

2013

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

DISABILITYCARE AUSTRALIA FUND BILL 2013

EXPLANATORY MEMORANDUM

Exposure Draft

(Circulated by authority of the authority of the Deputy Prime
Minister and Treasurer, the Hon Wayne Swan MP)

DISABILITYCARE AUSTRALIA FUND BILL 2013

Table of abbreviations and common terms

| Abbreviation or common term | Full term or description |
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| Agency | Future Fund Management Agency |
| COAG Reform Fund | means the Fund to be established under the <i>COAG Reform Fund Act 2008</i> for the purpose of making grants of financial assistance to the States and Territories |
| DisabilityCare Australia | The National Disability Insurance Scheme Act 2013 established the National Disability Insurance Scheme, known as DisabilityCare Australia |
| FMA Act | Financial Management and Accountability Act 1997 |
| Finance Minister | The Minister who administers the <i>Financial Management and Accountability Act 1997</i> |
| Future Fund Special Account | means the Future Fund Special Account established by section 12 of the <i>Future Fund Act 2006</i> |
| ITAA | <i>Income Tax Assessment Act 1997</i> |
| Legislative Instruments Act | <i>Legislative Instruments Act 2003</i> |
| National Disability Insurance Minister | means the Minister administering the National Disability Insurance Scheme Act 2013 |

1. Outline

Main features of the DisabilityCare Australia Fund Bill 2013

Context of the Bill

The *National Disability Insurance Scheme Act 2013* established the National Disability Insurance Scheme, known as DisabilityCare Australia. The establishment of DisabilityCare Australia is Australia's most fundamental social reform since the Medicare.

DisabilityCare Australia will ensure that Australians with significant and permanent disabilities get the support they need and allow them to live with choice and dignity.

To provide a strong and stable revenue stream for DisabilityCare Australia, and to provide certainty to people with a disability, their families and carers that it will be funded in the long term, the Government is increasing the Medicare levy by half a percentage point.

All revenue raised from increasing the Medicare levy will be placed in a special fund, the DisabilityCare Australia Fund, which is being established by this Bill.

The Medicare levy currently applies at a rate of 1.5 per cent of a person's taxable income. Low income earners receive relief from the Medicare levy through the low income thresholds for singles, families, seniors and pensioners. A number of taxpayers are also exempt from the Medicare levy, including for blind pensioners and sickness allowance recipients.

From 1 July 2014, the Medicare levy will increase by half a percentage point, from 1.5 per cent to 2 per cent of a person's taxable income. Low income earners will continue to receive relief through the low income thresholds and the current exemptions from the Medicare levy will remain in place.

Increasing the Medicare levy also requires a number of consequential amendments to other tax rates that are linked to the top marginal rate and Medicare levy. Consequential amendments include changes to fringe benefits tax, excess contributions tax and the tax withheld on bank accounts when the account holder has not provided their tax file number.

Summary of the Bill

The Bill:

Establishes the DisabilityCare Australia Fund, which consists of:

- the DisabilityCare Australia Fund Special Account, and
- the investments of the DisabilityCare Australia Fund.

Establishes the DisabilityCare Australia Transitional Special Account which will fund the implementation of the *National Disability Insurance Scheme Act 2013* in its initial period of operation.

Credits

Provides for the Treasurer to determine, by a non legislative instrument, that a specified amount be credited into the DisabilityCare Australia Fund Special Account.

The amount to be credited will be based on the advice provided by the Australian Taxation Office on the amount of revenue received from the increase to the Medicare levy.

Debits

Provides that the Finance Minister will, in writing, direct a debit from the DisabilityCare Australia Fund Special Account be made to transfer a specified amount to the COAG Reform Fund for the purpose of reimbursing the States and Territories for their expenditure in relation to DisabilityCare Australia. This direction will only be made on the recommendation of the National Disability Insurance Minister.

Requires that debits for the reimbursement to the States and Territories from the DisabilityCare Australia Fund Special Account will be governed by written agreement between the Commonwealth and each State and Territory.

Requires the Treasurer ensure that, as soon as practical after an amount is credited to the COAG Reform Fund debited for the purposes of making the grant to a State or Territory.

Provides that the Finance Minister will, in writing, direct a debit in relation to a reimbursement to the Commonwealth for expenditure in relation to DisabilityCare Australia from the DisabilityCare Australia Fund Special Account to transfer a specified amount to the general Consolidated Revenue Fund.

Investment of the Fund

The responsible Ministers will issue an Investment Mandate, a collection of Ministerial directions, to the Future Fund Board regarding the investment of the DisabilityCare Australia Fund. The purpose of the Investment Mandate is the same as provided for in the Future Fund Act.

The Future Fund Board is responsible for deciding how to invest the DisabilityCare Australia Fund.

Allows investments to be made from the DisabilityCare Australia Fund to include the acquisition, in the name of the Future Fund Board, of financial assets (such as shares, debentures and trust units). The Future Fund Board is bound by any Investment Mandate issued for the DisabilityCare Australia Fund.

Earnings of the Fund

All earnings of the DisabilityCare Australia Fund will be retained for the benefit of the Commonwealth.

All expenses associated with investment and administration of the DisabilityCare Australia Fund by the Future Fund Board, including funds managers' fees, will be met from the earnings of the Fund, not from the increase to the Medicare levy. The Future Fund will keep the fund management costs as low as possible.

Reporting

Gives responsibility to the Finance Minister to report on the balances of the DisabilityCare Australia Fund Special Account.

