

# THE SPECTATOR AUSTRALIA

## Loose laws

**A** slightly humbled Commonwealth Parliament resumed this week. Not because of the daunting array of legislation before it, but because in July the High Court finally brought down its reasoning for *Pape v. Commissioner of Taxation*. In March Bryan Pape, a punctilious law academic from the University of New England, successfully acquired standing to challenge the constitutional legitimacy of the Rudd government's \$900 'economic security' payments in the High Court. Australia is a federation and the Australian constitution places limits on the powers of the federal parliament and the executive (the government). Mr Pape thought the Tax Bonus for Working Australians Act, which authorised the payments (including one to him), exceeded those limits.

The legal debate is complicated. Section 81 of the constitution says the government can use collected money 'for the purposes of the Commonwealth', but does this imply the government possesses a general 'spending power' in addition to the powers listed famously in section 51? To complicate matters further, it is uncertain whether a law that pays citizens sums that might exceed their tax liabilities truly constitutes a tax measure.

Mr Pape's claims were ultimately dismissed because a majority of the judges believed the Bonus Act was an 'incidental' tax law, and that payments made under it could validly be appropriated under existing tax legislation. But the Commonwealth's victory was pyrrhic. Chief Justice French made clear his reasoning granted no shift in power to the government, and even remarked that the definitive scope of executive power was yet to be determined. Moreover, he rejected 'the proposition that section 81 is a source of power to spend money on anything that the Parliament designates as a purpose of the Commonwealth'.

This might be bad news for the Ministries of Social Inclusion, the Arts and Sport, for instance. One needs creativity to find justification for programmes like these.

Moreover, in court the government argued it 'is irresistible that the Commonwealth has constitutional responsibility for management of the national economy'. In any case, the argument went, had our constitutional draftsmen of the 1890s been aware of the wonders of 'Keynesian' economics, they would certainly have made such a power explicit. But to shudder at this prospect is to be reassured by Justice Heydon's response. He mocked the idea that the Australian constitution provided any such power, either in general, or in a time of 'crisis', and even suggested democratic governments would abuse any such power.

Justices Hayne, Kiefel and Heydon dissented. That three out of seven judges of the High Court would have upheld Mr Pape's concerns at the very least suggests the government should pay more attention to how its bills are drafted. A judicial rejection would have been politically sensational. It also reveals how precarious certain Commonwealth spending measures might be. We hope others are now emboldened to challenge the Commonwealth in areas where it has blatantly impinged on state responsibility. This verdict means they have a better chance of success.

The Rudd government has quickened the pace of centralisation. The education and now health 'revolutions' foreshadow more control and standardisation in Canberra, euphemistically called 'co-operative federalism'. *The Spectator Australia* thinks this unwelcome — it ignores the spirit if not the letter of the Australian constitution. Those who expect wonders from increased centralisation will be sorely disappointed: hospitals will not heal more patients and children will not become any brighter. Glib claims about costs

of 'duplication' miss the entire point of federalism, which requires duplication in order to enjoy diversity of policy and to protect citizens from a single government's stupidity, and even cupidity. Moreover, state governments, with their huge ministerial and bureaucratic payrolls, are here to stay whatever Canberra decides. We might as well make use of them.

Complacent ignorance is largely to blame. Australians have an appalling level of constitutional knowledge and understanding by comparison with their American or even British counterparts. State governments — in their own interest — should ensure compulsory instruction in the rudiments of the Australian constitution at high school. An attractive copy of the constitution should be provided to all school leavers for ease of reference. Over time, this cheap measure would better equip people to inveigh against harebrained federal government schemes on legal grounds as well as economic. The High Court has generally ruled in favour of the Commonwealth, but it can only arbitrate what it is given.

The judgment also provides pause for those eagerly awaiting an Australian 'bill of rights'. If 200-plus pages of reasoning are required to reach a disputed clarification of 'for the purposes of the Commonwealth', imagine the voluminous uncertainty that would emerge from a right to 'free speech', 'life', or 'social inclusion'. The High Court — one of the most respected and highly cited courts in the world — would inevitably enter the political realm. The appointment of judges would become a circus on par with appointments to the United States Supreme Court.

Mr Pape deserves public acclaim. He single-handedly drew attention to a potential violation of the constitution and was nearly successful. Regardless, his efforts have altered the balance of power in Australia's federalism for the better.

