



Procedural Information Bulletin

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For the sitting period 13 to 22 June 2017

Disallowance put again, by order

The Senate has for many years proceeded on the basis that its decisions should reflect the composition of the Senate as elected. This principle underpins the Senate's practice of allowing divisions to be taken again, by leave, where they have been affected by 'misadventure'. There is no precise definition of that term, but it suggests that a senator intending to vote was prevented by circumstances from doing so. The practice is based on [standing order 104](#), which provides that a division may be taken again if necessary to ensure that a decision based on confusion or error does not stand.

The accepted practice is that a senator affected by misadventure seeks leave of the Senate to explain the circumstances of their missing the vote. For example, the second reading vote on the Passenger Movement Charge Amendment Bill 2016, lost on 23 November 2016, was put again by leave the following day, after the senators involved explained their earlier absence: [Bulletin 310](#). The Senate has generally accepted such explanations and given leave for the vote to be held again; however, leave may be refused by any senator.

On 13 June 2017, a senator provided an explanation for missing a vote on the previous sitting day, 11 May. Leave was refused to have the question put again, however, apparently on the basis of a conflicting report of the senator's intention and the delay in her making the explanation. Instead, the proponent of the motion successfully suspended standing orders and the Senate ordered that the vote be taken again. The division revealed that a number of senators had changed their positions in the intervening time: what had been an equally divided vote in May succeeded 40 Ayes to 30 Noes in June.

For procedural purists, such a vote is merely 'put again', it is not 'recommitted'. In the Senate's standing orders, recommit means return to committee for further consideration.

Let me count the days...

An ancillary matter, not explored at the time, involves the question whether an overnight suspension of the Senate, as occurred on 30 to 31 March 2017, creates an extra sitting day for disallowance purposes.

The disallowance process must be undertaken in accordance with section 42 of the *Legislation Act 2003*, which depends on the number of sitting days that elapse. However, the term 'sitting day' is not defined. *Odgers' Australian Senate Practice* says it is safer to assume each day is a separate sitting day [[14th edition](#), pp 446-7]. This avoids any doubts about the disallowance process. The Senate generally organises its business to avoid the uncertainty, but it is a different thing to say that business should *for safety* be transacted in a particular way than that it *must* be.

Disallowance is a statutory process, so the courts have the final say in its interpretation – see, for instance, the discussion in [Bulletin 295](#) about the meaning of ‘the same in substance’ – however, the definition of sitting day in these circumstances has not been adjudicated. In this case, if 31 March is counted as a sitting day then 11 May was the last day for resolving the motion. If not, then 13 June was the last day. Without judicial authority, there is no basis for concluding that a vote taken on 13 June would be outside of the statutory timeframe for disallowance. Therefore the vote proceeded, the motion succeeded and the identified items in the instrument were disallowed. Of course, a disallowance resolution made in these circumstances may well invite legal challenge on the question whether the statutory timeframe was met.

Transfer of disallowance notice

Also connected to that statutory timeframe are the rules in [standing order 78](#) for the withdrawal of disallowance notices. Generally, notices may be withdrawn by their owners at any time, however, a senator wishing to withdraw a disallowance notice must give notice of their intention to do so. (The ‘protective notices’ given by the Regulations and Ordinances Committee are often withdrawn in this way: see [Bulletin 313](#), under *Disallowance*.)

A senator may object to the withdrawal, however, and add their own name to the notice so it may proceed. This preserves the rights of senators to pursue a disallowance when the statutory deadline to give a fresh notice may have passed. Usually, notice of intention is given on one day and the withdrawal occurs on a subsequent day. Both stages may occur on the same day if it is the last day for resolving the notice.

All of these elements came into play on 14 June, the last day for resolving a notice proposing to disallow a military superannuation instrument. The sponsoring Senators, Kakoschke-Moore and Lambie, satisfied that the matter would be better dealt with by a different process, sought to withdraw the notice on its last day. Senator Roberts objected to its withdrawal. It was transferred to his name, moved and debated, but ultimately lost in a vote on the voices.

Instrument taken to be disallowed

Finally in disallowance matters, the time for determining a disallowance notice relating to the Extradition (People’s Republic of China) Regulations (2017) expired upon the Senate’s adjournment on 20 June, with the matter unresolved. The business program for that day was rearranged to prioritise government bills, so the notice was not called on. Section 42(2) of the Legislation Act provides that instruments are taken to be disallowed if they are not determined in the prescribed time. Odgers records several ‘precedents for instruments disallowed by effluxion of the prescribed time’, the last in May 1992. Ordinarily, the instrument in question would cease to have effect, presumably at the time the Senate adjourns. In this case, however, the regulations had been repealed earlier so the presumed effect of this deemed disallowance would be to prevent regulations ‘the same in substance’ being made within 6 months without the Senate’s consent (see [Bulletin 313](#)).

