



Higher Education Endowment Fund Bill 2007

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Higher Education Endowment Fund Bill 2007

Date introduced: 16 August 2007

House: House of Representatives

Portfolio: Education, Science and Training

Commencement: The Act commences on the day after it receives Royal Assent.

Links: The [relevant links](#) to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at <http://www.aph.gov.au/bills/>. When Bills have been passed they can be found at ComLaw, which is at <http://www.comlaw.gov.au/>.

Purpose

The Bill proposes to establish the Higher Education Endowment Fund (HEEF), from which earnings from investments will be used to make grants of financial assistance to eligible higher education institutions in relation to capital expenditure and/or research facilities.

Background

Basis of policy commitment

The Treasurer opened his 2007-2008 Budget speech with the announcement that \$5 billion of the budget surplus would be invested in an endowment fund, the Higher Education Endowment Fund (HEEF), the earnings of which will fund university capital works and research facilities.¹

The Government announced that the HEEF may also receive additional capital from future budget surpluses, from philanthropic investment which will be tax deductible and, if asked, manage individual institutions' endowments.² Budget estimates of the annual

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1. The Hon. Peter Costello, Budget Speech 2007-2008, transcript, <http://www.aph.gov.au/budget/2007-08/speech/html/Speech.htm> Since introducing the Bill, the Government has announced an extra \$1 billion from the budget surplus will be added to the HEEF.
 2. The Hon Julie Bishop, [Higher Education Endowment Fund](#), Media Release BUDB 03/07, 8 May 2007. Although the Minister's second reading speech has foreshadowed possible future amendments that would allow universities to ask the HEEF to manage their endowment funds, there are no such provisions in the Bill.

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earnings of the HEEF were \$304 million.³ The earnings would be distributed to eligible higher education providers in a competitive tender process by the Minister for Education, Science and Training after advice from the HEEF Advisory Board.

At present, capital works and research facilities are funded under the *Higher Education Support Act 2003* (the HESA) from the Capital Development Pool (CDP), the Research Infrastructure Block Grants (RIBG) programme, the Institutional Grants Scheme (ISG), the National Collaborative Research Infrastructure Scheme (NCRIS), and discretionary funding. Capital works may also be funded under the annual Appropriations Act — \$186 million has been approved for special infrastructure projects between 2005 and 2008 from the appropriations.⁴

Although the Treasurer in a post budget interview guaranteed that the fund would not ‘take over existing education funding’⁵ and the HEEF measure media release described it as ‘additional and ongoing funding’, post budget discussion speculated that dividends from the HEEF might replace existing sources of capital works funding.⁶ Such speculation was reinforced when the Minister for Education, Science and Training was reported as stating that HEEF funds would ‘eventually supersede other capital funding sources such as the Capital Development Pool’.⁷ However such fears might be allayed by the Minister’s second reading speech which states that ‘the Endowment Fund investment is in addition to

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3. Opinion suggested that such estimates were conservative, for example the Australian Vice-Chancellors’ Committee (AVCC) suggested the HEEF could secure earnings of \$500 million or more a year. R. Lebihan and S. Morris, ‘Unis optimistic about higher returns’, *Australian Financial Review*, 10 May 2007, http://parlinfoweb.aph.gov.au/piweb/TranslateWIPILink.aspx?Folder=pressclp&Criteria=CITATION_ID:UR0N6%3B. With the additional \$1 billion capital, estimates of earnings will presumably be revised.
 4. *Higher Education Report 2005*, p. 47: <http://www.dest.gov.au/NR/rdonlyres/5213D64C-C3BA-4D8A-B139-7906281D27AD/15276/HigherEd2005Full.pdf>
 5. ‘Budget 2007: Treasurer discusses budget’, ABC, *7.30 Report (Budget Special)*, 8 May 2007, http://parlinfoweb.aph.gov.au/piweb/TranslateWIPILink.aspx?Folder=tvprog&Criteria=CITATION_ID:WD1N6%3B.
 6. See for example: Professor Ian Chubb, ‘Putting research on the policy agenda’. Paper presented at the Education, Science and Innovation in Australia, national public seminar series on policies and partnerships, Centre for the Study of Higher Education, The University of Melbourne 6 August 2007. http://www.cshe.unimelb.edu.au/publicpolicyseminars/downloads/Chubb_6Aug07_speech.pdf
 7. C. Armitage, ‘Fund will steer clear of politics’, *The Australian*, 16 May 2007, http://parlinfoweb.aph.gov.au/piweb/TranslateWIPILink.aspx?Folder=pressclp&Criteria=CITATION_ID:HX2N6%3B.

