Citizen Initiated Referenda: cure-all or curate's egg?
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## CONTENTS

Summary ........................................... 1

Background ...................................... 5

Mr Reith's Proposals ............................. 9

Constitutional Change ............................ 12

Pros and Cons .................................... 13
  A cure for political cynicism .................. 13
  Avoiding design faults .......................... 15
  Responsible government ........................ 19
  Representative democracy ...................... 20
  Protection of minorities ....................... 23
  Complexity of Constitutional alteration .... 25
  Complexity of Commonwealth legislative power 26

Cost ................................................ 29

Undue influence of advertising and the media 30

Current Controversies:
the Australian state of play ..................... 32

Prognosis ......................................... 37

Appendix

  List of 1993 and 1994 PRS Publications
Summary

To quote A D Lindsay, 'it is a commonplace of political theory that direct democracy became impossible when the size of the community outgrew the limits of a single public meeting.' While this much is uncontroversial, the form which democratic institutions should take has always been less so.

A central problem for democracies is how to translate that 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) remains a key dilemma for democratic governments.

Moreover, as representative democracy is at best an awkward compromise of competing values and objectives, there will always be evidence to suggest that this or that democracy is under threat, in decline, or no longer truly representative of its people. As it provides for the free organisation of opposing opinions, democracy is by nature difficult, fragile and prone to self-doubt.

Of late, commentators and critics from 'the left' and 'the right' have argued that many western democracies are experiencing a debilitating decline in political life and a loss of faith in their political institutions. Apathy and cynicism are said to be on the rise and are seen as a routine by-product of years of stable representative government.

This perceived decline in democratic values and the diminished capacity of representative institutions to meet the needs of the governed is said to be evidenced by the growth or re-emergence of fringe politics and by declining levels of mainstream political activism. Depending on the ideological stand-point of the individual critic, western democracies are either 'in crisis' or else in danger of becoming 'ungovernable'. Coincidentally, deeper concerns over the strength and performance of democratic institutions have variously spawned arguments for smaller government, constitutional reform, more open

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and accountable institutions and for lessening the ambitions/power of Executive Government.

The alleged decline in the fortunes of representative democracy generally has been matched by calls for more participative (inclusive) forms of decision-making, that is, a re-awakening of the participatory ethic.

A not at all novel 'solution' to the perceived weaknesses in representative government is to allow for more direct forms of citizen involvement.

Voter sponsored initiatives, including citizen initiated referenda (CIR), are seen as one method of ameliorating weaknesses in representative institutions.

With falling levels of political involvement, evidenced by secular declines in the membership of the major political parties and other established interest groups (eg trade unions), such concerns resonate strongly through Australian political discourse. It is not surprising then that CIR have attracted some local interest in recent years.

Citizen sponsored initiatives have been used in Switzerland, Italy, at the State and local government levels in the United States and are now part of New Zealand's institutional arrangements.

Citizen initiatives may take a variety of forms, including:

- proposals to amend the Constitution;
- legislative proposals;
- legislative veto or legislative recall; and
- voter initiated recall of public officials and elected representatives.

Australia has frequently flirted with such proposals, although the existing means for electors to influence political outcomes are limited. Indeed, those mechanisms that are available, including that for amending the Australian Constitution, have been government-initiated and arguably have made only a marginal or irregular impact on Australian political life.

CIR have been on and off the political agenda at the national level with some frequency in recent years, with the latest burst of interest being in July and August of 1994. The albeit short-lived prominence of CIR during these months was largely due to the relatively detailed
Citizen Initiated Referenda: cure-all or curate's egg?

proposals forcefully promoted by Liberal Party frontbencher Mr Peter Reith MP, underpinned by ongoing support from the Australian Democrats and other activists such as Independent MHR Mr Ted Mack and Professor of Law Geoffrey de Q Walker. Support from more 'radical' quarters has been less welcome and something of an embarrassment for politically moderate supporters of CIR.

The Reith proposals to alter the Constitution to provide for CIR at the national level require a petition from at least three percent of eligible voters with a plebiscite to be held on the same day as general elections to minimise the costs. To further refine the process, Mr Reith also proposes that referendum proposals be scrutinised by parliamentary committees and allowing for advisory opinions to be sought from the Federal Court regarding the constitutionality of proposals where such a need arises.

Supporters of citizen initiatives have argued that:

- CIR provide a means for encouraging greater voter participation in political affairs without significantly diminishing the strength of existing institutional arrangements which, in any event, are in serious need of reform;

- CIR are an antidote for the worst features of political bipartisanship, as where permanent or significant interests go largely unrepresented because the major party blocs are pursuing similar policy goals or would prefer to avoid discussion of certain issues;

- CIR enable voters to separate issues from personalities;

- CIR promote a greater respect for the law because laws instituted as a result of a CIR are more clearly derived from the popular expression of the people's will;

- the concerns of CIR's critics are frequently overblown and not infrequently motivated by a desire to maintain control over the political agenda; and

- CIR can act as a useful means of pegging back the influence of entrenched interests, especially those embedded in the executive arm of government, thereby promoting greater openness and accountability in public decision-making.

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4 The Australian Democrats themselves have developed detailed proposals. Refer: Constitution Alteration (Electors' Initiative) Bill 1989 and the Legislative Initiative Bill 1989.
Proponents also see the scope for first implementing CIR at the State and local levels, thereby avoiding the criticism that CIR are inherently incompatible with areas of national policy making (for example, foreign relations and macro-economic policy).

Like other proposals to renovate representative democracy, those advanced in recent times have, however, been subject to considerable criticism. It is argued that:

- the CIR process can be captured by well financed interest groups;
- CIR supporters mistake majority rule for genuine democracy;
- CIR are socially divisive and prone to produce short-term radical solutions to complex problems and are totally unsuitable for certain areas of policy formulation (eg defence and foreign affairs);
- CIR are costly and destructive of good planning; and
- CIR pose a threat to representative and responsible government and make little provision for minority views.

Recent debate on CIR also exposed considerable differences within, as well as between, the established political parties. One reason for citizen initiatives being so actively debated is the strength of both the case 'for' and the case 'against' CIR.

Division over the health of democratic institutions and the preferred means for reinvigorating the body politic need not give rise to partisan concerns. Indeed, attitudes to CIR appear to be formed more by the political tenor of the times and individual perceptions on the state of democracy than by ideological predilections. The Australian Labor Party, for instance, for much of its history supported citizen initiatives but is largely opposed to them now. Views within the Coalition parties are even more diverse.

Given the variegated history of Australian democracy, intra-party divergences of view about CIR and other reform proposals should not be altogether unexpected. Important issues, going to the nature and form of representative and responsible government, are at stake. Partisan concerns and questions of short term political advantage may muddy the waters and hold up debate, but the issues citizen initiatives raise about the functioning of democratic institutions can only be postponed, not ignored.
Background

Citizen initiated referenda (CIR) present an interesting set of political dichotomies. They have attracted seemingly short-lived attention but have come to the fore because of more long-standing problems. They are neither the intellectual property of 'the left' or 'the right' and have been supported and opposed by both sides of politics. They are profoundly democratic but have been attacked because they have been championed by groups which are seen as hostile to the interests of liberal democracy.

Supporters see CIR as a way of ensuring that democracy amounts to more than 'a triennial chance to punish those who have punished us' in the hope that 'retribution will frighten the incoming government into punishing us less than it had intended'. CIR's opponents see them as raising expectations about the political process which can never be met.

Citizen sponsored initiatives have been used in Switzerland, Italy, at the State and local government levels in the United States and are now part of New Zealand's institutional arrangements.

Citizen initiatives may take a variety of forms, including:

- proposals to amend the Constitution;
- legislative proposals;
- legislative veto or 'legislative recall'; and
- voter initiated recall of public officials and elected representatives.

This paper examines recent controversies, records the views of the major participants and attempts to place them in a larger public debate on the future of Australian political institutions. It takes as its starting point proposals advanced by Federal Liberal frontbencher, Mr Peter Reith, and examines responses to them. Wider arguments for and

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5 Humphrey McQueen, 'Right to say our raison d'etre', The Australian, 6 August 1994.

6 David D Schmidt in Citizen Lawmakers, Temple University Press, Philadelphia, 1989, esp at p 25, records citizen initiatives as being available in 23 of the 50 States. (Government sponsored plebiscites are more widely available.)

against CIR are also explored as are the likely ramifications of the present debate.

