of investments.

‘Investments of the Fund’ is defined in section 22 to include monies invested in financial assets (including returns on these investments), derivatives acquired under section 31 and other financial assets that the Board becomes a holder of through a securities lending arrangement or otherwise.

Clause 12 – Establishment of the Higher Education Endowment Fund Special Account

Clause 12 establishes the Higher Education Endowment Fund Special Account (‘the HEEF Account’) — a Special Account for the purposes of section 21 of the FMA Act. A Special Account is a ledger which records a right to draw money from the Consolidated Revenue Fund.

Any amounts credited to the HEEF Account are quarantined from the rest of the Consolidated Revenue Fund and can only be debited for the purposes set out in clause 16.

The second note (note 2) has been inserted after the section to assist the reader by clarifying that, in addition to the determinations process set out in clauses 13 and 14, amounts can be credited to the HEEF Account by an appropriation bill.
Division 3—Credits of amounts to the Higher Education Endowment Fund

Clause 13 – Initial credit of $5 billion to the Fund Account

Clause 13 provides that the Government’s initial contribution to the HEEF, or seed capital, is $5 billion. This amount is sourced from the 2006-07 surplus.

Subclause 13(1) provides that the initial contribution must be credited to the HEEF Account through a determination by the responsible Ministers as soon as practicable after the commencement of the Act and provides that the contribution can be credited either in one lump sum or in instalments.

Subclause 13(2) provides that the determination for crediting the initial contribution to the HEEF Account cannot be revoked.

Subclause 13(3) provides that the determination to credit the initial contribution to the HEEF is a legislative instrument for the purpose of section 5 of the Legislative Instruments Act 2003 and is required to be tabled in Parliament and published on the Federal Register of Legislative Instruments. However, the determination, as a ministerial direction, is not disallowable (see section 42 of the Legislative Instruments Act 2003) and this policy decision to exempt the instrument from the operation of the disallowance provisions has the approval of the Attorney-General.

Clause 14 – Subsequent credits of amounts to the Fund Account—determinations by the Treasurer

The Government’s policy is that any future Government contributions to the HEEF be made on an ex-post basis — that is, out of realised surpluses and subject to other policy priorities.

Subclause 14(1) provides that Government contributions of amounts to the HEEF, subsequent to the initial contribution, are made through determinations by the responsible Ministers and that such transfers can be made either in one lump sum or in instalments. A note at the end of subsection 14(1) has been inserted to assist the reader by referring the reader to subsection 33(3) of the Acts Interpretation Act 1901. This subsection deals with variations and revocations of instruments and provides that a power to make an instrument also includes a power to vary or revoke an instrument unless the contrary intention appears.

Subclause 14(2) provides that the determination to credit subsequent amounts to the HEEF is a legislative instrument for the purpose of section 5 of the Legislative Instruments Act 2003 and is required to be tabled in Parliament and published on the Federal Register of Legislative Instruments. However, the determination, as a ministerial direction, is not disallowable (see section 42 of the Legislative Instruments Act 2003) and this policy decision to exempt the instrument from the operation of the disallowance provisions has the approval of the Attorney-General.
Clause 15 – Credit of amounts to the Fund Account—gifts

Clause 15 allows gifts of money to be made to the HEEF Account that have been authorised, in writing, by the Education Minister, to be accepted by the Board and credited to the HEEF Account.

Subclauses 15(1) and 15(2) provide that the Board may accept a gift of money made for the purposes of the HEEF if the acceptance of the gift is authorised by the Education Minister in writing under subsection 15(2). A note at the end of subsection 15(2) has been inserted to assist the reader by referring the reader to subsection 13(3) of the *Legislative Instruments Act 2003* for specification by class.

Subclause 15(3) provides that a gift of money authorised by the Education Minister and accepted by the Board is deemed to be credited to the HEEF Account.

Subclause 15(4) provides that the determination by the Education Minister to authorise gifts of money is a legislative instrument for the purpose of section 5 of the *Legislative Instruments Act 2003* and is required to be tabled in Parliament and published on the Federal Register of Legislative Instruments. However, the determination is not disallowable (see section 42 of the *Legislative Instruments Act 2003*) and this policy decision to exempt the instrument from the operation of the disallowance provisions has the approval of the Attorney-General.
**Division 4—Debits of amounts from the Higher Education Endowment Fund**

**Clause 16 – Purposes of the Fund Account**

Clause 16 sets out the purposes for which the HEEF Account can be debited. Those purposes have been split into two categories.

The first category (subclause 16(1)) relates to the payment of grants for financial assistance to eligible higher education institutions for capital expenditure and research facilities and for payment of various expenses (associated with the investment and administration of the HEEF) that can be exclusively attributed to the HEEF.

The second category (subclause 16(4)) relates to payment of various expenses for purposes that are not exclusively attributable to the HEEF, but could be attributed to the HEEF or the Future Fund. The intention of paragraphs 16(4)(a) to (g) is to allow common costs of the HEEF and the Future Fund to be paid initially by one Fund (with subsequent apportionment between the Funds).