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existing programmes and serves a very different purpose ... It will not be a source of recurrent funding as some have suggested'.⁸

Details of how disbursements from the fund will be assessed will be provided in the administrative guidelines still to be designed. The Minister's budget media release stated the best proposals will 'support Australian Government policy with respect to diversity, specialisation and responsiveness to labour market needs' and that 'the [HEEF] Board would take into consideration whether universities had been able to raise matching funds, for example from state or territory governments, industry, alumni or members of the public.'⁹ This had been interpreted as a mandatory requirement, but the President of the Australian Vice Chancellors Committee (now Universities Australia), Professor Sutton, is reported as having been assured by 'Department of Education, Science and Training officials that it was not a requirement that universities must raise matching funds to get earnings from the endowment'.¹⁰ Although the administrative guidelines may not make matching funds a mandatory requirement, it seems likely that matching funds will be considered in the assessment process and could benefit those universities, such as the Group of Eight, that already win 70 per cent of national competitive research grants and in 2004 received \$98 million in donations and bequests.¹¹

An objective of the HEEF is to encourage greater philanthropic support to universities. Although philanthropic donations to the HEEF from business and individuals will be tax deductible they cannot be directed to nominated universities and will only be accepted on

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8. The Hon. Julie Bishop, 'Higher Education Endowment Fund Bill 2007, Second Reading Speech', House of Representatives *Debates*, 16 August 2007, p. 3.
 9. The Hon Julie Bishop, *Higher Education Endowment Fund*, op. cit. See also, 'Campuses that get donors favoured', *The Australian*, 11 May 2007, http://parlinfoweb.aph.gov.au/piweb/TranslateWIPILink.aspx?Folder=pressclp&Criteria=CITATION_ID:W71N6%3B
 10. R. Lebihan and S. Morris 'Unis optimistic about higher returns', *Australian Financial Review*, 10 May 2007, http://parlinfoweb.aph.gov.au/piweb/TranslateWIPILink.aspx?Folder=pressclp&Criteria=CITATION_ID:UR0N6%3B
 11. In 2004 a total of \$171 million in donations and bequests was received by all universities, of which the Group of Eight raised \$98 million. Department of Education, Science and Training, *Finance 2004*, (published December 2005) http://www.dest.gov.au/NR/rdonlyres/FC5576B6-C249-4C16-BE17-91199CF47845/9697/finance_2004.pdf. The Group of Eight consists of: The Australian National University, Monash University, The University of Adelaide, The University of Melbourne, The University of New South Wales, The University of Queensland, The University of Sydney and The University of Western Australia. See: The Group of Eight website <http://www.go8.edu.au/>.

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an unconditional basis.¹² This provision differs from the budget announcement which envisaged that particular universities could be nominated as recipients by philanthropic donors and that universities could request that the HEEF manage their endowment funds. The Minister's second reading speech has foreshadowed possible future amendments to allow donations to universities. Without such amendments it may be difficult to persuade donors to move from donating to their nominated university with existing tax deductibility to instead donating to the HEEF.¹³ The objective of encouraging philanthropic support might instead be achieved through the Government looking favourably at university grant applications that can show matching funds. Such a requirement would encourage universities to seek greater support from state governments, commercial bodies and philanthropic donors.

Overseas comparisons

Unlike the United States and to a lesser extent the United Kingdom, Australia does not have a strong tradition of philanthropic support of universities. In 2005 only 1.1 per cent of Australian university revenue came from donations and bequests.¹⁴

Private funding for higher education in the USA is substantially higher than it is anywhere else in the world, with many American universities having established considerable endowment funds over the last twenty years. Harvard University, for example, has developed an endowment fund that was valued at \$US 25.9 billion in 2005.¹⁵ Yale University, its closest competitor, has an endowment fund that was valued at \$US 15.2 billion whilst Stanford, Texas and Princeton Universities each have endowment funds that were valued at more than \$US 10 billion in 2005.¹⁶ The USA does not have a centralised, Federal-Government-run higher education endowment fund. However twenty-four US states have created government matching fund programmes.¹⁷ Although there is a great

12. Clause 15.

13. See: J. Mather, 'Unis vie for slice of \$5 billion endowment fund', *Campus Review*, 15 May 2007.

14. \$161.23 million out of a total of \$14.32 billion in university revenue. *Finance 2005: Financial reports of Higher Education Providers* (DEST, October 2006).