Recognising (without endorsing) the apparent political imperative 'obliging' public figures to maintain a consistent profile on any given issue, one of the authors' aims is to record the positions of the major participants. While not intended to be an exhaustive account of all the issues associated with CIR, the paper may serve as a user's guide to the 'state of play' circa October 1994.

Australia is, by international standards, a significant exponent of the forms of direct democracy, as evidenced by the number of referenda held at all levels of government. On the other hand, voter rejection of the majority of proposals to alter the Commonwealth Constitution (only eight out of 42 have succeeded) is as well known as any other fact of Australian political life. This phenomenon, support for the referendum process but low rates of support for referenda proposals at the national level, may reflect a perception that government sponsored referenda are more in tune with the interests of the governors than the governed.

Such conundrums aside, the theory and practice of direct democracy has a longer indigenous pedigree than is often realised. Recorded support for more participatory forms of democracy dates back at least to the time of the federation movement and Charles Kingston's

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8 The most recent round of public discussion of the substantive issues was effectively curtailed by Liberal Leader, Alexander Downer MP, requesting Peter Reith MP end his contribution to the public debate. Refer The Age, 'Referendum Proposal is a one-off, says Reith', 29 July 1994.

9 John T Rourke et al, Direct Democracy and International Politics, 1992, p 34. It is worth noting that referenda and plebiscites are not uncommon at the local government level. During his time as Mayor of North Sydney, Mr Ted Mack encouraged the use of referenda with in the order of 35 being held prior to his move to state politics. See Sydney Morning Herald, Editorial, 24 September 1994.

10 A leading academic commentator on the Australian Constitution, Professor Geoffrey Sawer, once referred to Australia as, constitutionally speaking, 'the frozen continent'. Australian Federalism in the Courts, Melbourne, 1967, p 208.


12 As historian Humphrey McQueen recalled in the Australian, 6 August 1994, plebiscites were part of the program of the 1890s (not 1980s as printed) radicals who sought a democratic Constitution for the Australian Commonwealth.
1891 Draft of a Constitution Bill which provided for referenda based on the Swiss model. Kingston proposed that:

No Bill passed by the federal Parliament could be assented to until after a referendum, if that were demanded within three months by one-third of the members of either House, or Resolutions of both Houses of any of the local legislatures, or 20,000 qualified electors. Assent should be given or withheld according to the result of the referendum, determined by a simple majority of voters.\(^{13}\)

Elector initiatives were adopted as part of the Australian Labor Party's Platform in 1908 and voter 'recall' of representatives was added in 1912.\(^{14}\) Both initiative and recall remained ALP policy until 1963.\(^{15}\) In 1929, the Royal Commission on the Constitution entertained evidence supporting a referendal system similar to that in Switzerland.

On several occasions between 1980 and 1987, Bills for the alteration of the Constitution to accommodate elector initiatives were presented to the Senate by the Australian Democrats. On 26 May 1988, the Senate carried, by 55 votes to six, an amendment moved by Senator Chris Puplick declining to give a Second Reading to one such Australian Democrats sponsored Bill, but affirmed that:

... the Senate is of the opinion that the concept which would enable citizens to have a direct opportunity to participate in the initiation of legislation for the peace, order and good government of Australia is worthy of careful and detailed consideration by both the people and the Parliament, and in recognition of the significance of the concept for our system of democracy is also of the opinion that to unreasonably pre-empt such consideration may jeopardise the right of the people to make an informed decision on the most appropriate mechanism for achieving the concept ... \(^{16}\)

In the 1980s, elector initiatives were also considered by the Australian Constitutional Commission, which:

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14 'Recall' refers to a process where government appointed officials can be removed from office on the basis of a popular vote.


by majority\textsuperscript{17} recommended against amending the Constitution to provide for the initiation by electors of referenda to alter the Constitution; and

- unanimously opposed changing the Constitution to provide for the initiation by electors of referenda proposing ordinary legislation.\textsuperscript{18}

On 12 April 1989, Senator Michael Macklin (Australian Democrats) introduced the Constitution Alteration (Electors' Initiative) Bill 1989 which provided for the altering of the Constitution on the initiative of electors. A companion Bill, the Legislative Initiative Bill 1989, contained detailed proposals for the holding of referenda on topics proposed by members of the public.\textsuperscript{19}

The Bills were restored to the Senate Notice Paper after the 1990\textsuperscript{20} and 1993\textsuperscript{21} elections but have not as yet been fully debated.

Subsequently interest in forms of direct democracy and citizen initiated referenda has waxed and waned as part of broad public debate on the state of Australian democracy and the health of democratic institutions generally. Throughout this wide-ranging debate, public interest in CIR at the federal level has been kept alive by the work of a relatively small number of individuals including, Mr Peter Reith MP.

A logical starting point for looking at the implications of introducing CIR federally is the writings and public statements of those individuals closely associated with the current debate. As Mr Reith's contribution is both detailed and contemporaneous, it provides the basis for much of the following discussion.

\textsuperscript{17} Former Victorian Premier, Sir Rupert Hamer, and leading academic lawyer and constitutional expert, Professor Leslie Zines, agreed broadly with a recommendation of Advisory Committee on Individual and Democratic Rights of the Constitutional Commission, which proposed the use of electors' initiatives for constitutional reform. \textit{Final Report} of the Constitutional Commission, 1988, p 870.

\textsuperscript{18} Ibid, pp 864-872.

\textsuperscript{19} Australia, \textit{Parliamentary Debates} (Hansard), The Senate, 12 April 1989, p 1379.

\textsuperscript{20} Australia, \textit{Parliamentary Debates} (Hansard), The Senate, 8 May 1990, p 69.

\textsuperscript{21} Australia, \textit{Parliamentary Debates} (Hansard), The Senate, 5 May 1993, p 105.
Mr Reith's Proposals

Mr Reith's interest in CIR partly stems from the prominent part he played in defeating the 1988 Constitutional referenda. As shadow Attorney-General, he issued the Opposition's discussion paper on voter initiated laws, seeking 'community comment on the proposals'. It is also clear, however, that he, like a number of other leading parliamentarians, has wider concerns over the health of Australia's system of representative democracy.

Recent discussion of CIR was promoted by an announcement on 1 July 1994 of a seminar to 'explore and promote' the idea of 'direct democracy'. The seminar, which was held on 28 July 1994, was supported by Mr Reith, Australian Democrats Leader Senator Cheryl Kernot, and Independent MHR for North Sydney, Mr Ted Mack. A paper entitled 'Direct Democracy: the Way Ahead' was issued by Mr Reith in Autumn 1994, prior to a July 1994 seminar. Mr Reith described the seminar as a way of having the issue debated outside party politics as a 'safety valve to the existing system' of Parliamentary democracy.

In his seminar issues paper, Mr Reith sets out his reasons for promoting discussion of CIR. These include:

- examining recent developments in relation to direct democracy to provide a guide to the type of proposals that may be acceptable in Australia;

- encouraging public support for direct democracy through the establishment of a national organisation to promote the idea; and


24 Mr Mack had also been active in supporting direct democracy and more participative forms of decision-making during his time in State and local politics. See also 'Putting Power in the Palms of the Public', Sydney Morning Herald, 17 August 1994. See also North Sydney Municipal Council, Public Participation & Direct Democracy in North Sydney Municipality, 1990.

• defining precisely the goals of direct democracy, and setting a national agenda, so that a specific plan of action can be developed.26

Mr Reith identifies three essential features of CIR proposals to be settled before a campaign to attract public support could be undertaken. These are:

• the type of citizen initiative which is contemplated;

• the number of signatures which would be required to trigger a referendum; and

• details of the system, such as the timing of the vote and the use of Parliamentary committees to complement the new system.

The key features of Mr Reith's proposals are:

• a threshold requirement that at least three percent of eligible voters must sign a petition requesting a referendum (this would be approximately 350,000 voters federally, based on current enrolments) before a proposal can be submitted to the people;

• referenda should be held on the same day as general elections to minimise costs;

• the use of parliamentary committees to scrutinise proposals; and

• to allow for resort to the Federal Court to obtain advisory opinions prior to referenda being held.27

Mr Reith's Autumn 1994 paper also recognised that the type of initiative involved is one of the issues which must be resolved to allow 'a common basis for a national campaign to promote direct democracy in the States, the Territories, local government and at the federal level'.28

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The proposals are, however, not exhaustive.\textsuperscript{29} CIR processes could apply in relation to changes to the Constitution, ordinary legislation, a limited power to veto legislation and/or recall of elected officials. While he notes that 'the weight of opinion favours the legislative initiative', Mr Reith does not give a view on whether the CIR process should also apply to Constitutional changes.\textsuperscript{30}

As noted above, the Reith proposals are significant for the detail they contain. They are also of interest for the strength of the response they have provoked.

