

## CITIZEN INITIATED REFERENDUMS

### Republican innovation or scourge of representative democracy?

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#### Introduction

A re-awakening of interest in notions of popular sovereignty and the role of ordinary citizens in the management of Australian society has occurred recently. Largely attributable to the current republic debate, it has also sparked curiosity about citizen initiated referendum (CIR). The 1998 Constitutional Convention on whether Australia should become a republic specifically recommended examination of better ways to involve people in the political process.

One such way to better involve people in the political process is CIR. This article argues that CIR does not necessarily spell the end of representative democracy, but that, regulated within a proper framework, it offers the potential to revitalise Australian democracy by making it more direct. The article outlines the history and background of the concept, with particular reference to the theoretical importance of citizen participation and the practical means through which this should occur. Arguments both for and against the introduction of CIR are discussed in some detail. Recent Australian proposals are discussed, as is the New Zealand model. CIR is an extremely powerful device which and that may go some way to explaining the cautious attitudes of various Australian parliaments when faced with the issue. At the time of writing, there has not been any successful introduction of a CIR scheme in any Australian jurisdiction, indicative of that cautious attitude.

#### Background

##### *What is CIR?*

The term 'direct democracy' is sometimes used interchangeably with CIR. CIR can take a variety of forms, all of which generally enable a prescribed percentage of voters to petition for a referendum to enact a law or to veto or repeal a particular law. It can be either binding or non-binding on government and can even include the recall of politicians and other public officials.<sup>1</sup> The common types of CIR can be grouped into four broad categories.

The **legislative referendum or people's veto** allows a specified percentage of voters (usually somewhere between 2% and 10%) to petition

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1 G de Q Walker (1987) *Initiative and Referendum*, Centre for Independent Studies, p 10.

for a referendum on a proposed law that has been passed through parliament in the normal way but is not yet in effect.<sup>2</sup> That is, bills passed by the legislature can be vetoed by referendums before they become law.<sup>3</sup>

**Advisory referendums** involve a petition with the required percentage of signatures being submitted to the government. A referendum is then held on the issue and the result serves as a legislative advice rather than binding the government.<sup>4</sup> These referendums have been described as a strange hybrid of direct and representative democracy because they involve the electorate but do not actually give voters the power to make law.<sup>5</sup> Their function seems to be that they supply the government with information about the electorate's attitude, particularly on controversial issues.<sup>6</sup> This may be desirable when referendum results are close. However, this is potentially a disadvantage if voters ignore the questions on the ballot paper that are not binding.<sup>7</sup>

**Legislative initiatives** are perhaps the most radical type of direct democracy, allowing electors to initiate their own legislation independently of the government. This process usually requires a certain percentage of voters (anywhere from 2% to 20%) to sign a petition to force the holding of a referendum upon a specified subject. If successful, the effect of the referendum will either be to enact a law or to repeal a law that is already in existence.<sup>8</sup>

The legislative initiative is the most commonly used form of direct democracy in the United States.<sup>9</sup> More than 200 measures reached state ballots during the 1980s via this form of CIR.<sup>10</sup>

**The recall** is a process by which the electorate can petition for the holding of an election to remove public officials.<sup>11</sup> In the United States, electors in 15 states can recall elected state officials, whilst 36 states permit the recall of local officials, irrespective of whether they have been appointed or elected.<sup>12</sup> Recall has occurred for reasons such as corruption, excessive government spending and increased taxation.<sup>13</sup> It appears that the recall

2 G de Q Walker (1996) 'Models for Direct Democracy and Options for Australia' in K Wiltshire (ed) *Direct Democracy Citizen Initiated Referendums*, Constitutional Centenary Foundation, p 3.

3 S Major (1994) *The Citizens Initiated Referendum: Direct Democracy or Irresponsible Mass Government*, Western Australian Electoral Commission, p 21.

4 Ibid, p 22.

5 T Cronin (1989) *Direct Democracy, The Politics of Initiative, Referendum and Recall*, Harvard University Press, p 176.

6 Major (1994) p 23.

7 Ibid.

8 Walker (1996) p 3.

9 Cronin (1989) p 203.

10 Ibid.

11 Walker (1987) p 13.

12 Cronin (1989) p 3.

13 Major (1994) p 22.

provisions are most likely to be employed at the local level against officials the public has close and regular dealings with and are least likely to be used against state officials except in the severest of cases.<sup>14</sup> In Canada, the province of British Columbia has enacted the *Recall and Initiative Act 1996* (RSBC), which requires that, to force a recall, the recall petition must be signed by more than 40% of voters who are registered in the electoral district of the member in question at the date of the last election and who on the date of the petition are registered in a British Columbian electoral district.<sup>15</sup> Part 7 of the Act must also be complied with to force a recall. It regulates recall petition financing, outlines general valuation rules and imposes limits on recall expenses and anonymous contributions.

### *History of CIR*

Examples of direct government go back at least as far as ancient Athens, the assemblies of the Saxon tribes and the plebiscite in the Roman Republic.<sup>16</sup> Optional referendums or plebiscites were also occasionally held in medieval Europe, whilst various forms of direct government have been used in Swiss cantons since the 12<sup>th</sup> and 13<sup>th</sup> centuries.<sup>17</sup> In the United States, direct democracy dates back to the 17<sup>th</sup> century, when the freemen in New England villages would gather to make the laws governing their communities.<sup>18</sup> These historical examples illustrate that direct democracy was utilised in earlier times, when societies were much smaller, simpler and less diverse, and there was less need for a representative style of government. However, how does direct democracy sit with modern societies dominated by representative government? Overseas experience in the United States, Switzerland, Canada and New Zealand indicates that direct democracy, and particularly CIR, can be effectively incorporated into a system of representative government. In this light, the New Zealand model is discussed in the last section of the paper.

### **Theoretical Background:**

#### **Improving Popular Participation in Politics through CIR**

Despite Kavanagh's rather sage comment that participation is a 'promiscuous' term which is 'mistress to many masters',<sup>19</sup> there is still a widely held assumption that popular participation in politics is an inherently good thing and a way of improving democracy generally. Participation is seen as the key for reinforcing a system of democracy in which ordinary

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14 Ibid.

15 Sections 21 and 23.

16 Cronin (1989) p 41.

17 Ibid.

18 Ibid.

19 D Kavanagh (1972) 'Political Behaviour and Participation' in G Parry (ed) *Participation in Politics*, Manchester University Press, p 121.

citizens have the opportunity to play some meaningful role in the management of their society.<sup>20</sup> What is the basis for such an assumption?