15. 'Harvard endowment posts solid positive return', *Harvard University Gazette*, 19 September 2006. <http://www.news.harvard.edu/gazette/2006/09.21/99-endowment.html>. In 2006, the overall value of Harvard's endowment increased to \$29.2 billion US. This amounted to almost a third of Harvard's operating budget (or, \$930 million US); see also S. Schwartz, 'HEEF must heed lesson of Harvard', *Australian Financial Review*, 2 July 2007.

16. 'Financing Universities: Mendicant Scholars', *Economist.Com*, 9 November 2006, http://www.economist.com/world/britain/displaystory.cfm?story_id=8143037.

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deal of variability in American matching fund programmes, due to their being designed, implemented and overseen at a state level, these programmes' purpose is typically to leverage private funds, enhance the quality of teaching and learning and increase access to higher education.¹⁸

The average American university in 2003 had an endowment fourteen times that of a comparable British university. The only British universities that compare with the best endowed American universities are Oxford and Cambridge. These universities would rank around 15th in the US list, with no other UK university figuring in the top 150.¹⁹

The UK Government is implementing policy to increase philanthropic support to English universities. In 2007 the UK Prime Minister and the UK Minister for Higher Education announced funding of £200 million over three years for a matched-funding scheme to support universities in their fundraising efforts. The scheme, to start in 2008, is based on recommendations in the *Increasing voluntary giving to higher education* report.²⁰ The scheme will contribute matching public funds to private donations on a 2:1 private to public basis up to a maximum of £2m. (The cap of £2m is to ensure that the funding will not be concentrated in just a few institutions.) Under the scheme institutions will be generally free to decide how to spend the funding but will be expected to strike a reasonable balance between infrastructure development and bursaries and scholarships.²¹

The UK Government's matched-funding scheme differs from the HEEF in that its' primary objective is to promote increased private funding through endowments for higher education, and thereby increase the funding independence of universities. Although the HEEF does seek to encourage increased philanthropic support for Australian universities, the main aim of the HEEF is to provide support for necessary capital works and research facilities in Australian universities.

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17. Council for Advancement and Support of Education, *Select Government Matching Fund Programmes: an Examination of Characteristics and Effectiveness*, December 2004, p.1. <http://192.203.212.22/files/Europe/pdfs/Sutton2.pdf> Similar government matching fund programmes have been implemented in provinces in Canada, other countries and Hong Kong and Singapore.
 18. Council for Advancement and Support of Education, *Select Government Matching Fund Programmes: an Examination of Characteristics and Effectiveness*, December 2004, p.6. <http://192.203.212.22/files/Europe/pdfs/Sutton2.pdf>.
 19. The Sutton Trust, *University Endowments – a UK/US Comparison. Discussion Paper*, May 2003, http://www.suttontrust.com/reports/endowments_report.pdf.
 20. Department for Education and Skills, *Increasing voluntary giving to higher education: Task Force report to Government*, May 2004.
 21. Department for Education and Skills, News Centre, '£600 million boost to be generated for higher education fundraising', 15 February 2007, http://www.dfes.gov.uk/pns/DisplayPN.cgi?pn_id=2007_0026.

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Position of significant interest groups/press commentary

Stakeholders have welcomed the HEEF measure provided it is not established at the expense of existing funding schemes, including those related to capital expenditure and research facilities of higher education institutions.²² Some reservation has been expressed on the ability of the HEEF earnings to meet the existing shortfall in infrastructure funding, such as the estimated deferred maintenance of \$1.5 billion in 2005.²³

Since the Bill was introduced stakeholders have expressed concerns on a number of issues discussed in the following key issues section.

