

# THE FIREFIGHTERS' REFERENDUM – SHOULD QUESTIONS ARISING FROM INDUSTRIAL DISPUTES BE EXCLUDED FROM REFERENDA HELD UNDER THE CITIZENS INITIATED REFERENDA ACT 1993?

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*The New Zealand Professional Firefighters' Union initiated the first referendum held under the Citizens Initiated Referenda Act 1993. This paper examines the question whether that referendum demonstrated a need to reform the Act to restrict the subject-matter of future referenda under the Act. The analysis is conducted in the context of the history and aims of the Act and of the firefighters' dispute. The paper provides a case study of New Zealand's first citizen initiated referendum.*

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The New Zealand Professional Firefighters' Union initiated the first referendum (the "Firefighters' Referendum") to be held under the Citizens Initiated Referenda Act 1993 (CIR Act).<sup>1</sup> The question put to voters at the referendum was "[s]hould the number of professional firefighters employed full-time in the New Zealand Fire Service be reduced below the number employed on 1 January 1995?"<sup>2</sup> The referendum attracted much criticism. Government Ministers pronounced the subject of the referendum unsuitable for

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1 The term "referendum" is used here in the sense of a popular vote, rather than in the narrower sense of a vote by electors on a measure proposed or enacted by the Government. Clearly the word in its narrower sense would inaccurately describe the direct democracy device embodied in the CIR Act, since popular votes under this Act are on questions initiated by electors. These types of popular votes are most accurately described as initiatives, however they will be referred to as referenda in this paper for consistency with popular terminology.

2 [1995] 1 *New Zealand Gazette* 387.

public consideration and described it as a waste of public funds.<sup>3</sup> The Prime Minister called for questions arising from industrial disputes to be excluded from referenda held under the CIR Act.<sup>4</sup> Opposition MPs claimed that the Government's cynical attitude toward the referendum demonstrated its lack of commitment to direct democracy.<sup>5</sup>

This paper examines the validity of the Prime Minister's assertion that the Firefighters' Referendum highlighted a need to further restrict the subject-matter of referenda held under the CIR Act. It does not aim to consider the strengths and weaknesses of the CIR Act in general.<sup>6</sup>

## I THE CITIZENS INITIATED REFERENDA ACT 1993

### A History of the Legislation

New Zealand suffered a "crisis in democracy" after the fourth Labour Government executed its radical liberal programme without an electoral mandate in the mid to late 1980s.<sup>7</sup> This spurred calls for constitutional reform as a means of making the Executive more accountable. The subsequent National Government's decision to continue with intensive free market reforms, thereby breaking election promises, intensified these calls. The "heavy handed" sale of state assets has been cited as the factor which most seriously eroded public confidence in the electoral system.<sup>8</sup>

It was during this period of disillusionment that a number of groups built public support for direct democracy as a means of enhancing elector participation in public

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- 3 Minister of Internal Affairs, Radio New Zealand Interview (Good Morning New Zealand) 29 November 1995; Minister of Justice, Radio New Zealand Interview (Good Morning New Zealand) 4 December 1995.
  - 4 "Referendum Law Up for Review" *The Evening Post*, Wellington, New Zealand, 4 December 1995, 1; The Minister of Internal Affairs also called for subject-matter restrictions. Radio New Zealand Interview (Good Morning New Zealand) 29 November 1995.
  - 5 Hon Winston Peters, MP, Radio New Zealand Interview (Good Morning New Zealand) 29 November 1995; Rod Donald (Alliance Spokesperson on Electoral and Parliamentary Reform) Radio New Zealand Interview (Good Morning New Zealand) 4 December 1995.
  - 6 For a comprehensive discussion on the CIR Act and its constitutional context, see M Gobbi *The Quest for Legitimacy: A Comparative Study of the Role of Direct Democracy in Switzerland, California and New Zealand* LLM thesis held by Victoria University of Wellington, 1994.
  - 7 J Kelsey *Rolling Back the State: Privatisation of Power in Aotearoa/ New Zealand* (Bridget Williams Books Ltd, Wellington, 1993) 160-161.
  - 8 (1992) 522 NZPD 6713 (Chris Fletcher, MP).

policy making. They achieved this by raising public awareness of the various devices and promoting the advantages of direct democracy.<sup>9</sup>

In 1985 the Labour Government established the Royal Commission on Electoral Reform. Included in its terms of reference was a direction to assess whether greater use should be made of referenda and whether the results of referenda should be legislatively binding.<sup>10</sup> In its 1986 report, the Royal Commission recommended that legislation allowing the public to initiate referenda not be enacted.<sup>11</sup> It reported that even non-binding referenda would derogate from government accountability.<sup>12</sup> The Commission was concerned that referenda could be misused as political tools.<sup>13</sup> It saw non-binding referenda as merely another means of surveying public opinion, for which adequate mechanisms already existed.<sup>14</sup> The Commission was concerned that minority rights could be threatened by the majoritarian potential of direct democracy.<sup>15</sup> Practical problems, such as the difficulty in framing a precise and easily understood question, also told against direct democracy.<sup>16</sup> The recommendation against legislation allowing public petitions to compel referenda was endorsed by the Electoral Law Committee.<sup>17</sup>

In spite of the recommendations of the Royal Commission, persistent campaigning by National Party member Merv Rusk, supported by the party wing, lead National to include a promise to introduce non-binding direct democracy legislation in its 1990 election manifesto.<sup>18</sup>

The CIR Act was enacted as part of the constitutional reform package which also included the introduction of proportional representation in the form of the Mixed Member Proportional (MMP) system of election. The aims of the CIR Act, as distilled from the speeches made in Parliament during its passage, were; to provide a mechanism for the voice

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9 Above n 6, 212.

10 *Report of the Royal Commission on the Electoral System: Towards a Better Democracy* (Government Print, Wellington, 1986) 167.

11 Above n 10, para 7.31.

12 Above n 10, para 7.23.

13 Above n 10, para 7.26.

14 Above n 10, para 7.25.

15 Above n 10, para 7.27.

16 Above n 10, para 7.28.

17 *Report of the Electoral Law Committee: Inquiry into the Report of the Royal Commission on the Electoral System* (Government Print, Wellington, 1988) para 9.1.16.

18 Above n 6, 220-242.

of the people to be heard,<sup>19</sup> to facilitate healthy debate, to test public opinion more accurately than could be tested through an opinion poll<sup>20</sup> and to help ensure that the will of the people prevails, rather than that of their elected representatives.<sup>21</sup> It was described as an "...attempt to give people who feel somewhat disfranchised and that they are not listened to at the present time an opportunity to raise an issue which they believe to be important..."<sup>22</sup>

Opposition MPs have since challenged National's commitment to direct democracy.<sup>23</sup> Hon Dr Michael Cullen, MP, has criticised the CIR Act as "an ill-thought-out piece of electioneering".<sup>24</sup>

## **B The Referendum Process**

### **1 Initiating a referendum**

A referendum is triggered under the CIR Act by five main steps,<sup>25</sup>

(1) A proposal for an indicative referendum petition, including the proposed question,<sup>26</sup> is submitted to the Clerk of the House of Representatives.<sup>27</sup> This must be accompanied by a prescribed fee, currently set at \$500.<sup>28</sup>

(2) The Clerk publishes the question in the *Gazette* and newspapers as he or she considers necessary and calls for comments on the wording.<sup>29</sup> The proposer and other persons as the Clerk thinks fit are also consulted.<sup>30</sup> These comments and consultations are

19 (1992) 522 NZPD 6703 (Minister of Justice).