Committees

The Legal and Constitutional Affairs Legislation Committee’s report on the Criminal Code Amendment (Protecting Minors Online) Bill 2017 was tabled on 13 June ahead of the bill’s emotionally charged passage in the following week. The bill followed the 2007 murder of 15 year old Carly Ryan by a 50

year old man who had posed online as a teenage boy. Other prominent reports tabled during the sitting fortnight included the Senate Economics Legislation Committee's report into the Major Bank Levy Bill 2017 and the Education and Employment Legislation Committee's report on the Australian Education Amendment Bill 2017, colloquially known as 'Gonski 2.0'.

Reports on time-critical bills were tabled over the fortnight in accordance with a Senate order, [agreed to on 10 May 2017](#). Time-critical bills are those Budget-related bills introduced into the House of Representatives while Senate committees are considering estimates that contain substantive provisions commencing on or before 1 July 2017. The Senate order expedites consideration of these bills by committees.

In all, the Senate's legislation and references committees presented 18 reports, including reports from the recent round of Budget estimates, and received 15 new bill inquiries and 8 new references. In addition, on the motion of Senator Hinch, the Senate agreed to establish a new joint select committee to conduct oversight of the implementation by the government of redress related recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse. The committee will commence once the Royal Commission reports.

Legislation

A raft of legislation was dealt with during the fortnight. The Native Title Amendment (Indigenous Land Use Agreements) Bill 2017 was passed, with governments amendments which implemented the recommendation of the Legal and Constitutional References Committee to remove several items from the bill for future consideration ([Bulletin 314](#)). Fourteen government bills were passed without amendment during the time set aside for non-controversial bills (colloquially, 'lunchtime bills') on the first sitting Thursday. The Major Bank Levy Bill 2017, which imposes a levy on banks with total liabilities greater than \$100 billion, was passed with broad agreement around the Senate. By contrast, the government required the votes of 10 crossbench senators to pass the Australian Education Amendment Bill 2017, with amendments and requests, after lengthy debate in the second sitting week. In total, 36 government bills were passed, 4 with amendments, and none were rejected. The Senate passed the Interactive Gambling Amendment Bill 2016 with amendments to which the House has proposed alternative amendments. The disagreement was not resolved before the end of the sittings.

On 15 June, the Senate also passed a private senators' bill, sponsored by six senators from around the crossbench, proposing to establish a commission of inquiry into banking and financial services. Touted as an alternative to a royal commission into the banks, the bill would confer investigative, intrusive and coercive powers upon the commission, and establish a range of offences for obstructing its work. The bill passed the Senate on the voices, after a majority supported closure of debate on its second reading. The receipt of the bill in the House was attended by procedural manoeuvres and closely balanced votes, leaving it in limbo on the House Notice Paper at the end of the fortnight. Senate bills cannot appropriate money (section 53, Constitution), so establishing such a commission ultimately requires the executive government to initiate an appropriation in the House.

A rare occurrence: in accordance with [standing order 189\(1\)](#), a senator moved that the 20 minute limit on another senator's speaking time be extended by up to 10 minutes; a motion supported unanimously to some acclaim. It is possible this occurred quite late on the final sitting day.

Parliamentary Commission of Inquiry

On 22 June the President informed the Senate of the decision of the Presiding Officers to release the records of the Parliamentary Commission of Inquiry, established in May 1986, to investigate whether the conduct of the Hon. Lionel Keith Murphy, a former justice of the High Court of Australia, had been such as to amount to ‘proved misbehaviour’ within the meaning of section 72 of the Constitution. The *Parliamentary Commission of Inquiry (Repeal) Act 1986* strictly controlled access to the documents, with those relating to Justice Murphy’s conduct required to be kept confidential for 30 years, after which the Presiding Officers were required to assess whether they should be released. In his [statement to the Senate](#), the President said, in part:

It is important to recognise that the records of the commission reflect an incomplete process, insofar as it could not fulfil its ultimate purpose of formulating and reporting to the parliament its conclusions regarding the conduct of Justice Murphy. Of course, the privacy or reputation of all people impacted by the documents was a factor that was carefully considered in deciding whether or not to release the records. However, these concerns had to be weighed against the considerable public interest in having access to information relating to important concerns about the integrity of the High Court and, more broadly, about serious issues of public governance and accountability at the time of the commission’s investigations.

In seeking to serve this public interest, the Speaker and I took into account the fact that the general and specific nature of the allegations relating to Justice Murphy and others are widely known and, after 30 years, are historical in nature. We also took into account the non-partisan, focused and highly credible nature of the investigative processes employed by the commission, which is reflected in the character of its records. At the time it was wound up, the commission had provided Justice Murphy with a number of specific allegations to which he had been invited to respond, but the judge’s unfortunate prognosis meant that a response was never to be received.

The documents will be published online at 10 am on 24 July 2017.

RELATED RESOURCES

[Dynamic Red](#) – updated continuously during the sitting day, the Dynamic Red displays the results of proceedings as they happen.

[Senate Daily Summary](#) – a convenient summary of each day’s proceedings in the Senate, with links to source documents.

Like this bulletin, these documents can be found on the [Senate website: www.senate.gov.au](http://www.senate.gov.au)

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