Financial implications

The Minister claimed the HEEF as an ‘unprecedented investment for the future of universities.’²⁴ The measure has been interpreted as doubling the existing annual \$5.8 billion funding to higher education. However it should be recognised that it is the \$304 million annual dividend from HEEF, not the \$6 billion capital investment, which provides the additional higher education funding in the 2007-2008 budget.

Key issues

Ministerial discretion

Provisions in **clause 40** of the Bill give the Minister control of the Advisory Board including selecting members (**40(2)**), terminating members of the Board (**40(3)**) and giving directions in relation to the way they carry out their function (**40(4)**). **Proposed clause 45** allows the Minister to authorise grants to eligible higher education institutions.

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22. Universities Australia [‘Additional \\$1 billion will boost benefits from HEEF’ Media Release](#), 21 August 2007; See also submissions to the Senate Standing Committee on Employment, Workplace Relations and Education, Inquiry into the Higher Education Endowment Fund Bill 2007 and the Higher Education Endowment Fund (Consequential Amendments) Bill 2007, in particular submissions from Australian Academy of Science, Federation of Australian Scientific and Technological Societies (FASTS) and The Group of Eight: http://www.aph.gov.au/Senate/committee/eet_ctte/highered_endowment07/submissions/sublist.htm
 23. Group of Eight, ‘Historic Day for Australia’s Higher Education sector’ *Media release*, 16 August 2007; [Federation of Australian Scientific and Technological Societies \(FASTS\) submission](#) to the Senate Standing Committee on Employment, Workplace Relations and Education, Inquiry into the Higher Education Endowment Fund Bill 2007.
 24. The Hon Julie Bishop, [Higher Education Endowment Fund](#), op. cit.

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Unlike section 238-10 of the *Higher Education Support Act 2003* (the HESA), which allows the Minister to make guidelines and for the guidelines to be disallowable legislative instruments, parliamentary scrutiny of the disbursements from the HEEF is minimal. The Minister's decisions are to be tabled but are non-disallowable legislative instruments. In making such decisions there is no requirement that the Minister follows the Advisory Board's recommendations or makes public any changes from the recommendations. Although stakeholders have expressed concern at these powers and the lack of transparency, they are not asking that the minister's decisions should be disallowable but rather that the program guidelines set out clear criteria and processes and that the guidelines, like those under the HESA, should be disallowable.²⁵ Professor Larkins, representing Universities Australia and the Group of Eight told the Senate Committee inquiring into the Bill that

Where final decisions by the minister differ from those of the advisory board, the reasons for that difference should be absolutely explicit. ... We have had recent experience of advice from the peer review system and the Australian Research Council being overturned by the minister — not the current minister. That creates a lot of mistrust in the system. For the confidence of the sector it is important that we have open and transparent mechanisms.²⁶

Similarly Mr Bradley Smith, representing the Federation of Australian Scientific and Technological Societies (FASTS) stated 'we have no problem with the minister having the final decision, as is the case with the ARC, but we want very clear criteria under which those decisions are made and then it is known when those variances occur and why'.²⁷ Without such criteria stakeholders fear that the grants process is open to political influence. FASTS submitted 'that in its current form, the Fund runs a risk of lacking credibility and accountability in the sector and wider community by becoming, in effect, a significant slush fund for Ministerial pork-barrelling'.²⁸

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25. See Mr Bradley Smith, Evidence to Senate Standing Committee on Employment, Workplace Relations and Education, Inquiry into the Higher Education Endowment Fund Bill 2007, August 31 2007.
 26. Professor Larkins, Evidence to Senate Standing Committee on Employment, Workplace Relations and Education, Inquiry into the Higher Education Endowment Fund Bill 2007, August 31 2007. see also [Group of Eight submission](#) to the Senate Standing Committee on Employment, Workplace Relations and Education, Inquiry into the Higher Education Endowment Fund Bill 2007, p. 3
 27. Mr Bradley Smith, Evidence to Senate Standing Committee on Employment, Workplace Relations and Education, Inquiry into the Higher Education Endowment Fund Bill 2007, August 31 2007.
 28. [Federation of Australian Scientific and Technological Societies \(FASTS\) submission](#) to the Senate Standing Committee on Employment, Workplace Relations and Education, Inquiry into the Higher Education Endowment Fund Bill 2007, p. 2

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Relationship of HEEF to other programmes

There is lack of clarity as to the relationship between grants from HEEF and existing capital and research infrastructure programmes, including other periodic submission-based programmes and those programmes that provide ongoing block funding. FASTS submits that there is a risk that ‘a series of annual, competitive project grants will lead to opportunistic planning and short horizons in universities rather than strategic investments’.²⁹ Stakeholders have suggested overcoming uncertainty by the allocation of two streams of grants from the HEEF: an annual block grant determined by an agreed formula (such as the existing Research Infrastructure Block Grants) and a submission based competitive application and allocation with priority given to projects of national significance.

