AUSTRALIAN EXPERIMENTS WITH COMMUNITY INITIATED REFERENDUM
CIR for the ACT?

George Williams[*] *and Geraldine Chin*[**]

Introduction

In Australia in recent years, there has been heightened cynicism of the political process and of the major political parties. The grip of the major parties has been challenged by the formation of new parties, such as Pauline Hanson's One Nation Party. In addition, in several State and Territory parliaments, no one party or coalition has been able to gain a majority of seats in the lower house, having instead to rely upon independent members for support. These developments are symptomatic of widespread distrust of Australia's current system of representative government. The rise of many proposals across Australia for community initiated referendum (CIR) reflects this.

CIR has been widely advocated by political parties in legislatures around Australia. While numerous Bills have been introduced at the State and federal level, CIR only operates in Australia at the level of local government. CIR was raised as an issue in the 1998 Queensland State election, being promoted by both Pauline Hanson's One Nation Party and Graeme Campbell's Australia First Party. CIR is also strongly supported by Independent Mr Peter Wellington, upon whom the minority Labor government in Queensland relied for support. Soon after the election, Mr Wellington introduced the *Citizens' Initiated Referendum (Constitution Amendment) Bill* 1998 (Qld) into the Queensland Parliament.[1] On 11 November 1998, the motion to read the Bill a second time was only supported by the two Independents and nine One Nation Party members and was opposed by 64 members of the Labor Government and the Coalition Opposition.[2] Despite the Liberal Party's opposition to CIR in Queensland, the minority Liberal government in the Australian Capital Territory (ACT) introduced a legislative proposal for CIR, the *Community Referendum Bill* 1998 (ACT), into the ACT Legislative Assembly on 28 May 1998. The ACT proposal has yet to be debated. This is the fourth time that

* Barrister, ACT Bar; Fellow, Law Program, Research School of Social Sciences, Australian National University

** Research Assistant, Law Program, Research School of Social Sciences, Australian National University

We wish to thank Geoffrey Brennan, Philip Pettit, Marian Sawer, Adrienne Stone and the anonymous referee for their comments on an earlier draft.

1 Queensland Parliament, Hansard, 25 August 1998, p 1804.

2 Ibid, 11 November 1998, p 3059.

the ACT Liberal Party has introduced this or a like Bill. This article focuses on the ACT experience with CIR and details how CIR would work under the *Community Referendum Bill.*

CIR is also known as 'citizens' initiated referendum', 'electors' initiative', 'direct legislation' and 'peoples' referendum'. CIR provides a mechanism for citizens to initiate, by petition, a referendum to repeal an existing law or to enact a new law. Proponents of CIR recognise two essential characteristics of a 'true' CIR system: 1) the people have the power to initiate a referendum on a particular law; and 2) the result of the referendum is binding on parliament.[3] A CIR process that does not lead to a binding result arguably undermines the basic principles of direct democracy and the participatory ethic underlying CIR. There are numerous variations of CIR, with different jurisdictions tending to adopt slightly different means of classification.[4] Three main types of CIR have been proposed in Australia: 1) *the direct initiative*, under which voters can put a proposal to referendum without any intervention by parliament; 2) *the indirect initiative*, by which parliament is given a specified time in which to enact the measure proposed by the citizen initiative before it is submitted to a referendum; and 3) *the voters' veto*, also known as *the legislative referendum*, under which voters may petition for a referendum to repeal an existing law which has been passed by parliament.[5] A fourth type of CIR, *the recall*, has been proposed less frequently. It would enable the community to petition to hold a referendum to remove a person elected to public office.[6] The proposals for direct and indirect initiatives in Australia have been for both the initiation and amendment of legislation (*legislative initiative*) and for amendment of the Australian Constitution (*constitutional initiative*).

---

3 G de Q Walker, 'Constitutional Change in the 1990s: Moves for Direct Democracy' (1993) 21 *Papers on Parliament* 15, p 20.

4 G de Q Walker (1987) *Initiative and Referendum: The People's Law*, Centre for Independent Studies, pp 11–14; KW Kobach (1993) *The Referendum: Direct Democracy in Switzerland*, Dartmouth, p 42; DB Magleby (1984) *Direct Legislation: Voting on Ballot Propositions in the United States*, Johns Hopkins University Press, pp 35–6; D Butler and A Ranney (eds) (1994) *Referendums Around the World: The Growing Use of Direct Democracy*, AEI Press, pp 219–22; M Cotton and B Bennett (1994) *Citizen Initiated Referenda: Cure-All or Curate's Egg?*, Current Issues Brief No 21, Parliamentary Research Service, p 5; J Newton (1995) *Citizen Initiated Referenda in Australia*, unpublished draft Information Paper 14, Research Service of the South Australian Parliamentary Library, p 1.

5 Walker (1987) pp 11–14.

6 Legislation to implement recall in Australia only seems to have been proposed in Queensland in relation to an amendment by the Queensland Legislative Council to the *Popular Initiative and Referendum Bill* 1917 and 1918. As outlined below, it also formed part of the federal platform of the Australian Labor Party for over 50 years. See generally JF Zimmerman (1997) *The Recall*, Praeger.

CIR Overseas and in Australia

The overseas experience

Much of the inspiration for CIR in Australia has come from experiences with CIR overseas, particularly from Switzerland, Italy and a number of States of the United States. Switzerland stands out as the pioneer of CIR. At the cantonal level, the constitutional initiative and voters' veto were first introduced in the 1830s and the legislative initiative in the 1860s. At the federal level, the constitutional initiative for total revision of the Constitution was introduced in 1848 and for amendments to the Constitution in 1891. However, there is still no provision for the legislative initiative at the federal level.[8] This has caused some problems, as it encourages proponents of legislative reform to cast normal laws as constitutional amendments.[9]

In the United States, CIR is widespread at the State level even though there is no provision for CIR at a federal level. The legislative initiative was introduced in South Dakota in 1898. Subsequently, 23 States and the District of Columbia have adopted either the legislative or constitutional initiative or both. The State most often cited as a leader in direct democracy is California, which comes closest to Switzerland in its use of referendums and initiatives as a pivotal element of the political system. In California, the enactment of the legislative initiative, constitutional initiative and voters' veto was approved by a margin of three to one in a special referendum in 1911. Subsequently, indirect initiative was deemed to be a failure and was removed from the California Constitution in 1966.[10]

More recently, in 1993, the New Zealand Parliament adopted CIR legislation in the form of the *Citizens Initiated Referenda Act* 1993 (NZ). The first referendum under the legislation was held on 2 December 1995, when New Zealanders were asked to vote on the number of full-time professional firefighters employed by the government.[11]

The Australian experience

Australia was a noted innovator in the practical application of democratic principles at the turn of the century and has since been recognised as a leading proponent of direct democracy.[12] Section 128 of the Australian Constitution, which was adapted from the Swiss Constitution,[13] provides for amendment of the Constitution by a referendum initiated by the federal Parliament. A referendum is the only way that the text of the Constitution can be altered, as s 128 provides that '[t]his Constitution shall not be altered

7 See generally Kobach (1993) ch 8.

8 An attempt to introduce the federal legislative initiative in 1961 was rejected by 70.6% of voters: ibid, p 30.

9 Ibid, pp 29–30.

10 Ibid, p 237.

11 'NZ Votes Yes and No', *The Bulletin*, 19 December 1995, p 19.