In relation to grant purposes and purposes related exclusively to the HEEF, these include:

- making grants of financial assistance to eligible higher education institutions in relation to capital expenditure, so long as the grants are authorised under subsection 45(1);
- making grants of financial assistance to eligible higher education institutions in relation to research facilities, so long as the grants are authorised under subsection 45(2);
- paying the costs of, or incidental to, the acquisition of financial assets and derivatives;
- paying expenses of an investment of the HEEF;
- expenses incurred by the Board under a contract with investment managers;
- costs associated with the establishment, maintenance or operation of a bank account, where the bank account relates exclusively to the HEEF;
- costs associated with the Board entering into a contract of insurance (including in relation to individual Board members) exclusively in connection with the HEEF;
- costs of discharging any other costs, expenses, obligations or liabilities incurred by the Board exclusively in connection with the HEEF.

The purpose of paragraph 16(1)(i) is to allow the HEEF to be used to discharge any other expenses or liabilities incurred by the Board that are exclusively incurred in connection with the HEEF and to capture miscellaneous costs that might arise and which are not covered by the other existing purposes.

A note at the end of subsection 16(1) has been inserted to assist the reader by referring the reader to section 21 of the FMA Act which deals with debits from Special Accounts.
Subclauses 16(2) and 16(3) provide that paragraphs 16(1)(a) and 16(1)(b) do not limit each other in their application.

In relation to the purposes which are not exclusively related to the HEEF, these expenses include:

- costs associated with the establishment, maintenance or operation of a bank account of the Board, where those costs, expenses or obligations cannot be exclusively attributable to the HEEF (see paragraph 16(1)(g)) or to the Future Fund (see paragraph 2(1)(g) of Schedule 2 to the Future Fund Act;
- costs associated with the Board entering into a contract of insurance entered into by the Board, where the premium cannot be exclusively attributable to the HEEF (see paragraph 16(1)(h)) or to the Future Fund (see paragraph 2(1)(h) of Schedule 2 to the Future Fund Act;
- costs of discharging any other costs, expenses, obligations or liabilities incurred by the Board, where the costs, expenses, obligations or liabilities cannot be exclusively attributable to the HEEF (see a paragraph of 16(1)) or to the Future Fund (see a subclause 2(1) of Schedule 2 to the Future Fund Act;
- paying remuneration and allowances of Board members;
- paying remuneration, and other employment-related costs and expenses, in respect of members of the staff of the Agency;
- costs of engaging consultants and advisers (for either the Board or the Agency);
- costs relating to the operation of the Agency.

A note at the end of subsection 16(4) has been inserted to assist the reader by referring the reader to section 21 of the FMA Act. Section 21 deals with debits from Special Accounts.

Clause 17 – Future Fund Board must ensure that there is sufficient money in the Fund Account to cover authorised grants etc.

Clause 17 requires the Board to take all reasonable steps to ensure that the amount of money standing to the credit of the HEEF Account is sufficient to cover the debit of amounts for grants authorised, or proposed to be authorised, under subsection 45(1) or 45(2).

A note at the end of section 17 has been inserted to assist readers to clarify that the Board may therefore need to liquidate non-cash assets in accordance with section 23 in order to comply with section 17.
Division 5—Transfers between the Higher Education Endowment Fund and the Future Fund

The purpose of Division 5 is to allow for amounts to be transferred between the HEEF and the Future Fund if one Fund pays entirely for an expense that should properly be apportioned between the two Funds. Clauses 18 and 19 allow the relevant Minister (or his or her delegate – see sections 50 and 51) to direct one fund be debited and the other credited by a specified amount.

In relation to amounts that are to be debited from the Future Fund to the HEEF (for a purpose mentioned in subsection 16(4)), the Finance Minister may issue that direction. In relation to amounts that are to be debited from the HEEF to the Future Fund, the Education Minister may issue that direction.

A direction issued under subsection 18(1) or 19(1) is not a legislative instrument for the purpose of section 5 of the Legislative Instruments Act 2003, as the directions are merely declaratory.
Part 3—Investment of the Higher Education Endowment Fund

Clause 20 – Simplified outline

Clause 20 is an information provision which provides an overview of Part 3 to assist with readability.

Clause 21 – Objects of investment of the Fund

Subclause 21(1) sets out the main objects of investment of the HEEF. The purpose of this subsection is to reinforce that amounts invested are invested by the Board for the main purposes of enhancing the Commonwealth’s ability to make grants of financial assistance to eligible higher education institutions in relation to capital expenditure and research facilities.

Subclause 21(2) sets out the ancillary objects of investment of the HEEF. The purpose of this subsection is to reinforce that amounts invested are invested by the Board for the ancillary purpose of enhancing the Commonwealth’s and the Board’s ability to discharge costs, expenses, obligations and liabilities and make payments as mentioned in paragraphs 16(1)(c) to (i) and 16(4)(a) to (g).

Clauses 22 and 23 – Investment of the Fund and Management of investments of the Fund

Clause 22 and 23 are modelled on the investment powers under section 39 of the FMA Act. However, subsection 22(1) expands those powers to specifically provide for the investment of the HEEF in a broad range of financial assets.