### *Participation and power*

In general terms, public or popular participation refers to the involvement of the community in the decision-making process.<sup>21</sup> It implies interaction between members of the public, individually or in groups and representatives of the government, with the aim of giving the public a direct voice in decisions that affect it.<sup>22</sup> Beyond this, the term does not specify the nature of the interaction and, as such, its function is largely ideological.<sup>23</sup>

It has been argued that for popular participation to be effective, there must be a fairly direct relationship between the act of participation and the outcome.<sup>24</sup> Voting under a modern representative democracy is so remotely connected to political decision-making that it cannot be attributed with any real participatory quality.<sup>25</sup> Instead, true political participation has been defined as involving a real transfer or redistribution of power.<sup>26</sup> Parry asserts that: '[t]he political participant must be someone who has a reasonable expectation of influencing the policy decision or at the very least of making his voice heard in the deliberations leading up to it'.<sup>27</sup>

It follows then that the essence of the problem for democracies is how to:

translate the convenient fiction, 'the will of the people', into something more practical. How to combine popular control over government, leadership and responsibility in decision-making and the maintenance of the smooth functioning of the political system (while retaining the support of the populace).<sup>28</sup>

This article will argue from this basis that CIR, within a proper framework, offers a mechanism through which the public can participate more

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- 20 C Kernot, 'For Parliament or Party: Whose Democracy is it Anyway?' (1995) *25 Papers on Parliament* 33, p 34.
  - 21 R Harding (ed) (1998) *Environmental Decision-Making*, Federation Press, p 108.
  - 22 M Munro-Clark (1992) 'Introduction: Citizen Participation — An Overview', in M Munro Clark (ed) *Citizen Participation in Government*, Hale and Iremonger, p 13.
  - 23 Ibid.
  - 24 G Parry (1972) 'The Idea of Political Participation' in G Parry (ed) *Participation in Politics*, Manchester University Press, p 1.
  - 25 Ibid.
  - 26 S Arnstein, 'A Ladder of Citizen Participation' (1969) *American Institute of Planners Journal* 216, p 217.
  - 27 Parry (1972) p 1.
  - 28 M Cotton and B Bennett (1994) *Citizen Initiated Referendums: Cure-All or Curate's Egg?*, Department of the Parliamentary Library (Cth) Current Issues Brief No 21, p 1.

effectively in government and consequently be better involved in the political process.

### *Why is political participation desirable?*

The theories used to explain why political participation is important can be classified into two broad groupings.<sup>29</sup>

First, **developmental theories** regard participation in government as a 'way of life' and as important because of the effect it has on those participating.<sup>30</sup> Participation is viewed as a means of stretching the individual, enhancing their sense of competence, self-esteem and commitment for their own and society's betterment.<sup>31</sup> Further, participation is part of a process of political and moral education, whereby responsibility can only be developed by wielding it.<sup>32</sup> Theorists from this camp stress the interrelationship between the working of institutions and the psychological qualities and attitudes of individuals interacting with them; that is, the emphasis is on considering how the social order affects the structure of human personality.<sup>33</sup> The central assertion is that individuals and their institutions cannot be considered in isolation from one another and that the necessary individual attitudes and psychological qualities for democracy can only be developed through the process of participation.<sup>34</sup>

Secondly, **instrumental theories** view participation in government as an important means to the end of effective and efficient government. That is, it supplies decision-makers with essential information about people's situations, wants and needs which is not otherwise available. Participation also provides a wider variety of accountability mechanisms.<sup>35</sup> Proponents of this strand of theories regard participation as the most effective defence against tyranny and counter to bureaucracy and centralisation, believing that it is only by participating that people can ensure that their interests are defended and promoted.<sup>36</sup>

Both types of theories suggest participation adds legitimacy and consequently stability to the political system.<sup>37</sup> Another way of looking at the issue is to consider the costs of low participation.<sup>38</sup> Kavanagh has suggested that low participation leaves the way open for the sudden intrusion of

29 G Airo-Farulla (forthcoming), *Participation and Accountability: Administrative Law in Context*, Federation Press, ch 1.

30 Ibid.

31 Kavanagh (1972) p 118.

32 Parry (1972) p 19.

33 C Pateman (1970) *Participation and Democratic Theory*, Cambridge University Press, London, pp 22-4.

34 Ibid, pp 42-3.

35 Airo-Farulla (forthcoming) ch 1.

36 Parry (1972) p 19.

37 Kavanagh (1972) p 118.

38 Ibid.

groups which will constitute threats to democratic values.<sup>39</sup> He also indicates that the assessment of the effectiveness of participation in maintaining political stability should take into account the fact that apathy and non-participation tend generally to be concentrated amongst the poor and those who are not well integrated into the political system (such as the aged, the unemployed and racial minorities).<sup>40</sup> He suggests that one reason for this apathy and non-participation is a particular perception of the political system; it is the system itself which has bred indifference because 'the kinds of issues generated, the means in which they are resolved, and the linkages between the political elites and the public simply lack appeal and relevance'.<sup>41</sup>

A solution to this indifference is CIR, since it offers a means of generating new legislative questions and solutions and of invigorating the relationship between the public and the political machinery.

### Would CIR Jeopardise the Current System?

CIR is usually implemented as a participatory tool within representative government, rather than as a replacement of it. Further, overseas models all contain safeguards and limits in their systems. However, it must be recognised that CIR is an important change to the current system in Australia and would in some respects be inconsistent with current Australian practices. Whether CIR can sit comfortably within the current system of representative democracy raises a subsidiary question of 'what is the current system?'

#### *The current system of representative democracy*

Australia's present system of Westminster-style democratic government through representative institutions can be regarded as an 'indirect democracy', where the citizen's role as a participant are limited.<sup>42</sup> Indirect democracy is characterised by the existence of an elected 'political layer', which performs governing roles, with most citizens accepting that, by and large, decision-making is the job of politicians who can be called to account for their performance at the next election.<sup>43</sup>

This style of democratic government through representative institutions is a relatively recent phenomenon. In earlier times, democracy meant that members of a community participated directly in government by voting on all of the decisions to be made.<sup>44</sup> Generally, this right was extended to a more limited group of people than presently would be accepted as

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39 Ibid, p 119.

40 Ibid.

41 Ibid.

42 M Painter (1992) 'Participation and Power' in M Munro-Clark (ed) *Citizen Participation in Government*, Hale and Iremonger, p 21.

43 Ibid, p 22.

44 Constitutional Centenary Foundation (1994) *Representing the People: The Role of Parliament in Australian Democracy*, Constitutional Centenary Foundation, p 8.