Lack of detail on disbursements

Grant details such as matching fund requirements, priorities, types of projects, maximum limits and compliance requirements are unknown.

Main provisions

The Bill provides for:

- the establishment of the Higher Education Endowment Fund (**Part 2**)
- how the Fund is to be invested (**Part 3**)
- how grants from the Fund are to be allocated to higher education institutions (**Part 4**)
- reporting obligations (**Part 5**), and
- other implementation issues (**Part 6**).

Part 1 of the Bill provides a simplified outline and definitions for key terms.

Part 2 – The Higher Education Endowment fund

Part 2, Division 2 (proposed clauses 11 and 12) establishes the Higher Education Endowment Fund (HEEF). The Fund consists of the Higher Education Endowment Fund Special Account and the investments of the Fund (**11(2)**).

29. [Federation of Australian Scientific and Technological Societies \(FASTS\) submission](#) to the Senate Standing Committee on Employment, Workplace Relations and Education, Inquiry into the Higher Education Endowment Fund Bill 2007, p. 3

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A Special Account is a ledger account recording a right to draw money from the Consolidated Revenue Fund (CRF). The HEEF Special Account is established for the purposes of section 21 of the *Financial Management and Accountability Act 1997* (FMA Act 1997). Special Accounts may record amounts credited to them by the Commonwealth, and also other sources as allowed by their establishing legislation, such as State and Territory governments or community members.³⁰

Part 2, Division 3 sets out how money can be credited to the HEEF.

Proposed clause 13 states that as soon as practicable after the commencement of the Act, the Treasurer and the Finance Minister (referred to as the 'relevant Ministers') must make a written determination to credit \$5 billion to the HEEF, either as a lump sum or in instalments. The written determination will be a legislative instrument but not disallowable by Parliament under section 42 of the *Legislative Instruments Act 2003*. **(13(3))**.

The relevant Ministers may then make subsequent credits to the HEEF Special Account via written determination (**clause 14**).

On 21 August 2007 the Treasurer announced that an extra \$1 billion budget surplus would be deposited to the HEEF. The Treasurer's press statement said that for cash management reasons, HEEF will be established with \$3 billion at the end of October 2007 and a further \$3 billion will be added to the Fund at the end of January 2008.³¹

Proposed clause 15 allows for gifts to the HEEF. The Education Minister must authorise the acceptance of a specified gift, or a specified class of gifts, to the HEEF. The Minister's authorisation is a legislative instrument but not disallowable by Parliament under section 42 under the *Legislative Instruments Act 2003* **(15(4))**. The Minister may delegate this power to the Secretary or an SES Officer of the Education Department (**clause 55**).

Part 2, Division 4 sets out how money will be debited from the HEEF.

Proposed clause 16 sets out the purposes of the Fund Account. Debits to the Fund Account are allowed if they meet the criteria for either:

- a grant purpose related exclusively to the Fund, for example the payment of a grant to a higher education institution for capital expenditure or research facilities, or payment of costs related to investments of the Fund, or

30. Department of Finance and Administration, *Special Accounts* at: http://www.finance.gov.au/finframework/special_accounts.html, accessed 27 August 2007.

31. Hon. Peter Costello MP, Treasurer, *Investment of 2006-07 Budget Outcome*, Media Release, 21 August 2007.

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- a grant purpose not related exclusively to the Fund, for example, costs associated with establishing a bank account for the Future Fund Board, or costs and expenses of the Future Fund Board including remuneration and allowances.

Under **proposed clause 17**, the Future Fund Board must ensure that there is sufficient money in the Fund Account to cover authorised grants.

Part 2, Division 5 facilitates transfers between the HEEF and the Future Fund to ensure equal apportionment of management expenses, such as remuneration and allowances as mentioned above.