20 (1993) 537 NZPD 17611 (Hon David Caygill, MP).

21 (1992) 522 NZPD 6705 (Minister of Justice).

22 (1993) 538 NZPD 17963 (Minister of Justice).

23 (1992) 522 NZPD 6708 (Rt Hon David Lange, MP); (1993) 538 NZPD 17958 (Pete Hodgson, MP); Hon Winston Peters, MP, above n 5.

24 (1992) 522 NZPD 6721 (Hon Dr Michael Cullen, MP).

25 For an official outline of the process, with a detailed schematic diagram, see *How You Can Have Your Say: The Citizens Initiated Referenda Act 1993* (Law Reform Division, Department of Justice, Wellington, 1994).

26 Citizens Initiated Referenda Act 1993, s 5(1)(b).

27 Above n 26, s 6.

28 The Citizens Initiated Referenda (Fees) Regulations 1993, reg 2.

29 Above n 26, s 7.

30 Above n 26, s 9.

taken into account, in addition to other matters the Clerk considers relevant, in framing the precise question (if the original wording needs to be modified at all).<sup>31</sup> The Clerk is solely concerned with ensuring that the wording of the question clearly conveys the purpose and effect of the referendum and is capable of being answered by one of two possible answers.<sup>32</sup> The Clerk approves the petition form that will be used to collect signatures.<sup>33</sup>

(3) The Clerk publishes notice in the *Gazette* that the question has been determined and the petition form has been approved.<sup>34</sup> Within 12 months of this publication, the promoter collects the signatures of at least 10 per cent of eligible electors and delivers the petition to the Clerk.<sup>35</sup>

(4) The Clerk checks that the petition complies with the requirements. A sample of signatures is verified.<sup>36</sup> The Clerk certifies the petition as correct and gives it to the Speaker<sup>37</sup> who presents it to the House.<sup>38</sup>

(5) The Governor-General sets the date for the referendum within one month of the petition being presented to the House.<sup>39</sup>

## 2 *Holding a referendum*

The referendum is held within 12 months (or 24 months with the support of 75 per cent of the members of the House)<sup>40</sup> of the petition's presentation to the House.<sup>41</sup> In some circumstances the referendum may be held in conjunction with a general election.<sup>42</sup> The

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31 Above n 26, s 10(2).

32 Above n 26, s 10(1).

33 Above n 26, s 12(1).

34 Above n 26, s 13(1)(b).

35 Above n 26, s 15(3).

36 Above n 26, s 19.

37 Above n 26, s 18(2)(a).

38 Above n 26, s 21.

39 Above n 26, s 22(1).

40 Above n 26, s 22(4)(a).

41 Above n 26, s 22(3).

42 Above n 26, s 22(4)(b).

referendum is conducted in the manner prescribed by the Electoral Act 1993 for general elections.<sup>43</sup>

### 3 *Result of a referendum*

The result of a referendum held under the CIR Act 1993 is not binding. It simply "...indicate[s] the views held by the people of New Zealand on specific questions...".<sup>44</sup>

#### C *Subject-Matter Restrictions*

Most of the debate during the passage of the CIR Bill focused on the question of whether results of referenda should be legislatively binding or non-binding. There was very little discussion on subject-matter restrictions. Of the 66 submissions made to the Electoral Law Select Committee on the CIR Bill, only two raised the issue of the lack of subject-matter restrictions in the proposed legislation for a non-binding system. These submissions expressed an apprehension that referenda on some topics could impinge on minority rights.

The New Zealand Aids Foundation's submission expressed concern that right-wing groups could use the CIR Act to play on fears and prejudices to win support for discriminatory measures. This could result in a disproportionate influence of these groups on policy making. The submission called for a restriction to prevent human rights issues directly affecting minority groups from being put to referendum. It was noted that this would preclude a referendum on issues relating to the Treaty of Waitangi.<sup>45</sup>

The submission of the Auckland Lesbian and Gay Lawyers Group expressed similar concerns about the potential for the CIR Act to be used by extremist groups to encourage discrimination against minorities. The Group felt that the non-binding nature of referenda would not adequately protect minorities since the strong public expectation that results would be acted upon might induce Parliament to pass discriminatory legislation. The submission proposed a prohibition on topics affecting fundamental human rights. The Group also proposed that questions dealing with the following areas be prohibited from being put to referendum: judicial independence, entrenched provisions of the Electoral Act 1956, the Bill of Rights Act 1990, and New Zealand's international treaty obligations (in particular the International Covenant on Civil and Political Rights). It feared that questions on such matters would have a divisive effect. A statement by the Government that it would not act on the outcome of a question relating to one of these sensitive areas

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43 Above n 26, s 24. (The CIR Act actually refers to the Electoral Act 1956, which has been repealed by the Electoral Act 1993.)

44 Above n 26, Long Title.

45 New Zealand Aids Foundation, Submission on the CIR Bill 1992, 11 May 1992.

would undermine confidence in the political process. The Group felt that it was better to impose limits at the outset.<sup>46</sup>

The Electoral Law Select Committee did not include significant subject-matter restrictions in the Bill. This decision was supported by the Government. The Minister of Justice said that the Government wanted the public to be able to voice its opinion on any topic.<sup>47</sup> This was one of the reasons he gave for making referenda held under the CIR Act non-binding. He explained that a binding system of referenda would have required subject-matter restrictions so that issues such as national security and foreign policy would remain within government control.<sup>48</sup> In the absence of an entrenched Bill of Rights, subject-matter limitations would have been required to prevent the majority from introducing discriminatory laws. The Government also thought that excluding certain matters would unduly complicate matters.<sup>49</sup>

Government and Opposition MPs recognised the potential for frivolous, vexatious, divisive or fruitless referendum petitions. Rather than suggesting subject-matter restrictions, they declared that common sense and maturity must prevail to prevent referenda on such issues from being initiated.<sup>50</sup>

The CIR Act was passed without significant subject-matter restrictions on referenda held under the CIR Act. The legality of a general election, or some aspect of it, cannot be challenged by a referendum under the CIR Act. Nor may a referendum call for an inquiry into the way a previous referendum was conducted.<sup>51</sup> A referendum petition may relate to only one question.<sup>52</sup> It may not deal with an issue which has been the subject of a referendum held in the 60 months (5 years) prior to the Clerk of the House of Representatives receiving the petition.<sup>53</sup>

An attempt was made in *Egg Producers Federation of New Zealand v Clerk of the House of Representatives & Anor*<sup>54</sup> to infer an additional restriction that questions must be

46 Auckland Lesbian and Gay Lawyers Group, Submission on the CIR Bill 1992, undated.

47 (1993) 538 NZPD 17952.