12 Walker (1987) p 19.

13 J Quick and R Garran (1995), *The Annotated Constitution of the Australian Commonwealth*, Legal Books, orig 1901, p 986.

except' in the manner set out in that section. A referendum proposal under s 128 must be passed by an absolute majority of both houses of the federal Parliament, or by one House twice,[14] and then by a majority of the people and by a majority of the people in a majority of the States (that is, in at least four of the six States). Forty-two proposals have been put to the Australian people under s 128. Of these, only eight have been passed.[15] Since federation in 1901, Australia has held more national referendums than any other country besides Switzerland.[16] Some State constitutions also provide for referendums in order to achieve constitutional reform. For example, s 7A of the *Constitution Act* 1902 (NSW) requires a referendum to be passed in order to abolish the Legislative Council of the New South Wales Parliament. However, s 7A, like s 128 of the Australian Constitution, does not provide for the referendum to be brought on by popular initiative. While government initiated referendums are provided for at the federal and State level, CIR only exists in Australia at the level of local government, such as in the areas of the North Sydney Council and Burnie City Council.[17]

The concept of CIR has been advocated in Australia at the State and federal level since before federation. From its earliest days in the 1890s, the Australian Labor Party adopted the principles of popular initiative and referendum as one of the primary objectives of the Party.[18] At a federal level, the Australian Labor Party adopted these principles as part of its platform in 1908 and also the notion of the recall in 1912.[19] CIR remained part of the federal platform until 1963, when the Labor Party Conference voted to remove it.[20] CIR has consistently enjoyed the support of the Australian Democrats, and, at times, support from members of the Liberal Party, most recently Mr Peter Reith, then Shadow Attorney-General and currently Minister for Employment, Workplace Relations and Small Business in the federal Coalition government.[21] Although the Liberal Party has not

14 However, should a referendum proposal be passed twice by the Senate against the wishes of the government, it still need not be submitted to the people unless the Governor-General is instructed by the executive to do so.

15 For the results of each referendum, see AR Blackshield and G Williams (1998) *Australian Constitutional Law and Theory: Commentary and Materials*, 2nd edn, Federation Press, pp 1183–8.

16 Kobach (1993) p 1.

17 The questions put in municipal referendums can generally be answered with a simple 'yes' or 'no'. Neither the North Sydney Council nor the Burnie City Council possesses the power to make laws on the comparatively complex and controversial issues that face the state or federal parliaments. See Legislative Assembly for the Australian Capital Territory (1994) *Community Initiated Referendums*, Report by the Select Committee on Community Initiated Referendums, November, pp 17–18.

18 Walker (1987) p 20.

19 L Crisp (1978) *The Australian Federal Labor Party 1901–1951*, Hale & Iremonger, pp 207–13, 241, 261; Walker (1987) p 20.

20 Australian Labor Party (1963) *Official Report of the Proceedings of the Twenty-fifth Conference*, pp 91–2.

21 P Reith (1994) *Direct Democracy: The Way Ahead*, Parliament House.

supported CIR as a party at the federal level and has recently rejected it in Queensland, it has supported it in the ACT, Tasmania and Western Australia.[22] Pauline Hanson's One Nation Party and Graeme Campbell's Australia First Party have also advocated CIR.

The first CIR Bill introduced in an Australian parliament was a Private Members Bill in South Australia in 1895. The *Referendum Bill* 1895 (SA) was introduced by Mr Batchelor, a member of the Labor Party, and provided for both indirect initiative and voters' veto. The Bill did not receive government support and lapsed at the end of the session.[23] Other State parliaments also considered CIR early this century, with the Labor Premier of Western Australia introducing the *Initiative and Referendum Bill* 1913 (WA) and a Minister of the Labor government in Queensland introducing the *Popular Initiative and Referendum Bill* 1915 (Qld). There was also early support for CIR at a federal level with the following motion, put by Labor member Dr Maloney, being passed in the House of Representatives in 1920:

> in the opinion of this House, the referendum and initiative should be embedded into the Commonwealth Constitution, and that such question should be placed before the electors at the earliest opportunity for acceptance or rejection.[24]

More recently, draft CIR bills have been prepared across Australia.[25] In the ACT, CIR has been firmly on the agenda since 1994 and several Bills have been introduced into the Legislative Assembly, most recently the *Community Referendum Bill* 1998 (ACT). Prior to this Bill, the State that seemed most likely to introduce CIR was Tasmania, where a Private Members Bill providing for the voters' veto was introduced in 1989 by Mr Neil Robson.[26] Mr Robson had the support of his colleagues in the Liberal opposition, meaning that the Bill needed only one more vote to pass through the lower house.[27] The Green Independents indicated that they would support the Bill with a number of amendments. Mr Robson agreed to incorporate these changes and introduced a revised Bill.[28] However, the Green Independents failed to support the Bill and the vote on the Bill in 1991 was lost.[29] In 1988, the Western Australian Liberal opposition introduced a Bill providing for a restricted, but binding, voters' veto.[30] A

22 Walker (1993) p 21.

23 Newton (1995) pp 6–7.

24 Australia, House of Representatives, Hansard, 25 March 1920, p 846.

25 See the very useful table in Reith (1994) pp 7–11, as adapted in H Gregorczuk (1998a) *Citizens Initiated Referenda*, Research Bulletin No 1/98, Queensland Parliamentary Library, pp 35–6.

26 *Referendums (Elector-Initiated Repeals) Bill* 1990 (Tas).

27 Walker (1993) p 25.

28 *Citizen-Initiated Referendums (Elector-Initiated Repeals) Bill* 1991 (Tas); Interview, Mr Neil Robson, Hobart, 1 June 1998.

29 Tasmania Hansard, 20 June 1991, pp 2025–2042.

30 *Referendums (Repeal of Acts and Regulations) Bill* 1988 (WA).

CIR Bill was also prepared in Queensland in 1988, but was abandoned shortly before it was due to be introduced.[31] Most recently, the *Citizens' Initiated Referendum (Constitution Amendment) Bill* 1998 (Qld) was introduced into the Queensland Parliament on 25 August 1998 as a Private Members Bill by Independent Mr Peter Wellington. However, the second reading of the Bill failed on 11 November 1998. In New South Wales, the Call to Australia Group introduced a Bill providing for a direct legislative initiative, but this Bill did not attract support and lapsed.[32] In South Australia, there have been no recent CIR Bills but the South Australian Parliament has received a number of petitions from residents calling for a referendum on whether CIR should be introduced.[33] The South Australian Legislative Assembly passed a motion requiring the Legislative Review Committee to consider the pros and cons of introducing CIR, but the Committee did not examine the issue in any detail.[34] In the Northern Territory, CIR has also been a subject of debate, with the Sessional Committee on Constitutional Development releasing a discussion paper on CIR in 1991.[35]

At the federal level, the Australian Democrats introduced CIR Bills into the Commonwealth Parliament several times during the 1980s. The *Constitutional Alteration (Electors' Initiative) Bill* (Cth), introduced in 1980, 1982, 1983, 1987 and 1989, provided for constitutional initiative, while the *Legislative Initiative Bill* 1989 (Cth) provided for legislative initiative. In 1990, Mr Ted Mack, an Independent member of the House of Representatives and formerly a proponent of CIR on the North Sydney Council, introduced Bills providing for constitutional and legislative initiative.[36] More recently, Mr Peter Reith advocated the introduction of CIR and issued a paper entitled *Direct Democracy: the Way Ahead* in August 1994.[37] However, the active support for CIR by Mr Reith provoked strong statements against CIR by his colleagues in both the National and Liberal Party, indicating that CIR was clearly not part of the federal Coalition agenda.[38]

In 1987, the introduction of CIR in the form of constitutional initiative for changes to the Australian Constitution was recommended to the Constitutional Commission by its Advisory Committee on Individual and

31 Walker (1993) p 24.

32 *Constitution (Citizen-Initiated Referendum) Bill* 1991 (NSW); New South Wales Hansard, 26 September 1991, pp 1837-1844.

