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Appendix D – Speech by the Hon Alexander Downer MP, Minister for Foreign Affairs

The Lobby Restaurant, Canberra, Thursday 30 March 2006

(unchecked against delivery)

Ladies and gentlemen,

Fellow Parliamentarians.

Whichever party we come from or support, Liberal, National, Labor or a minor party, I believe we share common ground in wanting to see democracy thrive.

Abroad, we see democracy being exercised by millions previously subjected to tyranny and oppression.

Australia is playing its part in this liberation.

It is equally important that we safeguard democratic principles and institutions at home.

Tonight, we gather to put aside party differences for a moment and celebrate the strength of the Australian Commonwealth and our democratic traditions on this, the tenth, anniversary of the Joint Standing Committee on Treaties.

It was back in May 1996 that I set out in Parliament the case for a package of reforms aimed at improving parliamentary scrutiny and public consultation in Australia's treaty-making process.

JSCOT was a major part of that package and has, in its ten years, helped fill what had been seen as a "democratic deficit", which was undermining public confidence.

No longer can Australian Governments legitimately be accused of entering into binding international obligations without adequate democratic consultation.

At the same time, the Executive's capacity to act decisively to further the national interest has been maintained.

Tonight, I would like to pay tribute to the key contributions to the public good made by JSCOT and the parliamentarians who have served on it.

Ladies and gentlemen,

It was with great conviction that the eminent 18th century jurist, Sir William Blackstone, declared that legislative assemblies should never be involved in the conclusion of treaties.

Such activities should be left solely to the Executive.

Blackstone was not alone in these views.

After all, historically, treaty-making had always been a function of executive government.

And the conventional wisdom held sway in the United Kingdom until the adoption in 1924 of the 'Ponsonby Rule' – a constitutional practice requiring treaties to be laid before both Houses of Parliament for a period of 21 days before ratification by the Crown could occur.

It took some time for this innovation to come to our own shores.

But in 1961, Australian Prime Minister Robert Menzies made a commitment that the texts of treaties would from then on be tabled in both Houses.

Although this was a sizeable step forward, many parliamentarians still regarded this bare tabling as an inadequate form of review.

Over the following decades, criticism of the treaty-making process began to grow – especially in the States.

These criticisms peaked in the 1980s and 1990s, spurred on by memorable differences between Coalition-led State Governments and a Labor Federal Government.

We all recall very well the legal debates surrounding the Tasmanian Dams case and use of the Commonwealth's foreign affairs powers.

It is fair to say that by 1996 when the Coalition came to power, it was time for the treaty-making process to have an overhaul.

A new policy of parliamentary scrutiny applying across all treaty actions, multilateral and bilateral, was one of the first major steps taken by the new Coalition Government.

Not only did such scrutiny extend to new treaties, it also covered all actions to amend, terminate or withdraw from treaties, where such actions would have a legally binding impact on Australia.

To aid this process, a new Joint Parliamentary Committee – JSCOT - was established to review and report on the actions tabled.

As is often the case with any significant change, these reforms attracted their fair share of criticisms – criticisms that have been shown over time to have been misdirected.

Opponents implied that opening up the government's executive treaty-making responsibility to parliamentary scrutiny and public consultation in this way would fetter our capacity for international engagement.

It was said:

that a cloud of uncertainty and inefficiency would hang over our treaty negotiations

that Australian diplomacy would be hamstrung by the legislature

that JSCOT would simply add a further layer of useless bureaucracy to the treaty-making process.

And so on.

Ten years on, those early criticisms have been convincingly dispelled and so largely forgotten.

Indeed the criticism began to fade as soon as JSCOT began its work, and with each passing year it has grown fainter.

Another key innovation was the establishment by the Council of Australian Governments of a Standing Committee on Treaties of the Commonwealth, States and Territories – or SCOT.

The SCOT has brought a new level of consultation with the States that was previously lacking.

Adoption of the new procedures were expressly subject to their operation not resulting in unreasonable delays in the negotiating, joining or implementing of treaties by Australia.

And this has proved to be the case.