Clause 22 allows the HEEF to be invested in a broad range of financial assets. Conditions on the acquisition of derivatives are covered later in the Act. Investments are to be made in the name of the Board rather than the Commonwealth to reinforce that the Board manages the HEEF at arms length from the Government. However, subclause 22(2) of the Bill and section 36 of the Future Fund Act provide that beneficial ownership of the HEEF remains with the Commonwealth at all times.

Subclauses 22(3), 23(2) and 23(3) provide that monies invested in financial assets, and any derivatives acquired under section 31, are ‘investments of the Fund’ and these investments may be realised, disposed of or redeemed by the Board.

To give effect to the requirements under sections 81 and 83 of the Constitution (which in effect provide that public money forms part of the Consolidated Revenue Fund and can only be spent if authorised by an appropriation made by law), subclause 23(4) provides that income derived from an investment of the HEEF, including a return of capital or another form of financial distribution, must be credited to the HEEF Account. In practice, any money that has not been invested must be held in an official bank account. (The requirement to hold the money in an official bank account is covered by the FMA Act.)
Subclause 23(5) allows the Board to authorise, prior to an investment maturing, that the proceeds of this investment be automatically reinvested with the same entity rather than needing to be treated as public money and credited to the Consolidated Revenue Fund only to be then reappropriated and reinvested. Any reinvestment is an investment of the HEEF. This subsection is consistent with subsection 39(6) of the FMA Act.

Clause 24 – Higher Education Endowment Fund Investment Mandate

It is appropriate that the Government, as manager of the economy and owner of the HEEF, have a mechanism for articulating its broad expectations for how the HEEF will be invested and managed by the Board. Clause 24 establishes a framework that enables the Government to give strategic guidance to the Board while preserving the Board’s role in managing the investment of the HEEF at arms length from Government.

Subclause 24(1) provides that the responsible Ministers have the power to give the Board written directions in relation to the performance of its investment functions and the exercise of its powers. The responsible Ministers must issue at least one direction under this subsection, to ensure that an Investment Mandate is in force at all times. This is done to provide clarity for the Board.

Subclause 24(2) provides that any direction issued under subsection 24(1) has effect subject to the limitations set out in clause 25.

The fact that a direction has already been issued does not prohibit the responsible Ministers from issuing additional directions. All of these directions together comprise the Investment Mandate (see subclauses 24(1) and 24(4)).

While the responsible Minister can issue new directions at any time, the intention is that the Investment Mandate will reflect the long term nature of the Government’s policy and those new directions will only be issued in light of significant policy changes or material changes in the investment environment faced by the HEEF.

Subclause 24(3) provides that in setting an Investment Mandate, the responsible Ministers must have regard to maximising the return on the Fund over the long term consistent with international best practice for institutional investment, enhancing the Commonwealth’s ability to make grants of financial assistance to eligible higher education institutions for capital expenditure and research facilities, any Maximum Grant Rules that are in force and any other matters the Ministers consider to be relevant. This requirement will give the Board, and the Parliament, comfort that the responsible Ministers must consider the scope of their directions from an investment perspective.

Subclauses 24(5) and 24(6) provide that the Investment Mandate may include, but is not limited to, statements about policies the Board must pursue in relation to risk and return and the allocation of the Fund to particular asset classes. This may include restrictions or thresholds for
investing the Fund in certain jurisdictions or asset classes and statements of the Government’s tolerance for losses.

**Subclause 24(7)** provides that any policies are subject to the limitations set out in clause 25.

**Subclause 24(8)** ensures that the Board is not given conflicting directions regarding the Government’s tolerance for risk, its expectations for returns and any associated allocation of the Fund across asset classes.

To avoid doubt, **subclause 24(9)** makes it clear that the scope of the responsible Ministers’ power to issue directions to the Board in relation to the investment of the Fund is bound by the Act. For example, the responsible Ministers could not direct the Board to use derivatives in a manner that contradicted section 31 (which deals with the acquisition of derivatives by the Board).

**Subclause 24(10)** provides that, to allow the Board time to adjust to any revised directions issued by the responsible Ministers, the Investment Mandate does not formally commence until 15 calendar days after it is issued. Importantly, the Board will be able to know with certainty when the new direction will come into force.

**Subclause 24(11)** provides that directions under subsection 24(1), that set out certain rules that the Board must comply with, are legislative in character and are therefore legislative instruments for the purposes of section 5 of the *Legislative Instruments Act 2003*. However, any directions issued by the responsible Ministers as part of the Investment Mandate are exempt from Parliamentary disallowance (covered by section 42 of the *Legislative Instruments Act 2003*) and exempt from sunsetting (covered by Part 6 of the *Legislative Instruments Act 2003*).

As legislative instruments, any directions given to the Board under this section of the Act are required to be registered on the Federal Register of Legislative Instruments and tabled in Parliament.

This approach enables the public and Parliament to hold the Government accountable for the directions it issues to the Board without impeding the Government’s ability to manage its finances.