Transitional Special Account

Establishes a Transitional Special Account to be administered by the Department of Families, Housing, Community Services and Indigenous Affairs to support the delivery of the National Disability Insurance Scheme as set out in the *National Disability Insurance Scheme Act 2013* in its initial period of operation.

Review

Requires a review of the DisabilityCare Australia Fund arrangements before 30 June 2024, unless the responsible Ministers agree to a later date.

Financial Impact Statement

The Budget impacts arising from the proposed legislation consists of the interest earnings (net of investment management fees) and the payments to reimburse the States. The Medicare levy proceeds credited into the Fund and the reimbursements back to the Commonwealth will not result in any additional budget impacts as these are already part of and remain within the CRF.

The Government committed to providing all revenue raised from increasing the Medicare levy to deliver DisabilityCare Australia.

To deliver this commitment, all expenses associated with investment of the DisabilityCare Australia Fund by the Future Fund Board will be met only from the earnings of the fund, not from the increase to the Medicare levy.

Statement of Compatibility with Human Rights

The proposed amendments do not engage any of the applicable rights or freedoms outlined in the *Human Rights (Parliamentary Scrutiny) Act 2011*, such as encompassed in the International Covenant on Civil and Political Rights.

The proposed amendments do not limit any human rights, nor propose any offences or penalties.

This Bill is therefore compatible with the human rights and freedoms recognised or declared in the international instruments listed in subsection 3(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

DISABILITYCARE AUSTRALIA FUND BILL 2013

NOTES ON CLAUSES

Part 1 Preliminary

Section 1 - Short Title

Section 1 provides for the Act to be cited as the *DisabilityCare Australia Fund Act 2013*.

Note: The sections in the Bill will become sections of the Act on Royal Assent.

Section 2 – Commencement

Section 2 is the commencement provision for the Bill. The commencement dates for the specific provisions are provided in the table in subsection 2(1).

Provision 1 of the table provides that sections 1 and 2 and anything not covered by this table commences on the day the Act receives Royal Assent.

Provision 2 of the table provides that sections 3 to 8 commence on 1 July 2013.

Provision 3 of the table provides that parts 2, 3 and 4 commence on the later of 1 July 2014 or the commencement of Schedule 1 to the *Medicare Levy Amendment (DisabilityCare Australia) Act 2013*. However, the provision(s) does not commence at all if Schedule 1 of that Act does not commence.

Provision 4 provides that Part 5 commences on 1 July 2013.

Provision 5 provides that section 52 commences on the later of 1 July 2014 or the commencement of Schedule 1 to the *Medicare Levy Amendment (DisabilityCare Australia) Act 2013*. However, the provision(s) does not commence at all if Schedule 1 of that Act does not commence.

Provision 6 provides that section 53 commences on 1 July 2013.

Section 3 – Simplified outline

Section 3 is an information provision which is intended to provide a high level introduction to the contents of the Bill, in order to aid readability.

Section 4 – Definitions

Section 4 provides definitions of the terms and expressions used in the Bill.

Section 5 – Crown to be bound

Section 5 provides that the Act binds the Crown in each of its capacities but does not make the Crown liable to be prosecuted for an offence.

Section 6 – Extension to external Territories

Section 6 provides that the Act extends to every external Territory, including Norfolk Island.

Section 7 – Extra-territorial application

Section 7 provides for the geographical reach of this Act to be very wide – applying both within and outside of Australia — due to the possibility that the Disability Care Australia Fund may be invested in overseas markets.

Section 8 – Object

Section 8 sets out the objects of the Bill, namely to enhance the Commonwealth’s ability to:

- reimburse the Commonwealth, States and Territories for expenditure incurred in relation to the *National Disability Insurance Scheme Act 2013*, and
- to fund the implementation of the *National Disability Insurance Scheme Act 2013* in its initial operation.

Part 2 – Disability Care Australia Fund

Division 1 - Introduction

Section 9 – Simplified outline

Section 9 is an overview of Part 2 to assist with readability.

Division 2 – Establishment of the DisabilityCare Australia Fund etc

Section 10 – Establishment of the DisabilityCare Australia Fund

Section 10 establishes a financial asset fund — the DisabilityCare Australia Fund — consisting of amounts credited to a DisabilityCare Australia Fund Special Account and investments of the DisabilityCare Australia Fund.

Section 11 – Establishment of the DisabilityCare Australia Fund Special Account

Section 11 establishes the DisabilityCare Australia Fund Special Account— a Special Account for the purposes of section 21 of the FMA Act.

A Special Account is an appropriation mechanism that sets aside an amount within the Consolidated Revenue Fund to be expended for specific purposes. Any amounts credited to the DisabilityCare Australia Fund Special Account are quarantined from the rest of the Consolidated Revenue Fund and can only be debited from the DisabilityCare Australia Fund for the purposes set out in **sections 14 to 17** and to the COAG Reform Fund, in order to make DisabilityCare Australia Fund related reimbursements.

The note immediately following this section is included to assist the reader by clarifying that, in addition to the processes set out in **section 12** amounts can be

credited to the DisabilityCare Australia Fund Special Account by an Appropriation Act.

Division 3 – Credits of amounts to the DisabilityCare Australia Fund

Section 12 – Credits to Special Account – determinations by the Treasurer

The crediting provisions are for the purpose of providing all revenue from the increase to the Medicare levy to the DisabilityCare Australia Fund Special Account. These credits will only be drawn down to make reimbursements to the Commonwealth and States and Territories for expenditure directly related to DisabilityCare Australia.