But under a federal system such as ours, it is essential that democratically elected State governments be aware of and consulted on proposals to enter into international obligations that might impact on their interests.

At the same time, the Commonwealth can only take on new obligations if Australia as a whole is able to meet them.

This is no less important now – when there are Labor State governments and the Coalition in power at a federal level – as it was back in the days of the Tasmanian Dams case.

Ladies and gentlemen,

As I have suggested, the underlying reason for the success of the treaty-making reforms is that it was an idea whose time had come.

But much of the credit must also go to the successive members of JSCOT during these first ten years, for the scrupulous way in which they have discharged their responsibilities.

These responsibilities are heavy – both in terms of importance and workload.

To date, JSCOT has tabled some 72 reports, reviewing and making considered recommendations on more than 350 separate treaty actions.

The Committee has considered major treaties establishing international legal rights and obligations across the full range of international engagement…

… including trade, the environment, counter-terrorism, the law of armed conflict, our role in the region, the law of the sea, international humanitarian law, crime and other fields.

JSCOT has produced some outstanding work, and often under considerable pressure.

Take the Australia-United States Free Trade Agreement, the largest and most complex treaty Australia has entered into, for example.

In little over 100 days, the Committee considered some 1400 treaty text pages and over 200 submissions, before producing a 300-page report recommending Australia join this historic treaty.

I would add that JSCOT's performance in reviewing our FTAs with Singapore and Thailand has also been exemplary.

Free trade agreements are a comparatively new and invariably complex venture for Australia, and one which brings to the fore the responsibility for full democratic consultation on the prospective impacts.

Ladies and gentlemen,

Free trade agreements are just one example of the new dynamics at play in diplomacy and treaty making in this rapidly globalising world.

These new dynamics highlight the need for institutions and practices able to deliver flexibility and decisiveness as well as accountability.

Australia's treaty-making practice has served us well and stacks up well against that of others.

We do not face the technical and legal obstacles of the United States, whose Constitution requires treaties be made with the consent of two-thirds of the Senate; or Canada, where parliamentary approval of major treaties is required.

And yet while addressing the democratic deficit, we have ensured that JSCOT is sufficiently flexible to allow that in those very infrequent cases where the national interest demands immediate treaty-taking effect, the Executive can move before tabling, under the 'national interest exception'.

As I made clear in my May 1996 statement to Parliament, "these exceptions will be used sparingly and only where necessary to safeguard Australia's national interests".

On that occasion, I referred by way of example to the 1994 Bougainville Peace Keeping Treaty.

The example turned out to be very apposite, because in 2003 the national interest exception had to be invoked for the Bougainville Transition Team Protocol, when once again Australian personnel had to be deployed without loss of time.

This 'urgency' system seems to be working satisfactorily.

Where a pressing national interest is at stake we can – and do – act decisively.

The flexibility of the system is also enhanced by it having been established by policy rather than law, enabling it to evolve quickly and effectively to meet the dynamics of modern diplomacy.

Contrary to the claims of those early critics, Australian diplomacy has not been hamstrung nor has the Government been reluctant to engage fully internationally.

In fact, because the system upholds democracy and pluralism through proper scrutiny, Australian governments can engage with increased confidence and decisiveness, knowing that they have public backing.

Moreover, the system is showing the flexibility to adapt to Australia's requirements as treaties become an ever more vital dynamic in the world and for all our lives.

Ladies and gentlemen,

In line with the increasing complexities of a globalising world, international treaty law has expanded at an ever increasing pace throughout the decade of JSCOT's existence.

If Australia is to protect and further its interests internationally, it must be fully engaged.

In retrospect, it can be said that the treaty-making reforms were an idea, not only whose time had come, but which were adopted just in time.

With Australia's treaty-making practice now bedded down, we find ourselves singularly well placed to adapt to and thrive in this demanding international environment, without surrendering our democratic sovereignty to decide.

The role of JSCOT has become crucial in ensuring that our domestic constituency's views and aspirations are taken into account in deciding which treaties should bind Australia.

It is truly democracy in action.

JSCOT already has much to be proud of, and its importance can only grow as globalisation accelerates.