Part 3 – Investment of the Higher Education Endowment Fund

This Part of the Bill grants to the [Future Fund Board of Guardians](#) the responsibility for managing the investments of the HEEF. The Future Fund Board currently consists of Chair Mr David Murray and six members: Mr Jeffrey Browne, Ms Susan Doyle, Dr John Mulcahy, Mr Trevor Rowe AM, Mr Brian Watson and Mr John Paterson. The powers provided in this Bill to the Future Fund Board of Guardians mirror those provided for in the [Future Fund Act 2006](#). For comment on the investment powers of the Future Fund Board readers are referred to the Parliamentary Library’s [Bills Digest](#) for the Future Fund Bill 2006.³²

Investments

Proposed clause 22 states that the Future Fund Board may invest in any financial assets, except for derivatives, which are covered separately in proposed clause 31. **Proposed clause 23** sets out the general rules for management of Fund investments:

- income derived from Fund investments is to be credited to the HEEF Special Account (referred to as the Fund account), rather than the CRF
- a return of capital, or any other financial distribution, relating to Fund investments is to be credited to the Fund account
- the Future Fund Board may realise an investment of the Fund (ie sell its investments), with proceeds to be credited to the Fund account
- investments nearing maturity may be re-invested, and

32. Leslie Nielsen and Jonathan Chowns, ‘Future Fund Bill 2005’, [Bills Digest](#) no. 93, 2005-06, Parliamentary Library, Canberra, 7 February 2006.

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- Section 39 of the FMA does not apply to Fund investments.³³

The HEEF Investment Mandate

Proposed clause 24 requires the Treasurer and Finance Minister to give the Future Fund Board at least one written direction about the performance of the HEEF investment functions, to be known as the **Higher Education Endowment Fund Investment Mandate**.

In giving the Mandate, the Ministers must have regard to:

- maximising the return earned on the Fund over the long term
- enhancing the Commonwealth's ability to make grants to higher education institutions for capital expenditure and research facilities,
- any Maximum Grants Rules in force – see **proposed clause 47**, and
- 'any other matters that the Ministers consider relevant'.

The Investment Mandate may include policies on risk and return and the allocation of financial assets. However, the Ministers must not give a direction to invest in a particular asset, to acquire a particular financial derivative, or allocate financial assets to any particular business entity, activity or business (**proposed clause 25**).

Investment Mandate directions will be legislative instruments, however will not be disallowable under section 42 of the Legislative Instruments Act because of the exclusion provisions of section 44 of that Act. Mandate directions must not take effect until 15 days after they are given (**proposed 24(10)**).

Under **proposed clause 26**, the Ministers must consult with the Future Fund Board before giving them an Investment Mandate direction. This must include sending the Board a draft direction, inviting the Board to make a submission (within a set time period – not specified

33. Section 39 of the FMA deals with the investment of 'public money'. All public money must be credited to the CRF. By providing that section 39 FMA does not apply the Fund's investments, they are removed from the definition of 'public money'. This allows the investments of the Fund to be reinvested and the income of these investments received into the Fund Account without having to first be re-credited to, and then paid out from, the CRF. Further, if section 39 of the FMA did apply, the investments would have to be made in the name of either of the responsible Ministers. However, removal of the Fund's assets from the definition of public monies allows these investments to be made in the name of the Board. This is an additional device to ensure that investments are made at arms-length from the responsible ministers in particular and the Government in general (reproduced from *Bills Digest* no. 93, 2005-06, op. cit).

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in the legislation however it must be ‘reasonable’), and considering any submission from the Board. Any submissions from the Board regarding proposed directions must be tabled in each House of Parliament at the same time as the clause 24 directions.

For its part, the Future Fund Board must take all reasonable steps to comply with the HEEF Investment Mandate (**proposed clause 27**). If the Board becomes aware that it has failed to comply with the Investment Mandate, it must write to the Ministers and set out any proposed action (**proposed 27(2)**). If the Ministers are satisfied that the Board has failed to follow the Mandate, they may require a written explanation for the failure, and direct the Board to take action in order to comply with the Mandate (**proposed 27(3)**). These directions are not legislative instruments. The Future Fund Board must then comply with the Ministers’ direction (**proposed 27(4)**).