33 Newton (1995) pp 9–10, 29.

34 Ibid.

35 Sessional Committee on Constitutional Development (1991) *Citizens' Initiated Referendums*, Discussion Paper 3, Legislative Assembly of the Northern Territory.

36 *Constitutional Alteration (Alterations of the Constitution on the Initiative of the Electors) Bill* 1990 (Cth); *Constitution Alteration (Making of Laws on the Initiative of the Electors) Bill* 1990 (Cth). For details of the mechanics of these two Bills, see Reith (1994) p 7.

37 Reith (1994).

38 Cotton and Bennett (1994) pp 32–3, 35.

Democratic Rights.[39] After considering the issues, a majority of the Constitutional Commission decided not to recommend the alteration of s 128 of the Constitution to provide for constitutional initiative.[40] The Commission unanimously agreed with its Advisory Committee that the Constitution should not be altered to provide for legislative initiative.[41]

CIR in the ACT

Several CIR proposals have been introduced into the ACT Legislative Assembly since it began sitting in 1989. Mr Dennis Stevenson of the Abolish Self-Government Coalition introduced a number of Private Members Bills, namely the *Voice of the Electorate Bill* 1993 (ACT), *Voice of the Electorate Bill (No 2)* 1993 (ACT), *Electors Initiative and Referendum Bill* 1994 (ACT) and *Electors Initiative and Referendum Bill (No 2)* 1994 (ACT). Each of these Bills was similar in providing for CIR in the form of direct initiative.

On 24 August 1994, the Liberal Leader of the opposition, Ms Kate Carnell, introduced the *Community Referendum Bill* 1994 (ACT), a proposal for CIR in the form of indirect initiative. The essential elements of this Bill are now contained in the *Community Referendum Bill* 1998 (ACT), which is currently before the Assembly. The 1994 Bill set out the following CIR process:

Stage 1 A sponsoring committee of two to ten electors is formed to initiate a request to make or change a law. The committee drafts a description of the legislative proposal of not more than 100 words. This description is checked by the Electoral Commissioner to ensure that it is within the powers of the Assembly and that it does not interfere with the budget by proposing or prohibiting expenditure of specific amounts of public money for particular purposes.

Stage 2 Once the legislative proposal has been signed by 1000 electors, it is registered by the Commissioner and is published in the Gazette.

Stage 3 After registration, the sponsoring committee has six months to collect signatures from at least 5% of electors requesting that the legislative proposal be submitted to a referendum. Where the petition is signed by at least 10% of electors, it becomes a qualified proposal.

Stage 4 The proposal is then drafted as a proposed law with the assistance of the Attorney-General's Department. If the proposed law is consistent with the legislative proposal and is suitable for presentation as a referendum question, a certificate is granted by the Attorney-General.

---

39 Constitutional Commission (1987) *Report of the Advisory Committee on Individual & Democratic Rights under the Constitution,* Australian Government Publishing Service, p 99.

40 Constitutional Commission (1988) *Final Report of the Constitutional Commission,* Australian Government Publishing Service, vol 2, p 864.

41 Ibid.

Stage 5 The proposed law and certificate are presented to the Legislative Assembly and an estimate of the costs or savings of the proposed law is prepared by the Auditor-General. The Assembly can pass the proposed law, or instead pass a law having the same objects, or it may refer the proposed law to a referendum. If the Assembly does nothing, the proposed law goes to a referendum after four months.

Stage 6 The proposed law is put to a referendum on a community consultation day at the next ACT general election. If a qualified proposal is tabled in the first two years of the Assembly, the referendum will be held on a special community consultation day before the next ACT general election.

Stage 7 If a majority of electors support the referendum proposal, the Chief Minister shall present the proposed law to the Assembly. The Assembly may or may not enact the proposed law and hence the referendum is not binding on the Assembly.

On 14 September 1994, both the *Electors Initiative and Referendum Bill (No 2)* 1994 and the *Community Referendum Bill* 1994 were referred to a Select Committee on Community Initiated Referendums. The Select Committee comprised three members of the Legislative Assembly and was given less than two months to inquire into and report on both Bills, as there was an ACT election planned for the beginning of 1995. A majority of the Committee, made up of an Independent and a Labor member, decided to adopt what it called a 'prudent approach' to CIR, finding that the time allocated to it was inadequate to explore all the issues involved in what it termed 'such a far-reaching change to the ACT's system of representation'.[42] The majority recommended that the Assembly proceed no further with the *Electors Initiative and Referendum Bill (No 2)* 1994 and defer consideration of the *Community Referendum Bill* 1994 until the implications of the Bill on ACT governance had been fully examined.[43] To achieve this, the majority recommended the creation of a further select committee which would examine issues such as implications of CIR for good governance, time limits for collecting signatures, the cost of referendums and the relevant overseas experience.[44] The Liberal member of the Committee submitted a strong dissenting Report in which he argued that the *Community Referendum Bill* 1994 should be passed without delay.

When the Report of the Select Committee was presented on 10 November 1994, there was a lengthy debate as to whether the Report should be noted.[45] Both the *Electors Initiative and Referendum Bill (No 2)* 1994 and the *Community Referendum Bill* 1994 lapsed in February 1995 when an

42 Legislative Assembly for the Australian Capital Territory (1994) p iii.

43 Ibid, p 21.

44 Ibid, pp 28–9.

45 ACT Legislative Assembly, Hansard, 10 November 1994, pp 4036–4052; 1 December 1994, pp 4422–4426; 7 December 1994, pp 4737–4752; and 8 December 1994, pp 4769.

election was held for the ACT Assembly. At this election, the Labor government was defeated and Ms Carnell became Chief Minister of a minority Liberal government. The introduction of CIR was part of the ACT Liberal Party's campaign policy. The Liberal government's response to the Select Committee's report was presented on 23 November 1995.[46] The government accepted the recommendation that the Assembly should not proceed with the *Electors Initiative and Referendum Bill (No 2)* 1994. However, the government did not accept that consideration of the *Community Referendum Bill* 1994 be deferred and that a further select committee be established. Instead, the government re-introduced the Bill on 23 November 1995, thereby becoming the first party in Australia to introduce a CIR Bill both in opposition and in government.[47]

The *Community Referendum Bill* 1995 (ACT) had been updated to take account of comments made in the Select Committee's Report and the passage of the *Referendum (Machinery Provisions) Act* 1994 (ACT).[48] The stages of the CIR process outlined above remained essentially the same, except that in Stage 5 the Chief Minister (rather than the Auditor-General) was required to prepare an estimate of the costs or savings of the proposal, with the Auditor-General providing an independent assessment of that estimate. The 1995 Bill differed from the 1994 Bill in that provisions of the 1994 Bill which attempted to prevent the Assembly from amending a community initiated law before enacting it (s 86(2)(a)) or from amending or repealing the community initiated law for 12 months after its passage (s 87) had been removed. These provisions were viewed by the ACT Deputy Law Officer as 'most probably inconsistent' with s 22 of the *Australian Capital Territory (Self-Government) Act* 1988 (Cth),[49] which grants legislative power to the Legislative Assembly. The ACT Deputy Law Officer also advised that these provisions represented an invalid attempt to bind a future Assembly because they failed to comply with the procedures set out in s 26 for imposing 'manner and form' restrictions.[50] That section requires that an 'entrenching law shall be submitted to a referendum'. Subsequently, on 14 December 1995, the Liberal government introduced the *Community Referendum Laws Entrenchment Bill* 1995 (ACT) which was designed to comply with s 26. In addition to prohibiting the Assembly from amending a proposed law before enacting it and from amending or repealing a community initiated law for 12 months, this Bill also sought to entrench any *Community Referendum Act* and any laws made under that Act.