48 (1992) 522 NZPD 6704.

49 (1992) 522 NZPD 6710 (Hon Murray McCully, MP).

50 (1992) 522 NZPD 6714 (Chris Fletcher, MP); (1993) 537 NZPD 17611 (Hon David Caygill, MP).

51 Above n 26, s 4.

52 Above n 26, s 5(2).

53 Above n 26, s 11(2)(b).

54 Unreported, 20 June 1994, High Court, Wellington Registry, CP 128/94.

capable of providing meaningful guidance to Parliament and the Government. The plaintiffs challenged the Clerk's determination of the precise question to be used on referendum petitions, which was "[s]hould the production of eggs from battery hens be prohibited within five years of the referendum?".<sup>55</sup> The plaintiffs contended that a referendum on the question could not provide meaningful guidance to Parliament and the Government because it was framed in vague and emotive terms. The question did not indicate whether egg producers adversely affected by the proposed prohibition would be compensated. They also submitted that the Egg Producers Federation would be unfairly disadvantaged by the wording of the question. It was not clear from the question that the proposed prohibition could have a financial impact on consumers by increasing the price of eggs (because of increased production costs). The emotive language of the question might induce electors to sign the petition without appreciating the possible consequences for egg producers and for themselves as egg consumers.

Eichelbaum CJ noted that "[i]t may seem extraordinary but...the Act provides no specific guidance as to the scope or nature of the permitted subject-matter."<sup>56</sup> (He expressed concern that the Act provided no basis on which to exclude "vexatious, defamatory, indecent or scandalous questions".)<sup>57</sup> In relation to the first submission, he rejected the argument that the Clerk must ensure the question is capable of providing meaningful guidance to Parliament or the Government. In the absence of subject-matter restrictions, there was simply no basis for this suggestion. This was true even if the question were such that "...any sensible person would agree that the subject-matter does not concern Government or is such that no Government would take action on it...".<sup>58</sup> He rejected the argument that the question was too imprecise and emotive to be valid, holding that the Clerk's decision to approve the wording of the question did not fall below the standard of *Wednesbury* reasonableness. He said that a question framed in truly emotive terms would probably not meet the clarity requirement<sup>59</sup> and could not be put to a referendum unmodified.<sup>60</sup>

In relation to the second submission, Eichelbaum CJ accepted that the Clerk is obliged to frame the question as neutrally as possible within the parameters of the original

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55 Above n 54, 4.

56 Above n 54, 6.

57 Above n 54, 6.

58 Above n 54, 7.

59 Above n 26, s 10(a).

60 Above n 54, 7.

proposal. However, since the question needed to be focused on a single issue, he found that the Clerk had not unfairly disadvantaged the Federation in framing the question.<sup>61</sup>

Eichelbaum CJ's comment that a question outside Parliament's competence could not be prevented from being put to referendum is obiter since Parliament was competent to legislate on the question in the case. His position could be challenged by referring to a subject-matter restriction placed on petitions presented to Parliament. The right to petition Parliament is ancient and independent of the process used to initiate referenda. The Standing Orders of the House of Representatives 1996 which govern such petitions<sup>62</sup> do not specify that the prayer must lie within Parliament's competence. In spite of this, petitions will not be presented to Parliament if they do not meet this requirement.<sup>63</sup> A petition calling for a change to a foreign state's domestic law, for example, would probably not be accepted.<sup>64</sup> This is a sensible restriction since there is no justification for requiring Parliament to waste its resources dealing with a request upon which it is unable to act. The same restriction should be held to apply to petitions presented under the CIR Act. There could be no justification for allocating resources to the holding of a referendum if Parliament would be unable to act on the result. The counter-argument to the need to imply in this restriction is that a referendum petition which deals with a matter outside the competence of Parliament or the Government would probably not attract the requisite number of signatures in any case.

## II BACKGROUND TO THE FIREFIGHTERS DISPUTE

### A Structure of the New Zealand Fire Service

The New Zealand Fire Service Commission controls the New Zealand Fire Service and is responsible to the Minister of Internal Affairs for its efficient operation.<sup>65</sup> The Commission is a body corporate established under the Fire Service Act 1975. It comprises the Secretary for Internal Affairs and three members appointed by the Governor-General on the recommendation of the Minister of Internal Affairs. In addition to controlling the Fire Service, the Commission is required by the Act to take a co-ordinating and active role in promoting fire safety.<sup>66</sup>

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61 Above n 54, 14-15.

62 Numbers 348-359.

63 D McGee *Parliamentary Practice in New Zealand* (GP Publications, Wellington, 1994) 387.

64 Above n 63, 387.

65 Fire Service Act 1975, s 14.

66 Above n 65, s 20.

The Fire Service comprises professional firefighters and non-operational staff employed by the Commission as well as registered volunteer fire brigades.<sup>67</sup> There are approximately 8000 urban and 3000 rural volunteer firefighters, 1800 professional firefighters and about 230 management and support staff in the Fire Service.<sup>68</sup> Fire stations are staffed by professional firefighters or volunteers or a combination of both.<sup>69</sup>

Almost all professional firefighters belong to the New Zealand Professional Firefighters' Union. The Union is the duly authorised bargaining agent for its members in relation to employment contract negotiations. Derek Best is the Secretary of the Union and Gordon Duncan is the President. The United Fire Brigades' Association of New Zealand represents volunteer firefighters. It took a neutral stance on the dispute and the referendum, saying that the issue did not concern volunteer firefighters.<sup>70</sup>

Maurie Cummings, as Chief Executive of the Fire Service Commission, is responsible for employing Fire Service staff and negotiating their terms of employment.<sup>71</sup> The Fire Service Act 1975 also provides that the Chief Executive shall from time to time conduct reviews on the efficiency and economy of the Fire Service.<sup>72</sup> The Fire Service reports its performance to the Minister through the Commission each quarter. An annual report is presented to Parliament each year.<sup>73</sup>

### *B Funding*

Eight per cent of the Commission's net annual expenditure is appropriated by Parliament.<sup>74</sup> The remaining 92 per cent is met by the proceeds of a levy on fire insurance.<sup>75</sup> Therefore the contribution an individual makes is largely proportional to the insured value of that individual's property. It is estimated that 90 per cent of all households in New Zealand make a contribution to the Fire Service funding through the

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67 Above n 65, s 3.

68 Maurie Cummings (Chief Executive, New Zealand Fire Service Commission) Address to the Pan-Pacific Conference, Christchurch, 22 February 1996.

69 Letter from Don Roper (General Manager, United Fire Brigades Association of New Zealand) to Gabriela Wehrle, 4 June 1996.