**Subclauses 24(12) and 24(13)** provide that, subject to the restrictions set out in the Act and the expectations of the Government as articulated in the Investment Mandate, the Board has a statutory obligation to seek to maximise Fund returns over the long term, consistent with international best practice for institutional investment and enhance the Commonwealth’s ability to make grants of financial assistance to eligible higher education institutions in relation to capital expenditure and research facilities.

This provision (together with **subclause 24(8)**) establishes a clear hierarchy of priorities for the Board — the responsibility to maximise returns is subordinate to the investment parameters set out by the Parliament and Government. This framework provides appropriate flexibility while still ensuring suitable accountability for any directions the Government gives the Board regarding the investment of the Fund.
It also provides the Board with clarity as to the extent of its accountability — the Board must be able to demonstrate that it is pursuing policies and strategies that are clearly directed at maximising long-term investment returns in a manner that is consistent with best practice.

In practice, it is expected that the Board will adopt a best practice approach to a range of issues by learning from the experiences of other investors and funds of national significance.

The purpose of subclause 24(13) is to clarify that the subclause is the default position in the event that a direction under subsection 24(1) is not issued or is revoked. However, a direction issued by the Ministers under subsection 24(1) will override subsection 24(13).

Clause 25 – Limitation on Higher Education Endowment Fund Investment Mandate

Clause 25 aims to ensure that the HEEF is not invested in a way that is inconsistent with the Fund’s objectives. A similar clause is included in the Higher Education Endowment Fund (Consequential Amendments) Bill 2007 (Consequential Bill).

Subclause 25(1) specifies that the responsible Ministers cannot direct the Board to use the assets of the Fund to invest in a particular financial asset, for example, shares in a particular infrastructure company. It also prevents the responsible Ministers from issuing a ministerial direction that has the effect of requiring the Board to use the assets of the fund to support a particular business entity, a particular activity or a particular business.

This clause does not limit the ability of the Investment Mandate to set out the policies as intended initially under the Act, such as those to be pursued by the Board in relation to matters of risk and return.

Clause 26 – Future Fund Board to be consulted on Higher Education Endowment Fund Investment Mandate

The responsible Ministers are required to consult the Board on any changes or additions to the Investment Mandate. Subclauses 26(1) and 26(3) achieve this by requiring the responsible Ministers to send a draft of the new direction to the Board and inviting the Board to make a submission within a reasonable time limit.

What constitutes a reasonable time limit will be determined on a case by case basis with regard to relevant circumstances and priorities at the time. It may be the case that urgent changes are required in the national interest. In this situation, it would be reasonable for the Board to be asked to consider the draft direction quickly. However, where there is less urgency, or the change in the Investment Mandate is quite substantial, it would be reasonable to provide the Board with more time to consider the draft direction.

Subclause 26(2) provides that any submission received by the responsible Ministers from the Board must be tabled in Parliament with the new direction. In this way the Board will be able to
ensure that their views on the expected impact on their ability to maximise returns are publicly known.

Clause 27 – Compliance with Higher Education Endowment Fund Investment Mandate

Subclause 27(1) provides that it is the responsibility of the Board to take all reasonable steps to ensure that all policies and decisions regarding the operation and investment of the HEEF are in accordance with any directions (Investment Mandate) issued by the responsible Ministers.

Subclause 27(2) provides that if the Board becomes aware of a breach of the Investment Mandate or judges that a policy does not comply with the Investment Mandate it must inform the responsible Ministers in writing as soon as is practical, including a proposed strategy to bring the operations of the HEEF into accordance with the Investment Mandate.

Subclauses 27(3) and 27(4) provide that if the Government identifies areas where the Board is not complying with the Investment Mandate, the responsible Ministers can issue written directions to the Board to take action to remedy the situation. The Act requires the Board to comply with any such directions, underlining that the responsible Ministers are the final arbiters on what is intended by the Investment Mandate.

Subclause 27(5) provides that any transactions undertaken by the Board that are deemed later not to have complied with the Investment Mandate are still valid and the Board is required to honour any commitment made. This protects third parties who enter into transactions with the Board or its agents in good faith.

Subclause 27(6) provides that a direction under subsection 27(3) is administrative in character and therefore not a legislative instrument for the purposes of section 5 of the Legislative Instruments Act 2003. The direction is also not merits reviewable because the direction concerns a government to government dispute, not a government to individual dispute.

Clause 28 – Future Fund Board must not trigger the takeover provisions of the Corporations Act 2001

To minimise market distortion and eliminate the potential for conflicts of interest for the Government as a market regulator, the Board is prohibited from triggering the takeover provisions under section 606 of the Corporations Act 2001 (‘the Corporations Act’).

The Board is also prohibited from acquiring more than a 20 per cent stake (as defined in the Financial Sector (Shareholdings) Act 1998 (‘the Financial Sector (Shareholdings) Act’) with a few minor adjustments) in a foreign publicly listed company. However, this prohibition is found in the Consequential Bill but applies to the Board’s activities in relation to the HEEF and the Future Fund.