Section 12 establishes the mechanism that the Treasurer may, in writing, determine that a specified amount is to be credited to the DisabilityCare Australia Fund Special Account on a specified day or by instalments on specified days.

Subsection 12(3) deems that a determination to credit a specified amount to the DisabilityCare Australia Fund Special Account is not a legislative instrument.

The credits will be made periodically in arrears based on Australian Taxation Office advice of revenue received from the increase to the Medicare Levy.

The making of the determination will be a mechanical process in that the amounts specified in the determination will be based on the advice provided by the Australian Taxation Office, and will not involve the exercise of a discretion by the Treasurer.

Section 13 – Maximum amount of credits for States and Territories for a financial year

Section 13 sets out the maximum amount of credits available to States and Territories for each financial year, until 2024. This amount is \$825 million in 2014-2015 and will increase by 3.5% annually until 2023-24. States and Territories will be reimbursed for expenditure on the scheme once key conditions are met. The conditions will be formalised in agreements between Governments.

Division 4 – Debits of amounts from the DisabilityCare Australia Fund etc.

Section 14 – Purposes of the DisabilityCare Australia Fund Special Account – main purposes

Section 14 sets out the main purposes of the DisabilityCare Australia Fund Special Account. These purposes are to reimburse the States, Territories and the Commonwealth for expenditure incurred in relation to the DisabilityCare Australia.

Section 15 – Purposes of the DisabilityCare Australia Fund Special Account – purposes related exclusively to the investments etc. of DisabilityCare Australia Fund.

Sections 15 relates to the cost that may be faced when investing the DisabilityCare Australia Fund. The Future Fund will keep the fund management costs as low as possible and any costs will be met from investment earnings, not from the levy. This delivers on the Government's commitment to provide all revenue raised from increasing the Medicare levy to deliver DisabilityCare Australia.

Section 15 sets out the purposes for which the DisabilityCare Australia Fund Special Account may be debited that relate exclusively to the DisabilityCare Fund.

Section 16 – Purposes of the DisabilityCare Australia Fund Special Account— purposes not related exclusively to the DisabilityCare Australia Fund

Section 16 relates to the cost that may be faced when investing the DisabilityCare Australia Fund. The Future Fund will keep the fund management costs as low as possible and any costs will be met from investment earnings, not from the levy.

Section 16 sets out the purposes for which the DisabilityCare Australia Fund Special Account may be debited that do not relate exclusively to the DisabilityCare Fund.

This ensures that the DisabilityCare Australia Fund Special Account can only be debited for Future Fund costs that are limited to those in relation to the DisabilityCare Australia Fund.

Section 17– Reimbursing the Commonwealth - transfer to general CRF

Section 17 provides that the Finance Minister may, in writing, direct that a specified amount may be debited to reimburse the Commonwealth for expenditure incurred in relation to DisabilityCare Australia from the DisabilityCare Australia Fund Special Account.

Section 18 – Reimbursing the States and Territories – channelling of State/Territory grants payments through the COAG Reform Fund

Section 18 provides that the Finance Minister may direct that a specified amount will be debited from the DisabilityCare Australia Fund Special Account and credited to the COAG Reform Fund for the purposes of making a grant of financial assistance to a State or Territory to reimburse them for expenditure incurred in relation to DisabilityCare Australia.

The terms and conditions upon which the financial assistance is granted to the State or Territory are to be set out in a written agreement between the Commonwealth and the State or Territory.

Section 19 – Reimbursing the States and Territories - limit on annual debits from based on Maximum amount of credits for States and Territories

Section 19 relates to **Section 18** and the table provided at **Section 13** regarding the maximum amount of credits available to States and Territories each year for ten years from the increase to the Medicare levy.

Section 19 establishes the maximum amount of credits for the States and Territories in a given year. States and Territories are reimbursed for expenditure in relation to DisabilityCare Australia through the COAG Reform Fund. The DisabilityCare Australia Fund is debited, and the COAG Reform Fund is credited, to enable these reimbursements to be effected.

It also provides that any credits unspent in a given year can be rolled over to subsequent years. States and Territories reimbursements cannot exceed the value of the credits in a given year, as per the table, plus any funds not debited in a previous

year(s). In effect, the total State and Territory reimbursement cannot exceed the total credits over the ten year period.

Section 20 – Reimbursing the States and Territories - recommendations about grants payments

Section 20 requires the National Disability Insurance Minister to recommend to the Finance Minister that amounts be debited from the DisabilityCare Australia Fund to reimburse the States and Territories for expenditure in relation to DisabilityCare Australia.

Section 21 – Reimbursing the States and Territories – debit from the COAG Reform Fund

Section 21 reflects the Government’s intention that the COAG Reform Fund is not an asset fund like the DisabilityCare Fund, but rather will act as a vehicle by which payments from the COAG Reform Fund will be distributed to States and Territories.

The Treasurer is required to ensure that, as soon as practicable after an amount is credited to the COAG Reform Fund, that amount is debited for the purposes of making the grant.

Section 22 – Reimbursing the States and Territories – grant to a State or Territories for NDIS expenditure

Section 22 is concerned with grants of financial assistance to a State or Territory through the COAG Reform Fund in relation to reimbursement of expenditure for DisabilityCare Australia. The note immediately following **subsection 22(1)** assists the reader by referring to **subsection 21(2)** which deals with payments channelled through the COAG Reform Fund.