The *Community Referendum Bill* 1995 was the first CIR Bill voted on in the Assembly. On 14 December 1995, the motion to accept the Bill in

46 ACT Legislative Assembly, Hansard, 23 November 1995, p 2316.

47 For instance, in the Tasmanian Parliament, the Liberal Party unanimously supported Mr Robson's CIR Bill when they were in opposition, but when they were elected to government, the Party decided not to re-introduce the Bill: interview, Mr Neil Robson, Hobart, 1 June 1998.

48 ACT Legislative Assembly, Hansard, 23 November 1995, p 2314.

49 'Legal Opinion from ACT Deputy Law Officer' in Legislative Assembly for the Australian Capital Territory (1994) p 45.

50 Ibid, pp 45–6.

principle was lost by ten votes to seven, with only the seven members of the minority Liberal government supporting the Bill.[51] The circumstances of the loss were bitter, as the Liberal government was forced to bring on the Bill when it was not ready to debate it as the last substantive item before adjourning for the Christmas break. During the debate, Ms Carnell commented that this was indicative of what had happened to CIR since it was brought forward by the Liberal Party, claiming that it had been 'subjected to every single device that the Assembly could use to knock it off without getting any publicity that the Assembly did not want to give any power at all to the people'.[52] On the other hand, Labor member Mr Wayne Berry alleged that the Bill was a piece of legislation that had been used as a 'sales gimmick' in the election campaign;[53] and the ACT Greens argued that the Bill was a 'cynical exercise from a government that refused to allow participatory government to work' in the Assembly.[54]

The Liberal government introduced the *Community Referendum Bill* 1996 (ACT) into the ACT Assembly on 27 June 1996.[55] The 1996 Bill was exactly the same as the 1995 Bill. Debate on the motion to accept the Bill in principle was adjourned until 4 December 1997, when the motion was again negatived.[56] However, the debate on the motion showed that some members were more open-minded than in 1995 about the concept of CIR and were more willing to accept that it deserved further exploration.[57] For example, while the Greens again voted against the Bill, they indicated that they were prepared to consider CIR as part of achieving more community participation in government decision-making.

After its re-election in February 1998, the Liberal government introduced the *Community Referendum Bill* 1998 (ACT) on 28 May.[58] This Bill was again in the same form as the 1995 Bill. At the time of writing, the fate of the 1998 Bill has not been decided and no date has been set for the debate of the Bill in the Assembly. It is clear, however, that the Bill will face strong opposition, with the 17-member chamber being led by a minority government of six Liberals.[59]

Can the ACT Legislative Assembly Provide for a Binding Referendum?

This question goes to the heart of whether CIR can be fully enacted in the ACT. Indeed, without a binding referendum whereby laws can be brought

51 ACT Legislative Assembly, Hansard, 14 December 1995, p 3095.
52 Ibid, p 3091.
53 Ibid, p 3093.
54 Ibid, p 3090.
55 ACT Legislative Assembly, Hansard, 27 June 1996, pp 2223–2236.
56 ACT Legislative Assembly, Hansard, 4 December 1997, p 4653.
57 Ibid, pp 4640–4642, 4646–4648.
58 ACT Legislative Assembly, Hansard, 28 May 1998.
59 'Humphries may be Fourth Time Lucky with Citizens' Law', *Canberra Times*, 30 May 1998, p 4; 'Referendum Bill "Divisive": Greens', *Belconnen Chronicle*, 2 June 1998, p 7.

about without being passed by the Legislative Assembly, the value of legislating for CIR in the ACT is questionable (see below). The non-binding nature of a referendum under the *Community Referendum Bill* 1998 is consistent with legal advice received from the ACT Deputy Law Officer. The constitutional arrangements of the ACT are governed by the *Australian Capital Territory (Self-Government) Act* 1988 (Cth). Section 22 of that Act provides that the Assembly has the power to make laws for the 'peace, order and good government of the Territory'. In the opinion of the ACT Deputy Law Officer, s 22 does not permit the Assembly to abdicate this power to a CIR process.[60]

There is little case law on the abdication of legislative power and none of it is determinative. The decision of the Privy Council in *In re The Initiative and Referendum Act*, upon which the ACT Deputy Law Officer placed some reliance, is of some assistance.[61] That decision struck down legislation passed by the Manitoba Parliament in Canada, under which laws of that Province could be made or repealed by electors voting at a referendum. The basis of this finding was not that the Parliament had abdicated its legislative power,[62] but that the legislation derogated from the Office of Lieutenant Governor, which was guaranteed by s 92 of the Canadian Constitution (the *British North America Act* 1867 (Imp)). However, Viscount Haldane for their Lordships stated, obiter, that 'it does not follow that it [the Manitoba Parliament] can create and endow with its own capacity a new legislative power not created by the Act to which it owes its own existence'.[63] A statement was made to the same effect by Lord Selborne for their Lordships in *R v Burah*.[64]

There is also Australian authority to the same effect. In *Commonwealth Aluminium Corporation Pty Ltd v Attorney-General*,[65] the Supreme Court of Queensland considered the validity of the *Commonwealth Aluminium Corporation Pty Ltd Agreement Act* 1957 (Qld), which sought to give the force of law to an agreement between the State government and a private corporation. Section 3 of that Act stated that '[u]pon the making of the Agreement the provisions thereof shall have the force of law as though the Agreement were an enactment of this Act', while under s 4 the agreement could be varied pursuant to further agreement between the parties.

60 'Legal Opinion from ACT Deputy Law Officer' in Legislative Assembly for the Australian Capital Territory (1994) p 42. Note that the ACT Legislative Assembly could not avoid s 22 by providing for the entrenchment of a CIR process under s 26 of the *Australian Capital Territory (Self-Government) Act*. Section 26 merely enables the passing of a law 'prescribing restrictions on the manner and form of making particular enactments'. It does not authorise the Assembly to derogate from the effect of s 22.

61 [1919] AC 935.

62 Compare 'Legal Opinion from ACT Deputy Law Officer' in Legislative Assembly for the Australian Capital Territory (1994) p 43.

63 [1919] AC 935 at 945.

64 (1878) 3 App Cas 889 at 905.

65 [1976] Qd R 231.

Moreover, s 4 provided that '[a]ny purported alteration of the Agreement not made and approved in such manner shall be void and of no legal effect whatsoever'. A majority of the Court held that s 4 was unable to bind the Queensland Parliament because it was not a 'manner and form' provision.[66] In the course of this finding, Wanstall SPJ stated:

> [t]he nettle that must ultimately be grasped by the argument is its logical conclusion that, by s 4, Parliament has set up a body with legislative power, the power of amending an agreement having the force of a law enacted by Parliament, and to do so to the exclusion of Parliament which cannot take the matter of variation directly into its own hands. Thus would the Queensland legislature 'create and endow with its own capacity a new legislative power not created by the Act to which it owes its existence' ... I would hold invalid an enactment purporting to do that.[67]

More generally, in *Victorian Stevedoring & General Contracting Co Pty Ltd & Meakes v Dignan*, Evatt J stated that 'the Parliament of the Commonwealth is not competent to "abdicate" its powers of legislation'.[68] In the same case, Dixon J indicated that while the Parliament is competent to delegate legislative power, this depends 'upon the retention by the Legislature of the whole of its power of control and of its capacity to take the matter back into its own hands'.[69] Subsequently, in *Giris Pty Ltd v Federal Commissioner of Taxation*, Barwick CJ stated that '[n]o doubt whilst the Parliament may delegate legislative power it may not abdicate it.'[70]

Such authority supports the opinion of the ACT Deputy Law Officer. However, a recent High Court decision is more equivocal. It is clear that a parliament may create other, subordinate legislative bodies.[71] Hence, in *Capital Duplicators Pty Ltd v Australian Capital Territory (No 1)*, the High Court found that the Commonwealth could grant self-government to the ACT under its territories power in s 122 of the Australian Constitution.[72] The dictum of Mason J in *Berwick Ltd v Gray* was approved where he said that the power 'is wide enough to enable Parliament to endow a Territory with separate political, representative and administrative institutions, having control of its own fiscus'.[73] In *Capital Duplicators (No 1)*, Brennan, Deane,

---

66 On 'manner and form' provisions generally, see Blackshield and Williams (1998) pp 386–96.

67 *Commonwealth Aluminium Corporation Pty Ltd v Attorney-General* [1976] Qd R 231 at 236–237. See *Cobb & Co Ltd v Kropp* [1967] 1 AC 141 at 157.