'democratic'.<sup>45</sup> Today, for practical reasons, the emphasis is on representative democracy, whereby government is for the people through representative institutions, the chief of these being parliament.<sup>46</sup>

Democracy is a 'dynamic phenomenon'<sup>47</sup> and, as such, representative democracy is an evolving concept which is neither fixed nor precise.<sup>48</sup> However, the Australian High Court has indicated that, at the very least, the representative democracy or representative government required by the Commonwealth Constitution must include the direct choice of representatives by those eligible to vote.<sup>49</sup> The judges who distinguish between representative government and representative democracy suggest that representative democracy also requires that those eligible to vote should include 'all citizens of the Commonwealth who are not under some special disability' and that they should be 'entitled to share equally in the exercise of those ultimate powers of governmental control'.<sup>50</sup>

Accountability is fundamental to the system. At election time, governmental decisions are subject to review by the electors. Electors ought to be able to choose between contending political parties on the basis of alternative and coherent sets of policies which reflect genuinely different views on a wide range of economic, social and political matters.<sup>51</sup> Concerns of individual voters and interest groups alike are channelled through their parliamentary representatives.<sup>52</sup>

45 Ibid.

46 *Australian Capital Television v Commonwealth (ACTV)* (1992) 177 CLR 106 at 137 per Mason CJ.

47 *McGinty v Western Australia* (1996) 134 ALR 289 at 319 per Toohey J.

48 *Attorney-General (Commonwealth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1 at 56 per Stephen J.

49 Some members of the High Court distinguish between 'representative government' and 'representative democracy' in that representative democracy requires something more (notions of equality) than representative government in order to be satisfied. For the purposes of this article, the terms are used interchangeably.

*McGinty v Western Australia* (1996) 134 ALR 289 at 307 per Dawson J; *ACTV v Commonwealth* (1992) 177 CLR 106 at 230 per McHugh J. See generally *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *ACTV v Commonwealth* (1992) 177 CLR 106; *Theophanous v Herald and Weekly Times* (1994) 182 CLR 104; *Stephens v West Australian Newspapers* (1994) 182 CLR 211; and *McGinty v Western Australia* (1996) 134 ALR 289.

50 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 72 per Deane and Toohey JJ

51 Australian Constitutional Commission (1988) *Final Report*, Australian Government Publishing Service, p 868. In modern times, though, the differences between the main parties seem to be limited to relatively minor variations on economic management and the amount and direction of public spending: B Beedham 'A Better way to Vote: Why Letting the People Themselves Take the Decisions is the Logical Next Step for the West' (1993) 11 September *The Economist* 5, p 6.

52 Beedham (1993) p 6.

### *The pros of CIR*

Drawing on the virtues of political participation, there are a number of arguments put forward in favour of CIR.

CIR promotes government responsiveness and accountability and improves the quality of political decision-making through a sharing of law-making power. According to Cheryl Kernot, the very essence of a democracy is not just the right to choose who is going to govern you but also to have some opportunity to scrutinise, amend and even reject the measures chosen by those who are doing the governing.<sup>53</sup> If officials ignore the wishes of the electorate, the electorate has a means available to make its own law. CIR picks up on issues which may be of concern to the electorate and yet have been ignored by the political parties.<sup>54</sup>

CIR offers a means of revitalising Australian political processes. It can overcome voter apathy and alienation by allowing for greater participation in the political process and can produce open, educational debate on critical issues.<sup>55</sup> This in turn leads to a greater sense of responsibility in the electorate about public affairs.<sup>56</sup> Issues can be dealt with separately, such that electors' views can be gauged on each issue. The direct participation in decision-making offered by CIR increases the legitimacy of the law and therefore promotes greater respect for the law.<sup>57</sup>

### *The cons of CIR*

The controversy surrounding CIR stems largely from the numerous criticisms made of it. Briefly, the sorts of arguments usually made against CIR include:

- ◇ CIR undermines the Westminster system of representative government and there is no real need for CIR, since current levels of participation are adequate.<sup>58</sup>
- ◇ CIR is expensive and destructive of good planning. The process can be manipulated by well-financed interest groups.
- ◇ Voters are not competent to judge particular legislative proposals.<sup>59</sup>
- ◇ CIR is a vehicle for extremist or ultra-conservative groups and thus will encourage radical/reactionary measures that would otherwise be filtered out in a representative system.

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53 Kernot (1995) p 36.

54 Cronin (1989) pp 10–11.

55 Ibid, p 11.

56 M Macpherson, 'Citizen Participation in Politics and the New Systems of Communication', <http://www.snafu.de/~mjm/CP/cp.html>, 23 October 1997.

57 Walker (1987) p 50.

58 C Puplick (1996) 'Citizen Initiated Referenda: The Case Against' in K Wiltshire (ed) *Direct Democracy: Citizens Initiated Referendums*, Constitutional Centenary Foundation, p 36.

59 Walker (1987) p 68.



- ◇ CIR leaves minority groups open to unfair treatment and generally the 'tyranny of the majority'. It is socially divisive and prone to produce short-term, simplistic solutions to complex problems and is totally unsuitable for certain areas of policy making.<sup>60</sup>

## How Persuasive are these Criticisms?

### *Claim one:*

*CIR undermines notions of responsible and representative government and is unnecessary since current levels of participation are adequate.*

Can CIR be reconciled with the institutions of representative government, including the courts and other less formal tribunals, and the check and balance function they offer?<sup>61</sup> Various commentators believe not and have argued against CIR on this basis. For example, Puplick has suggested that CIR could expose less popular court decisions to referendums, thereby undermining a cornerstone of our political and legal system: the independence and integrity of the courts.<sup>62</sup>

Similarly, Moore and Pettit have argued that CIR would leave individuals vulnerable to a new form of unchallengeable decision-making, whereas the current system incorporates various checking mechanisms through which people can have their complaints heard.<sup>63</sup> A related fear of CIR is that it could weaken governments and make them afraid to take hard decisions.<sup>64</sup>

The response to these arguments is that rather than being an impediment to the current checks and balances on the political system, CIR is a way of diffusing power and, as such, an important means of checking government power.<sup>65</sup> Furthermore, representative democracy and CIR need not be inconsistent. Overseas experience reveals that CIR is not so much a replacement for representative democracy as an augmentation to it. CIR is not intended to fundamentally restructure parliamentary processes but rather revitalise them by putting politicians directly in touch with the electorate's concerns.<sup>66</sup>

60 Cotton and Bennett (1994) p 4; N Franklin (1992) 'Initiative and Referendum: Participatory Democracy or Rolling Back the State?' in M Munro-Clark (ed) *Citizen Participation in Government*, Hale and Iremonger, p 59.