The section provides that the terms and conditions upon which the financial assistance is granted to States or Territories are to be set out in a written agreement between the Commonwealth and the State or Territory.

Section 23 – Future Fund Board must ensure that there is sufficient money in the DisabilityCare Australia Fund Special Account to cover authorised debits etc.

Section 23 requires the Future Fund Board to take all reasonable steps to ensure that the amount of money standing to the credit of the DisabilityCare Australia Fund Special Account is sufficient to cover amounts to be debited from the DisabilityCare Australia Fund Special Account.

Division 5 – Inter-fund transfers

This section only provides for transfers from the DisabilityCare Australia Fund to the Future Fund Special Account.

Sections 24 allows for amounts to be transferred between the DisabilityCare Australia Fund and the Future Fund. The purpose of this is to enable reimbursement to the Future Fund for expenses incurred in relation to the DisabilityCare Australia Fund that have been debited from the Future Fund Special Account.

The section allows the Finance Minister to direct one Fund is to be debited and the other Fund credited by a specified amount.

Subsection 24(3) makes it clear that directions of the Finance Minister are not legislative instruments. Directions of this type are administrative in character because they are merely the application of a legal power in a particular case; they do not determine or alter the content of the law itself.

Part 3 Investment of the DisabilityCare Australia Fund

Section 25 – Simplified outline

Section 25 is an information provision which provides an overview of Part 3 to assist with readability.

Section 26– Objects of investment of the DisabilityCare Australia Fund

Subsection 26 (1) is intended to reinforce that amounts are invested by the Future Fund Board for the main objects of enhancing the Commonwealth’s ability to reimburse the States and Territories and the Commonwealth for expenditure incurred in relation to DisabilityCare Australia.

Subsection 26(2) sets out that the ancillary objects of the investment of the DisabilityCare Australia Fund are for enhancing the ability of the Commonwealth and the Future Fund Board to discharge costs, expenses, obligations and liabilities and make payments for the ancillary purposes as set out in **Sections 15 and 16**.

Section 27 – Investment of the DisabilityCare Australia Fund

Section 27 is modelled on the investment powers under section 39 of the FMA Act. However, **subsection 27(1)** expands those powers to specifically provide for the investment of the DisabilityCare Australia Fund in a broad range of financial assets, which could include cash, interest bearing securities and global property securities, with the use of derivatives for risk management. Specific conditions on the acquisition of derivatives are separately covered in **section 36**. This approach to investment of the DisabilityCare Australia Fund is consistent with similar arrangements for the Future Fund.

Investments of the DisabilityCare Australia Fund will be made in the name of the Future Fund Board (rather than the Commonwealth) to reinforce the position that the Future Fund Board manages the DisabilityCare Australia Fund at arm’s length from the Government. However, beneficial ownership of the DisabilityCare Australia Fund remains with the Commonwealth at all times.

Subsection 27(3) provides that money invested in financial assets are ‘investments of the DisabilityCare Australia Fund’ and may be realised, disposed of or redeemed by the Future Fund Board.

Section 28– Management of investments of the DisabilityCare Australia Fund

Subsections 28(1) and (2) provide that income derived from an investment of the DisabilityCare Australia Fund, including a return of capital or another form of financial distribution, must be credited to the DisabilityCare Australia Fund Special Account. This is consistent with 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). 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 in the FMA Act.

Subsections 28(3) to (5) relate to the arrangements that will apply in relation to the realisation of assets. While **subsections 28(3) to (4)** are self explanatory, **subsection 28(5)** allows the Future Fund Board to authorise, prior to an investment maturing, that the proceeds of this investment be automatically reinvested with the same entity. This avoids the need for the proceeds of realisation of the investment 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 DisabilityCare Australia Fund.

Subsection 28(6) provides that section 39 of the FMA Act does not apply to an investment of the DisabilityCare Australia Fund. Section 39 of the FMA Act authorises the Finance Minister to invest public money in only a limited range of investments, such as government bonds and bank deposits. However, **section 27(1)** provides for the investment of the DisabilityCare Australia Fund in a broader range of financial assets, which could include cash, interest bearing securities and global property securities, with the use of derivatives for risk management.

Section 29 – DisabilityCare Australia Fund Investment Mandate

It is appropriate that the Government, as owner of the DisabilityCare Australia Fund, has a mechanism for articulating its overall expectations for how the DisabilityCare Australia Fund will be invested and managed by the Future Fund Board. **Section 29** establishes a framework that enables the Government to give strategic guidance to the Future Fund Board while preserving the Board's role in managing the investment of the DisabilityCare Australia Fund at arm's length from the Government. This approach is consistent with that existing in relation to the Future Fund.

Subsection 29(1) provides that the responsible Ministers have the power to give the Future Fund 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 to ensure that an Investment Mandate is in force at all times and to provide clarity and certainty to the Future Fund Board. Note that *DisabilityCare Australia Fund investment function* is defined in **section 4**.

Subsection 29(2) provides that any direction issued under **subsection 29(1)** has effect subject to the limitations set out in **section 30** - Limitation on DisabilityCare Australia Fund Investment Mandate.

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 **subsections 29(1) and 29(4)**).

While the responsible Ministers can issue new directions at any time, the intention is that the Investment Mandate will reflect the nature of the Government's policy. Any new directions will therefore only be issued in light of significant policy changes or

material changes in the investment environment faced by the DisabilityCare Australia Fund.