68 (1931) 46 CLR 73 at 121.

69 Ibid at 102. See ibid at 95–96 per Dixon J.

70 (1969) 119 CLR 365 at 373.

71 *R v Burah* (1878) 3 App Cas 889; *Hodge v The Queen* (1883) 9 App Cas 117; *Powell v Apollo Candle Company* (1885) 10 App Cas 282.

72 (1992) 177 CLR 248.

73 (1976) 133 CLR 603 at 607. See *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170 at 279 per Wilson J as to the creation of the Northern Territory Legislative Assembly under the *Northern Territory (Self-Government) Act* 1978 (Cth).

Toohey JJ, with whom Gaudron J agreed on this point,[74] found that the ACT Legislative Assembly is a separate parliament that exercises its own legislative power and not that of the Commonwealth. This legislative power is 'concurrent with, and of the same nature as, the powers of the [Commonwealth] Parliament'.[75] Members of the Court also discussed the dicta in *In re Initiative And Referendum Act* and *Victorian Stevedoring* that a parliament cannot 'abdicate' its legislative power. The point did not strictly arise, as s 122 expressly gives the Commonwealth the power to legislate 'for the government of any territory'. Brennan, Deane and Toohey JJ gave some support to the dicta, stating:

> [a] legislature which derives a plenary legislative power from a written Constitution does not necessarily have power to create another legislature to exercise a corresponding plenary legislative power either in substitution for, or concurrently with, its own exercise of such power.[76]

On the other hand, Mason CJ, Dawson and McHugh JJ declared:

> [t]here are very considerable difficulties in the concept of an unconstitutional abdication of power by Parliament. So long as Parliament retains the power to repeal or amend the authority which it confers upon another body to make laws with respect to a head or heads of legislative power entrusted to the Parliament, it is not easy to see how the conferral of that authority amounts to an abdication of power.[77]

A court has never determined whether an Australian parliament is capable of providing for a binding referendum under a CIR process. The authority cited above gives a very imprecise guide and does not take account of arguments that might be put to distinguish the CIR process. It might be argued that a binding referendum does not amount to an abdication of legislative power, but instead the creation of an alternative means of enacting law. After all, s 22 of the *Australian Capital Territory (Self-Government) Act* does not state that the grant of legislative power to the Assembly is exclusive.[78] Alternative mechanisms for enacting law exist elsewhere in Australia's constitutional arrangements, such as in s 57 of the Australian

74 (1992) 177 CLR 248 at 284 per Gaudron J.

75 Ibid at 283 per Brennan, Deane and Toohey JJ. Compare ibid at 263 per Mason CJ, Dawson and McHugh JJ, who found that the legislative power of the Australian Capital Territory is a delegated power of the Commonwealth Parliament.

76 Ibid at 270–271.

77 Ibid at 265.

78 Compare *Australian Capital Territory (Self-Government) Act* 1988 (Cth), s 3, which defines 'enactment' to mean certain Acts passed by the New South Wales or Imperial Parliaments and 'a law (however described or entitled) made by the Assembly'.

Constitution and s 5B of the *Constitution Act* 1902 (NSW). The alternative procedure set out in s 5B, under which any deadlock between the Legislative Assembly and the Legislative Council in the New South Wales Parliament can be resolved by way of a referendum, was found valid by the High Court in *Clayton v Heffron.*[79] In that case, the High Court unanimously upheld s 5B not as a 'manner and form' provision, but as an exercise of the Parliament's 'peace welfare and good government' power in s 5 of the *Constitution Act.* Dixon CJ, McTiernan, Taylor and Windeyer JJ stated that s 5 contains 'a sufficient power ... to enable the resolution of disagreements between the two Houses by submitting an Act passed by the Assembly for the approval of the electors in substitution for the assent of the Council'.[80]

There is, however, a potentially important difference in the case of the constitutional arrangements of the ACT. *Clayton v Heffron* concerned a parliament granted 'plenary power' by the Imperial Parliament.[81] Subject to any 'manner and form' requirements, s 5 of the *Colonial Laws Validity Act* 1865 (Imp) granted each of the colonial legislatures 'full Power to make Laws respecting the Constitution, Powers, and Procedure of such Legislature'. The power of the new State parliaments to amend their own Constitutions was expressly continued by s 107 of the Australian Constitution.[82] The ACT Legislative Assembly is in a different position with respect to the Commonwealth than are the States in respect of the Imperial parliament. The ACT Legislative Assembly has not been granted the power to amend the *Australian Capital Territory (Self-Government) Act.* That Act is an enactment of the Commonwealth Parliament and s 28 of the Act provides that a law passed by the Assembly 'has no effect to the extent that it is inconsistent with a law' of that Parliament. In the case of a subordinate legislature such as the ACT Legislative Assembly, unable to alter its own constitutional arrangements, it may be that any rule against the abdication of legislative power operates more strongly.

It is arguable that under s 22 of the *Australian Capital Territory (Self-Government) Act,* the ACT Legislative Assembly could enact a CIR process under which laws may be brought about by the approval of the people of the ACT voting at a referendum without also gaining the assent of the Assembly. The opinion of the ACT Deputy Law Officer may thus be incorrect in so far as it suggests that the ACT Legislative Assembly cannot enact a CIR process incorporating a binding referendum. It is certainly arguable that an unentrenched and thus repealable process whereby a referendum result brings about a change in the law (that is itself subject to repeal by the Assembly) does not amount to an unconstitutional abdication of power. Such a CIR process would clearly itself be subordinate to the power of the ACT Legislative Assembly as entrenched by the *Australian Capital Territory (Self-Government) Act,* s 22. In the absence of clear

79 (1960) 105 CLR 214.

80 Ibid at 250.

81 *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1 at 9 per the Court.

82 See also *Australia Act* 1986 (Cth), ss 2, 6.

authority, the approach of Mason CJ, Dawson and McHugh JJ in *Capital Duplicators (No 1)* (with the checks and balances it suggests) should be preferred. In interpreting the powers of the federal Parliament, the High Court has consistently preferred a broad rather than a narrow construction. In *Jumbunna Coal Mine NL v Victorian Coal Miners' Association*, O'Connor J argued that:

> where the question is whether the Constitution has used an expression in the wider or in the narrower sense, the Court should, in my opinion, always lean to the broader interpretation unless there is something in the context or in the rest of the Constitution to indicate that the narrower interpretation will best carry out its object and purpose.[83]

Similarly, in *R v Public Vehicles Licensing Appeal Tribunal (Tas); Ex parte Australian National Airways Pty Ltd*, the High Court found that the powers vested in the federal Parliament under s 51 of the Constitution 'should be construed with all the generality which the words used admit'.[84] A like approach to the legislative power conferred by s 22 of the *Australian Capital Territory (Self-Government) Act* would support ACT legislation that provided for a binding referendum under a CIR process. This view should in any event be preferred lest a cramped view of the shape and form of Australian democracy prevail into the next century.