70 Above n 69.

71 Above n 65, s 17C.

72 Above n 65, s 17E.

73 Above n 68.

74 Above n 65, s 47(2)(a).

75 Above n 65, s 47(2)(b).

fire levy on insurance.<sup>76</sup> Thus the Fire Service could be said to be publicly funded. The fire levy rate is prescribed by Order in Council<sup>77</sup> and is currently set at 0.00062 per cent of the total sum insured.<sup>78</sup> It is reviewed annually by the Minister of Internal Affairs.<sup>79</sup> In 1994, the total operating expenditure of the Fire Service was \$183,502,000.<sup>80</sup>

Policy is separated from service delivery, as is customary in New Zealand's public sector. The Fire Service negotiates a Purchase Agreement with the Commission each year. This agreement sets out the outputs to be provided together with performance indicators. The agreed price establishes the budget for the coming year.<sup>81</sup>

### C *The Fire Service Review*

Lobbying by a number of key interest groups (Federated Farmers, the Business Roundtable and the Insurance Council) prompted the Government to order a review of the Fire Service. These groups contribute significantly to the Fire Service's funding through fire insurance levies. The Fire Service was not to escape the reform which has swept through New Zealand's state sector over the past decade.

The Chief Executive of the Fire Service Commission co-ordinated the review. It was conducted by two teams which were given the same terms of reference and were directed to present independent recommendations. The "Independent Review Team" consisted of three prominent New Zealand businessmen. The "Internal Team" comprised two senior staff members of the Fire Service.<sup>82</sup> The review was completed in October 1994 and the recommendations of the two groups, which were substantially the same, were accepted by the Commission and the Government. The recommendations were to be implemented in two stages. Stage one consisted of introducing a new, flatter management structure by 30 June 1995. Stage two, to be completed by 30 June 1996, involved negotiating a new employment contract and roster system with professional staff.<sup>83</sup> This would increase the number of hours firefighters would be available for preventative work such as teaching fire safety to

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76 *A Review of Fire Service Funding in New Zealand: A Report Prepared for the Insurance Council of New Zealand* Wheeler Campbell Securities Ltd, 1994, 11.

77 Above n 65, s 48(2).

78 "New Zealand Fire Service Reforms" (1996) 28 *The Professional Firefighter* 19.

79 Above n 65, s 48(3).

80 *1995 Official Year Book of the New Zealand Professional Firefighters Union* (Wellington, 1995) 65.

81 Above n 68.

82 Above n 68.

83 Above n 68.

school children and promoting the installation of smoke alarms and sprinkler systems. With the increase in productive hours worked by each firefighter under the proposed new contract, the Commission envisaged that it would need to employ approximately 400 fewer firefighters. An estimated annual saving of \$28 million was forecast to result from the implementation of these recommendations.<sup>84</sup> The Commission did not propose to make firefighters redundant.<sup>85</sup>

Up until the recommendations of the latest review of the Fire Service were implemented, its structure was extremely hierarchical. National Headquarters in Wellington exercised centralised control. A new management structure was introduced from 3 April 1995 as a result of the review. Administration was decentralised so that the role of the National Office (previously called "Headquarters") was limited to strategic direction, co-ordination and audit.<sup>86</sup>

#### *D Employment Contract Negotiations*

The collective agreement under which professional firefighters were employed expired on 24 February 1994. Attempts by the Union and the Commission to negotiate a new contract have been protracted, acrimonious and unsuccessful. Prior to the review recommendations being made, the Commission had offered a one per cent salary increase and various other minor changes to the existing contract which the Union had rejected. Upon the completion of the review, the Commission withdrew this offer and sought to introduce a 56-hour working week contract in accordance with the recommendations. Employees were offered lump sum payments of \$8,000 to sign individual contracts. Few accepted.<sup>87</sup> Since fewer firefighters would be required under the proposed roster system, it also offered an enhanced early retirement package to older firefighters to leave the Fire Service which approximately 250 accepted. The Commission then embarked on a roadshow, presenting the proposed restructuring plan to professional firefighters. It received a negative reception. It was at this stage that the Firefighters' Union decided to launch a referendum petition under the CIR Act.

Since the expiry of the collective agreement, firefighters have been employed under individual contracts with the same terms and conditions of the expired collective

84 Above n 68.

85 Interview with Vic Hewson (Human Resources Manager, New Zealand Fire Service Commission), 26 June 1996.

86 Above n 68.

87 Interview with John Devereux (Acting Secretary, New Zealand Professional Firefighters' Union) 20 May 1996.

agreement.<sup>88</sup> Under this contract, firefighters are rostered on for 42 hours a week. 17.5 of these hours, known as "routine hours", are dedicated to carrying out maintenance and participating in fire prevention activities. They are on call during the remaining 24.5 hours. Approximately five per cent of this time is spent responding to call outs.<sup>89</sup> There are four "watches" or shifts. This means that at any one time, one shift of firefighters is on duty while three are off duty.

Attempts by the Commission to solicit individual acceptances of their offer from firefighters resulted in the Union taking court action. It sought a declaration and an injunction to prevent the Commission from attempting to negotiate directly with Union members. The Union submitted that the Commission, in communicating with its employees, was trying to undermine the authority of the Union for collective bargaining. The Union was successful in the High Court,<sup>90</sup> but the decision was overturned on appeal.<sup>91</sup> The case demonstrates the degree of antagonism which had developed in the relationship between the Commission and the Union.

### III THE FIREFIGHTERS' REFERENDUM

#### A *The Referendum Petition*

In November 1994 the Union applied to the Clerk of the House of Representatives to start a petition under section 5 of the CIR Act.

The Union's aim in initiating the referendum was to give the public a say in the future of the Fire Service against the background of the reforms in health and education. It hoped that a favourable result would apply political pressure to Government and encourage it to reconsider its plans to negotiate a contract requiring firefighters to work longer hours.<sup>92</sup> The referendum was also seen as a way to raise the morale of Union members and encourage solidarity. A unified rejection of the Commission's proposals was seen to be crucial to maintaining the Union's position.

The petition was approved in February 1995 and the firefighters set about collecting signatures. They framed their campaign as a public safety issue, using the slogan "Sign to Save Lives". They claimed that a reduction in the number of firefighters would undermine the quality of the service provided. However, the Fire Service claimed that the Union had

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88 This is in accordance with the Employment Contracts Act 1991, s 19(4).

89 Above n 85.

90 *Ivamy v New Zealand Fire Service Commission* [1995] 1 ERNZ 724.

91 *New Zealand Fire Service Commission v Ivamy* [1996] 1 ERNZ 85 (CA).

92 Above n 87.

not demonstrated a link between the number of firefighters employed and the quality of the service delivered. It maintained that public safety would not be compromised by reducing the number of firefighters.<sup>93</sup> The Minister of Internal Affairs gave his assurance that the time taken for the Fire Service to respond to fires would not be increased by the proposed staff cuts.<sup>94</sup>

The firefighters were aware that their cause was associated in the mind of the public with state sector reforms in general:<sup>95</sup>

There is of course an element of protest in the whole...campaign. The public are also identifying with the firefighter in a two-fingered gesture to the Government. They have had enough of Governments that have either hocked off or pruned back public services without reference back to the electorate.