Subsection 29(3) provides that in setting an Investment Mandate, the responsible Ministers must have regard to maximising the return on the DisabilityCare Australia Fund, consistent with international best practice for institutional investment, enhancing the Commonwealth's ability to reimburse the Commonwealth and the States and Territories for expenditure incurred in relation to the DisabilityCare Australia, and any other matters the Ministers consider to be relevant. This requirement will give the Future Fund Board and the Parliament assurance that the responsible Ministers must consider the scope of their directions from an investment perspective, while ensuring that there is flexibility to take account of broader policy issues and national interest considerations.

Subsections 29(5) and 29(6) provide that the Investment Mandate may include, but is not limited to, statements about policies the Future Fund Board must pursue in relation to risk and return and the allocation of the DisabilityCare Australia Fund to particular asset classes. This may include restrictions or thresholds for investing the DisabilityCare Australia Fund in certain jurisdictions or asset classes and statements of the Government's tolerance for losses.

Subsection 29(7) provides that any policies are subject to the limitations set out in **section 30**.

Subsection 29(8) ensures that the Future Fund Board is not given conflicting directions regarding the Government's tolerance for risk, its expectations for returns and any associated allocation of the DisabilityCare Australia Fund across asset classes.

To avoid doubt, **subsection 29(9)** makes it clear that the scope of the responsible Ministers' powers to issue directions to the Future Fund Board in relation to the investment of the DisabilityCare Australia Fund is bound by the Act. For example, the responsible Ministers could not direct the Future Fund Board to use derivatives in a manner that contradicts **section 36** (which deals with the acquisition of derivatives by the Future Fund Board).

Subsection 29(10) provides that the Investment Mandate will not formally commence until at least 15 calendar days after it is issued. This is to allow the Future Fund Board time to adjust to any revised directions issued by the responsible Ministers. Importantly, the Future Fund Board will be able to know with certainty when the new direction will come into force.

Subsection 29(11) provides that directions under **subsection 29(1)**, that set out certain rules that the Future Fund Board must comply with, are legislative in character and are therefore legislative instruments for the purposes of section 5 of the *Legislative Instruments Act*. However, any directions issued by the responsible Ministers as part of the Investment Mandate are exempt from parliamentary disallowance provided by section 44 of the *Legislative Instruments Act* and exempt from sunseting provided by section 54 of the *Legislative Instruments Act*.

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

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

Subsections 29(12) and 29(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 Future Fund Board has a statutory obligation to seek to maximise returns, consistent with international best practice for institutional investment and enhancing the Commonwealth's ability to make payments in relation to the objects of the DisabilityCare Australia Fund (set out in **section 8(a) and (b)**).

This provision (together with **subsection 29(8)**) establishes a clear hierarchy of priorities for the Future Fund Board — the responsibility to maximise returns is subordinate to the investment parameters set out by the Parliament and the Government. This framework provides appropriate flexibility while still ensuring suitable accountability for any directions the Government gives the Future Fund Board regarding the investment of the DisabilityCare Australia Fund.

It also provides the Future Fund Board with clarity as to the extent of its accountability — the Future Fund Board must be able to demonstrate that it is pursuing policies and strategies that are clearly directed at maximising investment returns in a manner that is consistent with best practice.

It is expected that the Future Fund 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 **subsection 29(13)** is to clarify that **subsection 29(12)** is the default position in the event that a direction under **subsection 29(1)** is not issued or is revoked. However, a direction issued by the Ministers under **subsection 29(1)** will override **subsection 29(12)**.

Section 30 – Limitation on DisabilityCare Australia Fund Investment Mandate

Subsection 30 specifies that the responsible Ministers cannot direct the Future Fund Board to use the assets of the DisabilityCare Australia 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 Future Fund Board to use the assets of the DisabilityCare Australia Fund to support a particular business entity, a particular activity or a particular business.

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

Section 31– Future Fund Board to be consulted on DisabilityCare Australia Fund Investment Mandate

Consistent with the Future Fund arrangements, the responsible Ministers are required to consult the Future Fund Board on any changes or additions to the Investment Mandate. **Subsections 31(1) and 31(3)** achieve this by requiring the responsible Ministers to send a draft of the new direction to the Future Fund Board and inviting the Board to make a submission within a specified time limit.

The specified 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 Future Fund Board to be asked to consider a 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 Future Fund Board with more time to consider a draft direction.

Subsection 31(2) provides that any submission received by the responsible Ministers from the Future Fund Board must be tabled in the Parliament with the new direction. In this way, the Future Fund Board will be able to ensure that their views on the expected impact on their ability to maximise returns are publicly known.

Section 32 – Compliance with DisabilityCare Australia Fund Investment Mandate

Subsection 32(1) provides that it is the responsibility of the Future Fund Board to take all reasonable steps to ensure that all policies and decisions regarding the operation and investment of the DisabilityCare Australia Fund are in accordance with any directions (Investment Mandate) issued by the responsible Ministers. Since the Investment Mandate is intended to provide broad guidance to the Future Fund Board, it may contain directions that require the Board to apply its judgement on whether or not DisabilityCare Australia Fund investments that comply with the Mandate.

Subsection 32(2) provides that if the Future Fund 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 practicable, including a proposed strategy to bring the operations of the DisabilityCare Australia Fund into accordance with the Investment Mandate.

Similarly, **subsections 32(3) and 32(4)** provide that if the Government identifies areas where the Future Fund 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 Future Fund Board is required to comply with any such directions, noting that the responsible Ministers are the final arbiters on what is intended by the Investment Mandate.