Limitations on investment

Proposed clause 28 states that the Future Fund Board must not trigger the takeover provisions of the *Corporations Act 2001*. These provisions are detailed in the [Bills Digest](#) for the Future Fund Bill 2006. In short, the Future Fund Board is prevented from acquiring an interest in the voting capital of either a listed or unlisted company with more than 50 members, where such an acquisition would result in the Board:

- increasing their share of the voting capital to more than 20 per cent of the total issued voting capital, or
- increasing their share of the voting capital if they already have between 20 and 90 per cent of the total voting capital on issue.

The Explanatory Memorandum states that this provision is included to minimise market distortion and eliminate the potential for conflicts of interest for the Government as a market regulator, and that the restrictions are not expected to have a material impact on the investment efficiency of the HEEF as they are similar to the limits that other fund managers often use.³⁴

If, for some reason, the Board has not complied with section 606 of the *Corporations Act 2001*, the validity of the transaction is not affected (**proposed subclause 28(2)**).

The HEEF (Consequential Amendments) Bill 2007 contains a provision which would also limit the Future Fund Board from acquiring more than a 20 per cent stake in a foreign publicly listed company.

Proposed clause 29 prohibits the Future Fund Board from borrowing for the Fund, except in limited circumstances set out in **sub-clause 2**, regarding the need for short-term (7 day)

34. *Explanatory Memorandum*, p. 19.

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borrowing for transaction settlement. However, **proposed subclause 29(3)** does allow for borrowing to be authorised for a purpose as specified in the regulations. The Explanatory Memorandum states that this is to provide flexibility for ‘unforeseen events or changes in the investment environment’, to be met without the need for amending legislation. These Regulations would be disallowable by Parliament (unlike many other instruments as provided for in this Bill).

The Future Fund Board is required to formulate policies with regard to the investment strategy of the Fund, benchmarks for assessing the Fund’s performance, risk management, meeting international best practice for institutional investment, and any other matter specified in the regulations. These policies must be consistent with the HEEF Investment Mandate. The Board’s policies must be published on the internet and regularly reviewed (**proposed clause 30**).

Proposed clause 31 sets out the circumstances in which the Future Fund Board may acquire derivatives. The Explanatory Memorandum outlines the use of 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.³⁵

Under proposed clause 31, the Future Fund Board may acquire derivatives for the purpose of:

- protecting the value of an investment of the Fund (other than a derivative)
- protecting the return on an investment (other than a derivative)
- achieving indirect exposure to financial assets for a purpose in connection with the Fund, or
- achieving transactional efficiency for a purpose in connection with the Fund.

However derivatives must not be acquired for the purposes of speculation or leverage (**31(1)(e-f)**). Any acquisition of a derivative must be consistent with the Future Fund Board’s investment policies (**31(2)**).

Proposed clause 33 allows the Future Fund Board to enter into securities lending arrangements.

Proposed clause 34 allows the Future Fund Board to engage investment managers. The clause also states that the Board *must* use an investment manager to make investments, acquire derivatives, enter a securities lending arrangement or realise the Fund’s financial

35. *Explanatory Memorandum*, p. 20.

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assets, unless the responsible Ministers approve another manner of investment (**34(2)(f)**). The [Future Fund Management Agency](#)³⁶ is specifically excluded from the definition of an ‘investment manager’, because, as the Explanatory Memorandum explains, it is intended that the investment activities mentioned above will be outsourced.³⁷

Investment managers are required to report to the Future Fund Board and the Future Fund Management Agency on the state of the Fund’s investments, when and how the Future Fund Board determines (**proposed 34(4)**).

Part 4 – Grants to higher education institutions

Proposed Part 4 of the Bill establishes the HEEF Advisory Board, sets out its functions, and enables the Education Minister to authorise grants to eligible higher education institutions in relation to capital expenditure and research facilities. This part of the Bill has attracted significant public comment regarding the Minister’s role in determining the make-up and actions of the Advisory Board, and the fact that the role of the Board in helping to determine grant guidelines, as set out in the Bill, is vague (see key issues).

The HEEF Advisory Board

Proposed clause 40 establishes the HEEF Advisory Board, to be appointed by the Education Minister. The Education Minister may direct the Board as to how it is to carry out its functions, and procedures for meetings. These directions are non-disallowable legislative instruments.