Is the *Community Referendum Bill* 1998 a Good Proposal?

Does the Community Referendum Bill 1998 address common objections to CIR?

There are many arguments for and against CIR, which are extensively covered elsewhere,[85] including in this volume.[86] This article instead focuses on whether the *Community Referendum Bill* 1998 addresses some of the central objections to CIR. The *Community Referendum Bill* is a careful and

83 (1908) 6 CLR 309 at 368.

84 (1964) 113 CLR 207 at 225.

85 Walker (1987) chs 2, 3; Magleby (1984) pp 3, 27–30, 196–9; Butler and Ranney (1994) pp 11–21; Cotton and Bennett (1994) pp 18–32; Constitutional Commission (1988) pp 867–72; Constitutional Commission (1987) pp 96–8; Gregorczuk (1998a) pp 11–20; M Macklin (1996) 'The Case For a Citizens' Initiative' in K Wiltshire (ed) *Direct Democracy: Citizens Initiated Referendums*, Constitutional Centenary Foundation; C Puplick (1996) 'Citizen Initiated Referendums: The Case Against' in K Wiltshire (ed) *Direct Democracy: Citizens Initiated Referendums*, Constitutional Centenary Foundation; M Moore and P Pettit, 'Undermining Democracy: The Danger of Citizen-Initiated Referenda' (1997) April *The Parliamentarian* 153; G Cornwell, 'Involving the People: Citizen-Initiated Referenda in the Australian Capital Territory' (1997) April *The Parliamentarian* 150; H Evans, 'Citizens' Initiative versus Constitutional Government' (1992) 7 *Legislative Studies* 55.

86 H Gregorczuk, 'Citizen Initiated Referendums: Republican innovation or scourge of representative democracy?' (1998b) 7(2) *Griffith LR* 249.

constructive proposal for introducing CIR. It has been designed to address some of the common objections to CIR by including a number of safeguards.[87] One of the major objections to CIR is the significant cost of holding referendums and of verifying signatures. The Bill aims to minimise costs through the following safeguards:

- ◊ referendums will generally be held in conjunction with elections;
- ◊ the threshold of 5% (10,000 signatures) is a significant hurdle; and
- ◊ the Assembly may pass the CIR proposal before a referendum is held (if, for instance, polling shows strong approval).

The Bill also aims to prevent proposals being brought forward in haste by requiring several months to elapse from the initiation of an idea to it being tested at a referendum. Frivolous proposals put forward by an individual elector are frustrated by the requirements for:

- ◊ a sponsoring committee to propose the initiative;
- ◊ 1000 signatures before a proposal can be registered;
- ◊ the Electoral Commissioner, prior to registration, to ensure that a proposal is within the power of the Assembly and that it does not interfere with the budget by proposing or prohibiting expenditure of specific amounts of public money for particular purposes;
- ◊ support from at least 5% of electors before a proposal can be put to referendum; and
- ◊ the drafting of legislation by the Attorney-General's Department before the proposal is put to a referendum.

The Bill also aims to provide voters with adequate information. For instance, the Chief Minister is required to prepare and distribute to all voters an independently assessed estimate of the costs or savings of a CIR proposal. Finally, unlike other jurisdictions with CIR, voting in a referendum would be compulsory. Accordingly, for a proposal to succeed, it must have the majority support of the entire voting community.

While the *Community Referendum Bill* 1998 has been carefully drafted, there are other problems raised by studies of overseas experiences that are not addressed by the Bill.[88] The Bill does not adequately address the issue of judicial review. Section 35 of the Bill allows for judicial review of only a limited number of decisions. For example, it allows for review of the decision of the Electoral Commissioner under s 5(3) to reject a legislative proposal, but not for review of a decision to accept a proposal. Overseas experience has shown that it is desirable to provide for judicial review of

87 Presentation speech, ACT Legislative Assembly, Hansard, 24 August 1994, p 2562; Legislative Assembly for the Australian Capital Territory (1994) p 30.

88 Kobach (1993) pp 248–9.

community initiated laws prior to the proposal being put to popular vote, at which time it may become highly politicised, particularly where the proposal may infringe civil liberties or be used to exploit voter prejudices.[89] The Bill also fails to address the need for campaign spending limits and allocated advertising time. Analysis of spending patterns in the United States has shown that while spending large amounts of money cannot guarantee the result of a referendum, it can be very influential.[90] Under the ACT proposal, rich and powerful interest groups might seek to hijack the CIR process. In the United States, the signatures necessary to initiate a referendum can be purchased by employing a firm in the signature collection business.[91] These problems could be partially addressed by imposing mandatory disclosure of campaign contributions, providing free broadcasting time and providing public funding for community groups that wish to support or oppose a CIR proposal.[92]

Direct democracy or the Westminster system?

There are deeper, conceptual problems with the *Community Referendum Bill* 1998. The Bill betrays an unresolved ambivalence between adherence to the current system of Westminster government and emerging doctrines of direct democracy. The fact that the 1998 Bill can be strongly criticised from both perspectives raises questions as to its utility and suggests that the Bill has failed to achieve an appropriate balance between the two.

When assessed from the vantage point of direct democracy or of increasing the power of the voice of the majority in the governance of the ACT, the *Community Referendum Bill* can be criticised for being an extremely weak form of CIR or perhaps not a 'true' CIR proposal at all. This stems from the fact that Bill does not provide for a binding referendum. The Bill thus lacks a fundamental characteristic of CIR, the ability of a majority of the community to have a determinative influence upon the laws that govern the community as a whole. The 1998 Bill provides the appearance of giving the people of the ACT a direct say in their governance, but in reality a successful referendum amounts to no more than a non-binding or advisory plebiscite because law-making power remains solely with the ACT Legislative Assembly. It is true that a successful referendum would have tremendous political force, but that does not amount to giving a majority of ACT residents control over their laws. The voice of the community must still be endorsed by the Assembly, undermining the notion that the people of the ACT are themselves capable of effecting legal change. In the event of the Assembly failing to implement a successful referendum, the 1998 Bill also offers the significant risk that the whole notion of CIR and of direct popular participation would be compromised by even greater popular cynicism about the political process. To anyone with a commitment

89 Ibid, pp 248, 260–1.

90 Cotton and Bennett (1994) pp 30–1.

91 Magleby (1984) pp 61–5.

92 Kobach (1993) p 249; Cotton and Bennett (1994) p 32.

to direct democracy, this potential undermines the value of the non-binding referendum provided for in the 1998 Bill.

The advisory nature of the referendum proposed by the 1998 Bill has understandably been described as a 'cynical ploy to give the illusion of democracy'.[93] In the words of one of the submissions to the Select Committee on Community Initiated Referendums:

> the Liberal Party Bill contains a number of provisions which clearly show the reluctance of the Party to allow citizens ready access to the governmental process: it contains provisions which allow the Executive to not only oversee the CIR process but to regulate and control it and, as a final measure, to ignore the process and the results of any referendum if it so chooses.[94]

In defending their position, the Liberal Party proponents of the 1998 Bill have made a commitment to lobby for amendments to the *Australian Capital Territory (Self-Government) Act* that would allow binding referendum results and enable the entrenchment of the 1998 Bill.[95] However, without binding referendums, the 1998 Bill is unable to achieve its aim of providing a meaningful voice for a majority of ACT residents in the governance of the Territory. This suggests that the 1998 Bill should not be proceeded with in its current form.