Subsection 32(5) provides that any transactions undertaken by the Future Fund 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 Future Fund Board or its agents in good faith.

Subsection 32(6) makes it clear that a direction under **subsection 32(3)** is not a legislative instrument. This provision is merely declaratory in nature. Directions of this type are administrative in character because they are merely the application of a legal power in a particular case; they do not determine or alter the content of the law itself.

Section 33 – Future Fund Board must not trigger the takeover provisions of the Corporations Act 2001

Section 33 aims to minimise market distortion and eliminate the potential for conflicts of interest for the Government as a market regulator, the Future Fund Board is prohibited from triggering the takeover provisions under section 606 of the Corporations Act.

Section 606 of the Corporations Act essentially prohibits acquisitions in relevant interests in the voting shares of a listed company, or unlisted company with more than 50 share holders, if a person’s voting power increases from a figure at or below 20% to a figure above 20% (or from a figure above 20% to a higher figure above 20% but below 90%) – unless the shares are acquired in one of the circumstances set out at section 611 of that Act.

However, it is the Government’s intention that the takeover threshold be adhered to quite strictly in relation to listed companies and unlisted companies with more than 50 shareholders. Therefore, **subsection 33(1)** provides that the exceptions provided under section 611 of the Corporations Act (that is, exceptions to the prohibition in section 606) do not apply in relation to acquisitions by the Future Fund Board.

The prohibition on the Future Fund Board is not expected to have a material impact on the investment efficiency of the DisabilityCare Australia Fund as such limits are quite similar to those often used by other fund managers. However, the Future Fund Board will need to have regard to the entirety of its interest (i.e. through investment of the DisabilityCare Australia Fund) in a particular company when the Board is proposing a particular acquisition in the context of the DisabilityCare Australia Fund.

Subsection 33(2) provides that if for some reason the Future Fund Board has not complied with section 606 of the Corporations Act (as it is applied to the Future Fund Board under **section 33**), the relevant transactions will still be valid. The aim of this provision is to ensure third parties are not adversely affected by any non compliance of the Future Fund Board.

A note at the end of the section assists the reader by referring to section 39 of the Future Fund Act, which sets out the application of the Corporations Act to the Future Fund Board.

Section 34 – Borrowing

Section 34 prohibits the Future Fund Board from borrowing money, except for short term borrowing associated with the settlement of transactions or in other circumstances prescribed in regulations (see **subsection 34(3)** below).

The overall aim of this section is to ensure that the Future Fund Board is able to operate efficiently without exposing the budget to undue risk.

Subsection 34(3) provides that regulations may be made to specify circumstances in which it is considered appropriate for the Future Fund 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 Future Fund 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 primary legislation. The regulations would be disallowable by either House of the Parliament.

Section 35 – DisabilityCare Australia Fund investment policies

Section 35 provides that the Future Fund Board is required to formulate, publish and comply with a number of policies on its investment activities.

The aim of this provision is to ensure rigour and transparency around how the Future Fund Board performs its investment function in relation to the DisabilityCare Australia Fund, including risk management and performance assessment and benchmarks.

Subsection 35(1) and 35(7) requires the Future Fund Board formulate and comply with policies and any additional matters specified in regulations.

A note at the end of **subsection 35(1)** reminds the reader that, under subsection 33(3) of the Acts Interpretation Act, the Future Fund Board is able to repeal, rescind, revoke, amend, or vary any such policies.

Subsection 35(2) provides that the policies that the Future Fund Board develops must not be incompatible with the Investment Mandate.

Subsection 35(3) and (4) provides that the Future Fund Board must publish the first set of policies on the internet.

Subsections 35(5) and 35(6) provide that the Future Fund Board must conduct reviews of these policies periodically and where 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. However, if the review resulted in any changes to the policies, it is intended that the updated policies would be published on the internet.

Subsection 35(8) provides that if the Future Fund Board enters into a transaction which is not consistent with a policy that it has published under this section, the transaction will still be valid. This will ensure that third parties are not affected by any inconsistency with the Future Fund Board's policies. However, **subsection 35(7)**

provides that the Future Fund Board is required to take all reasonable steps to comply with the policies it develops under **subsection 35(1)**.

Subsection 35(9) makes it clear that the policies of the Future Fund Board are not legislative instruments, because they are administrative in character. They do not determine or alter the content of the law.

Section 36 – 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.

Section 36 provides for the Future Fund Board to make use of derivatives for certain purposes. This includes as a risk management tool and to achieve indirect exposure to assets that it could not otherwise achieve. The Future Fund Board may also use derivatives to reduce the transaction cost of achieving required exposures. However, **subsection 36(1)(e) and (f)** provides that it may not use derivatives for speculative purposes or for leverage.

Subsection 36(2) provides that the acquisition of derivatives under this section cannot be inconsistent with the requirement under **section 35** for the Future Fund Board to formulate a policy on its investment strategy and take all reasonable steps to comply with that policy.

Subsections 36(3) and 36(4) provide that derivatives must be held in the name of the Future Fund Board and are taken to be an investment of the DisabilityCare Australia Fund. Similar to other investments, derivatives may be realised by the Future Fund Board under **subsection 28(3)**.

Section 37 – Additional financial assets

Section 37 provides that if the Future Fund Board becomes a holder of another financial asset, for example through a capital distribution, that asset becomes an investment of the DisabilityCare Australia Fund and is therefore subject to all the restrictions and requirements for investments of the DisabilityCare Australia Fund.