The Prime Minister, Mr Keating has described CIR as 'a mish-mash of measures, some of which nobody could accept'.\textsuperscript{31}

Writing in \textit{The Bulletin}, Laurie Oakes argued that the CIR proposals advocated by Mr Reith are 'far more radical than anything the republicans have suggested'.\textsuperscript{32} On a not entirely different tack, historian Humphrey McQueen observed that, 'CIR is more valuable than a republic'.\textsuperscript{33} The respected \textit{Sunday Program}, in a 'Cover Story' on Australia's fringe right-wing political groups, dwelt on the support of fringe groups for citizen initiated referenda and the problems that their support poses for the more credible proponents of CIR.\textsuperscript{34} Journalist Geoffrey Barker, whilst noting that CIR 'has, of late, attracted some surprisingly respectable friends', suggested that CIR are largely supported by a raft of 'dreamers and zealots' and that:

\begin{quote}
CIR is the last refuge of the political eunuch and loopy populist, and it exposes the nation to dangers including the exploitation of irrational fears and prejudices, and lack of balance and consistency in national policy formulation.\textsuperscript{35}
\end{quote}

The remainder of this paper tests the arguments for and against elector sponsored constitutional change and voter initiated legislation and reviews the recent debate on the Reith proposals. (Arguments

\begin{flushleft}
\textsuperscript{29} Nor could they reasonably be expected to be.
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\begin{flushleft}
\textsuperscript{30} \textit{Direct Democracy: the Way Ahead}, op cit, p 3.
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\textsuperscript{33} Op cit.
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\textsuperscript{34} \textit{Sunday}, 7 August 1994. MICAH Transcript, 89-8734.
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\textsuperscript{35} \textit{Australian Financial Review}, 1 August 1994.
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concerning a form of veto power, as proposed by Kingston\textsuperscript{36}, are not considered separately as they are not greatly dissimilar to those applying to more far reaching forms of initiative processes.\textsuperscript{37)}

**Constitutional Change**

The introduction of any CIR processes at the federal level in Australia would require constitutional amendment.

Under Part I of Chapter 1 of the Constitution, the legislative power of the Commonwealth is vested exclusively in the Parliament. The Parliament consists of the Queen, the Senate and the House of Representatives, with the powers of the Parliament being limited to certain matters set out in Part V of the Constitution. At present there is no scope for the direct initiation of legislation by electors.

Moreover, as CIR may affect the legislative power of the Commonwealth, any proposal which obliged the Commonwealth to enact legislation proposed by way of a CIR, may itself require a change to the Constitution. Accordingly, a Constitutional change may also be necessary to allow for CIR on ordinary legislation.\textsuperscript{38} Indeed, the 1988 Opposition Green Paper on voter initiated laws contained a draft Constitutional amendment which would have allowed for CIR in relation to legislation.\textsuperscript{39}

CIR could provide an alternative mechanism for constitutional amendment. Presently, section 128 of the Commonwealth Constitution

\textsuperscript{36} See page 6 above.

\textsuperscript{37} The paper also does not consider citizen initiated recall. This is because the notion of recall has not been seriously advanced at the federal level in Australia, probably because the concept of the election of non political public officials is alien to the Australian political environment. This contrasts with the political system in the United States where the election of judges and other office holders is not uncommon.

\textsuperscript{38} The Australian Democrats sought to overcome this obstacle in their Legislative Initiative Bill 1989 by providing that initiative proposals should take the form of petition for the introduction of proposed legislation. The Australian Democrats Bill provided that: if at least 2.5 percent of electors who voted formally at the last federal election petition for the introduction of legislation, then a national referendum must be held on the proposal. However, as the Bill obliged the Commonwealth Parliament to take certain legislative actions, it is still arguable that it infringed section 1 of the Constitution.

\textsuperscript{39} The draft bill to implement voter initiated laws was contained in an attachment to the Coalition’s ‘Green Paper on Voter Initiated Laws’, April 1988, Parliament House, Canberra, ACT.
sets out the only process for altering the Constitution.40 A proposed law to alter the Constitution must first be passed through the Parliament.41 Under section 128, once approved by Parliament, and assented to by the Governor-General, the proposed change is then put to a referendum of electors who are qualified to vote for the House of Representatives. To alter the Constitution the proposal must be agreed by what is known as a double majority, that is, an overall majority of voters, and a majority of voters in a majority of States.

The requirements for implementing CIR will vary according to the particular form of CIR chosen. This may affect the nature of the Constitutional amendments required. In designing CIR, relevant considerations will not only include the mechanism for implementing CIR (thresholds and majority requirements), but also whether the result of a referendum ought to be binding and whether CIR should be entrenched by means of a constitutional amendment.

Mr Reith's proposal to invest the Federal Court with the power to give advisory opinions would also require a constitutional amendment, as the High Court has held that the Parliament cannot confer on any federal court the power to give advisory opinions. (The Court's reason is that the federal jurisdiction in Chapter III of the Constitution is confined to 'matters' and that this term refers exclusively to disputes or issues relating to actual rights and obligations, not hypothetical situations.42)

Pros and Cons

A cure for political cynicism

One of the principal arguments for CIR is that they may arrest political apathy and cynicism by allowing for more direct action by citizens. Mr Reith has articulated this argument as follows:

...in recent times Australia's democracy has become stricken with the cancerous growth of cynicism and a sense of alienation for many citizens...

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40 Although section 51 (xxxvii) does allow the States to transfer or refer a portion of their legislative power to the Commonwealth, the making of any such reference does not amend the text of the Constitution itself. Similar considerations may also apply to section 51 (xxxviii).

41 Section 128 requires such a law to be passed by an absolute majority of both Houses of Parliament, or by one House twice if the second House has amended the law in an unacceptable way, or failed to pass the law.

42 *In Re Judiciary and Navigation Acts* (1921) 29 CLR 257.
I do not believe that Australians are apathetic by natural disposition. I think our apathy is a product of the system. Likewise, I don't believe that politicians are inherently arrogant but political arrogance is a feature of today's politics. Again in my view this is a product of the system.

Australians have a lot to offer and they would like to be involved. Direct democracy can be the cure to our political cancer and an elixir to create a new participatory ethic.43

It is, of course, desirable for such assertions to be treated carefully and tested against any available evidence. Assessing CIR is however, no easy task because experience with CIR is very limited. 'Counter-factual' (what if) evidence is generally not available and there are, as far as we can discover, no Australian opinion polls directly on point, which is why commentators and community leaders have relied on their political instincts in assessing the public's likely support for CIR.

Mr Reith's fundamental premise, that Australian democracy is in need of fundamental reform, can also not be taken at face value. He may be right but his arguments may equally be based on entirely false perceptions.

What perhaps can be said with some safety is that faith in Australia's political institutions has been stretched in recent times by a variety of political and economic factors. This is evidenced by the secular decline in membership of mainstream political parties and interest groups (such as trade unions), the growth in single issue politics, and the loss - or apparent loss - of public confidence in the ability of government to deliver on the electorate's expectations. Greater volatility in opinion poll results for political parties and political leaders in many western countries (including Australia) and a fall in absolute levels of support for political leaders generally also point to higher levels of alienation amongst voters.

Opinion polls on related issues tend to suggest that representative democracy may benefit from the limited but more direct involvement in national decision-making that CIR may provide. For example, one relatively recent poll has suggested that 49 percent of respondents had 'not much' confidence in the political system compared to only 36 percent who had a 'fair amount' or 'great deal' of confidence. This poll also put political institutions behind the media, banks, the legal system and the education system in terms of public confidence.44

Other poll results however, are more ambiguous. One recent survey found that Australians are not prepared to protest or take political

44 'The sad truth about politics', The Sydney Morning Herald, 8 July 1991.
action even over issues they felt strongly about. While generally unenthusiastic about political activity, 42 percent of respondents also claimed that they would be prepared to help collect signatures for a petition about an issue they felt strongly about. This compared with 24 percent of respondents who would write letters to a newspaper and 21 percent who said they would go to a protest march.

Bearing in mind the caution that a nation of inveterate political activists may be at least as ungovernable as a nation of political 'drop-outs', the poll results and views of leading commentators, such as Hugh Mackay, do point to a general malaise in Australian politics. What evidence there is thus tends to support Mr Reith's view that too many Australian's are being 'turned off' by politics as it is presently practiced. The unanswered question is whether CIR can assist in ameliorating such discontents.