61 M Moore and P Pettit, 'Undermining Democracy: The Danger of Citizen Initiated Referenda' (1997) 78(2) *The Parliamentarian* 153, p 154.

62 Puplick (1996) p 38.

63 Moore and Pettit (1997) p 154.

64 Major (1994) p 49.

65 M Macklin (1996) 'The Case for a Citizen's Initiative' in K Wiltshire (ed) *Direct Democracy: Citizen Initiated Referendums*, Constitutional Centenary Foundation, p 21.

66 Cotton and Bennett (1994) p 22; G Cornwell, 'Involving the People: Citizen Initiated Referenda in the Australian Capital Territory' (1997) 78(2) *The Parliamentarian* 150, p 152.

As for the fear that governments will be weakened and afraid to make hard decisions in a system where CIR operates, the converse could be argued. That is, rather than encouraging a government to escape its responsibilities, CIR is actually an effective method of tackling difficult issues by letting the people decide.<sup>67</sup>

Finally, the proposition that current levels of participation are adequate is highly debatable. Voter apathy and alienation are recognised phenomena in the Australian political context, despite the existence of compulsory voting.<sup>68</sup> CIR is a way of combating such apathy because it empowers the electorate to become directly involved in the democratic process and provides it with a tangible and ongoing role in the decisions that govern it.<sup>69</sup> US research suggests that public apathy is a result of the electorate's lack of impact on the political process.<sup>70</sup> For example, comparisons of voter turnout in US states that use the initiative with states that do not show that the states that use the initiative tend to have a much higher voter turnout.<sup>71</sup>

### *Claim two*

*CIR is expensive and destructive of good planning. The process can be manipulated by well-financed interest groups.*

The most common objection to CIR is that it is expensive and the money could be better spent on services such as health and education. Referendums do cost money; however, the question should really be whether it is money well spent. It could be argued that the funding required for CIR would in fact create jobs whilst improving democracy.<sup>72</sup> Furthermore, factors such as holding referendums concurrently with elections and electronic tallying methods can serve to minimise costs.<sup>73</sup>

As for manipulation by well-financed groups, the argument is that money and the media combined can distort and misinterpret the information that is being supplied to the electors,<sup>74</sup> creating an artfully contrived atmosphere of emotionalism and alarm, rather than informing the voters.<sup>75</sup>

67 Canadians for Direct Democracy, 'Direct Democracy in Canada', <http://www.npset.com/cdd/common-2.htm>, 23 October 1997.

68 Cornwell (1997) p 151.

69 Ibid.

70 M Macklin (1985) 'The Case for a Popular Initiative', a paper presented to the Constitutional Amendment Sub-Committee May 1984, reproduced in *Proceedings of the Australian Constitutional Convention*, Vol 2, Standing Committee Reports, Australian Government Publishing Service p 78.

71 Ibid.

72 Canadians for Direct Democracy, 23 October 1997.

73 Alliance for Democratic Reform, 'Rebuttal of Arguments Against the ADR Direct Democracy Policy', <http://www.cs.su.oz.au/~mrg/adr/rebut.html>, 7 January 1998.

74 Major (1994) pp 49-50.

75 H Scheiber, 'Foreword: The Direct Ballot and State Constitutionalism' (1997) 28 *Rutgers LJ* 787, p 815.

Clearly, the quality and impartiality of information distributed to the public is a crucial factor in the effectiveness of a referendum. The success of a referendum will largely depend on how well-informed the electorate is about the issue; thus, advertising is crucial. In New Zealand, there is a limit of NZ\$50,000 that can be spent on such advertising.<sup>76</sup> This can be contrasted with the United States, where there are no spending limits because of that nation's constitutional right to freedom of speech.<sup>77</sup> For example, tobacco companies spent US \$21 million on a 1988 campaign opposing taxes on cigarettes.<sup>78</sup> Instead of spending limits, a number of the US states that use CIR have 'forced disclosure' provisions, whereby all companies providing financial support to a campaign have to make such support publicly known.<sup>79</sup> In Switzerland, financial secrecy legislation makes both caps on spending and disclosure of funding requirements impractical.<sup>80</sup>

It is interesting to consider what effect these two features may have had in the recent Swiss referendum on genetic engineering. An overwhelming majority of voters rejected the proposal to ban, by constitutional amendment, the genetic alteration and patenting of animals and plants.<sup>81</sup> Key opponents of the measure included Swiss drug companies and the Swiss Government, whilst the proponents of the issue were environmentalists, animal rights activists and consumer groups.<sup>82</sup> Clearly, there is an imbalance of power and financial resources between the opponents and proponents of such a referendum. It is likely that a more sustained and expensive media campaign could have been launched by the government and pharmaceutical industry than by consumer and environmental groups, thereby influencing the result of the referendum. Such power imbalances are to some extent curtailed by the New Zealand model's limits on allowed advertising; however, it is clearly an issue which should be addressed in any CIR model.<sup>83</sup>

Whilst the criticism of the power of moneyed interests is a valid one, it is not limited to CIR but could equally apply to the current legislative process in Australia. Currently, the effect of moneyed groups is perhaps more insidious because they have the potential to influence policy agendas without any public knowledge of what is taking place.<sup>84</sup> To overcome this problem, every CIR model should have provisions dealing with disclosure of financial contributions and regulation of advertising. Any limits on funding

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76 H Catt, 'The Other Democratic Experiment: New Zealand's Experience with Citizens' Initiated Referendum' (1996) 48(1) *Political Science* 29, p 33. See *Citizens Initiated Referenda Act 1993* (NZ) s 42.

77 Catt (1996) p 33.

78 Ibid.

79 Major (1994) p 57.

80 Catt (1996) p 33.

81 'Voters Reject Restrictions on Genetic Tampering', *Sydney Morning Herald*, 9 June 1998, p 9.