It has been argued that CIR tends to undermine the Westminster system of government (as applied in Australia under a written Constitution) and, in particular, the principles of responsible government and representative democracy.[96] The proponents of CIR frequently misconstrue the relationship between CIR and these principles in arguing that CIR increases the participation of the electors in democracy and thus improves the functioning of representative democracy by making governments more responsive and accountable to voters.[97] Instead, CIR has the potential to undermine the accountability of elected representatives by allowing them to abdicate leadership to the CIR process. One of the underlying principles of the Westminster system is that governments are responsible for developing policies and are held accountable in the parliament and to the people at election time for their performance in implementing these policies.

---

93 The Movement for Direct Democracy, Submission to the Select Committee on Community Initiated Referendums, 10 October 1994.

94 Citizens Electoral Councils of Australia Group, Submission to the Select Committee on Community Initiated Referendums, 10 October 1994, p 10.

95 Presentation speech, ACT Legislative Assembly, Hansard, 23 November 1995, pp 2314–2315; Transcript of Proceedings, Public Hearing of the Select Committee on Community Initiated Referendums, Canberra, 19 October 1994, p 13; Presentation Speech, ACT Legislative Assembly, Hansard, 14 December 1995, p 3006; Presentation Speech, ACT Legislative Assembly, Hansard, 28 May 1998.

96 Constitutional Commission (1988) pp 868–9; Puplick (1996) p 37.

97 Evans (1992) p 55; Puplick (1996) p 37.

However, governments can escape accountability if they are able to abdicate responsibility for these policies during their term of government. It would be politically difficult to hold governments accountable for policies initiated by members of the community and endorsed by the people at a referendum under a CIR process. This would be particularly evident where the effect of a successful CIR is to reject or overturn government policy. CIR would weaken the authority of parliament, and thereby the doctrine of responsible government, by creating a competing centre of political legitimacy within the community.[98] These concerns are lessened by the fact that the *Community Referendum Bill* does not provide for a binding referendum and thus incorporates only a very weak version of direct democracy.

The Westminster system of government imposes a buffer between majority and minority interests. An elected representative belonging to a major party will often be unable or unwilling to cater to the demands of a particular majority where these would impact upon the rights and freedoms of minority groups. This follows from the fact that the major political parties need to build shifting coalitions of interest across different issues, rather than being able to focus on single issues. They cannot afford to alienate a significant minority interest where this interest may be needed to support a position on a different issue. This conception is deepened by Professor Philip Pettit's republican vision of liberty as 'freedom as non-domination'.[99] His analysis is based upon the idea that a person is only truly free when he or she is not under the arbitrary sway of another or subject to the arbitrary interference of another. A central danger in modern democratic systems is that minorities may fall under the domination of the majority through the majority's control of the parliament. This danger is increased exponentially in the case of CIR, under which a binding referendum supported by a simple majority may be able to derogate from the civil liberties of minority groups.[100] Professor Pettit argues that a model of governance that is based upon maximising the power of the majority should not be preferred. Instead, a system should be designed such that there is 'as little room as possible for the exercise of arbitrary power'; the system should be 'maximally non-manipulable'.[101] This suggests that CIR should not be preferred because it may enable the domination of minorities by bypassing the counter-majoritarian checks and balances evident in the Westminster system of government as implemented by the Australian Constitution. This objection to CIR would be lessened by an entrenched Bill of Rights. However, the ACT currently lacks such a Bill.[102]

The dangers posed to the principles of responsible government and representative democracy were magnified in the case of the *Community*

98 Cotton and Bennett (1994) p 20.

99 P Pettit (1997) *Republicanism: A Theory of Freedom and Government*, Oxford University Press, p 51.

100 Compare Kobach (1993) p 260.

101 Pettit (1997) p 173.

102 See ACT Attorney-General's Department (1993) *A Bill of Rights for the ACT?*, ACT Government Printer.

Referendum Laws Entrenchment Bill 1995. That Bill would place restrictions on the Assembly's powers in relation to CIR and would further undermine the role of elected representatives. Under this Bill, the Assembly would not be able to: 1) amend a community initiated law before enacting it; 2) amend or repeal a community initiated law for 12 months; or 3) enact a law which would be inconsistent with a proposed law for 12 months even if the Assembly chooses not to enact the community initiated proposal. The *Community Referendum Laws Entrenchment Bill* 1995 has not been re-introduced into the ACT Assembly, as attention has focused on the passage of the *Community Referendum Bill* 1998.

Conclusion

Australia has a long history of CIR proposals. The *Community Referendum Bill* 1998 is unique in that it is the only CIR proposal that has been moved by a party in both opposition and in government. It is also a careful and constructive attempt to implement CIR in the ACT that addresses many of the common objections to CIR. However, the Bill is flawed. Although it provides for a number of checks and balances in the CIR process, it fails to satisfactorily resolve the underlying tensions between direct democracy and the current system of Westminster government. Principles of direct democracy strongly support CIR in the form of a binding referendum. On the other hand, the doctrines of representative and responsible government suggest that a referendum should be advisory only and that minorities should be protected by a legal instrument such as a Bill of Rights. The 1998 Bill fails to adequately meet either doctrinal approach.

Strong reservations can be expressed about introducing CIR into an Australian jurisdiction. CIR has the potential to erode the strengths of the current Westminster system, and in particular the doctrines of representative and responsible government, without providing compensating advantages. More effective popular participation in government might be achieved by other means, such as greater use of community advisory committees or Community Cabinet meetings. However, if the ACT government intends to proceed with the idea, three conclusions may be drawn with regard to the 1998 Bill. First, the recommendation of the Select Committee on Community Initiated Referendums that the *Community Referendum Bill* be examined from the perspective of overseas experiences with CIR should be followed through. Secondly, the 1998 Bill should be amended to provide for binding referendums. This is necessary if the ACT experiment with CIR is to be worthwhile. In the words of a former Leader of the Labor opposition, Ms Rosemary Follett, the Bill may otherwise be just 'an expensive way of giving the Legislative Assembly another gauge of public opinion'.[103] The legal position on a binding referendum is not as clear as the opinion of the ACT Deputy Law Officer suggests. It is at least arguable that the ACT Assembly could, under its current constitutional powers, legislate for a binding referendum, so long as it retained the ability to repeal the CIR process and to

103 ACT Legislative Assembly, Hansard, 14 December 1995, p 3085.

amend or repeal any law brought about under the process. This suggests that entrenchment of the CIR process under the *Community Referendum Laws Entrenchment Bill* 1995 should not be proceeded with. Thirdly, a greater effort must be made to mitigate the possible impact of CIR upon the interests and rights of minority groups. The best way of achieving this would be to enact a Bill of Rights for the ACT as a condition of the introduction of CIR. A weaker alternative would be to amend the *Community Referendum Bill* to provide that a proposed law under the CIR process cannot abrogate certain rights or amend the *Community Referendum Bill* itself.

References

Books, Articles, Papers, Reports, Hansard

ACT Attorney-General's Department (1993) *A Bill of Rights for the ACT?*, ACT Government Printer.

ACT Legislative Assembly, Hansard.

Australia, House of Representatives, Hansard.

Australian Labor Party (1963) *Official Report of the Proceedings of the Twenty-fifth Conference.*

Blackshield, AR and G Williams (1998) *Australian Constitutional Law And Theory: Commentary and Materials*, 2nd edn, Federation Press.