Avoiding design faults

Proponents and opponents of CIR point to international experience to bolster their respective cases.

The international literature supporting CIR seems to have a number of common themes drawing largely on a perceived lack of confidence in representative institutions. It also shares a common language. Compare, for example, the following extract with Mr Reith's remarks quoted (at page 13) above:

Government paralysis carries a price-tag for any electorate. Today nearly 70 percent of the American people disapprove of the way Congress is handling its job, up from only 12 percent in 1958, according to a Gallup survey. This lack of faith cannot continue. If left unchecked, declining public confidence will destroy the credibility of national institutions so much that governing sensibly - and democratically - will become nearly impossible.

Perhaps the best way to restore confidence in the political process is to rebuild the connection between national elections and national issues. We need a new constitutional device that lets the voters help set the nation's agenda.

International parallels notwithstanding, whether CIR can be successfully transplanted from one political culture to another is open to doubt.

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45 'Couldn't care less, mate: political action the Aussie way', The Sydney Morning Herald, 14 June 1991.

46 Reinventing Australia, Angus and Robertson, Sydney, 1993, esp. pp 184-188.

International experience of CIR is limited in a number of respects. CIR are not a feature of many political systems and they are less common as a feature of political systems at the national or federal level. While CIR are commonly used at the State or Canton level in the US and Switzerland, only Switzerland, Italy and New Zealand have provision for CIR at the national level. Even the Swiss provision for citizen initiated changes applies only to the constitution, not to ordinary laws.48 (Citizens can, however, veto ordinary legislation within a specified period after it is published by the Federal Assembly). The restriction of the procedure to constitutional questions has created some difficulties. For instance, specific matters which would in ordinary circumstances be dealt with by legislation, such as the level of old-age pensions, are sometimes put forward as proposals to alter the constitution.49

The limited use of CIR internationally may raise doubts in some minds about the ease with which CIR can be translated to Australia as a device for promoting constitutional change. Moreover, the limited international experience with CIR at the national level may also argue for limiting its use in Australia to issues that arise at a State or local level. To quote the majority Report of the Australian Constitutional Commission:

> Few referendums have been held in other countries to initiate or repeal national legislative or constitutional provisions. Swiss examples are of dubious validity in Australia.50

More specific objections have also been raised against the use of CIR in national politics. It is argued that national issues more commonly require the development and application of policy consistently over time. For example, national security, foreign affairs and migration policies in particular require a measured and consistent approach and 'one-off' forays into these complex fields have the potential to disrupt relations built up over many years.

More broadly, initiatives having a certain immediacy may attract majority support, at the expense of desirable longer term outcomes

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49 Butler and Ranney, op cit, p 43.

50 op cit, p 867.
which may either be less apparent or else more difficult to articulate during the course of a short referendum campaign.51

Such concerns have not gone entirely unheeded and some proponents of CIR recognise that there should be limits on the matters subject to the CIR process. To quote one leading CIR advocate:

There is one area in which I would argue that a Federal CIR system should not apply, and that is in foreign affairs. I do not mean treaties necessarily. I think that perhaps treaties should be subject to people's veto, but not foreign affairs generally. First of all, it is the primary function of government to protect the nation from external threats. Secondly - and I think this is more conceptually important - in foreign affairs the Government often has to act on information that is not generally available. It has to act on secret intelligence information and various pieces of information it gets from diplomatic posts...52

Professor Walker's argument, however, points to a further potential weakness with CIR, that being access to information for electors to make informed choices.

If the public availability of relevant information is the most important indicator of a subject matter that should be excluded from CIR processes, many other areas of legislation could also be excluded. These might include areas where secret commercial information is involved. Alternatively, if the secrecy of the subject matter is not the only reason for excluding foreign affairs, the other factors justifying its exclusion should be identified.

The issue of whether international relations are qualitatively different from other types of government action has been considered by one writer concerned with the application of direct democracy principals in the international arena who has argued that:

Only with difficulty can the world of international affairs be compared with the direct democracy advocates' favourite (sic) images of a New England town meeting or the deliberations of the Athenian Boule. International politics is not carried out by neighbours in any meaningful sense ... it presumes to practice the political craft behind closed doors in the shadow of war. According to the realist school, international politics is not about rights, justice, freedom or morality by any but the victor's definitions. To quote some of the first to expound this essence, international politics is the realm of necessity and power, wherein 'the strong do what they can and the weak suffer what they must' ....


We should see immediately why the doctrine of realism challenges the usage of referendums on international issues. First, realists are apt to conclude that because citizens have a regrettable tendency to moralize about issues, including those of international politics, prudence dictates that foreign policy should be left to the experts. Realism downplays the moralistic aspects of the international politics as distracting, or even dangerous to the national interest. Realists are therefore suspicious of referendums, which even their defenders acknowledge could be a tool of emotional hate groups or others seeking to legislate their own moral agenda. And even if the referendum process were altered to prevent such occurrences, the theory of participation that stands behind referendums seems, to the advocates of realism, somehow out of place or 'unrealistic' in the realm of foreign affairs.3

Calls for exceptions must be examined with care, as should all special pleadings of this kind.

Whilst a realpolitik approach adopted by Rourke correctly recognises the unique nature of international relations, the case for imposing a blanket prohibition on CIR with a foreign policy dimension is more difficult to sustain.

Although Australia arguably did not enjoy full extra-territorial competence until 1942,54 there is little doubt that in recent times defence and foreign affairs have left their imprint on domestic political life. Australian involvement in the Vietnam War was marked by a substantial level of protest and public debate as was Australia's involvement in the Gulf War. Making such issues 'no go zones' for citizen initiatives would damage the credibility of the CIR process generally, sending a signal to the electorate that citizen participation is only to be permitted where the issues involved are fairly marginal. This may, in turn, add to any voter apathy and disenchantment thereby helping to perpetuate the very problem that the introduction of CIR is aimed at addressing. Moreover, as many domestic issues have foreign or extra-territorial implications,55 such a bar may be manipulated by stake-holders in the present system to further restrict the use of CIR.

On the other hand, any CIR proposal which included the provision for ballots on defence and foreign affairs issues may taint efforts to introduce CIR at the national level. Accordingly, for tactical, if for no other reasons, CIR supporters may be wise to exclude foreign policy or


54 With the adoption of the Statute of Westminster 1931.

55 For example, environmental issues.
citizen initiated referenda: cure-all or curate's egg?

security related matters from their initial proposals to alter to the constitution.

responsible government

one of the basic characteristics of the australian political system is that governments are responsible for developing a full and coherent range of policies and are held accountable at elections for their performance in implementing these policies. however, this theory of accountability retains operational value for only as long as governments are unable to abrogate responsibility for programs and initiatives pursued during their time in office.

clearly, government cannot be held accountable for policies endorsed by voters at referenda, and indeed the very existence of cir may make governments less directly accountable to the electorate overall. there are two aspects to this problem. the first relates to specific policies, the second to accountability generally.

a further blurring of traditional lines of accountability is easier to rationalise where government policy on a specific issue has been rejected or overtaken by a cir. in these circumstances, government would not be accountable for the policy but would remain responsible for its efficient implementation. more difficult accountability issues arise in relation to the secondary affects of successful referenda, that is where a elector sponsored initiative substantially cuts across the government's political priorities. in instances involving serious knock-on effects; 'textbook' accountability, already the sickly child of the westminster model and its derivatives, is likely to be an even less weighty restraint on the executive than is presently the case.

accountability problems are particularly acute wherever proposals interfere with the raising or expenditure of government revenue. indeed much of the enthusiasm for, and loathing of, cir can be traced back to the (in)famous proposition 13 proposal to limit state property taxes which was carried by california's voters on 6 june 1978.56

the budgetary process, although one of compromise and adjustment, is not one which is readily amenable to piecemeal tinkering. any significant adjustment on one side of the 'ledger' may not only have implications for the budgetary bottom line but for the viability of other government programs and for macro economic outcomes generally. accordingly, where significant elements of expenditure, or the

collection of revenue, are taken out of the government's control, the concept of responsible government must be heavily compromised. For example, if a referendum resulted in significant expenditure commitments, the government may not be able to meet existing budgetary targets or other policy objectives. Similarly, the use of CIR could also jeopardise longer term planning. Capital works projects, for example, invariably require long term commitment of government funding which may be placed at risk where previously unfunded and unanticipated spending becomes necessary as a result of an elector sponsored initiative.