82 Ibid.

83 See discussion of safeguards in the last section of this article.

84 Major (1994) p 50.

for such 'political advertising' will need to be carefully drafted so as to not infringe the implied freedom of political communication which the Australian High Court has developed in cases such as *Australian Capital Television v Commonwealth*.<sup>85</sup>

### *Claim three*

*Voters are not competent to judge particular legislative proposals.*

Opponents of CIR argue that the ordinary voter should not be asked to decide about matters which are largely emotional or too intellectually complex, the assumption being that the people's elected representatives can do the job better.<sup>86</sup> Whilst some overseas experience suggests that voters have been short-sighted and self-serving on issues such as property taxation,<sup>87</sup> the evidence is by no means conclusive on this. For example, Swiss voters agreed by referendum in 1993 to an increase in Switzerland's petrol tax.<sup>88</sup> Further, the Swiss experienced a period of xenophobia in the 1960s, reflected in attitudes such as 'there are too many foreign workers in the country' and 'jobs are in short supply and being taken from the true Swiss'.<sup>89</sup> After several related referendums on immigration quotas, the result was that even though a limit was set on the total number of foreigners who could come to work in Switzerland, a provision was made so as to permit a subsequent rise in the total.<sup>90</sup> Similarly, a measure which would have halved income tax was overwhelmingly defeated in California.<sup>91</sup> Such evidence suggests that the ongoing sense of involvement that people have through CIR can encourage them to be more far-sighted and responsible in their decision-making than the aforementioned critics give them credit for.<sup>92</sup>

Further, given ever-higher literacy and education levels in Australia, arguments about voters being unsophisticated in comparison to their elected representatives are increasingly unpersuasive. As Macklin puts it, 'the arguments against a popular initiative all basically suggest that the people are incapable of making rational and responsible decisions on legislation that affects them. This is a naive and paternalistic attitude...'.<sup>93</sup>

### *Claim four*

*CIR is a dream for cranks and extremists.*

The fear here is that CIR offers 'an opening for cranks and those with bees in their bonnet'.<sup>94</sup> Whilst it is true that CIR has been embraced by certain

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85 (1992) 177 CLR 106.

86 Beedham (1993) p 5.

87 Scheiber (1997) p 796.

88 Beedham (1993) p 7.

89 Ibid.

90 Ibid.

91 Macklin (1996) p 21

92 Ibid.

93 Macklin (1985) p 84.

94 Moore and Pettit (1997) p 154.

radical or ultra-conservative groups, it does not follow that CIR is an exclusive device of these particular interest groups. Every major political party in Australia has at one time or another advocated CIR. Further, the requirement for a minimum petition size before a vote is triggered ensures that only issues which generate significant interest in the community go to referendum.<sup>95</sup>

In addition, as Macklin argues, there should be openings for groups in a democratic society which espouse values to which the majority do not necessarily subscribe. Allowing alternative voices to be heard can act as a safety-valve.<sup>96</sup>

### *Claim five*

*CIR creates social divisiveness and tyrannical majorities and produces simplistic, short-term solutions.*

CIR is not suitable for all types of decision-making. Possibly the strongest argument against CIR is that the interests of unpopular minorities may be destroyed by majorities at the ballot box, with these majorities possibly less sensitive to those interests than elected representatives.<sup>97</sup> The concern is that CIR would make it easier for those who happen to belong to a majority on some issue to mobilise others in that majority and to enforce their view, irrespective of the interests or rights of the minority.<sup>98</sup> The argument is based on the assumption that elected representatives have a residual discretion or even a duty to sometimes make decisions which are contrary to popular prejudice. As the Australian Constitutional Commission puts it:

Thus, while those in authority should be responsive to the felt interests of the electorate, they also have other duties and responsibilities. In particular, Governments have a duty to guard against the persecution of an unpopular minority.<sup>99</sup>

However, it has not been proven that elected representatives do a particularly good job of preserving minority rights or that CIR processes are intrinsically more likely to damage such interests.<sup>100</sup> For example, in the 1950s, it was the Menzies' government which sought to outlaw the Australian Communist Party by changing the Constitution. The referendum on the issue was unsuccessful, illustrating that popular opinion when put to the test is not necessarily antithetical to the interests of an unpopular minority and that threats to the rights of these groups can occur from the government itself.<sup>101</sup>

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95 Alliance for Democratic Reform, January 1998.

96 Macklin (1996) p 23.

97 Cronin (1989) p 212.

98 Moore and Pettit (1997) p 154.

99 Australian Constitutional Commission (1988) p 869.

100 Cotton and Bennett (1994) p 24.

101 Ibid.

For those still swayed by the minority interest argument, the New Zealand model in which the referendum is advisory only provides a safeguard in such circumstances. The crucial point is that CIR is an addition to representative democracy rather than an obliteration of it and, as such, any CIR model must include safeguards to ensure that the system operates as intended. That is, CIR is intended as a 'restoration of popular influence in state politics',<sup>102</sup> 'to educate and develop the people' and to make 'legislative bodies truly representative'.<sup>103</sup> Irrespective of the conceptual difficulty in defining 'truly representative', it can be taken that CIR is not intended to be a vehicle for oppression and that the correlation between the intended and actual effect of CIR can be maintained by including safeguards in the system.

First, minority rights are unlikely to be affected, given the difficulty of successfully passing a referendum. For example, past experience of referendums to amend the Commonwealth Constitution demonstrates that very few have in fact been passed, suggesting that if the electorate is in any doubt as to the benefit of the proposed change, they will vote against it. Secondly, there are various procedural safeguards, such as the often required 'double majority' for passage.<sup>104</sup> Thirdly, there may be substantive limits in the form of topics excluded from CIR. Alternatively, a Bill of Rights could be enacted to provide a mechanism for limiting any potential impact of CIR on minority rights.<sup>105</sup> Even without a Bill of Rights, Australian courts have the power to strike down legislation for incompatibility with the Commonwealth Constitution and state legislation would be inoperative to the extent that it is inconsistent with any Commonwealth legislation.<sup>106</sup> Another substantive limit sometimes employed in relation to legislation enacted through CIR is for the legislative body to have a right to veto popularly enacted legislation which is inconsistent with minority rights or other 'fundamental legislative principles'.<sup>107</sup> Such a mechanism may prove unnecessary, however, given that unsuitable referendum questions can easily be filtered out at the petition stage by requiring them to be formulated with the assistance of and be approved by, for example, the Clerk of the Parliament or the Electoral Commission.

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102 Scheiber (1997) p 787.

103 Ibid, p 790.

104 This would translate, in Australia, to a majority of voters and a majority of electorates at state level and to a majority of voters at federal level and a majority of states.

105 G Williams (1998) 'CIR Will Not Work Without Bill of Rights', *Courier-Mail*, 9 September, p 19.

106 For example, the *Racial Discrimination Act* 1975 (Cth) operates to prevent the states from legislating to remove indigenous property rights without compensation.

107 This phrase comes from the *Legislative Standards Act* 1992 (Qld). See s 4 for a definition. Briefly, these are the principles relating to legislation that underlie a parliamentary democracy based on the rule of law and include requiring that legislation has sufficient regard to rights and liberties of individuals and the institution of parliament.