A rally of firefighters and PSA members was held outside Parliament on 28 February 1995. Then Alliance Leader Sandra Lee, MP, called on public servants and professional firefighters to join with teachers, students and nurses in protest against the assault on their living standards. Alliance supported the firefighters' campaign as well as the PSA's pay claim.<sup>96</sup> New Zealand First Leader, Hon Winston Peters, MP, also supported the firefighters' campaign in the interests of public safety.<sup>97</sup>

A dispute arose regarding the petition for the referendum and the way firefighters were collecting signatures. The Chief Fire Service Officer had issued a directive to its employees to refrain from collecting signatures while on duty and with the use of Fire Service equipment. (Rt Hon Mike Moore, MP, condemned this as a stand-over tactic by the Government which stifled "freedom of information and free debate over the referendum on Fire Services".)<sup>98</sup> The Commission sought an injunction to prevent its employees from defying the directive. The Union maintained that it had not directed the firefighters to defy the Commission's directive. The dispute culminated in another court case,<sup>99</sup> in which the court refused to grant an interim injunction. The Union saw the Commission's action as an

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93 Vic Hewson (Human Resources Manager, New Zealand Fire Service), Radio New Zealand Interview (Morning Report) 18 May 1995.

94 Letter from the Minister of Internal Affairs to Barrie Grant, 27 November 1995.

95 Above n 80, 27.

96 Above n 80, 29.

97 Above n 80, 31.

98 Rt Hon Mike Moore, MP, Media Release, 21 November 1995.

99 *Fire Service Commission v Duncan* [1995] 1 ERNZ 169.

attempt to subvert its campaign,<sup>100</sup> but believes that the case actually attracted publicity for the firefighters.<sup>101</sup>

The Chief Executive of the Fire Service Commission predicted that insufficient signatures would be collected within the year allowed under the CIR Act. In fact 100,000 signatures were collected within the first week,<sup>102</sup> and around 400,000 had been collected within two months.

The petition was presented to the Clerk of the House of Representatives. Of the 4,656 signatures which were checked, 3,924 were found to be valid.<sup>103</sup> On the basis of this, the number of valid signatures on the petition was estimated at 290,000 by statistical analysis.<sup>104</sup> The electoral roll on 4 May 1995 and 9 May 1995, these being the dates between which the signatures were checked, was 2,379,236 and 2,379,722 respectively.<sup>105</sup> This means that at least 12 per cent of registered electors signed the petition.

### *B The Referendum*

Cabinet initially agreed that a pre-referendum information pamphlet would be distributed to each household at a cost of \$182,946. However, the Chief Electoral Officer exercised his discretion<sup>106</sup> and decided not to proceed with the mail-out as he was unable to collate and present relevant information.<sup>107</sup> The reason he was unable to do this was that the parties could not agree on the information to be put in the pamphlet. Each party accused the other of trying to spread propaganda and lies.<sup>108</sup> Thus no neutral summary of the issues underlying the referendum question was provided to voters.

Ogilvy & Mather was contracted to promote the referendum on behalf of and in consultation with the Ministry of Justice. This involved a media campaign aimed at

100 Above n 80, 27.

101 Above n 87.

102 Above n 80, 27.

103 Letter from Murray Wicks (for the Chief Registrar of Electors) to David McGee (Clerk of the House of Representatives), 12 May 1995.

104 Letter from Len Cook (Government Statistician) to David McGee (Clerk of the House of Representatives), 16 May 1995.

105 Above n 103.

106 Citizens Initiated Referenda Regulations 1995, reg 2(3).

107 Memo from the Secretary of the Cabinet to the Minister of Justice, 14 November 1995.

108 Phil Whelan (Chief Electoral Officer), Radio New Zealand Interview (Good Morning New Zealand) 29 November 1995.

making people aware that the referendum was to be held and informing them of where they could vote. The campaign was also designed to encourage people to vote.

The referendum was held on 2 December 1995. The total cost of polling day staff, returning officers fees, rental of polling places, printing of forms and booklets, stationary, travel costs, advertising and publicity costs was approximately \$9 million.<sup>109</sup>

### *C Government's Approach to the Petition and Referendum*

The Government was repeatedly asked by Opposition MPs, among others, whether it intended to put the Fire Service restructuring on hold so that it could take the result of the referendum into account.<sup>110</sup> The Prime Minister replied that the restructuring would not be delayed, particularly as the Union was using the referendum as a ploy to deal with an industrial relations matter.<sup>111</sup> Labour Leader Rt Hon Helen Clark, MP, accused the Government of treating the public with contempt in going ahead with the restructuring.<sup>112</sup>

The Government repeatedly discredited the question in the referendum as an emotive one. The Minister of Internal Affairs referred to the Union's appeal to the public as "emotional mudraking"<sup>113</sup> and commented that "the public has been taken in by a rather large dose of emotional clap trap".<sup>114</sup>

The Minister of Justice was critical of the subject-matter of the Firefighters Referendum, and hoped that people would "wake up" to the fact that such topics are unsuitable. He said the question concerned an industrial dispute, and that it was very difficult for the public to understand the issues involved.<sup>115</sup> (A member of the public included a similar comment

109 Letter from Phil Whelan (Chief Electoral Officer) to Gabriela Wehrle, 22 March 1996.

110 Letter from the Hon Phil Goff, MP, to the Prime Minister, 9 May 1995 (In this letter Mr Goff claimed that the referendum process would be farcical if the plans to restructure were implemented before the public had voted. He said that if the Government was not prepared to delay the restructuring, it should repeal the CIR Act to avoid a "fraudulent waste" of ten million dollars.); Letter from Maxine Gay (General Secretary, New Zealand Trade Union Federation) to the Minister of Internal Affairs, 26 July 1995; Letter from Derek Best (Secretary, New Zealand Professional Firefighters' Union) to the Prime Minister, 19 May 1995; (1995) 547 NZPD 6625 (Rt Hon Helen Clark, MP); (1995) 547 NZPD 7111 (Sandra Lee, MP).

111 Letter from the Prime Minister to Derek Best (Secretary, New Zealand Professional Firefighters' Union), 27 July 1995.

112 (1995) 547 NZPD 6626.

113 Minister of Internal Affairs, Radio New Zealand Interview (Morning Report) 18 May 1995.

114 Letter from the Minister of Internal Affairs to AV Hunter, 26 May 1995.

115 Minister of Justice, above n 3.

in his submission to the Clerk on the wording of the precise question.)<sup>116</sup> The Minister's view that some questions should not be put to referendum seems contradictory to his earlier statement that the CIR Act was intended as a mechanism to allow the public to voice its opinion on any topic. (See part II C above.) The Prime Minister said that it was impossible for the public to be able to make a decision on the question.<sup>117</sup> The Minister of Internal Affairs was similarly critical of the referendum question.<sup>118</sup>

The Union envisaged that a referendum arising from the petition would be held by a postal ballot in conjunction with the local body elections.<sup>119</sup> Cabinet rejected this and said it would need to be held separately to avoid confusion. The Union has accused the Government of holding the referendum separately to make it much more expensive and thereby discredit the Union in the eyes of the public.<sup>120</sup>

#### *D Outcome*

There were 652,394 valid votes cast in the referendum. This was 28 per cent of the total registered electors, the lowest ever recorded for a referendum according to records maintained by the Chief Electoral Office.<sup>121</sup> 12 per cent of the votes cast were for a reduction in the number of firefighters. 88 per cent were against.<sup>122</sup>

The Union was pleased with the turnout in light of what it describes as attempts by the Government to discredit the referendum, and sees the referendum as a success. It boosted morale in the Union and lifted public awareness of the proposed restructuring. The Union believes that the result has applied political pressure even though the Government has discredited the result on the basis of the low voter turnout.<sup>123</sup>

The Chief Executive of the Fire Service Commission has said that the Fire Service Commission has taken the referendum result into account in developing its reform

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116 Alan Thompson, Submission on the wording of the precise question, as per CIR Act, s 7(2)(b), 4 January 1995.