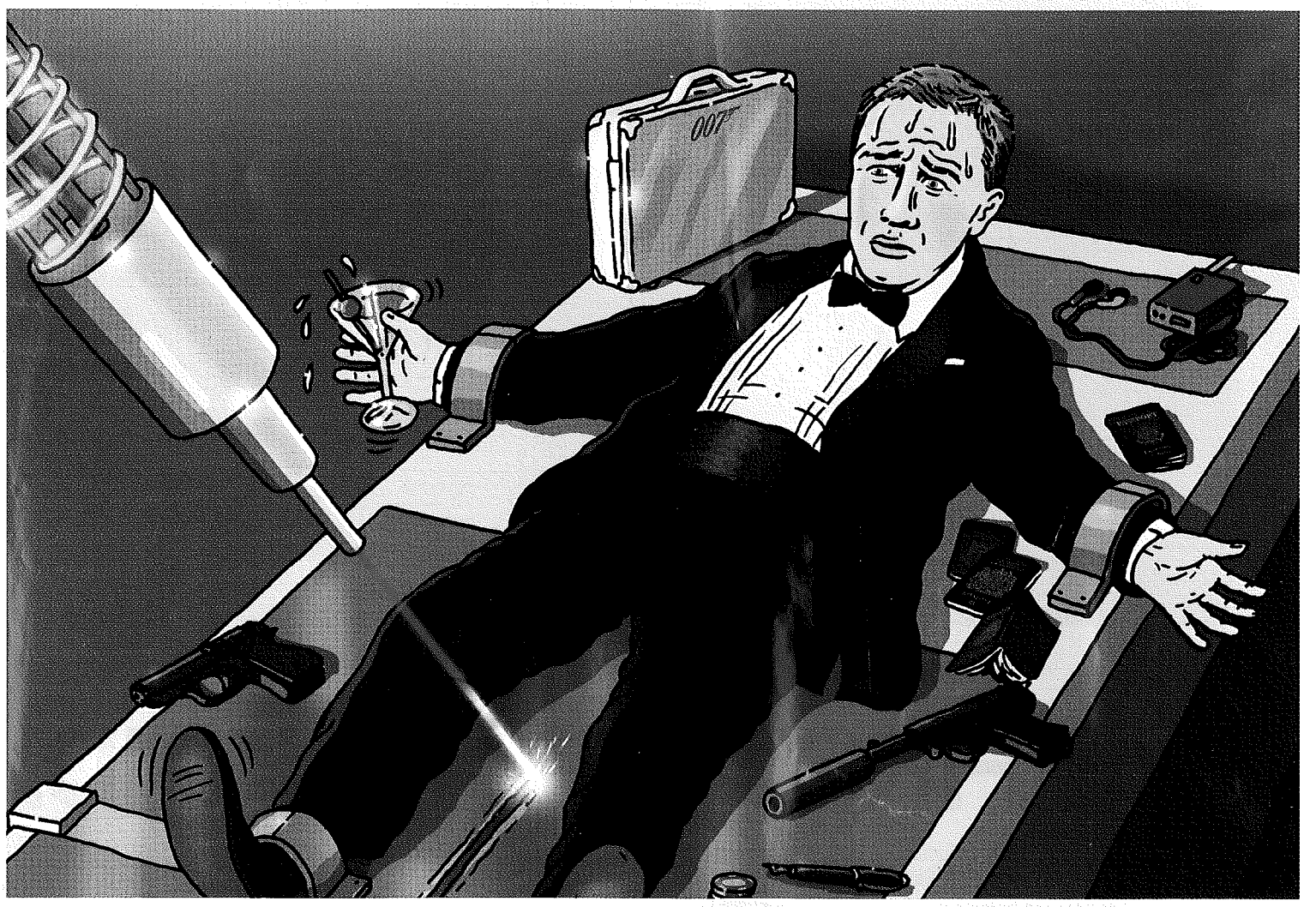
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## AUSTRALIA



# Spies on the rack

**MATTHEW D'ANCONA** on torture and a perilous challenge to the spooks

## Why the \*!@# shouldn't politicians swear? **ALAN GOLD**



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*Charles Moore, Tamzin Lightwater, Deborah Ross and Melissa Kite are away.*

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