The concern has also been raised that CIR can be socially divisive, since it will require direct confrontation on difficult, sensitive and emotional issues, unlike the present representative system which allows such conflict to be placed at arm's length from those directly affected by the issue.<sup>108</sup> This argument seems to rest on the assumption that the information presented before a referendum is unlikely to be reliable or balanced. However, it could equally be argued that free discussion is the best way of countering the prejudice and suspicion which breeds when debate is suppressed; further, that stereotypes of minorities can be broken when the majority have the opportunity to be informed about the issues.<sup>109</sup>

*CIR is not suitable for all types of decision-making.*

This is a fair criticism. Referendum voting tends to be effective only when the question being voted upon can be answered in a simple yes or no manner. It does not lend itself well to identifying all affected interests and obtaining and analysing all relevant information in complicated matters.<sup>110</sup> Further, there is not generally any in-built capacity to accommodate negotiation, compromise or amendment in a referendum process.<sup>111</sup> For this reason, it is important to have safeguards built-in to any model to ensure that adequate and relevant information is presented before a referendum and that there are mechanisms in place to ensure that questions put to referendum can be answered in a 'yes' or 'no' manner.

In conclusion, the concerns raised against CIR are not impassable and, in some circumstances, apply equally to the current representative system. Provided that there is refinement of the model adopted and certain safeguards and limits built into it, CIR offers a means of rejuvenating representative democracy. The justifications for introducing CIR are based on sound theoretical reasons for increasing citizen participation and a number of practical benefits flow from CIR.

## Australian Proposals and Experience

In Australia at the time of the Constitutional Conventions leading to federation, there was some mention of more participatory forms of democracy.<sup>112</sup> For example, Charles Kingston's 1891 Draft of a Constitution Bill provided for referendums based on the Swiss model. It was proposed that a referendum be held on any bill passed by the Federal Parliament if 20,000 electors demanded it.<sup>113</sup> However, Kingston's idea was not pursued. Other types of CIR do not seem to have been discussed in any detail at the Convention debates.<sup>114</sup> For example, during Isaac's explanation of the

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108 Puplick (1996) p 41.

109 Alliance for Democratic Reform, January 1998.

110 Franklin (1992) p 59.

111 Ibid, p 60.

112 Cotton and Bennett (1994) p 6.

113 JA La Nauze (1972) *The Making of the Australian Constitution*, Melbourne University Press, p 295.

proposed referendum procedure to amend the Constitution, McMillan raised the CIR issue by interjecting 'You mean there is no initiative like there is in Switzerland' but the point was not discussed further.<sup>115</sup>

However, by the early 20<sup>th</sup> century, the idea was gaining interest in some of the Australian states. Elector initiatives were adopted as part of the Australian Labor Party's (ALP) platform in 1908 and voter recall of representatives was added in 1912.<sup>116</sup> Both initiative and recall remained ALP policy until 1963.<sup>117</sup> After the First World War, the ALP lost interest in the idea and it remained dormant until the late 1970s, when the Democrats in the Senate began introducing a series of bills for a constitutional amendment to provide for the system.<sup>118</sup>

In the last decade, there has been a resurgence of interest in CIR in Australia, with most jurisdictions preparing or introducing direct democracy bills.<sup>119</sup> Proposals have been put forward by high profile politicians including Peter Reith, Ted Mack, Cheryl Kernot, Pauline Hanson and, most recently, Peter Wellington.

Eighteen of the more recent proposals have been examined by Peter Reith by way of a comparative table.<sup>120</sup> In general, the proposals have not included the concept of recall. Interestingly, a number of them were never introduced into Parliament and some were limited to constitutional initiatives. The percentage of signatures that would be required to trigger an initiative generally ranged from between 2% to 6% of voters and most of the federal proposals have required a double majority (ie the specified percentage of voters as well as a majority of states). Some of the states have also opted for this double-majority requirement for passage, with the requirement for approval by a majority of voters and a majority of electoral districts within the State. The motivation for this is to protect the process from capture by the larger districts to the detriment of less populated districts, such as rural areas.<sup>121</sup> Most proposals have favoured the timing of the referendum to be concurrent with the next general election and a number have been subject to parliamentary review.<sup>122</sup>

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114 C Hughes (1985) 'Commonwealth Constitution: Methods of Initiating Amendments' in *Proceedings of the Australian Constitutional Convention*, Vol 2, Standing Committee Reports, Australian Government Publishing Service, p 49.

115 Ibid. See also *Official Record of the Debates of the Australasian Federal Convention* (1897) Government Printer, p 1021.

116 Cotton and Bennett (1994) p 7.

117 Ibid.

118 Walker (1996) p 3.

119 Ibid. For an account of the process in the Australian Capital Territory, see G Williams and G Chin 'Australian Experiments with Community Initiated Referendum: CIR for the ACT?' (1998) 7 *Griffith LR* 274.

120 P Reith (1996) 'Appendix: Review of Australian Direct Democracy Initiatives' in K Wiltshire (ed) *Direct Democracy: Citizen Initiated Referendums*, Constitutional Centenary Foundation, pp 43-51.

121 Ibid, p 49. See, for example, the One Nation Party's CIR policy, below n 128.

122 Ibid.



### *The Queensland experience*

As early as 1916, the Queensland Government showed an interest in CIR. The Labor Government of the time introduced the Popular Initiative and Referendum Bill to 'amend the Constitution of Queensland by providing for legislation and repeal or rejection of laws or proposed laws by means of the popular initiative and referendum...'.<sup>123</sup> The Government relied on the positive experience of Switzerland and the United States and supportive comments of jurists such as Dicey, Bryce and John Stuart Mill in relation to referendums and popular participation.<sup>124</sup> The debate, however, was side-tracked both by discussion of recall and by the irrelevant question of 6 pm-closing of public bars during the duration of the war.<sup>125</sup> The Bill was ultimately declared lost after the opposition-controlled Upper House extensively amended the Bill in a way that was unacceptable to the government.<sup>126</sup> The Government proceeded to introduce the Bill again in 1917, 1918 and 1919 with the same result.

In 1988, the Citizens' Electoral Council party was formed with the intention of working towards the introduction of CIR at all levels of government.<sup>127</sup> The underlying goal of the group was to represent the 'will of the people' at all times rather than having specific policies on particular issues.<sup>128</sup> It is unclear how this aim could have been achieved in practice and, perhaps not surprisingly, the Council was on the decline by 1989 and is not currently registered as a political party in Queensland.