117 "Referendum Law Up for Review" *The Evening Post*, Wellington, New Zealand, 4 December 1995, 1.

118 Minister of Internal Affairs, above n 3.

119 Above n 87.

120 Above n 80, 137.

121 Above n 109.

122 [1996] no 6 New Zealand Gazette 158-159.

123 Above n 87.

strategies.<sup>124</sup> It is not clear whether the result has actually had any impact. At the end of 1995, the Commission decided to introduce Community Safety Personnel to replace firefighters who left the Service through early retirement or natural attrition.<sup>125</sup> They are employed under the same terms and conditions which were rejected by the Union prior to the referendum. Under this contract, Community Safety Personnel have the same emergency response duties as existing firefighters but spend more hours of their working week involved with preventative work such as education campaigns. The contract provides for a significantly lower salary than that paid to existing firefighters.<sup>126</sup> The number of firefighters employed by the Commission on 1 January 1995 was 1,819. By 1 December 1995, the number employed (including Community Safety Personnel) had been reduced by 69 to 1,750. There are no plans to further reduce the number of firefighters employed by the Commission.<sup>127</sup>

Negotiations between the Commission and the Union in relation to the employment contract of existing firefighters have yet to be concluded.

#### ***IV SHOULD QUESTIONS ARISING FROM INDUSTRIAL DISPUTES BE EXCLUDED?***

As explained earlier, very little attention was focused on the issue of subject-matter restrictions during the passage of the CIR Bill. Most of the debate centred around whether the results of referenda should be legislatively binding or not. In a few instances, concern was raised that the lack of subject-matter restrictions might allow referenda to be held which threaten minority rights or are trivial or vexatious. However the possibility that the CIR Act might be used as a tool in an industrial dispute was not addressed, much less analysed in terms of whether it would be appropriate and how this might be dealt with.

The validity and practicality of the Prime Minister's assertion that questions based on industrial disputes should be excluded from referenda held under the CIR Act will be examined. This analysis will be conducted by specific reference to the circumstances surrounding the Firefighters Referendum.

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124 Above n 68.

125 Geoff Summers (Human Resources Strategic Manager, New Zealand Fire Service), Radio New Zealand Interview (Nine to Noon) 26 January 1996.

126 Derek Best (Secretary, New Zealand Professional Firefighters' Union), Radio New Zealand Interview (Nine to Noon) 26 January 1996.

127 Above n 85.

## A Factors in Support of Excluding Such Questions

### 1 Cost to the tax payer

Government Ministers categorised the subject-matter of the referendum as an industrial dispute and claimed that it was a waste of public funds on that basis.<sup>128</sup> It is interesting to contrast this with the Minister of Justice's earlier statement that promoters of referendum petitions "...have certain thresholds and obstacles to overcome. If they succeed in doing that, it is right and proper, in my view, that the Government should fund the cost of holding that referendum".<sup>129</sup> In reply to a question in the House on the cost of the referendum, the Prime Minister stated: "I have to observe that I would rather spend that amount of money on extra education or extra health care rather than try to conduct industrial negotiations by way of referendum".<sup>130</sup> The Minister of Internal Affairs described the referendum as an affront to the tax payer.<sup>131</sup>

The Fire Service Commission questioned the need to spend public funds on an issue which only impacts certain areas of the country. It pointed out that only 20 major towns and cities are serviced by professional firefighters employed by the New Zealand Fire Service Commission and represented by the New Zealand Professional Firefighters' Union. Most of the country is covered by a force of voluntary firefighters and would not be affected by the proposed restructuring of the Fire Service.<sup>132</sup> This criticism is weak since most of New Zealand's population lives in these major towns and cities and could therefore be affected by the proposed restructuring. Also, people from all over New Zealand contribute to the funding of the Fire Service and therefore have an interest in the way it is run.

Cost is a weak argument for reducing the potency of the CIR Act by imposing subject-matter restrictions. Any form of democracy appears, at least in the short term, more costly than a less democratic option.<sup>133</sup> In the long term, a sense of involvement in policy and law making, even if only to the extent of indicating public opinion in a referendum, must enhance the legitimacy of the state's decision making processes and therefore of government

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128 Above n 3.

129 (1993) 538 NZPD 17964.

130 (1995) 547 NZPD 6626.

131 Above n 3.

132 Dereck Broadmore (Solicitor for the New Zealand Fire Service Commission), Submission on the wording of the precise question, as per CIR Act 1993, s (7)(2)(b), 22 December 1995.

133 G Walker *Initiative and Referendum: The People's Law* (The Centre for Independent Studies Ltd, St Leonards (NSW), 1987) 94.

in general. The cost benefits of ensuing social stability and compliance would certainly outweigh the costs of holding referenda.

A more valid way of addressing the cost concern would be to investigate ways of reducing the cost of holding referenda under the CIR Act. Sir Geoffrey Palmer has suggested that postal voting, as used for local body elections, be introduced in the interest of reducing expense.<sup>134</sup> The Chief Electoral Officer intends to consider this possibility in his review of the Firefighters Referendum.<sup>135</sup> However, the Minister of Justice has said that the Electoral Law Select Committee rejected the option of using postal balloting for referenda held under the CIR Act and that he has no intention of introducing legislation to allow it.<sup>136</sup>

If people think that a referendum on a particular question would not be good use of public funds, they will presumably not sign the referendum petition. Admittedly in the case of the Firefighters Referendum, people were probably unaware of the cost of the referendum which would follow. Now that people are aware of the cost, they can be said to implicitly approve of the expenditure when they sign the petition. Perhaps the estimated cost of holding a referendum should be stated on the referendum petition forms used to collect signatures. This would enable people to make an informed decision as to whether a particular issue is important enough to warrant the public expenditure.

## 2 *Unsuitable for public consideration*

It may be argued that questions which are unsuitable for public consideration cannot produce meaningful results and should be excluded from referendum to avoid fruitlessly wasting resources. However, it is not possible to clearly define which types of issues are unsuitable. There is general disagreement between politicians on this point. This is illustrated by the following comments relating to the introduction of the Death with Dignity Bill which proposed to legalise active voluntary euthanasia. Ian Revell, MP, made a strong statement against accepting the Bill on the basis of a referendum result.<sup>137</sup>

This debate will resurface either in a more narrowly focused private member's Bill, or perhaps, God forbid, in citizens initiated referenda, which would be the least acceptable way of all for this sort of law to be made.