Such concerns, of course, go beyond budget matters. As already noted, governments may also be required to implement referendum proposals which are contrary to their electoral platform or which are inconsistent with Australia's international obligations or broader interests in the world community.

On the other hand, 'design problems' should not be overstated. Many of the possible ill effects of elector initiatives can be minimised or held to tolerable levels. In response to the above criticisms of CIR it may be argued that:

- CIR will only have a marginal impact on political process as major accountability problems will not arise frequently;
- existing notions of accountability are somewhat artificial and are a relatively poor substitute for more direct citizen involvement; and
- the theory of responsible government is so infrequently applied in practice as to be virtually moribund.57

Representative democracy

The possible compromising of the integrity of the existing system of representative democracy is also used as an argument against citizen initiatives. (The contrary view, being, of course, that it is a valuable adjunct to representative democracy.)

One aspect of this argument is that the Parliament (except for the Queen) is elected by the community and endeavours to represent the electors in decision-making across the range of issues and activities. As an alternative expression of popular opinion, CIR could weaken the authority and standing of Parliament by creating a new and competing centre of political legitimacy within the community.

If one function of Parliament is to balance competing interests and arrive at solutions which are most appropriate for all, alternative arrangements for measuring, balancing and brokering competing views will also tend to undermine the legitimacy of Parliament.

Moreover, the representative process allows for the views of electors to be reflected in a more subtle way than the negative or positive response on a defined issue which is required in a referendum. The elected representative is also able to take account of the intensity of views on an issue, not only the bare number in support or opposition. A representative may support a measure if only 40 percent of the electors support it, on the basis that the 60 percent who might oppose it if forced to consider the matter are only moderately concerned about the issue or largely indifferent to the final outcome.

Elected representatives may also be able to make decisions in a more informed and flexible way because they are exposed to a wide range of views on the full gamut of public affairs. Moreover, a representative may have more information available and therefore be in a better position to see a particular decision in its broader context. An elected representative is also able to take account of the most recent developments and vote accordingly. This contrasts with a CIR process which usually requires the prior formulation of a proposal for the purpose of putting it to the vote. Such settled proposals cannot be readily adapted or amended to take account of supervening events.

The major weakness with arguments based on the representative nature of Parliament is that they often underestimate the very real limitations on a member’s capacity to fully represent the electorate. These limitations include:

- imperfect communication with voters (less confident, less organised or poorly educated constituents may be less likely to raise matters with members);

- party structures and norms of political conduct which, except in unusual circumstances, require parliamentarians to adopt the party position on any given issue irrespective of their constituents’ views; and

- demands on the time of parliamentarians and the frantic nature of public life which make it very difficult for politicians to consult with constituents in a meaningful way.

Simply staying in touch is a major effort for even those decision-makers with the best will in the world. Indeed, where the governors become too distant from the governed that 'will' may not always be
resilient enough to prevent self-interest becoming confused with the public good. As John Hyde has recently argued:

Those who put their own opinions on a plane above public opinion tend to compare referendums with idealised representative government instead of comparing them with the governments we actually suffer... They tend to assume that those who govern us now always place the public interest ahead of their own so that, even when politicians dissemble, they have our interests at heart. And they tend to portray CIR as an alternative to representative government rather than a check upon it.58

Elitist tendencies, which are in part fostered by unconstrained representative government, have also been remarked on by Australian Democrats Leader, Senator Cheryl Kernot. In a speech to the National Press Club she reminded her audience that:

[The fact is that representative democracy is comfortable for an elite few who run the agendas of this country - the elite few in executive government, the media, and the lobbying world.59]

Arguments over the positive and negative consequences for representative government of CIR are easily overstated. CIR is not intended to replace or fundamentally restructure parliamentary processes and is not being promoted as a magical elixir for all the ills of representative government.

CIR is intended to augment the existing structures,60 and to the extent that the representatives of the electorate accurately anticipate and deal with matters of major concern, recourse to referenda should be rare. Whilst it is true that if used too frequently CIR could prove disruptive, CIR's supporters have sought to blunt criticism of the unwieldiness of the citizen initiative process by arguing that they should only be used sparingly.61

It is in striking the balance between the order provided by representative institutions and the freedom provided by forms of direct action that the contribution of CIR to good government is to be judged. As political theorists have noted, democracy is a process forming a necessary part of 'free government'. Good government requires more, however, than just majority rule. To quote Bernard Crick:

58 'Citizen power a proper check', The Australian, 29 July 1994.
... good government is a matter of experience, skill and knowledge - not just opinion, but is subject to the consent of the governed.\textsuperscript{62}

Citizen initiatives can improve the functioning of representative government by widening that pool of experience, skill and knowledge and by reinforcing democracy by giving electors the opportunity to directly speak for themselves rather than through others.

Protection of minorities

Another frequently expressed concern is that in the emotionally charged atmosphere of referendum campaigns voter intolerance and mistrust of unpopular minorities may turn into something rather more nasty.

US Professor of Law, D A Bell Jnr, has concluded that the record of direct ballot legislation in the US:

\ldots reflects all too accurately the conservative, even intolerant, attitudes citizens display when given the chance to vote [on] their fears and prejudices, especially when exposed to expensive media campaigns. The security of minority rights and the value of racial equality which those rights affirm are endangered by the possibility of popular repeal.\textsuperscript{63}

Examples of the way in which minority rights have been adversely affected by citizen initiated action can be drawn from the referenda held in the US at the State level. Another commentator has suggested:

There have been rare but clear-cut cases in which voters at large were decidedly less caring about minority rights than were legislators. In the early 1960s the Californian legislature had passed a law prohibiting racial discrimination by realtors and owners of apartment houses and homes built with public assistance. California's real estate interests, which had opposed the legislation, sought to repeal the law with a 1964 initiative. In an emotional and heavily financed campaign the realtors won a two-to-one victory.\ldots

The issue of gay rights provides yet another example of majorities' occasional disregard for the rights of minorities. Usually the issue arises at the city or county level where a local legislature approves some form of ordinance that bans discrimination against homosexuals in terms of employment or housing. Perhaps Dade County (Miami area), Florida, is the most famous case; but Boulder, Colorado; St Paul, Minnesota; Eugene, Oregon and San Jose, California, are among other communities that have witnessed popular repeal by initiative or referendum of similar gay rights ordinances.\ldots

\textsuperscript{62} Bernard Crick, \textit{In Defence of Politics}, op cit, p 71.

\textsuperscript{63} Cited in Cronin, op cit, p 94.
This pattern of defeat for gay rights ordinances suggests majority disapproval for homosexual relations... Plainly, those local elected officials have been more willing than the general public to protect gay rights and liberties.\textsuperscript{64}

While the potential to disadvantage unpopular minorities is a very real concern, it is not obvious that citizen initiated processes are intrinsically more likely to produce such an outcome. The US experience has also yielded examples of where voters have been prepared to protect minority rights. For example, in California voters rejected a proposal to strip confidentiality from AIDS blood test results and require doctors and blood banks to report individual cases to officials.\textsuperscript{65} The record on capital punishment is also less chilling than one might suppose. While two US States have reintroduced it through CIR, in one State citizen initiatives have led to its abolition. This compares with 29 States where government legislation provides for capital punishment.\textsuperscript{66}

Threats to individual liberty and political freedom may arise under existing institutional arrangements and are not, in any event, the sole preserve of government. A notable Australian example is the referendum held by the Menzies Government in late 1951, which sought to outlaw the Australian Communist Party. When the High Court ruled the legislation invalid the Government attempted, through a referendum, to have the Constitution amended to allow for the legislation which clearly discriminated against an unpopular and distrusted minority.

Although the Menzies Government's proposal was only narrowly defeated in the referendum, the episode shows that the rights of unpopular minorities are not subject only to threat through the processes of direct democracy. It also shows that the referendum process can provide an opportunity for popular opinion to build against anti-libertarian policies.\textsuperscript{67} Other Australian examples of popular opinion being resistant to attempts to reduce individual liberty are the

\textsuperscript{64} Ibid, pp 94-95.


\textsuperscript{66} 'CIR could make the ACT the mouse that roared', The Canberra Times, 30 July 1994.

\textsuperscript{67} J M Kirby, H V Evatt, the Anti-Communist Referendum and Liberty in Australia, (1991) 7 Australian Bar Review, pp 93-120.

Apart from again illustrating the electorate's conservatism on referendum proposals generally,\footnote{Refer James Crawford, 'Amendment of the Constitution' in \textit{Australian Federation: Towards the Second Century}, Greg Craven (editor), Melbourne University Press, Melbourne, 1992, pp 177-192, on the trials of securing constitutional change in Australia.} the above examples also suggest that popular opinion need not be as easily swayed by powerful interests, as some commentators and CIR critics may believe.

