

THE PERCIPIENT MR DEAKIN

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*'[O]ne wonders how many of the framers of the Constitution were as percipient as Alfred Deakin...'*¹

Australia's first attorney-general and second prime minister was a remarkable man. He demonstrated talents in the diverse fields of journalism, philosophical analysis, oratory, sonnet-writing and the practice, in politics, of the art of the possible.

One of Deakin's more daring exploits was the writing of a weekly piece on Australian political developments for the London *Morning Post*. Like the author of *Primary Colors*,² he wrote anonymously. He invariably referred to himself as 'Mr Deakin', but the references were not always favourable. To create a false scent, the articles were by-lined from Sydney.

The readers of the English newspaper, like those who read *Primary Colors*, must have speculated that the source was close to the centre of power. In the former instance they were absolutely right.

One of Deakin's more remarkable qualities was his capacity to foresee future federal developments. He displayed not only the statesmanship of a Churchill, but also the prescience of a Nostradamus. Time and time again he made prophecies that have been vindicated by posterity.

Some will attribute this quality to Deakin's mysticism. For, like another dominion prime minister – W.L. Mackenzie King³ – Deakin was attracted to spiritualism. Others will conclude that Deakin's prophetic talents simply reflected a thorough understanding of the nature of the institutions with which he was associated. Whatever the explanation, there can be no doubt about Deakin's percipience. This can be demonstrated in a number of areas.

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¹ Michael Coper, *Encounters with the Australian Constitution* (1987) 204.

² Anonymous, *Primary Colors* (1996).

³ See J E Esbrey, *Knight of the Holy Spirit* (1980) 126-132.

I THE TWO-PARTY SYSTEM

It is not widely appreciated that our federal polity was initially an unstable one. There were no less than seven changes of government in the first decade. Deakin was a principal player in that unstable system. He was a direct witness, for example, of the events of 1904 which featured three distinct governments. He gave the English readers the benefit of what appeared to be the reaction of a detached observer of the elections of late 1903. 'Mr Deakin', he wrote, 'may well view the position before him with rueful solicitude.'⁴

Two months later, Deakin analysed the situation. The problem lay in the existence of three roughly equally powerful parties: The Free Traders, the Protectionists and the Labor Party. Deakin delivered a speech in which he used the striking analogy of three cricket teams playing a game on a field, with one team playing 'sometimes for one side, sometimes for the other, and occasionally for itself.'⁵

Having diagnosed the problem, Deakin suggested the remedy. It was, he said,

absolutely essential that as soon as possible the three parties should somehow be resolved into two – either as parties or parts of parties in order that constitutional government might be carried on.⁶

Some five years and an equal number of governments later, Deakin became actively involved in changes that were to lead to his objective of a stable two-party system. He promoted the 'fusion' of the non-Labor forces, the Protectionists and the Free Traders. He became the leader of the new coalition, and attained prime ministerial office for the third time. The fused party was the lineal ancestor of today's major conservative party. It wove its way through the political fabric, as it underwent a series of changes in title: Liberal, Nationalist, United Australia, and finally back to Liberal.

Deakin's forecasts in this context have been fulfilled. Whatever criticisms one may level at the two-party system, it is conducive to stability. Even Deakin would have been surprised if he had been told that a number of his successors would serve for approximately seven years – Hughes, Bruce, Lyons and Fraser – while the Labor party would enjoy record periods in office in the forties and in the last two decades of the century. Even more remarkably, Menzies was to serve for a record period of sixteen consecutive years.

II THE SENATE

The framers devoted many words to the questions of the Senate and the resolution of deadlocks between the two chambers. The smaller colonies fought for equal representation of the States in the Senate. The large colonies capitulated, but insisted on a provi-

⁴ *Morning Post*, 28 January 1904 quoted in Alfred Deakin, 'Election Stalemate' in John La Nauze (ed), *Federated Australia* (1968) 129. Each of the three parties had achieved almost equal numbers in the lower house.

⁵ *Ibid* 135.

⁶ Cited in John La Nauze, *Alfred Deakin* (1965) 363.

sion for double dissolution in the event of the Senate frustrating the will of the lower house.

Nearly all of the framers seemed to think that the Senate would operate as a States' house, protecting the interests of the smaller States and dividing on lines designed to achieve that objective.

Alfred Deakin saw the error of that perspective:

The men returned as radicals would vote as radicals; the men returned as conservatives would vote as conservatives. The contests will not be, never has been, and cannot be, between States and States. It must be and will be between the representatives of the States according to the different political principles upon which they are returned.⁷

Once again events have justified Deakin's prophecy. The reality has been, as Professor Hanks has observed, that 'senators do not vote as representatives of any State. When they divide it is along party lines.'⁸

The true role of the Senate was dramatically highlighted in 1975 when the conservative coalition decided to obstruct supply in the Senate. The decision was made, not by a meeting of coalition senators, but by a coalition leadership group led by J.M. Fraser, the leader of the opposition in the lower house.⁹ When the governor-general proposed to appoint Fraser as caretaker prime minister, he sought assurances, including an undertaking that the Senate would pass the supply bills. Fraser had no difficulty in providing the assurance and the Senate obediently made good Fraser's promise.