Proposed clause 41 states that the function of the Advisory Board is to advise the Education Minister about matters referred to it by the Education Minister. The matters must relate to the making of grants of financial assistances to eligible higher education institutions in relation to capital expenditure or research facilities. **Proposed clauses 42 to 44** outline remuneration, disclosure and resignation arrangements.

Authorisation of Grants

Proposed clause 45 gives the Education Minister the power to authorise grants to eligible higher education institutions in relation to capital expenditure and research facilities. The Minister may delegate this power to the Secretary or an SES Officer of the Education

36. The Future Fund Management Agency was established in the *Future Fund Act 2006* to give effect to the investment strategies and decisions of the Future Fund Board of Guardians. The Agency engages the service providers who implement the Board’s investment decisions, and provides secretariat support to the Board.

37. *Explanatory Memorandum*, p. 21.

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Department (**proposed clause 55**). Grants may not be authorised until 1 July 2008 (**proposed clause 46(3)**).

The Education Minister must not make a grant under section 45 unless they have received a statement from the Future Fund Board regarding the Maximum Grant Amount for that financial year (**proposed clause 46**).

If a grant of financial assistance is to be made to an eligible higher education institution, the terms and conditions of the grant are to be set out in a written agreement between the Education Minister (on behalf of the Commonwealth) and the institution (**proposed clause 50**). The Education Minister may delegate this agreement-making function to the Secretary or an SES Officer of the Education Department (**proposed clause 55**).

Maximum Grants Rules

Proposed clause 47 requires the Treasurer and Finance Minister to make rules for ascertaining the maximum amount that can be debited from the HEEF Account during a financial year for grants for capital expenditure and research facilities. These rules are to be referred to as the **Maximum Grants Rules**. In making the rules, the Ministers must **only** have regard to (**proposed 47(3)**):

- the objective that over the medium to long term (defined as five years or longer), the HEEF's balance not fall below the real value of the Government contributions to the HEEF Account (to be initially \$6 billion), and
- the objective of moderating volatility in maximum grants amounts from financial year to financial year (ie avoiding large swings in the grant amounts).

The Ministers must consult with the Education Minister and the Future Fund Board prior to making the Maximum Grants Rules. The Rules are to be non-disallowable legislative instruments (**proposed 47(6)**).

The maximum amount that can be debited from the HEEF Account in each financial year for grants in relation to capital expenditure or research facilities must not exceed the accumulated nominal earnings of the Fund as at the start of the financial year (defined as the difference between the balance of the Fund at 1 July and the total of Government contributions to the Fund at 30 June). If the balance of the Fund does not exceed the total Government contributions, the nominal earnings are taken to be nil (**proposed clause 49**).

Part 5 – Reporting Obligations

Part 5 details reporting obligations for the Future Fund Board regarding the HEEF. Firstly, the Treasurer and Finance Minister are required to agree on which of them is to be the 'nominated Minister' for the purposes of the Act (**proposed clause 54**).

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The nominated Minister may then give the Future Fund Board a written notice requiring a report or information on one or more specified matters relating to the performance of the Board's functions under the Act, within a specified period (**proposed clauses 51(1) and (2)**). The Future Fund Board must comply with such a request, and the Minister **may** decide to publish the Boards' report or information provided. These documents will not be legislative instruments. The 'nominated Minister' **may** provide these documents to their counterpart responsible Minister, and **must** provide such documents to the Education Minister (**clause 54 (4) and (5)**). There is no requirement for the Minister to publish an annual report or similar document on the performance of the HEEF.

In addition, **proposed clause 52** requires the Future Fund Board to keep the Treasurer and the Finance Minister informed of its operations under the Act, in the form of reports, documents and information as appropriate.

Conclusion

The Bill deals broadly with the investment and disbursement aspects of the HEEF, and these largely mirror the provisions set out in the Future Fund Bill of 2006. However, much of the detail of the disbursement to universities will be in the administrative guidelines yet to be released. There is a degree of uncertainty caused by the lack of clarity in how funding applications will be assessed, and the paucity of transparency created by the Minister's powers in relation to the establishment of the Advisory Board and the granting of funds to universities.

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