It is the Government’s intention that the takeover threshold be adhered to quite strictly for unlisted companies with more than 50 shareholders and listed companies. Therefore, subclause
Subclause 28(1) provides that the exceptions provided under section 611 of the Corporations Act do not apply for acquisitions by the Board. However, the restrictions are not expected to have a material impact on the investment efficiency of the HEEF as they are quite similar to the limits that other fund managers often use.

Subclause 28(2) provides that if for some reason the Board has not complied with section 606 of the Corporations Act (as amended) this does not make the transactions invalid. The aim of this provision is to ensure third parties are not adversely affected by the Board’s non-compliance.

Clause 29 – Borrowing

The Board cannot borrow except for short-term borrowing associated with the settlement of transactions or any circumstances listed in the regulations for the purposes of this section. The eligibility of short-term borrowing for transaction settlement is consistent with the treatment of superannuation funds under the Superannuation Industry (Supervision) Act 1993. Clause 29 provides that these restrictions ensure that the Board is able to operate efficiently without exposing the Budget to undue risk.

Subclause 29(3) provides that regulations may be made to specify circumstances in which it is considered appropriate for the Board to be able to borrow. Regulations may also be used to clarify any uncertainty on whether a particular activity constitutes borrowing. While it is not anticipated that the Board will have a need to borrow, this provision allows for unforeseen events or changes in the investment environment without the need to amend the legislation. Regulations would be disallowable by Parliament.

Clause 30 – Higher Education Endowment Fund Investment policies

Subclauses 30(1) and 30(3) provide that the Board is required to formulate, publish and comply with a number of policies on its investment activities. In particular, the Board is required to develop and publish a policy on:

- the strategy it is adopting for the investment of the HEEF;
- how it proposes to manage risks associated with investments of the HEEF;
- the benchmarks and standards the Board uses for assessing the performance of the investments of the HEEF in general, the performance of any investments it wishes to identify separately, and the performance of certain classes of investments;
- matters for which international best practice dictates the Board should have a policy. This may include matters such as how the Board will exercise any voting rights that are connected with the investments of the HEEF; and
- other matters that are specified in the regulations (see subclauses 30(1) and 30(7)).

A note at the end of subclause 30(1) provides that under subsection 33(3) of the Acts Interpretation Act, the Board is able to repeal, rescind, revoke, amend, or vary any such policies.
Subclause 30(2) provides that the policies that the Board develops must not be incompatible with the Investment Mandate.

Subclause 30(4) provides that the Board must publish the first set of policies on the Internet as soon as is practicable following the commencement of section 31 of the Act.

Subclause 30(3) provides that the policies must be published on the Internet.

Subclauses 30(5) and 30(6) provide that the Board must conduct reviews of these policies periodically and when the responsible Ministers change the Investment Mandate. It is not expected that these reviews would be a formal process or that the results of the reviews would be required to be published.

Subclause 30(8) provides that if the Board enters into a transaction which is not consistent with a policy that it has published under this section, the transaction is still a valid transaction. This ensures that third parties are not affected by any inconsistency with the Board’s policies. However, subclause 30(7) provides that the Board is required to take all reasonable steps to comply with the policies it develops under subsection 30(1).

Subclause 30(9) provides that the policies that the Board formulates are not legislative instruments for the purposes of section 5 of the Legislative Instruments Act 2003 because they are of an administrative character.

Clause 31 – Derivatives

Derivatives are widely used by financial market participants as a tool for risk management. As the sophistication, size and mobility of capital markets around the world increases, investment managers are looking for more ways to maximise the returns on investments while minimising the volatility of results. The types and volumes of derivatives being traded has grown exponentially as the underlying markets have created demand for these types of instruments.

Clause 31 provides for the Board to make use of derivatives as a risk management tool and to indirectly achieve exposure to assets that it could not otherwise achieve if it were required to invest directly in these assets. The Board may also use derivatives to reduce the transaction cost of achieving required exposures. However, subsection 31(1) provides that the Board may not use derivatives for speculative purposes or for leverage.

Subclauses 31(3) and 31(4) provide that derivatives must be held in the name of the Board and are taken to be an investment of the HEEF. Subsection 23(3) provides that derivatives may be realised by the Board.

Section 30 requires the Board to formulate a policy on its investment strategy and take all reasonable steps to comply with this policy. Subclause 31(2) provides that the acquisition of derivatives under section 31 cannot be inconsistent with this strategy.
Clause 32 – Additional financial assets

Clause 32 provides that if the Board becomes a holder of another financial asset, for example through a capital distribution, that asset becomes an investment of the HEEF and is therefore subject to all the restrictions and requirements for investments of the HEEF.

Clause 33 – Securities lending arrangements

Clause 33 provides that the Board is able to enter into securities lending arrangements. Lending of securities is commonplace among institutional investors. It may also take collateral as part of a securities lending arrangement. Any collateral it takes is either credited to the HEEF Account or becomes an investment of the HEEF.