Section 38 – Securities lending arrangements

Section 38 provides that the Future Fund 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 DisabilityCare Australia Fund Special Account or becomes an investment of the DisabilityCare Australia Fund.

Section 39 – Investment managers

Subsection 39(1) provides that the Future Fund 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

excluded from this definition as it is generally expected that investment activities, such as acquiring derivatives or investing money, will be outsourced.

Unless approved by the responsible Ministers, the Future Fund Board must use investment managers to invest money in financial assets, acquire derivatives, enter into securities lending arrangements or realise financial assets.

Subsection 39(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.

Subsections 39(3) and 39(4) provide that the Future Fund Board is required to ensure that investment managers operate within the Act and must report on the state of investments of the DisabilityCare Australia Fund to the Board and the Agency. It would be expected that such obligations are set out in the contractual arrangements between the Future Fund Board and the investment manager.

Section 40 – Custody of securities

Section 40 provides that section 40 of the FMA Act does not apply to investment of the DisabilityCare Australia Fund.

Section 40 of the FMA Act requires officials who receive any bonds, debentures or other securities in the course of their duties to deal with them in accordance with the Finance Minister's Orders. This provision is designed for departments of state which carry out a more limited range of investment activities than is envisaged for the Future Fund Board (and Agency) in relation to the DisabilityCare Australia Fund. Further, making custodians and other investment managers comply with the Finance Minister's Orders for investment purposes could impose an undue administrative burden.

While section 40 of the FMA Act is excluded, a framework for how the Future Fund Board must deal with securities that it receives in relation to the DisabilityCare Australia Fund is covered by **sections 27 and 36**.

Section 41 – Refund of franking credits

Under subsection 84B(1) of the Future Fund Act, the Future Fund Board is deemed to be an exempt institution that is eligible for a refund of franking credits under the ITAA. As the Future Fund Board is exempt from income tax, it may have an investment bias towards assets whose return had not previously been subject to income tax (such as debt instruments or unfranked dividends). Refunding franking credits removes any potential bias against franked dividends.

Section 41 deals with refund of franking credits and provides that if the Future Fund Board receives a refund of a tax offset under the ITAA and the tax offset is attributable to the investment of the DisabilityCare Australia Fund, any refund received is credited to the DisabilityCare Australia Fund Special Account.

Section 42 – Realisation of non-financial assets

Section 42 requires the Future Fund Board to realise an asset that ceases to be a financial asset or any asset acquired by the Board (as an investment of the

DisabilityCare Australia Fund) that is not a financial asset. This could include circumstances where the Future Fund 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 to a revision of the ABS government finance statistics manual, for example.

The section provides that a non-financial asset is treated as a financial asset up to the time it is realised. **Sections 42(1)(b) and 42(2)(b)** ensure that the asset is considered an investment of the DisabilityCare Australia Fund and that relevant provisions relating to investments of the DisabilityCare Australia Fund apply to that asset for the time it is held by the Future Fund Board.

Section 43 – Additional function of the Future Fund Board

Section 43 provides that the functions of the Future Fund Board include the function of investing amounts in accordance with the Act.

Part 4 Reporting obligations etc.

Section 44 – Finance Minister to prepare report on balance of DisabilityCare Australia Special Account etc.

Section 44 sets up the requirement that, starting on 1 July 2014, the Finance Minister must prepare a quarterly report setting out the quarterly balance of the DisabilityCare Australia Special Account and also the total States and Territories share of the DisabilityCare Australia Fund.

Section 45 – Finance Minister may require Future Fund Board to prepare reports or give information

Section 45 provides that the Finance Minister may require, in writing, that the Future Fund Board prepare a report or a document on one or more specified matters relating to the performance of the Future Fund Board's functions under **Part 3**. This report or information must be provided within the timeframe outlined in the Finance Minister's request.

The Finance Minister may choose to publish any report or document provided.

Section 46 – Keeping the responsible Ministers informed etc.

Section 46 requires the Future Fund Board to notify the responsible Ministers of any information that the responsible Ministers should know, including by providing any written information to the Finance Minister. This could include significant investment results, concerns regarding fraud and any non compliance with the Board's policy on conflicts of interest.

Section 47 – Finance Minister may give reports to other Ministers etc.

Section 47 allows flexibility for the Finance Minister to give reports, documents and other information to the Treasurer and the National Insurance Disability Minister. This includes reports and documents under **sections 45 and 46** and any other information obtained by the Finance Minister under the Act.

Part 5 – Disability Care Australia Transitional Special Account

Division 1 Establishment of the DisabilityCare Australia Transitional Special Account

Section 48 – Establishment of the DisabilityCare Australia Transitional Special Account

Section 48 establishes the DisabilityCare Australia Fund Transitional Special Account.

The DisabilityCare Australia Fund Transitional Special Account is to commence on 1 July 2013 and will hold the State, Territory and Commonwealth contribution for 2013-14 for DisabilityCare Australia until the National Disability Insurance Scheme Launch Agency is financially separated from the Department of Families, Housing, Community Services and Indigenous Affairs.

The DisabilityCare Australia Fund Transitional Special Account provides certainty that the appropriate financial arrangements will be in place on 1 July 2013 to deliver DisabilityCare Australia.