Butler, D, and A Ranney (eds) (1994) *Referendums Around the World: The Growing Use of Direct Democracy*, AEI Press.

Citizens Electoral Councils of Australia Group, Submission to the Select Committee on Community Initiated Referendums, 10 October 1994.

Constitutional Commission (1987) *Report of the Advisory Committee on Individual & Democratic Rights under the Constitution*, Australian Government Publishing Service.

Constitutional Commission (1988) *Final Report of the Constitutional Commission*, Australian Government Publishing Service, vol 2.

Cornwell, G 'Involving the People: Citizen-Initiated Referenda in the Australian Capital Territory' (1997) April *The Parliamentarian* 150.

Cotton, M, and B Bennett (1994) *Citizen Initiated Referenda: Cure-All or Curate's Egg?*, Current Issues Brief No 21, Parliamentary Research Service.

Crisp, L (1978) *The Australian Federal Labor Party 1901–1951*, Hale & Iremonger.

Evans, H 'Citizens' Initiative versus Constitutional Government' (1992) 7 *Legislative Studies* 55.

Gregorczuk, H (1998a) *Citizens Initiated Referenda*, Research Bulletin No 1/98, Queensland Parliamentary Library.

Gregorczuk, H, 'Citizen Initiated Referendums: Republican innovation or scourge of representative democracy?' (1998b) 7(2) *Griffith LR* 249.

'Humphries may be Fourth Time Lucky with Citizens' Law', *Canberra Times*, 30 May 1998, p 4.

Interview with Mr Neil Robson, Hobart, 1 June 1998.

Kobach, KW (1993) *The Referendum: Direct Democracy in Switzerland*, Dartmouth.

Legislative Assembly for the Australian Capital Territory (1994) Report by the Select Committee on Community Initiated Referendums, *Community Initiated Referendums*, November.

Macklin, M (1996) 'The Case For a Citizens' Initiative' in K Wiltshire (ed) *Direct Democracy: Citizens Initiated Referendums*, Constitutional Centenary Foundation.
Magleby, DB (1984) *Direct Legislation: Voting on Ballot Propositions in the United States*, Johns Hopkins University Press.
Moore, M, and P Pettit, 'Undermining Democracy: The Danger of Citizen-Initiated Referenda' (1997) April *The Parliamentarian* 153.
Movement for Direct Democracy, Submission to the Select Committee on Community Initiated Referendums, 10 October 1994.
Newton, J (1995) *Citizen Initiated Referenda in Australia*, unpublished draft Information Paper 14, Research Service of the South Australian Parliamentary Library.
New South Wales Parliament, Hansard.
'NZ Votes Yes and No', *The Bulletin*, 19 December 1995, p 19.
Pettit, P (1997) *Republicanism: A Theory of Freedom and Government*, Oxford University Press.
Puplick, C (1996) 'Citizen Initiated Referendums: The Case Against' in K Wiltshire (ed) *Direct Democracy: Citizens Initiated Referendums*, Constitutional Centenary Foundation.
Queensland Parliament, Hansard.
Quick, J, and R Garran (1995) *The Annotated Constitution of the Australian Commonwealth*, orig 1901, Legal Books.
'Referendum Bill "Divisive": Greens', *Belconnen Chronicle*, 2 June 1998, p 7.
Reith, P (1994), *Direct Democracy: The Way Ahead*, Parliament House.
Sessional Committee on Constitutional Development (1991) *Citizens' Initiated Referendums*, Discussion Paper 3, Legislative Assembly Northern Territory.
Tasmania Parliament, Hansard.
Transcript of Proceedings, Public Hearing of the Select Committee on Community Initiated Referendums, Canberra, 19 October 1994.
Walker, G de Q (1987) *Initiative and Referendum: The People's Law*, Centre for Independent Studies.
Walker, G de Q, 'Constitutional Change in the 1990s: Moves for Direct Democracy' (1993) 21 *Papers on Parliament* 15.
Zimmerman, JF (1997) *The Recall*, Praeger.

Cases and Statutes

Australia Act 1986 (Cth).
Australian Capital Territory (Self-Government) Act 1988 (Cth).
Commonwealth Constitution.
Berwick Ltd v Gray (1976) 133 CLR 603.
British North America Act 1867 (Imp).
Capital Duplicators Pty Ltd v Australian Capital Territory (No 1) (1992) 177 CLR 248.
Citizens Initiated Referenda Act 1993 (NZ).
Citizens' Initiated Referendum (Constitution Amendment) Bill 1998 (Qld).
Citizen-Initiated Referendums (Elector-Initiated Repeals) Bill 1991 (Tas).
Clayton v Heffron (1960) 105 CLR 214.
Cobb & Co Ltd v Kropp [1967] 1 AC 141.
Colonial Laws Validity Act 1865 (Imp).
Commonwealth Aluminium Corporation Pty Ltd v Attorney-General [1976] Qd R 231.
Commonwealth Aluminium Corporation Pty Ltd Agreement Act 1957 (Qld).

Community Referendum Bill 1994 (ACT).
Community Referendum Bill 1995 (ACT).
Community Referendum Bill 1996 (ACT).
Community Referendum Bill 1998 (ACT).
Community Referendum Laws Entrenchment Bill 1995 (ACT).
Constitution Act 1902 (NSW).
Constitutional Alteration (Alterations of the Constitution on the Initiative of the Electors) Bill 1990 (Cth).
Constitutional Alteration (Electors' Initiative) Bill 1980 (Cth).
Constitutional Alteration (Electors' Initiative) Bill 1982 (Cth).
Constitutional Alteration (Electors' Initiative) Bill 1983 (Cth).
Constitutional Alteration (Electors' Initiative) Bill 1987 (Cth).
Constitutional Alteration (Electors' Initiative) Bill 1989 (Cth).
Constitution Alteration (Making of Laws on the Initiative of the Electors) Bill 1990 (Cth).
Constitution (Citizen-Initiated Referendum) Bill 1991 (NSW).
Electors Initiative and Referendum Bill 1994 (ACT).
Electors Initiative and Referendum Bill (No 2) 1994 (ACT).
Giris Pty Ltd v Federal Commissioner of Taxation (1969) 119 CLR 365.
Hodge v The Queen (1883) 9 App Cas 117.
In re The Initiative and Referendum Act [1919] AC 935.
Initiative and Referendum Bill 1913 (WA).
Jumbunna Coal Mine NL v Victorian Coal Miners' Association (1908) 6 CLR 309.
Legislative Initiative Bill 1989 (Cth).
Northern Territory (Self-Government) Act 1978 (Cth).
Popular Initiative and Referendum Bill 1915 (Qld).
Popular Initiative and Referendum Bill 1917 (Qld).
Popular Initiative and Referendum Bill 1918 (Qld).
Powell v Apollo Candle Company (1885) 10 App Cas 282.
R v Burah (1878) 3 App Cas 889.
R v Public Vehicles Licensing Appeal Tribunal (Tas); Ex parte Australian National Airways Pty Ltd (1964) 113 CLR 207.
R v Toohey; Ex parte Northern Land Council (1981) 151 CLR 170.
Referendum Bill 1895 (SA).
Referendums (Elector-Initiated Repeals) Bill 1990 (Tas).
Referendum (Machinery Provisions) Act 1994 (ACT).
Referendums (Repeal of Acts and Regulations) Bill 1988 (WA).
Union Steamship Co of Australia Pty Ltd v King (1988) 166 CLR 1.
Victorian Stevedoring & General Contracting Co Pty Ltd & Meakes v Dignan (1931) 46 CLR 73.
Voice of the Electorate Bill 1993 (ACT).
Voice of the Electorate Bill (No 2) 1993 (ACT).