Clause 34 – Investment managers

Subclause 34(1) provides that the Board is able to hire one or more investment managers. Investment manager is defined broadly to include custodians, transition managers and other investment managers. However, the Agency is carved out of this definition as it is expected that investment activities, such as acquiring derivatives or investing money, will be outsourced.

Unless approved by the responsible Ministers, the Board must use investment managers to invest money in financial assets, acquire derivatives, enter into securities lending arrangements or realise financial assets. Subclause 34(2) provides that the responsible Ministers may provide approval in writing for certain methods of investment other than through investment managers should it be prudent and cost effective to do so.

Subclauses 34(3) and 34(4) provide that the Board is required to ensure that in the contracts with the investment managers it ensures that investment managers must operate within the Act and specifies when and how investment managers report on the state of investments of the HEEF.

Clause 35 – Custody of securities

Clause 35 provides that section 40 of the FMA Act does not apply to investments of the HEEF. While section 40 of the FMA Act is excluded, a framework for how the Board must deal with securities that it receives is covered by sections 24 and 34.

Clause 36 – Refund of franking credits

Clause 36 deals with refund of franking credits and provides that if the Board receives a refund of a tax offset under the Income Tax Assessment Act 1997 and the tax offset is attributable to the investment of the HEEF, any refund received is credited to the HEEF Account.
Clause 37 – Realisation of non-financial assets

Paragraphs 37(1)(a) and 37(2)(a) provide that if the Board holds an asset which was mistakenly acquired by the Board or given to the Board or which ceases to be a financial asset due. The Act treats this asset as a financial asset up to the time it is realised. Paragraphs 37(1)(b) and 37(2)(b) ensures that the asset is considered an investment of the HEEF for that period and that the other rules in the Act relating to investments of the HEEF apply to that asset for the time it is held by the Board.

Clause 38 – Additional function of the Future Fund Board

Provides that the functions of the Future Fund Board include the function of investing amounts in accordance with this Act.
Part 4—Grants of financial assistance to eligible higher education institutions

Division 1—Introduction

Clause 39 – Simplified outline

Clause 39 is an information provision which provides an overview of Part 4 to assist with readability. The outline makes it clear that the Education Minister is responsible for authorising grants of financial assistance to eligible higher education institutions, that the total amount of grants authorised in a financial year must not exceed the maximum grants amount calculated in accordance with the Maximum Grants Rules and that those grants will be made on terms and conditions set out in a written agreement between the Commonwealth and the institution. It is not the intention that the Board will have any role in making grants or providing advice to the Education Minister in respect of making grants. The Board’s responsibility is the investment of the HEEF monies.

Division 2—Higher Education Endowment Fund Advisory Board

Division 2 establishes the Higher Education Endowment Fund Advisory Board (the Advisory Board) and sets out general provisions relating to the Advisory Board.

Clause 40 – Higher Education Endowment Fund Advisory Board

Clause 40 provides that the Advisory Board is established once this section of the Act commences. The Education Minister can appoint Advisory Board members from time to time and can terminate a person’s appointment as well. The Education Minister may also issue written directions to the Advisory Board in relation to the way they carry out their functions and the procedures to be followed in relation to meetings. A direction issued by the Minister is a legislative instrument for the purposes of the section 5 of the Legislative Instruments Act 2003 and is required to be tabled in Parliament and published on the Federal Register of Legislative Instruments. However, the direction as a ministerial direction, is not disallowable and is not subject to sunsetting (see section 42 and Part 6 of the Legislative Instruments Act 2003 respectively).

Clause 41 – Function of the Advisory Board

Provides that the function of the Advisory Board is to advise the Education Minister about matters referred to it by the Education Minister and those matters must relate to making grants of financial assistance to eligible higher education institutions in relation to capital expenditure or research facilities.
Clause 42 – Remuneration and allowances

Subclause 42(1) provides that a member of the Advisory Board is to be paid the remuneration that is determined by the Remuneration Tribunal and subclause 42(2) provides that a member is to be paid the allowances that are prescribed by the Remuneration Tribunal. If no determination of that remuneration by the Tribunal is in operation, the member is to be paid the remuneration that is determined by the Education Minister.

Clause 43 – Disclosure of interests

Clause 43 provides that if a member of the Advisory Board has a material personal interest in a matter being considered, or about to be considered, by the Advisory Board, the member must, as soon possible after the relevant facts have come to the member’s knowledge disclose the nature of the interest at a meeting of the Advisory Board and disclose the nature of the interest to the Education Minister. Subclause 43(4) provides that the Education Minister must terminate the appointment of an Advisory Board member if the member fails, without reasonable excuse, to comply with subsection 43(2). Subclause 43(4) does not limit the Education Minister’s ability to terminate an Advisory Board member’s appointment under subsection 40(3).

Subclause 43(3) provides that a disclosure under paragraph 43(2)(a) must be recorded in the minutes of the meeting.

