

Chapter 18

State Initiation of Section 128 Referenda

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I Introduction

Edmund Burke wrote that ‘a state without the means of some change is without the means of its conservation’.¹ For the Australian states this observation has rung true in relation to the federal relationship under the Commonwealth Constitution. Under the Constitution, the only way to trigger the s 128 amendment procedure is for a Bill to be introduced in the House of Representatives or the Senate. Hence, the constitutional reform process is exclusively in the hands of the federal Parliament. This federal monopoly inevitably sculpts proposals that align, or appear to align, with the political, fiscal and economic interests of the Australian federal sphere. The states are therefore inhibited in their ability to participate in constitutional reform. This constitutional handicap has made it difficult for the states to counter the aggrandising tendencies of the Commonwealth Parliament; tendencies which have been bolstered by the High Court’s centralist constitutional interpretations.

The exclusion of the states from the s 128 initiation process was not an oversight by the framers. Instead, the delegates to the Constitutional Conventions in the 1890s assumed that the states would be capable of instigating reform proposals by way of their representation in the Senate. This assumption was addressed by the inclusion of a deadlock clause in s 128. This clause was designed to circumvent a parliamentary stalemate by allowing the Senate to put forward reform proposals in the absence of the support of the House of Representatives. However, the practical hitch with this mechanism has proven to be the degree to which the upper house is controlled by the dynamic of party politics rather than the political and constitutional interests of the states.

In 1988, the Constitutional Commission recommended an amendment to the Constitution to address this federal–state imbalance to allow the state legislatures to initiate s 128 alterations.² However, the Commission’s recommendation

1 Edmund Burke, *Reflections on the Revolution in France* (Bobbs-Merrill, first published 1790, 1955 ed) 24.

2 Constitutional Commission, Commonwealth, *Final Report of the Constitutional Commission – Volume Two*, Parl Paper No 230/88 (1988) 856.

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