Division 2 – Credits of amounts to the DisabilityCare Australia Transitional Special Account

Section 49– Credits to Transitional Special Account – determination by National Disability Insurance Minister

Section 49 establishes the mechanism that the National Disability Insurance Minister may, in writing, determine that the specified amount is to be credited to the DisabilityCare Australia Fund Special Account on a specified day or by instalments on specified days.

Section 49(3) provides that a determination to credit amounts to the DisabilityCare Australia Transitional Special Account is not a legislative instrument

This determination will only be used to credit the amounts paid in by the States and Territories. The credits from the States and Territories will be frequent but irregular in timing.

The making of the determination will be a mechanical process in that the amounts specified in the determination will be tied to the amounts received from States and Territories, and will not involve the exercise of discretion by the National Disability Insurance Minister.

The credit to the DisabilityCare Australia Transitional Special Account from the Commonwealth will be sourced from an appropriation to the Department of Families, Housing, Community Services and Indigenous Affairs.

The note immediately following this section is included to assist the reader by clarifying that, in addition to the processes set out in **sections 49** amounts can be credited to the DisabilityCare Australia Fund Special Account by an Appropriation Act. For completeness, if any of the purposes of a Special Account is a purpose that is

covered by an item (whether or not the item expressly refers to the Special Account), then amounts may be debited against the appropriation for that item and credited to that Special Account.

Division 3 – Debits of amounts to the DisabilityCare Australia Fund Transitional Special Account

Section 50 – Purposes of the DisabilityCare Australia Transitional Special Account—General

Section 50 sets out the purposes for which the DisabilityCare Australia Transitional Special Account may be debited. The purpose of the DisabilityCare Australia Transitional Special Account is restricted to the payments to cover the expenses, charges and obligations incurred by the Commonwealth or the National Disability Insurance Scheme Launch Transition Agency during the period before the National Disability Insurance Scheme Launch Transition Agency receives financial separation from the Department of Families, Housing, Community Services and Indigenous Affairs.

Division 4 - Payments

Section 51 – Authorisation of payments

Section 51 provides for the National Disability Insurance Minister to authorise payments from the DisabilityCare Australia Transitional Special Account for the purposes of DisabilityCare Australia.

Part 6 Miscellaneous

Section 52 – Delegation by the Finance Minister

Under **subsection 52(1)**, the Finance Minister may, in writing, delegate his or her powers under **sections 17, 18 or 24** to the Secretary of the Finance Department or to an SES employee (or acting SES employee) in that Department.

The Finance Minister's powers under **sections 17, 18 and 24** relate to the making of authorisations for payments from the DisabilityCare Australia Fund and directing that specified amounts be transferred from the DisabilityCare Australia Fund Special Account to the COAG Reform Fund for the purposes of making a specified grant of financial assistance to a State or Territory or to the Consolidated Revenue Fund for the purposes of DisabilityCare Australia. Delegation of these functions to the Secretary of, or SES official in, the Finance Department is consistent with the efficient administration of these matters.

Subsection 52(3) allows the Finance Minister to delegate, in writing, his or her functions under **section 24** of the Act, to the Chair of the Future Fund Board or to an SES employee (or acting SES employee) in the Agency. The Finance Minister's functions under this provision allows for amounts to be transferred from the DisabilityCare Australia Fund Special Account and the Future Fund Special Account. Accordingly, the Minister delegating this function to the Chair of the Future Fund Board or an SES official in the Agency is considered to be a normal administrative arrangement for the efficient handling of these matters.

A note at the end of **subsections 52(1) and 52(3)** assists the reader by referring to the relevant section of the Acts Interpretation Act in relation to the expressions ‘SES employee’ and ‘acting SES employee’.

It is envisaged that the delegate will be accountable to the Finance Minister for his or her actions under any delegation. **Subsections 52(2) and (4)** reinforce this intention by requiring the delegate to comply with any direction of the Minister in exercising powers under a delegation.

Section 53 – Delegation by the National Disability Insurance Minister

Under **section 53**, the National Disability Insurance Minister may, in writing, delegate his or her powers under **sections 20, 49 and 51** to the Secretary of the National Disability Insurance Department or to an SES employee (or acting SES employee) in that Department.

A note at the end of the subsection assists the reader by referring to the relevant section of the Acts Interpretation Act in relation to the expressions ‘SES employee’ and ‘acting SES employee’.

The National Disability Insurance Minister’s powers under **sections 20, 49 and 51** relate to the making of authorisations for credits to and payments from the DisabilityCare Australia Transitional Special Account. Delegation of these functions to the Secretary of, or SES official in, the National Disability Insurance Department is consistent with the efficient administration of these matters.

Section 54 – Delegation by the Treasurer

Section 54 allows the Treasurer to, in writing, delegate his or her functions under **section 12** and **subsection 21(2)** to the Secretary of the Treasury Department or to an SES employee (or acting SES employee) in that Department.

A note at the end of the section assists the reader by referring to the relevant section of the Acts Interpretation Act in relation to the expressions ‘SES employee’ and ‘acting SES employee’.

Delegation of these functions to the Secretary of, or SES official in, the Treasury Department is consistent with the efficient administration of this matter.

Section 55 – Review of operation of Act

Section 55 sets up a mechanism for the review of the operation of the Act before 30 June 2024 . This provision is to ensure there is a review mechanism in place at the intended point that credits into the DisabilityCare Australia Fund are due to cease.

Section 56 – Regulations

Section 56 provides that the Governor-General may make regulations covering matters required to be prescribed in this Act, or matters that it would be convenient to prescribe for the purposes of this Act.

Exposure Draft