Clause 44 – Resignation

A member of the Advisory Board may resign his or her appointment by giving the Education Minister a written resignation which takes effect on the day it is received by the Education Minister or, if a later day is specified in the resignation, on that later day.
Division 3—Authorisation of grants

Clause 45 – Authorisation of grants

Clause 45 provides that the Education Minister may, by writing, authorise a grant of financial assistance to an eligible higher education institution in relation to capital expenditure or research facilities.

Subclauses 45(3) and 45(4) provide that the subsections 45(1) and 45(2) do not limit each other in application (i.e. the Education Minister may authorise a grant of financial assistance to an eligible higher education institution in relation to both capital expenditure and a research facility).

Subclause 45(5) provides that an instrument of authorisation is a legislative instrument for the purposes of section 5 of the Legislative Instruments Act 2003 and is required to be tabled in Parliament and published on the Federal Register of Legislative Instruments. However, the authorisation, as a ministerial authorisation, is not disallowable (see section 42 of the Legislative Instruments Act 2003) and this policy decision to exempt the instrument from the operation of the disallowance provisions has the approval of the Attorney-General.

Clause 46 – Limits on authorisation of grants

Clause 46 limits the Education Minister in relation to the grants the Minister may authorise under section 45 during a financial year.

Subclause 46(1) provides that the Education Minister must not give an authorisation under section 45 during a financial year unless the Education Minister has been given a statement under subsection 48(1) in relation to the financial year. A note at the end of subsection 46(1) has been inserted to assist the reader by clarifying that the statement sets out the result of the Board’s calculation of the maximum grants amount in relation to the financial year.

Subclause 46(2) provides that the total amount of grants authorised by the Education Minister under section 45 during a financial year must not exceed the result set out in the statement given to the Education Minister by the Board under subsection 48(1).

Subclause 46(3) provides that the Education Minister must not give an authorisation under section 45 before 1 July 2008. This is because subsection 48(1) requires the responsible Ministers to make the Maximum Grants Rules by 1 July 2008 and the Board is required under subsection 48(1) to provide the Education Minister with a calculation as soon as practicable after 1 July 2008. The effect of this subsection is to prevent the Education Minister from authorising any grants of financial assistance under section 45 until the Maximum Grants Rules have been made and the Board has provided the Minister with a calculation.
Clause 47 – Maximum Grants Rules

Clause 47 makes provision for Maximum Grants Rules to be made by the responsible Ministers.

Subclause 47(1) provides that the responsible Ministers may in writing make rules for ascertaining the maximum amount that can be debited from the HEEF Account during a financial year for the purpose of making grants of financial assistance to eligible higher education institutions for capital expenditure and research facilities. The responsible Ministers must make at least one rule by 1 July 2008 and subclause 47(2) clarifies that those rules are to be known as the Maximum Grants Rules.

Subclause 47(3) sets out the criteria that the responsible Ministers must only have regard to when making the Maximum Grants Rules and subclause 47(4) prohibits the responsible Ministers from making rules that are inconsistent with the Act. The criteria are as follows:

- the objective that, over the medium to long term (as defined in subclause 47(8)), grants authorised by the Education Minister under section 45 should not result in the balance of the HEEF falling below the real value of the Government contributions to the HEEF Account under sections 13 and 14; and
- the objective of moderating volatility in maximum grants amounts from financial year to financial year.

These criteria are subject to the overarching requirement in subclause 47(5) that the maximum amount that can be debited from the HEEF Account must not exceed the accumulated nominal earnings (defined in section 49) of the HEEF as at the start of the financial year.

Subclause 47(6) requires the responsible Minister to consult the Education Minister and the Board before making rules under subclause 47(1). The Board will be consulted about any implications for the performance of the Board’s HEEF investment functions.

Subclause 47(7) provides that the Maximum Grants Rules are a legislative instrument for the purposes of section 5 of the Legislative Instruments Act 2003 and are required to be tabled in Parliament and published on the Federal Register of Legislative Instruments. However, the rules are not disallowable (see section 42 of the Legislative Instruments Act 2003) and this policy decision to exempt the rules from the operation of the disallowance provisions has the approval of the Attorney-General.

Subclause 47(8) provides that for the purposes of section 47, the medium to long term is a period of 5 years or longer.

Clause 48 – Calculation of maximum grants amounts

Clause 48 sets out how the maximum grants amount will be calculated.
Subclause 48(1) provides that as soon as practicable after 1 July 2008 and for each later financial year, the Board must calculate the maximum amount that can be debited from the HEEF Account in accordance with the Maximum Grants Rules for the purpose of making grants of financial assistance to eligible higher education institutions for capital expenditure and research facilities. The Board must give the Education Minister a written statement setting out the result of the calculation and must give a copy of that calculation to each responsible Minister.

Subclause 48(2) provides that the Board may provide any relevant comments on the calculation.

Clause 49 – Accumulated nominal earnings

Clause 49 provides that for the purposes of this Act, the accumulated nominal earnings of the HEEF as at the start of the financial year is either:

- the amount of the excess if the balance of the HEEF as at the start of the financial year exceeds the total of the Government contributions to the HEEF Account that were made before the start of the financial year; or
- otherwise nil.
Division 4—Terms and conditions of grants

Clause 50 – Terms and conditions of grants of financial assistance to eligible higher education institutions

If the Education Minister authorises a grant of financial assistance under section 45 and that authorisation is for a purpose set out in paragraph 16(1)(a) or 16(1)(b) then subclause 50(1) provides that an amount can be debited from the HEEF Account for the purpose of making a grant of financial assistance to an eligible higher education institution.