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134 Sir Geoffrey Palmer, Radio New Zealand Interview (Nine to Noon) 5 December 1995.

135 Phil Whelan (Chief Electoral Officer), Radio New Zealand Interview (Good Morning New Zealand) 1 December 1995.

136 (1995) 547 NZPD 7110-7111.

137 (1995) 549 NZPD 8719.

Michael Laws, MP, on the other hand, saw the CIR Act as an ideal mechanism for resolving the debate:<sup>138</sup>

Public morality is too important to be left to politicians. It is an issue that all New Zealanders should be allowed their say on. This petition and the referendum will allow the public that say and that choice. In many ways, this is exactly the kind of issue for a decision under the Citizens Initiated Referenda Act.

A referendum on a question which is unsuitable for public consideration could discredit the direct democracy process. Conceivably there are some matters on which the public could not cast an informed vote. In matters of national security for example, the Government is privy to information which is not publicly available.<sup>139</sup> A referendum on such a matter may produce a result which the Government feels compelled to ignore in the interests of the public good. Such a situation would be undesirable because the Government would be unable to justify its position to the electors without divulging sensitive material. Questions which might place the Government in such a difficult position would be extremely limited, and the Firefighters Referendum was certainly not of this type. There should be no reason why the Government could not have explained the impact (or the lack of impact) of the result on its Fire Service restructuring policy.

The fact that the question posed in the Firefighters Referendum arose from an industrial dispute does not make it inherently unsuitable for public consideration. The United Kingdom does not provide for citizens initiated referenda, however government initiated referenda are held from time to time. While she was Leader of the Opposition, Margaret Thatcher stated that if the kind of industrial disputes which brought down the Heath Government were to reoccur, she would hold a referendum to decide who governs, "the [G]overnment or the trade unions".<sup>140</sup> Evidently Mrs Thatcher believed an industrial dispute to be suitable subject-matter for public consideration, at least in some circumstances. Questions arising from industrial disputes may be of legitimate public concern. The question in the Firefighters Referendum arguably had a public safety dimension and involved the allocation of public funds. Therefore the criticism that the issue was not of sufficient public importance to warrant a referendum because it centred on an industrial dispute was unjustifiable.

The Minister of Justice has said that the Firefighters Referendum question was unsuitable because of its complexity and has given abortion as an example of a suitable

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138 Michael Laws, MP, Media Release, 25 September 1995.

139 Above n 133, 127.

140 "Referendum is a Foreign Word" (1988) 138 New LJ 181, 182.

topic.<sup>141</sup> The Minister of Internal Affairs has said that the CIR Act should be restricted to "big issues" such as the independence poll in Quebec or the Irish divorce referendum.<sup>142</sup> It could be argued that these issues are at least as complex as that posed in the Firefighter Referendum. Indeed almost all questions of public policy or morality are complex at some level. The Government's position that the question was too complex to be suitable for public consideration was therefore unconvincing.

In addition to being of dubious validity, the Minister of Justice's comment about the issues being too complex for the public to understand smacks of elitism. The belief that people are capable of making intelligent and rational decisions about how they should be governed is central to the idea of democracy. At general elections, electors are required to evaluate the complex raft of policies upon which the various parties campaign. It is unacceptable to suggest that they were incapable of understanding the issues involved in the Firefighters Referendum question. If voters were uninformed, it was because there was inadequate information on the issues available to them. This points to a flaw in the legislation; there is no requirement that a neutral summary of the issues be distributed to electors prior to the referendum.

An argument that the issue was emotive and that the public was therefore unlikely to have considered the issues rationally would be extremely weak. Political parties frequently include policies on emotional issues in their election platforms, yet no one would suggest that this renders election results invalid. In any case, it would be patronising to suggest that electors are incapable of rationally analysing issues with an emotive content.

At its most basic level, the referendum result indicates that a significant proportion of New Zealanders were concerned about the Fire Service restructuring. Concern about public sector reform is precisely the kind of signal a direct democracy device such as the CIR Act is designed to convey to Government. It is conceivable that the Government was trying to discredit the referendum question as unsuitable for public consideration to achieve a low voter turnout. This would make it easier to disregard the result and avoid having to address the public's concerns about the restructuring.

### *3 Administrative rather than legislative issue*

The Prime Minister defended the Government's failure to acknowledge the validity of the subject-matter and result of the referendum by saying that the question dealt with an

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141 Minister of Justice, above n 3.

142 Above n 118.

issue of administrative detail rather than one of broad principle.<sup>143</sup> The American courts have held that initiatives may only be held on legislative matters. They are struck down if held on administrative matters, an administrative matter usually being one concerned with executive action carried out in pursuance of established legislative policy. The distinction between legislative and administrative matters is unclear and is drawn on a case by case basis.<sup>144</sup> This restriction is seen as essential to maintaining the efficient operation of government.<sup>145</sup>

Although the issue dealt with in the Firefighters Referendum could arguably have been classified as an administrative rather than a legislative matter, there is no basis for excluding such questions under the CIR Act. This is because the argument that such a referendum may interfere with the efficient operation of Government does not apply to our non-binding system since Parliament and the Government are not constrained by referendum results.

## ***B Factors Against Excluding Such Questions***

### ***1 Restrictions are unjustifiable***

In relation to binding referenda, Walker has stated that the rationale behind direct democracy tells against subject-matter restrictions.<sup>146</sup> He identified national security, an area in which the public cannot have full access to information, as a possible exception. California and Switzerland's binding direct democracy devices which enable electors to propose a question to be put to referendum are limited by only a few subject-matter restrictions.

In Switzerland, the only subject-matter restrictions on constitutional referenda are that each may deal with only one proposal<sup>147</sup> and that the referendum must target a specific provision of the constitution. For example, if the old age pension is increased by referendum, it is not the social insurance law which is amended but the relevant article of the constitution.<sup>148</sup> The Swiss Government's current proposal to substantially amend the

143 Letter from the Prime Minister to the Minister of Internal Affairs, 2 August 1995.

144 "The Scope of the Initiative and Referendum in California" (1966) 54 California L Rev 1717, 1734-1735.

145 Above n 133, 127.

146 Above n 133, 127.

147 Federal Constitution of the Swiss Confederation 1874, art 121(3). (This corresponds to CIR Act 1993, s 5(2).)

148 D Butler and A Ranney (eds) *Referendums: A Comparative Study of the Practice and Theory* (American Enterprise Institute for Public Policy Research, Washington DC, 1978) 43.

constitution<sup>149</sup> does not include further subject-matter restrictions on constitutional initiatives.