The June 1998 Queensland election sparked interest in CIR once again. Pauline Hanson's One Nation Party announced a Queensland policy on CIR, entitled 'Community Based Referendum'.<sup>129</sup> It described the policy as being a 'facility for Australians to raise their concerns for debate and public decision'.<sup>130</sup> An interesting feature of this policy was that the Electoral Commission was required to assess the proposal potential to be given legal effect. Presumably, this would nip a number of proposals in the bud if they are not specific enough to be encapsulated in legislation or, alternatively, if

123 Hon J Huxham (1916) 'Popular Initiative and Referendum Bill' (30 August 1916) 123 *Queensland Parliamentary Debates* p 176.

124 Ibid, p 280. See also J Larcombe, 'Popular Initiative and Referendum Bill' (6 September 1916) 123 *Queensland Parliamentary Debates* p 370.

125 For example, D Gunn, 'Popular Initiative and Referendum Bill' (30 August 1916) 123 *Queensland Parliamentary Debates* p 185; P Murphy, 'Popular Initiative and Referendum Bill' (30 August 1916) 123 *Queensland Parliamentary Debates* p 187.

126 Hon TJ Ryan, 'Popular Initiative and Referendum Bill' (12 October 1916) 123 *Queensland Parliamentary Debates* p 1348.

127 T Perrett, 'My Experience with the CEC Movement' (1989) 24 *National Outlook* 12, pp 12-13.

128 Ibid, p 12.

129 The policy is also to apply at federal level. See D Pratt, 'Community Based Referendum Will Give Power Back to the People', <http://www.gwb.com.au/onenation/qldstate/cbr.htm>, 7 January 1998.

130 Ibid.

they involve complex issues which would require substantial amendment of existing legislation.

Most recently, an independent member of Queensland Parliament, Peter Wellington, introduced a private member's Citizens' Initiated Referendum (Constitution Amendment) Bill 1998 (Qld). The Bill purports to change the *Constitution Act 1867* (Qld) by including provision for legislation by CIR. The Bill is very short and contains little detail;<sup>131</sup> however, it does list a number of matters which are specifically excluded from being the subject of a proposed law under CIR. Amongst these are:

- ◇ matters affecting a particular locality or person,
- ◇ retrospective penalties or liabilities,
- ◇ recall of public officials,
- ◇ matters beyond Parliament's constitutional power to enact,
- ◇ tax and appropriation,
- ◇ the composition of the judiciary and
- ◇ the republic issue as long as Australia remains a constitutional monarchy.

However, it faced an uphill battle, given that the Beattie Labor government has repeatedly stated its opposition to CIR.<sup>132</sup> Indeed, it failed passage on 11 November 1998.<sup>133</sup> The Beattie government has instead proposed regular 'community Cabinet meetings' as a means of improving opportunities for public participation.

### Further Issues and Safeguards to Consider in any CIR Model *Should compulsory voting be maintained for CIR?*

It is more expensive to make voting for referendums compulsory than not and there is no guarantee that compelling people to vote will ensure an adequate level of participation (for example, voters often leave the ballot paper blank). However, compulsory voting creates a sense of obligation and attaches importance to the process of voting. It is one means of keeping the power of money and organised pressure groups in check by levelling out power at the ballot box.<sup>134</sup> The argument is that if all citizens must vote, then

131 Mr Wellington has indicated an intention to introduce a further bill, the Citizens' Initiated Referendums Machinery Bill. See P Wellington (1998) 'Citizens' Initiated Referendum (Constitution Amendment) Bill 1998, Second Reading Speech, *Queensland Parliamentary Debates*, 25 August, p 1804.

132 S Emerson (1998) 'Beattie Rules With Power of One', *The Australian*, 26 June, p 1; P Beattie (1998) 'Beattie Outlines Blueprint for Power', *Courier-Mail*, 26 June, p 4.

133 Hon PD Beattie (1998) 'Citizens' Initiated Referendum (Constitution Amendment) Bill', *Queensland Parliamentary Debates*, 11 November, pp 3051-3059.

134 Puplick (1996) p 42.

the effects of participation and non-participation are not distorted to the same extent they might be if voting was voluntary and turnout was consequently low. Non-compulsory voting also tends to mask the pitfall of marginalised groups becoming totally excluded from the process. The fear is that if CIR is introduced and features non-compulsory voting, then this will spell the end of compulsory voting generally in Australia.<sup>135</sup>

### *Ensuring effective participation*

Leading on from this argument is the question of how effectively participation can be guaranteed under CIR. Scheiber has pointed out that the ideal of participatory democracy requires more than just the availability of voting opportunities on direct ballot issues. He argues that it must also be tied to the realities of participation levels and access to the process, the accuracy and fullness with which information about the options is disseminated to the public and the degree to which judicial standards of review ensure that there is proper conformity to the specific terms of the legislation setting out the process.<sup>136</sup> He points out that the 'signature collection' industry that has developed in the United States, with professional consultants engineering and overseeing petition signature campaigns through expensive media campaigns and computerised mailings and targeted voter lists, has come under criticism as a perversion of the underlying rationale behind CIR.<sup>137</sup>

Scheiber's arguments relate to the US experience; however, they can inform the Australian context. Clearly, issues of advertising and information dissemination to the public as well as the availability of judicial review of the process must be addressed in any CIR model. In particular, as discussed earlier, strict regulation of advertising and its funding is crucial if the integrity of the CIR process is to be maintained. As for accessibility to the system and the realities of participation levels, the Australian tradition of compulsory voting suggests this should be less of problem here. Even if CIR voting is made non-compulsory, it is still likely that since at least some CIR could be held concurrently with elections at which voting is compulsory, participation and accessibility could be maintained at current levels. However, further consideration should be given as to how to design a CIR model which addresses these concerns.

### *Drafting*

Parliamentary Counsel should be involved in the technical and specialised task of drafting proposed popularly initiated legislation, since the drafting of a bill is crucial both in getting it passed and in its future effectiveness.<sup>138</sup> This should also obviate the criticism that ordinary people drafting laws will create all sorts of complications and inconsistencies with existing laws.<sup>139</sup>

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135 Ibid. A full discussion of compulsory voting is beyond the scope of this article.

136 Scheiber (1997) pp 814–15.

137 Ibid, p 815.

138 Major (1994) p 60.

139 C Hull (1994) 'Reith Champions the Ideal of Direct Democracy', *Canberra*

### *What will be presented at referendum?*

One difficulty is that a number of CIR models are designed such that the referendum actually presents a bill to the public to vote on. As mentioned above, this will have inherent difficulties in any referendum situation where, to be effective, a simple yes/no response is required, when most bills will have a level of complexity going beyond a simple yes/no response. However, such models seem to work in the United States; in Australia, there is a proposal to put the not uncomplicated 'bipartisan model' for a Republic to the Australian electorate in 1999.