III CENTRALISM

Influenced by their fond belief that the Senate would protect the interests of the States, few of the framers foresaw the trend towards centralism. Again Deakin stood out as a soothsayer. 'The rights of self-government of the States', he wrote in the *Morning Post*, 'have been fondly supposed to be safeguarded by the Constitution.' That instrument, however, left the States

legally free, but financially bound to the chariot wheels of the Central Government. Their need will be its opportunity. The less populous will first succumb; those smitten by drought or similar misfortunes will follow; and, finally, even the greatest and most prosperous will, however reluctantly, be brought to heel. Our Constitution may remain unaltered, but a vital change will have taken place in the relations between the States and the Commonwealth.¹⁰

⁷ Convention Debates (Sydney, 1897) 584.

⁸ Howard and Saunders, 'Parliamentarians and the Electorate' in G Evans (ed), *Labor and the Constitution - 1972-1975* (1st ed, 1977) 168, cf 260.

⁹ Paul Kelly, *November 1975* (1995) 113.

¹⁰ Deakin, above n 4, 97.

The transformation did not occur in the course of Deakin's lifetime. During that period, the States were protected, not by the Senate, but by the members of the High Court, a number of whom had been appointed by Deakin. They adopted a benevolent approach towards the States, drawing from the Constitution an implication that the States' powers were protected from invasion by the Commonwealth (and vice versa). It was not until 1920, the year after Deakin's death, that this approach was reversed, with Sir Isaac Isaacs leading the charge.¹¹

Isaacs' centralist views gained ascendancy in other areas, culminating in the *Uniform Taxation Case*,¹² which effectively forced the States to vacate the field of income tax. A generous interpretation of the grants and the external affairs powers accelerated the trend so that today the State premiers make their annual visit to Canberra in the role of mendicants. The States are indeed financially bound to the chariot wheels of the central government.

IV JUDICIAL REVIEW

Despite the American experience, many of the framers naively believed that parliamentary sovereignty would prevail in Australia as it does in the United Kingdom. A large number of the framers who discussed the question of the establishment of the High Court saw the court almost exclusively as an appellate court. Some of them suggested that the State chief justices could be seconded to sit on the High Court on a part-time basis.

Few of them envisaged the court as a powerful third arm of federation which would invalidate legislation, destroy governments and find implications they had never envisaged. The notion of a court enquiring into parliamentary processes and finding legislation to be unconstitutional was quite foreign to them.¹³

Even in the late 1960s an eminent constitutional scholar was found lamenting that he could not find any constitutional basis for the notion that the High Court could sit in judgment on an act of the federal parliament.¹⁴ Three decades later, the invalidation of legislation proscribing paid political advertising provoked even stronger criticisms of the institution of judicial review by members of the government.

But for Alfred Deakin there was never any doubt that the High Court would play a vital role in the new federation. He expressed his confidence on the matter as early as 1890.¹⁵

¹¹ *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

¹² *South Australia v Commonwealth* (1942) 65 CLR 373.

¹³ Indeed it was foreign to the governors-general, who brought to their role preconceptions based on their familiarity with a unitary system. Governor-General Northcote, for example, wondered whether he was justified in assenting to the Arbitration Act, in the light of Deakin's publicly expressed opinion that it was unconstitutional. He raised the matter with Attorney-General Symon, who told him that the question of constitutionality was for the High Court to determine. Undeterred, Lord Northcote asked for the opinion of the law officers in England. They supported Symon's view. Still not satisfied, Northcote took steps to have the matter raised by a question in the House of Lords: see La Nauze, *Alfred Deakin*, above n 6, 379-380.

¹⁴ Patrick Lane, 'Judicial Review or Government by the High Court (1966) 5 *Sydney Law Review* 203.

¹⁵ Federal Conference Debates (1890) 89, 91.

When he introduced the Judiciary Bill into the lower house a dozen years later, he reiterated the prediction:

The Constitution is to be the supreme law, but it is the High Court which is to determine how far and between what boundaries it is supreme...[T]here is one [condition of federation] which is more essential than the others – the competent tribunal which is able to protect the Constitution, and to oversee its agencies. That body is the High Court. It is properly termed the ‘keystone of the federal arch’.¹⁶

V OTHER PROPHECIES

There were other areas in which Deakin revealed his prophetic abilities. He foresaw the problems of State parliaments referring powers to the federal parliament under section 51 (xxxvii), in view of doubts about whether such referrals are capable of retrieval.¹⁷ He had misgivings about the form of section 92.¹⁸ And he observed that the Constitution was ‘incapable of being readily altered’; he predicted that amendment would be ‘costly and difficult’; it was an exercise that should be attempted ‘only in grave emergencies’.¹⁹

It is clear, from examples already given, that Deakin manifested an extraordinary, if not a mystical, talent for prophecy.