The overwhelming support for 1967 federal Referendum to extend Commonwealth power over Aboriginals and to count them in the census, can also be seen as an instance of referenda (albeit government initiated) positively bolstering individual and minority rights.

**Complexity of Constitutional alteration**

Allowing citizens to initiate constitutional and legislative changes was considered by the Constitutional Commission. As already noted, a majority of the Commission did not support a change to the Constitution to provide for the initiation by electors of referenda to alter the Constitution. The Commission also unanimously opposed changing the Constitution to allow for the initiation of referenda concerning ordinary legislation.\footnote{Constitutional Commission, \textit{Final Report}, 1988, Volume 2, AGPS, Canberra, p 864.}

One issue raised by the Commission in rejecting CIR was the complexity involved in constitutional change. The majority of the Commission accepted that:

\begin{quote}
the formulation of a constitutional alteration is a detailed and complicated task, involving considerable experience and expertise.\footnote{Ibid, p 869.}
\end{quote}

This argument echoes concerns over the intrusion of CIR into the budget process and foreign policy-making. The Constitution, as the instrument delineating the power and structure of the Commonwealth, is a complex and carefully balanced document. The Constitution establishes the institutions of the Parliament, the Executive and the Courts and sets out the respective status of the Commonwealth and
the States. Each of the elements are inter-related and carefully balanced; a change in one area may have wide-ranging consequences in others.

While it is true that CIR opens up the possibility of significant changes to the existing balance within the Constitution, opposition to CIR on this ground from lawyers or politicians may appear self-serving and invariably tends to be somewhat overblown. Not all referenda proposals will affect constitutional arrangements and those that do should nonetheless be fought on their merits. The Constitution is in any event not an immutable document and to suggest that it is would be to disregard the impact of High Court decisions affecting the 'constitutional balance'. Anti CIR arguments also ignore the existence of referenda procedures under Section 128 and the fact that the 'complex balance' established in the Constitution was itself the product of a popular initiative.72

Complexity of Commonwealth legislative power

As anyone close to the political process knows, outsiders often have little idea of the time and wherewithal needed to achieve change and secure reform. It is a truism that a political problem which was one dimensional or straightforward could rarely be described as 'political'.

A federal system will tend to magnify the complexity of politics and the legislative process as the Constitution restricts the subject matter over which the Commonwealth may enact valid laws as well as means for making them. As even without federalism much of the legislation enacted by the Commonwealth Parliament would be very complex, those who believe that CIR will provide simple solutions for complex problems are setting up very high expectations which are likely to be disappointed.

In attempting to assess the likely influence of CIR, it must be remembered that most citizens have little appreciation of or interest in the minutia of government. As Senator Gareth Evans has remarked, the allocation of resources and the raising and spending of public monies are not the sort of issues for which every voter will be able to find answers from within his or her personal experience.73

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73 Cited in G de Q Walker, Initiative and Referendum: The People's Law, op cit, p 80.
Commonwealth Governments are generally more conservative in their approach to the use of Commonwealth powers than many of their extra-parliamentary supporters and other political activists. This relative conservatism may be attributed to a variety of factors. One of these is that Commonwealth Governments since federation have frequently been reminded of the hazards of seeking to press the limits of constitutional powers.

The perception that federal (especially Labor) governments have systematically pursued a strategy of increasing central dominance over the States is tenuous. Commonwealth initiatives frequently follow pressure from outside interests, private legal actions or leads given by the High Court. Indeed, the perceived growth of Commonwealth power has been sporadic and not always triggered by the Commonwealth itself.

The reluctance to legislate up to the limits of constitutional authority is often activated or bolstered by political considerations. Apart from the standard legal checks performed by the sponsoring agency and/or the Attorney-General’s Department to ensure that legislation is within a valid head of Commonwealth power, there is usually a strong inclination amongst political professionals not to ‘test’ Commonwealth power unless such a course cannot be avoided. Even the most centralist of Commonwealth Governments are not totally oblivious to State interests and the power of State governments and party organisations.

Citizen groups which are more single-minded and less experienced in these matters, especially organised lobby groups which have significant financial interests to pursue, may be less reticent in ‘pushing the envelope’ of federal power. However, the price of such constitutional adventurism is potentially high. Were they used indiscriminately, CIR could be a spur to numerous and unwanted constitutional challenges. Each may have a significant ‘downside’ arising from:

- the uncertainty which would exist while the legislation was being challenged;

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74 Or a combination of factors. See for example the High Court’s decision in Koowarta v Bjelke-Petersen (1982) 153 CLR 168.

75 It is also important not to assume that so called ‘judicial activism’ and the growth of Commonwealth power are one and the same. A number of High Court which are tagged as ‘activist’ have actually been about restricting the power of government and bolstering the rights of individuals rather than altering the so called ‘federal balance’. Refer: Australian Capital Television Pty Ltd v The Commonwealth (1992) 177 CLR 106, Nationwide News Pty Ltd v Wills (1992) 177 CLR 1.
Citizen Initiated Referenda: cure-all or curate's egg?

- the disruption and expense which may be caused by any law being reversed; and

- the creation of false expectations in the community which may be difficult to redress.

While the uncertainty and confusion surrounding the enactment of constitutionally doubtful legislation might be better avoided, the risk of invalidity can be easily overstated. Constitutional validity is a matter on which experts frequently differ and the advice taken by citizen groups could be expected to reflect these differences in the same way as advice given to governments. As infrequent players in the legislative process, community groups might even be more conservative in their approach to the limits of legislative power, as a high priority would be placed on ensuring legislation which is fully effective at the first attempt.

One of the principal advocates of CIR in Australia has rejected the complexity of legislation as an argument stating:

In the broader sense, I am not so sure that all problems are, at bottom, so complicated. Acts of Parliament are complicated when you look at them because there is so much machinery, so much need for definitions and so many consequential matters to deal with. But the basic principle behind most Acts of Parliament is simple; for example: 'Do you want an income tax or don't you?' 'Do you want a GST or don't you?'. The basic principle lends itself to voting yes or no and, in fact that is what the Parliament does; it votes yes or no once the proposal is formulated. That is what the High Court does when a matter comes before it in which there may be equities or merits on both sides. At the end of the day the court still has to decide yes or no. Although in one sense matters are complicated, life would become impossible if all problems of government were complicated. At bottom they basically have a certain simplicity.76

This characterisation of legislation as intrinsically simple is problematic. It is also not strictly correct to claim that Parliament and the High Court are tied to deciding 'yes or no' on a piece of legislation. The Parliament has a power to amend which is regularly used and the High Court is dealing with the application of legislation in particular cases, or validity, rather than the policy content of legislation. Walker himself, however, points to mechanisms to alleviate difficulties arising from the inherent complexity of the legislative process. One such option is to have a preferential system of voting for the referendum process which could allow the Parliament to put forward an alternative formulation of legislation and allow greater voter choice.

76 G de Q Walker, Constitutional Change in the 1990s: Moves for Direct Democracy, op cit, p 19.
Technical difficulties may also arise in interpreting legislation emanating from the CIR process. Such concerns are, again, not insurmountable. Federal courts currently interpret legislation with the assistance of rules set out in the Acts Interpretation Act 1901. Where a statute is ambiguous in some particular, reference may be made to extrinsic material including the explanatory memorandum which is prepared for and considered by Parliament. This material assists in ascertaining what Parliament intended when the legislation was passed. This may help the Court resolve an ambiguity in a law. How such a process could apply to CIR based legislation is unclear as no single intention may easily be distilled from a broad ranging community debate. 77

Cost

CIR are costly, particularly where the government is charged with the responsibility of producing basic information material.

The Australian Electoral Commission (AEC) has reported that the cost of holding the 1993 General Election was $46.65 million 78 and it estimated that a further $2.5 million would be expended on that election in the 1993-94 reporting period. These figures excluded public funding payments to political parties and candidates. 79 The cost of the 1988 referenda (which were not held in conjunction with a general election) was $35 million. 80

Whatever the actual figure, the cost of any system which allows direct initiatives in a relatively unconstrained manner would be significant. 81 This might be moderated, however, if the system was constrained so that referenda could only take place at particular times, for example in conjunction with general elections, as suggested by Mr Reith.