Subclause 50(2) provides that the terms and conditions on which that financial assistance is granted are to be set out in a written agreement between the Commonwealth and the eligible higher education institution. Subclause 50(3) provides that agreement may be entered into by the Education Minister on behalf of the Commonwealth.
Part 5—Reporting obligations

Clause 51 – Nominated Minister may require Future Fund Board to prepare reports or give information

Clause 51 provides that the nominated Minister (as defined by section 54) may write to the Board requiring the Board to prepare a report or specified information on certain matters relating to the performance of the Board. This report or information must be provided within the timeframe outlined in the nominated Minister’s request.

Subclause 51(4) provides that the nominated Minister may choose to publish this report or information.

Subclauses 51(5) and 51(6) provide that such reports and documents are of an administrative nature and the ability to request reports or information by written notice is therefore not a legislative instrument for the purposes of section 5 of the Legislative Instruments Act 2003.

Clause 52 – Keeping the responsible Ministers informed etc

Clause 52 requires the Board to notify the responsible Ministers of any information the responsible Ministers should know, including by providing any written information to the nominated Minister. This could include significant investment results, concerns regarding fraud and any non compliance with the Board’s policy on conflicts of interest.
Part 6—Miscellaneous

Clause 53 – Higher Education Endowment Fund Investment Mandate and Maximum Grants Rules – additional obligations of responsible Ministers

Clause 53 sets out additional obligations of the responsible Ministers in relation to the HEEF Investment Mandate (see section 24) and the Maximum Grants Rules (see section 47). The purpose of section 53 is to impose a duty on the responsible Ministers to consider the effect of making, amending or revoking one instrument on the operation of the other instrument and vice versa.

Subclause 53(1) provides that if the responsible Ministers propose to give, vary or revoke an Investment Mandate direction under subsection 24(1), the responsible Ministers must consider whether they should make, vary or revoke Maximum Grants Rules under subsection 47(1) and consult the Board about whether to make, vary or revoke those rules.

Subclause 53(2) provides that if the responsible Ministers propose to give, vary or revoke Maximum Grants Rules under subsection 47(1), the responsible Ministers must consider whether they should give, vary or revoke an Investment Mandate direction under subsection 24(1) and consult the Board about whether to give, vary or revoke a direction.

Clause 54 – Nominated Minister

Subclause 54(1) provides that the responsible Ministers must determine in writing that one of them (that is, either the Treasurer or the Finance Minister) is the ‘nominated Minister’. This decision affects the operation of:

- section 51 — Nominated Minister may require Board to prepare reports or give information;
- section 52 — Keeping the responsible Ministers informed etc.

The effect of this is that only the nominated Minister (rather than both Ministers) is required to cause relevant information to be published or seek additional information or reports from the Board. In addition, the Board only needs to provide information to the nominated Minister, rather than both Ministers. This is intended to streamline and simplify these processes. Other sections of the Act require decisions from both Ministers and reports to be provided to both Ministers.

Subclause 54(2) provides that the determination may be varied but not revoked in accordance with subsection 33(3) of the Acts Interpretation Act 1901.

Subclause 54(3) provides that the determination is of an administrative nature and therefore not a legislative instrument for the purposes of section 5 of the Legislative Instruments Act 2003.
Subclause 54(4) provides that the nominated Minister may provide the other responsible Minister with information he or she has received in his or her capacity as nominated Minister.

Subclause 54(5) provides that the nominated Minister must as soon as practicable after receiving a report, information or document under sections 51 or 52 give a copy of the report, document or information to the Education Minister. As the Education Minister is not a ‘responsible Minister’ for the purposes of this Act, the subsection ensures that the Education Minister will be kept informed of matters that relate to the HEEF by the nominated Minister.

Clauses 55 and 56 – Delegation by the Education Minister and delegation by the Finance Minister

Clause 55 provides that the Education Minister may by writing, delegate any or all of his or her powers under section 15, 19, 45 or 50 to the Secretary of the Department or an SES employee, or acting SES employee, in the Department.

Clause 56 provides that the Finance Minister may by writing delegate any or all of his or her powers under section 18 to the Chair of the Agency or an SES employee, or acting SES employee, of the Agency.

Subclauses 55(2) and 56(2) clarify that a delegate must comply with any directions of the Education Minister or the Finance Minister (as applicable) in exercising any delegated powers.

Clause 57 – Regulations

Provides that the Governor-General may make regulations under clause 57 covering matters required to be prescribed in this Act, or matters that it would be convenient to prescribe for the purposes of this Act. It is the intention that the relevant Minister would be responsible for recommending regulations be made by the Governor-General that relate to the aspects of the Act that fall within that Minister’s responsibility.