VI DEAKIN’S MYSTICISM

Deakin himself would have regarded his prophetic abilities as a demonstration of inspired revelation, for he was an enthusiastic adherent of theories of spiritualism. Later, more materialistic generations have found this astonishing.

Just as contemporary Canadians have difficulty in reconciling Mackenzie King’s spiritualism²⁰ with his intellect (Mackenzie King was a Harvard graduate), so have Australian historians experienced difficulty and embarrassment²¹ in accounting for Deakin’s dabbling in the occult. But one needs to see this aspect in the context of nineteenth century thought.²²

¹⁶ Parliamentary Debates, 1902, vol 8, 10967.

¹⁷ Coper, above n 1, 84.

¹⁸ John La Nauze, *The Making of the Australian Constitution* (1972) 158. Isaacs was more trenchant in his criticisms of the section.

¹⁹ Parliamentary Debates, 1902, vol 8, 10965, 10967.

²⁰ Esbrey, above n 3.

²¹ La Nauze, *Alfred Deakin*, above n 6, 61; Walter Murdoch, *Alfred Deakin* (1923) 31-35.

²² See, for example Al Gabay, *The Mystic Life of Alfred Deakin* (1992) 198: ‘At the turn of the century, an abiding interest in psychical research and its religious implications informed the inner life of leaders at both ends of the Empire. Arthur Balfour of Great Britain, his counterpart Deakin at the Antipodes and Smuts in South Africa Deakin shared not only a habit of private introspection but something of a capacity for mystical rapture’.

Spiritualism had flourished in the United States, where it had attracted men such as Horace Greeley and Robert Owen, in the middle of the nineteenth century. From there it had spread to England and Australia.

In 1870, W.H. Terry founded the Victorian Association of Progressive Spiritualists. Deakin joined the association in 1874, at the age of eighteen. He became its president four years later.

Deakin taught at the Progressive Lyceum, the Spiritualist Sunday school. It was there, in 1877, that he met his future wife, Pattie Browne, who was then aged fourteen.

Deakin's spiritualism was an eclectic blend of beliefs in medium-ship, reincarnation, theosophy, clairvoyance, the occult, mysticism and extrasensory perception. Like Mackenzie King he attended numerous seances. But for present purposes, the most significant aspect of his credo was a belief in prophecies and revelations. He had himself received prophecies about his own political career, some of which proved to be cannily accurate.

These forecasts were delivered by barely literate housewives, a factor which Deakin found compelling, for the women lacked the political sophistication to invent the prophecies. Mrs Armstrong had predicted that Deakin would travel to the United States for education purposes and that he would travel, free of charge, on an overseas trip with a white-haired gentleman.

In October 1878, Mrs Cohen predicted that Deakin would, within two years, be ushered into active public life and forced into prominence. She later forecast, after Deakin's dramatic resignation from Victorian politics, that he would be back in parliament within six months.

Mrs Armstrong made what a biographer had described as the 'Grand Prophecy',²³ that Deakin would be officially sent to London as a Victorian representative to appear before and to address a gathering. Finally, Mrs Stirling forecast in August 1880 that Deakin would 'hold the reigns of power' within three years. Each of these predictions came true.

In later political life, Deakin, sensing that the matter might be politically damaging, sought to distance himself from his earlier adherence to spiritualism.²⁴ So, too, have his biographers.²⁵ But his diaries reveal that he remained an adherent throughout his life.

VII DEAKIN'S PERSPICACITY

Today's materialists are more likely to attribute the accuracy of Deakin's forecasts to his profound insight into the institutions with which he dealt: it was a matter of perspicacity, not prescience in the supernatural sense.

²³ Ibid 21-22.

²⁴ Ibid 21.

²⁵ La Nauze, *Alfred Deakin*, above n 6, 61; Murdoch, above n 21.

Not all astute practitioners of the political art display a profound insight into the nature of their avocation. Johannes Bjelke-Petersen, a celebrated Queensland premier, had great difficulty in responding to a question about the doctrine of separation of powers. But he managed to outmanoeuvre the far better equipped prime minister, Gough Whitlam, when the latter attempted to achieve an election for six senators in Queensland.

Deakin was both an astute practitioner of the political art and a scholar with a deep understanding of the process. He was not a great lawyer. At law school, he displayed a listlessness towards his studies; he 'seems to have been extremely keen about everything – except law.'²⁶ When Deakin commenced practice, he was more interested in writing epic poetry than in advocacy. In the 1890s, liberated from ministerial office, he did not achieve great distinction at the bar. According to his contemporary, Higgins, 'Deakin's mind and a lawyer's mind travelled in different directions.'²⁷

Yet Deakin performed with great distinction as attorney-general in the Barton administration, when both creativity and careful legal drafting were called for. He had a profound sense of history and a superb understanding of the intersection of law and politics. He was, as Gabay has observed, 'a visionary whose practical mysticism has left an enduring legacy in the institutions and the political processes of his beloved nation.'²⁸

²⁶ Murdoch, above n 21, 17.

²⁷ Ibid 176.

²⁸ Gabay, above n 22, 200.