Unfortunately, linking referenda to elections may also create problems. On one hand, there is the risk that the referendum may become politicised with the outcome merely reflecting partisan concerns and

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77 On the other hand, if a statement of the 'yes' and 'no' case is a formal requirement of the CIR system, these statements could be used by the Courts to assist in interpretation.

78 As at 30 June 1993.


81 A threshold requirement of 3% of eligible voters signing a petition would appear to be a significant constraint.
relevant party lines. Alternatively, there is always some chance of the accompanying election campaign being dominated by the plebiscite with the election becoming little more than a secondary poll on the referendum question(s).

The direct cost of holding a referendum is not the only cost to be considered. Assuming government will be charged with the administration of the new laws, additional costs may well arise for government agencies. Parliament now requires that legislation be accompanied by a financial impact statement. It is unclear whether this would apply to citizen initiatives and, if it did, who would be responsible for the costings. The involvement of the Treasury or the Department of Finance in any costing exercise would seem desirable except that this may give rise to possible conflicts of interest, especially where the government of the day was opposed to the particular CIR proposal.

Supporters of CIR processes acknowledge some costs are involved but respond that in the long run the initial expense is outweighed by having a better informed, less apathetic electorate which generally understands, and has more respect for, both legislation and the processes of government. Some CIR supporters claim that law enforcement and policing costs drop after the introduction of CIR. There has been, however, no solid evidence advanced to support these assertions although one writer has noted that the Swiss, who have referenda every three months, 'enjoy the highest standard of living in the world'!82

Undue influence of advertising and the media

Another argument against CIR is that they can be 'hijacked' by well financed interests.

There has been considerable analysis of spending patterns and success rates of CIRs in the United States. This shows that while spending large amounts of money cannot guarantee the outcome of the process, heavy expenditure can be very influential.

Established interests generally used the media more effectively than their frequently 'amateur' opponents. By conducting mass mailings and carefully monitoring and funding opinion polls, they were also often in a superior position to target paid advertising. These advantages were generally decisive where vested interests sought to block, rather than to promote, change. Where large amounts of money were spent in opposition to CIR proposals, the wealthier side had a 75 percent, or

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82 G de Q Walker, op cit, p 94.
better, chance of defeating the proposal.\textsuperscript{83} In summary, money and electoral conservatism have invariably gotten the better of enthusiasm and misplaced idealism.

While frequent defeat for CIR proposals might not be seen as a good reason for opposing the availability of CIR processes, the defeat of a worthwhile proposal due to one side's domination of the media and advertising is worrying. Less obvious, but of equal concern, are the possible ramifications of such a result, one being that the relevant legislature may feel morally obliged not to pursue a measure defeated in a plebiscite, even though the proposal is one which it believes to be of considerable merit.\textsuperscript{84}

Other US evidence suggests that spending was not particularly likely to ensure the passage of legislation which is supported by the high spender. To quote Cronin:

\begin{quote}
So-called big money has only a 25 percent success rate in promoting ballot initiatives.\textsuperscript{85}
\end{quote}

This is not totally reassuring. While a 25 percent success rate might be characterised as low, the stakes in terms of securing market interests or avoiding regulatory measures may be very high for the interests involved. If a lobby group can buy 25 percent of the legislation it desires through CIR, it may regard such a strategy as more cost effective than having to pursue favourable treatment through the established channels.

Existing levels of political arrangements and voter apathy may also be a factor. One would expect that in countries where voter turnout is high, for instance where voting is compulsory, the cost of 'buying out' popular opinion will generally be too high or even totally out of reach.

Supporters of CIR also argue that the existing legislative process itself is already heavily influenced by powerful interests. Their argument is that:

\begin{quote}
Australia has now reached the stage where much of the law-making activities of our parliaments is seen to be conducted on a basis of blackmail and corruption. Governments are engaged in the uninhibited sale of statutory
\end{quote}

\textsuperscript{83} Cited in Cronin, op cit, p 109.

\textsuperscript{84} There are clearly limits on the extent to which governments feel morally bound by referendum decisions. This was demonstrated with the creation of self-government in the Australian Capital Territory, despite a referendum in which ACT voters clearly rejected such a development.

\textsuperscript{85} Cronin, op cit, p 109.
monopolies through licensing procedures whereby government imposed barriers to entry enable participants to effect a coercive wealth transfer from consumers to themselves. 86

While it may be true that representative legislatures from time to time pass laws which benefit sectional interests, CIR may do little to prevent this from continuing to occur. 87 Government would be subject to the same type of pressure from interest groups as is currently the case. If sectional legislation is passed, there is the possibility of using CIR to repeal it but, as discussed above, the US experience shows that it has been relatively easy for well organised groups to defeat citizen initiatives which threaten their interests.

Though the experience in the US may not be directly applicable in Australia, the conclusions of one US commentator are salutary:

... the role of media coverage and media is closely tied to the influence and impact of money. In general, the side with the most money can acquire the shrewdest media consultants and thus the best chance of influencing voter thinking and voter preference. As a result the rights of those who cannot afford to be heard are diminished in the direct democracy elections. And in the absence of imaginative safeguards they are likely to be diminished further, as the importance of money and the media grows. 88

Such 'imaginative safeguards' could not, in Australia, include a ban on paid television advertising during referendum campaigns as that would amount to interference with free political discourse which is impliedly guaranteed by the Constitution. 89 Redressing the balance between well off and less well off interests, by, for example, providing public funding for community groups which wish to pursue elector initiatives would not, however, be subject to such constitutional impediments.

Current controversies: the Australian state of play

The reaction to Mr Reith's and other recent attempts to raise debate on CIR was more negative than may have been expected although the level of media coverage generated in July and early August 1994 suggests that interest in CIR has risen over recent years.

86 G de Q Walker, Initiative and Referendum: The People's Law, op cit, p 47.

87 An example of legislation said to be contrary to the general public interest is the Petroleum Retail Marketing Franchise Act 1980 which supposedly lessened retail competition and led to higher prices for consumers.

88 Cronin, op cit, pp 123-124.

89 Australian Capital Television v Commonwealth (1992) 177 CLR 106
Somewhat predictably, media coverage of the Reith proposals and the contributions from mainstream political figures concentrated more on differences amongst prominent Coalition members, than on the proposals themselves. (In the media’s defence, there was certainly a surfeit of Coalition comment to report.)

The Leader of the National Party, Mr Tim Fischer MP, was amongst the most forthright in his rejection of CIR describing it as:

... a cancer that would eat away at the basis of our system of government and Constitution, through attacking the delicate system of checks and balances that allows governments to govern. 90

Mr Fischer argued that there is no obvious weakness in the existing system that could be fixed by CIR, and no evidence to suggest that CIR is needed to ensure that issues of major importance are addressed by the political system. Mr Fischer also warned of the likelihood of populist, single issue referenda being carried, creating difficulties for rural Australians. He noted:

CIR by its very definition, is simply a raw vote, and the only thing that counts is numbers. On any number of issues - daylight saving and kangaroo culling are two that come immediately to mind - I can envisage emotive campaigns to people in the cities being quite enough to carry the vote. 91

National Party Leader in the Senate, Senator Ron Boswell, added:

The great Australian virtues of a fair go and tolerance would be threatened by a mob mentality driven by moneyed interests pursuing who-knows-what agendas. Voters would be on a rollercoaster ride through a haunted house, hurtling up and down past the bogeymen of special interest groups, without ever getting out of the theme park. 92

The then shadow Minister for Industry, Commerce, Infrastructure and Customs, Dr John Hewson, has also been strongly critical of CIR generally, saying:

I think it is an inane idea. Politicians have a responsibility to perform in a particular way and I see this as an abrogation of that responsibility ... Australia is becoming increasingly ungovernable as you have minority parties with considerable influence on our political system. [There are] minority groups with considerable interests, minorities in the Senate dominating parliamentary process and what the CIR process would do is institutionalise that one more


91 Ibid.

stage... I think that is pretty much a populist gimmick and not what we ought to be doing in Australia.93

The Australian Democrats, however, have generally supported CIR.94 Senator Cheryl Kernot has been reported as stating, '[d]irect democracy is micro-economic reform of democracy', emphasising that the CIR process is designed to complement the role of elected representatives.95

CIR also attracted support from both inside and outside politics. Professor Cheryl Saunders, Director of the University of Melbourne's Centre for Comparative Constitutional Studies, argues for constitutional change to be able to be instigated by CIR.96 Commentators P.P. McGuinness97 and Humphrey McQueen98 have added their support for CIR as has Federal Liberal Member for Groom, Bill Taylor MP99. Further lustre also attached to Mr Reith's July 1994 Seminar by the presence of a number of leading Australian authors, thus demonstrating that interest in CIR is not confined exclusively to political professionals.