### **Overseas Experience of CIR: The New Zealand Model**

When the New Zealand Royal Commission into the Electoral System examined CIR in 1986, it was highly critical of the concept, describing it as involving 'blunt and crude devices', which, if used frequently, 'would blur the lines of accountability and responsiveness of governments and political parties and blunt their effectiveness'.<sup>140</sup> Nevertheless, the *Citizens Initiated Referenda Act* 1993 (NZ) was enacted just seven years later. The Act gives voters the power to initiate non-binding referendums on any subject. Despite the Royal Commission's fears of 'frequent use' of the process, it has not been used often in New Zealand. Although various petitions have been circulated on topics including euthanasia, victims' rights, public ownership of forests and government funding of health care, to date there has only been one referendum which has gone to the electorate: the Firefighters Union referendum in 1995.

Douglas Graham, the current New Zealand Minister for Justice, has outlined the legislative procedure as follows.<sup>141</sup>

A proposal for referendum is submitted to the Clerk of the House of Representatives. The Clerk, in consultation with the person submitting the referendum proposal, determines the final wording of the question. The Act provides that the wording of the question should clearly convey the purposes and effect of the referendum and that the wording should be such that only one of two answers may be given to the question.<sup>142</sup> Signatures of a minimum of 10% of voters must be gathered and delivered as a petition to the Clerk within 12 months of the approval of the petition form.<sup>143</sup> The objective of the petition is to ensure that the 'issues that are put to the voters excite the concern of more than a small group'.<sup>144</sup> The Clerk checks the petition for erasures and blank lines and takes a sample of the signatures to

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*Times*, 4 May, p 19.

140 Royal Commission on the Electoral System, *Towards a Better Democracy*, Appendix to the Journals of the House of Representatives of New Zealand, 1986-87, vol 9, 'Royal Commissions', p 175.

141 D Graham, 'Direct Democracy: Citizen's Initiated Referenda: A Question of Public Confidence' (1994) 75 *The Parliamentarian* 89, p 89.

142 *Citizens Initiated Referenda Act* 1993 (NZ) s 10.

143 In 1995, this translated to 235,000 signatures: Catt (1996) p 31.

144 *Ibid*, pp 30-1.

verify that the petition has been signed by 10% of voters. If not, then the petition lapses; if so, then the Clerk certifies the petition correct and presents it to the House of Representatives.<sup>145</sup> This checking mechanism is an important safeguard in any model.

The Governor-General has a month from the date of presentation to set a date for the referendum. The referendum must be held within 12 months of the date of presentation unless 75% of the members of the House vote to defer it. The House may defer the date for 12 to 24 months from the date of presentation or they may change the date to coincide with a general election if Parliament has less than 12 months of its term left.<sup>146</sup>

A referendum is then held but the result is not binding on the government. That is, the referendum is indicative only; the government does not have a legal obligation to give effect to the result. This would seem to preserve a key assumption of representative democracy, namely that the government has a duty to act in the best interests of the nation and that it should have some discretion in order to achieve this where necessary.<sup>147</sup> Furthermore, the non-binding nature of the referendum in New Zealand is important because of New Zealand's constitutional framework. The courts in New Zealand do not have a power of judicial review to strike down legislation or referendum results which are contrary to New Zealand's basic constitutional and democratic principles. The fact that the referendum results are not binding is significant because it gives Parliament the flexibility to ensure that rights and freedoms are not compromised by referendum results.<sup>148</sup>

On the other hand, as Graham points out, the government is unlikely to place itself in a position where it would be required to justify its refusal, unless there is some fundamental issue at stake.<sup>149</sup> Graham doesn't define 'fundamental issue' but it would seem that rather than his point is that the referendum result may effectively be binding because the government will be loath to go against the wishes of the people unless there is a persuasive justification for doing so. However, the experience of the Firefighters Union referendum - a referendum which did not even involve fundamental issues, may indicate otherwise.

### *An example*

The 1995 Firefighters Union referendum offers a useful illustration of the actual workings of the New Zealand model. This referendum was initiated by the Firefighters Union in response to a proposed restructuring of the fire service. The restructuring would have meant reducing staff and increasing working hours. The initiating petition was signed by approximately 12% of registered voters. About one-third of the total registered voters voted in the

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145 *Citizens Initiated Referenda Act 1993* (NZ) ss 16–18.

146 *Ibid.*, s 22.

147 See discussion at text above nn 102–3.

148 Graham (1994) p 89.

149 *Ibid.*

referendum, with 88% of them voting against the restructuring. Nonetheless, the government went ahead with the restructuring of the fire service without waiting for the result of the referendum. Various ministers claimed that the topic of industrial relations was inappropriate for referendum.<sup>150</sup> It is not clear what sort of impact the result actually had because 'community safety personnel' were employed to replace retiring firefighters. These community safety personnel were employed on the same terms and conditions which had been rejected by the union prior to the referendum.<sup>151</sup> Arguably, the effect of the referendum was more subtle; it sent a message to the government about public dissatisfaction with economic rationalism and cutting costs through cutting essential services.

The criticisms of the New Zealand legislation are that there is no requirement in the Act that a neutral summary of the issues be distributed to the electors prior to the referendum.<sup>152</sup> However, although no information pamphlet for the firefighters referendum was produced, press coverage was seen to be sufficient.<sup>153</sup> A survey revealed that in the week before the vote, over two-thirds of those in the sample knew there was an imminent vote and the substance of the issues concerned.<sup>154</sup> The other main criticism of the Act is that it does not specifically exclude defamatory, vexatious, indecent or scandalous questions.<sup>155</sup> However, this may not be necessary, given the requirement that the final wording of the referendum proposal must be approved by the Clerk of the House of Representatives.

## Conclusion

CIR is something of a hot potato in Australian politics. It has been raised by virtually every major party at some point and yet no Australian parliament has actually taken the plunge and enacted it to date. Whilst offering the opportunity to rejuvenate and enliven Australian democracy, it is an extremely powerful tool which is viewed with suspicion by many commentators. This article has argued in favour of CIR on the basis that it can be a useful tool to revive Australian democracy by better involving more people in the political process. Provided that adequate safeguards are built into the model, CIR could be a dynamic complement to the current Australian system.

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150 G Wehrle, 'The Firefighters Referendum: Should Questions Arising from Industrial Dispute be Excluded from Referendums Held under the CIR Act 1993?' (1997) 27 *Vict U Wellington LR* 273, p 288.

151 *Ibid*, p 290.

152 *Ibid* p 294.

153 Catt (1996) p 33.

154 *Ibid*.

155 Wehrle (1997) p 281.

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