

A Survey of Arguments against the Constitutional Recognition of Indigenous Australian Peoples

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Introduction

In the course of discussing the recognition of Indigenous Australian peoples in the Constitution, one can easily get the impression that success is virtually assured. On this view, the precise nature of recognition still needs to be worked out – that is, whether it should involve a prohibition on racial discrimination, what should be done with the race power, etc – but the appeal of the underlying idea itself tends to be taken for granted. Assertions that recognition enjoys bipartisan support, that polling has often been favourable, and that there is little if any in the way of organised opposition are frequently cited as proof that a referendum would easily be successful.

However, each of us could find ourselves caught in an echo chamber of like-minded people and become deafened to the existence of dissenting views.¹ This can happen with the proposed recognition for Indigenous Australian peoples as with any other political issue, and there is good reason not to take the success of a referendum on recognition for granted. Indeed, the prospects for a successful referendum to recognise Indigenous Australian peoples in the Constitution may not be so cut-and-dried. Bipartisan support may be necessary for any referendum to succeed,² but it is not by itself sufficient; referenda enjoying bipartisan support have failed in the past.³ In the absence of an actual referendum question, favourable polling data⁴ from 2014 must be taken with a grain of

1 Perhaps apt, although apocryphal, is the famous (mis)quotation of Pauline Kael after Richard Nixon defeated George McGovern in the 1972 Presidential election: ‘How could Nixon have won? Nobody I know voted for him’. According to Wikiquote, *Pauline Kael*, <http://en.wikiquote.org/wiki/Pauline_Kael>, the actual, correct quotation appears in Israel Shenker, ‘2 Critics Here Focus on Films as Language Conference Opens’, *New York Times*, 28 December 1972.

2 See generally George Williams and David Hume, *People Power: The History and Future of the Referendum in Australia* (UNSW Press, 2010).

3 See Scott Bennett, *The Politics of Constitutional Amendment* (2003), <http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp0203/03rp11> (citing as examples the 1926 referendum regarding industry and commerce and the 1967 referendum regarding the ratio of members of the House of Representatives to Senators).

4 See Patricia Karvelas, ‘“No need to fear” referendum plan’, *The Australian*, 25 July 2014 (containing views of Professor George Williams that poll results show that ‘current

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