The Australian Capital Territory (ACT) Legislative Assembly has also recently taken an interest in elector initiatives.100 An independent member of the Legislative Assembly, Mr Dennis Stevenson, tabled a Bill requiring a binding referendum where a petition signed by two percent of voters is presented and the Liberal Opposition introduced a similar Bill on 22 August 1994 providing for a five percent threshold requirement.101 These Bills may yet be debated in the present

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93 Transcript of interview with Dr John Hewson, Morning show (2CN, ABC Radio), 29 July 1994.

94 But not without a healthy degree of scepticism. See Kernot admits to qualms on referendums', Canberra Times, 16 July 1994.

95 'Supporters reject criticism', Australian, 29 July 1994.


97 'Citizens will put their hands up for referendums', The Australian, 9 August 1994.


100 As noted above, see Geoffrey de Q. Walker, 'Constitutional Change in the 1990s: Moves for Direct Democracy', Papers on Parliament, No. 21, op cit, 1993, for a more detailed account of recent developments.

101 Clause 11 of the Bill also provides for the Electoral Commissioner to check a 10 percent sample of signatories to the request for a ballot.
sittings of the ACT Legislative Assembly although the issue was
dispatched to a Committee for more detailed consideration. While initially the prospects for this Bill looked promising, one
independent member of the Assembly has recently qualified his support
for CIR. Predictably, the difficulties identified are whether referendum
questions would be clear enough to guide the government, and concern
that decisions affecting the Budget would make governing
difficult. On balance, the prospects for the Bill now appear
doubtful, but the committee process will provide another forum for
examining the concept.

As noted earlier, however, irrespective of the fate of the ACT Liberal's
Bill, CIR appears to be off the federal Coalition's agenda, with the
Opposition leader, Mr Downer, declaring:

My view is that citizens initiated referendum is not a practical idea.
Governments are elected to govern, to govern for up to a 3-year period. They've
got to make decisive decisions in the interests of the country and they will be
judged at the end of that period. As far as citizen initiated referenda are
concerned, there's no doubt a bit of support in the community for this idea, as
a reflection of the growing cynicism about our political system, but I don't think
we are going to see any of the major political parties supporting this proposal
because at the end of the day government is a tough business, tough decisions
have to be made, and governments must govern.

The diversity of views amongst the Coalition make it unlikely that CIR
proposals at the federal level will be further developed, or successfully
introduced in the short term, although Mr Reith's view is that 'it's an
idea that has its own momentum'. For the present, CIR appears
to require a very significant boost indeed to overcome the opposition
now evident in both major parties.

For CIR to gain a surer foothold on the political agenda, there will
have to be a marked change in political priorities or personnel. In the

102 'ACT Liberals plan to move referenda Bill', The Australian, 29 July 1994. See
104 It is also reported that the NSW State Government intends putting a
referendum at the time of the next State Election to constitutionally limit the
power of NSW State Governments in relation to budget deficits. Sydney
Morning Herald, 14 September 1994.
105 Transcript of the Leader of the Opposition Alexander Downer MP, The World
106 'Reith retreats from referendum proposal', Sydney Morning Herald, 29 July
1994.
words of Sir John Quick, in supporting the creation of an inter-colonial conference on federation in 1882:

It is only by consistent agitation and discussion that a national question such as this can ever be brought to maturity. 107

The creation of a national organisation to promote the idea of CIR, as proposed by Mr Reith, might be useful. 108 Additional research on issues such as the extent of voter cynicism, and interest in more direct involvement in government, could be supported and disseminated by such a group.

Linking CIR to some of the activity which is being planned for the 100 year anniversary of Australian Federation could be a way forward. Indeed, the Centenary of Federation Committee has recognised that there is a strong desire:

... for non partisan community debate on whether we need changes to our Constitution so it better reflects our independent nationhood and national identity. 109

While consideration of CIR has not been identified as a key area for discussion, the Committee suggested a number of ways for ensuring that genuine national dialogue on Constitutional issues occurs. These included sponsorship of popular debates, and a series of lectures and education campaigns in relation to the Constitution and the meaning of citizenship. 110 If CIR were amongst the issues discussed in this context there may be some prospect of it attracting more widespread support.

Another way of encouraging support nationally would be for CIR to be introduced at local or State government levels. As many of the arguments against CIR are most cogent when considered at the federal level, the use of CIR at other levels could provide an avenue of assessing some of the claims that are made in relation to the process without jeopardising national security or economic management. Some issues, such as whether CIR should apply to foreign affairs, do not arise at other levels of government. Others, such as the implications

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110 Ibid, pp 40-45.
for minority groups and the impact of advertising and the media, might be tested in relation to smaller population units.

If CIR was seen to be popular and efficient at other levels of government, a groundswell of support for the idea might be generated. CIR might come to be regarded as the political norm.

**Prognosis**

As there are good arguments for and against citizen initiatives, discourse on CIR is always likely to be lively.

Proposals such as those developed by the Australian Democrats, Mr Ted Mack MP and more recently by Mr Peter Reith MP, have provided the basis for an informed and ongoing debate but this work will come to nothing if public discussion is either suppressed or is not encouraged by political leaders.

In the absence of the sort of consistent agitation and discussion postulated by Quick, CIR may remain an issue of transient importance at the federal level. The apparent fate of the Reith proposals supports such a conclusion.

Whether interest in CIR will resurface over time depends on a variety of factors including the political system's ability to air ideas and debate them openly. It is a worrying aspect of current political norms and mores that the unwelcome support of some fringe groups for CIR appears to have done more to 'see off' debate on this issue than any other argument advanced by its opponents.

Only one factor may be more worrying for those who believe that 'citizen initiatives are fundamental to giving the average voter greater clout to compete with current powerful interests'. That is that for a reform such as CIR to succeed it must first navigate the very set of 'comfortable relationships and cozy alliances' that its supporters want it to disrupt. For the optimists, however, CIR may make a contribution to making politics generally, and policy formulation in particular, somewhat less routine (less predictable) than it has become in recent years. CIR may serve to open up the political agenda in ways which even minor party and independent representation in the Parliament cannot achieve.

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111 Pete Hoekstra, op cit, p 86.

112 Ibid, p 86.
Underpinning the case for CIR is the belief that a little more flexibility in political life may not be altogether a bad thing. As we have sought to argue, this is not an entirely new claim. Direct democracy pre-dates representative government and elector initiatives have a long, if at times doubtful, pedigree in Australia and internationally.

Calls for the immediate implementation of CIR also hinge on whether the discontents of representative democracy require urgent attention or merely a steady dosage of palliatives. The answer requires a balancing of the competing and often amorphous propositions we have referred to above. Are representative institutions really inadequate? Is the perceived want of confidence amongst the electorate as marked as some believe? If there are problems, how pressing are they? These are questions which will have to be answered before the value of elector initiatives can be properly assessed.

Although the evidence is mixed and in some places rather thin, one can understand the concerns of those promoting CIR who see the electorate's commitment to political life, as currently practised, as tepid or even grudging. Electoral cynicism will always be hard to dispel when the phrase 'stage-managed event' is itself the quintessential political cliche, political activism is increasingly fragmented and membership of the mainstream parties is close to, or at, historical lows. Those in agreement with such criticisms are also likely to accept that more is needed to maintain active support for Australian democracy than a 'business as usual' approach or largely symbolic changes to some institutions.

If the critics of the present system are right about the depth of this apparent malaise, it is also possible that the electorate may have correctly judged that 'machine politics' and representative democracy have now become synonymous and that both are ultimately unfulfilling substitutes for genuine democracy. These critics may also be right in believing that citizen initiatives, in whatever form and whatever their flaws, hold some prospect of fracturing a political mould in which good management is mistaken for innovation, and careerists and 'spin doctors' cut the deck for a game which finds it increasingly difficult to attract players to the table.

If however the critics are wrong, and the electorate's apparent cynicism and alienation is seriously overstated, then there is little cause to worry and CIR may safely be seen as a luxury rather than a necessity. Moreover, if the current level of commitment in the electorate to present institutions is satisfactory, then the wider case for what Senator Kernot has described as the 'micro economic reform of politics', is also diminished.
The authors would not, of course, presume to pass judgment on these larger questions. Indeed, we could not claim to have a fixed view on CIR other than that it is an issue that should not be dismissed out of hand or treated as purely the province of 'dreamers and zealots'.113

113 See page 11 above.