The Californian constitutional initiative may deal with only one subject. It may not name an individual to office, nor may it name a private corporation. The courts have the power to strike down a constitutional initiative if it is in violation of the United States' Constitution. A Californian constitutional initiative may thus not deal with subjects which are reserved to the Federal Government, such as defence, interstate commerce and foreign affairs.<sup>150</sup>

The second initiative device enshrined in Californian's state constitution is the legislative initiative. A legislative initiative which is in violation of the State or Federal Constitutions will be struck down by the courts. This is a significant restriction. The Supreme Court has partially or completely struck down the majority of initiatives approved in the past thirty years as unconstitutional.<sup>151</sup> There are additional subject-matter restrictions. Executive or administrative acts with a purely constitutional basis cannot be addressed in a legislative initiative. Since legislative referenda may not address legislation which contains an urgency clause, calls an election or provides for tax levies or appropriations for the State's usual current expenses,<sup>152</sup> the courts also impose these restrictions on initiatives.<sup>153</sup>

The few subject-matter restrictions which apply to these direct democracy devices are clearly designed to maintain efficient operation of Government and to prevent fundamental rights enshrined in the constitutions from being eroded by the majoritarian potential of referenda. Since the results of referenda held under the CIR Act are not binding, these concerns do not apply in New Zealand and there is no justification for applying subject-matter restrictions. If ad hoc restrictions were to be imposed for reasons other than to address specific and articulated concerns, they would undermine the credibility of the CIR Act. More specifically, further subject-matter restrictions would be unjustifiable in view of the aims of the CIR Act. Restricting the subject-matter of referenda held under the Act would thwart its objective of providing New Zealanders with a voice on any specific issue to enhance their sense of participation in public policy making.

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149 *Reform der Bundesverfassung: Erläuterung zum Verfassungsentwurf* (Swiss Government Publication, Berne, 1995).

150 Above n 6, 183.

151 KW Kobach *The Referendum: Direct Democracy in Switzerland* (Dartmouth Publishing Co Ltd, Vermont, 1993) 243.

152 Constitution of the State of California 1879, art II, s 9(a).

153 Above n 6, 187.

## 2 *Practical difficulties with excluding such questions*

Sir Geoffrey Palmer has criticised the Firefighters Referendum. He believed the topic to be unsuitable for public consideration, but said that it would be very difficult to screen out such questions while allowing issues which he considered appropriate (such as capital punishment) to be put to referendum. He believes that the CIR Act is constitutionally unsound because it interferes with the Government's accountability to the electorate and should be repealed.<sup>154</sup>

If subject-matter restrictions were to be introduced, careful consideration would need to be given to who would make the decision whether or not to accept a particular referendum question. Opposition MPs see the Clerk of the House of Representatives' role in determining the wording of the precise question under the CIR Act as political.<sup>155</sup> The decision on whether to allow a particular issue to be put to referendum at all could potentially be much more political. The Minister of Justice has said that subject-matter restrictions could not be applied without attracting allegations of Government manipulation.<sup>156</sup> If a decision to reject a question on a matter which is politically embarrassing or which otherwise puts the Government in an unfavourable light were made by a majority in Parliament or by a government official, it would certainly attract such criticism. However, such criticism could be averted by vesting the power to exclude particular questions on the basis of subject-matter restrictions with an independent commissioner, committee or the Parliamentary Ombudsman. The decision, being an administrative exercise of statutory power, would be susceptible to judicial review.<sup>157</sup>

A subject-matter restriction excluding questions arising from industrial disputes would be very difficult to apply. In the case of the Firefighters Referendum for example, such a provision could have been circumvented by classifying the question as a public safety issue.

## 3 *Restrictions may become redundant*

The issue of whether further subject-matter restrictions are required may become redundant for two reasons.

<sup>154</sup> Above n 133.

<sup>155</sup> (1992) 522 NZPD 6722 (Hon Dr Michael Cullen, MP); (1993) 538 NZPD 17960 (Pete Hodgson, MP).

<sup>156</sup> Above n 140.

<sup>157</sup> In relation to the Swiss constitutional initiative, the Federal Law on Political Rights 1976 (Switzerland), art 80 makes the Federal Chancellery's decision on whether a petition complies with the technical requirements judicially reviewable.

The public may become disillusioned with the CIR Act process, particularly if the Government fails to take the subject-matter and results of referenda seriously in the future. The tool may become disused, in which case further subject-matter restrictions will become a non-issue.

The MMP environment, in which MPs are expected to become more sensitive to public sentiment, may open more attractive avenues of propelling issues into the legislative forum than by initiating a referendum under the CIR Act. The CIR Act may then fall into disuse. Alternatively, more MPs and the inability of a minority Government to progress legislation quickly, may increase the use of the CIR Act as a means of introducing an issue into a congested legislative system.

## V CONCLUSION

The CIR Act was enacted to enhance public participation in policy and law making decisions. One of the reasons for making the results of referenda held under the Act non-binding was to avoid the need to devise subject-matter restrictions. This would leave the mechanism for conveying the voice of the people to the Government and Parliament unfettered. Public opinion on any issue of sufficient public interest to enable the requisite number of signatures to be collected could be brought to the Government's attention.

The Firefighters' Union initiated a referendum under the CIR Act as a means of using public opinion to strengthen its position in an acrimonious industrial dispute with the Fire Service Commission. The use to which the Union put the Act was self-serving and probably beyond the contemplation of those who drafted and passed the Act.

The question asked in the Firefighters Referendum was criticised as being unsuitable to be put to referendum because it was concerned with an industrial dispute. As such, it was complex and a matter of administrative detail rather than broad policy. These criticisms appear to be invalid. Since the Fire Service is essentially publicly funded and its integrity is a matter of public safety, the referendum was an appropriate way for electors to express their concern about an area of public sector reform and call the Government to account for its plans to restructure. A question without these public interest dimensions would be unlikely to attract enough signatures to trigger a referendum.

Had some or all of the criticisms levelled at the Firefighters Referendum been valid, subject-matter restrictions to exclude questions arising from industrial disputes would still not have been justified. The aim of the legislation was to provide the public the opportunity to voice its opinion on any matter of sufficient public interest to be able to collect the requisite number of signatures. The question in the Firefighters Referendum met this criterion. It would be contrary to the spirit of the CIR Act to exclude such questions. The Prime Minister's assertion that the Firefighters Referendum has highlighted a need to

exclude questions arising from industrial disputes from referenda held under the CIR Act is invalid.

Even if it were desirable to exclude questions arising from industrial disputes from referendum, it would be extremely difficult to frame a subject-matter restriction which could not easily be circumvented. Questions based on industrial disputes, particularly if played out in the public sector, would often involve wider issues of public interest. It would be difficult to justify the exclusion of such questions from referendum.

The low voter turnout does not indicate that the issue was unsuitable for public consideration. Rather it was probably a reflection of the lack of neutral information available on the issues and the Government's attitude toward the question. Its trivialisation of the issue undoubtedly discouraged electors from voting. The Government's attitude was arguably a manifestation of its lack of commitment to the CIR Act as the first step toward true direct democracy.

The Government's failure to acknowledge the validity of the subject-matter of the referendum and the result has undermined the credibility of the CIR Act as a direct democracy device. It has done nothing to dispel the disillusionment which prompted the calls for direct democracy legislation in the first place.

