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Power, Control and Citizenship: The Uluru Statement from the Heart as Active Citizenship

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Keywords

reconciliation, first nation, voice

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Who governs and how they govern is central to the questions of power, control and citizenship that are at the core of a democratic society. The Uluru Statement from the Heart is the outcome of the 12 First Nations Regional Dialogues culminating in the National Constitutional Convention at Uluru in May 2017. There the First Peoples from across the country formed a consensus position on the form constitutional recognition should take. This article argues that the Uluru Statement from the Heart affirms a commitment to ‘active citizenship’ that draws from a belief in the equal power of the governors and the governed. This understanding of the Uluru Statement from the Heart enables it to be promoted as a document for all Australians, both in the spirit of reconciliation and in its affirmation of a commitment to an equality underpinning Australian citizenship in the 21st century. By examining how citizenship in Australia has evolved as a legal concept and by reflecting on how law is a fundamental tool for providing a ‘meaningful limitation of the lawgiver’s power in favour of the agency of the legal subject’, this article examines the Uluru Statement from the Heart as a commitment to the importance of recognising the nature of the proper relationship between the law giver and those subject to the law — the citizenry. To exercise power within a democratic framework, as opposed to brute force or sheer will over the subject, involves recognising the agency of the citizenry. This idea not only enables reconciliation to be a meaningful and restorative act but one that recalibrates the exercise of power in Australia to benefit all Australians by affirming a commitment to all Australians equal citizenship as active agents.

I Introduction

The call for ‘the establishment of a First Nations’ Voice enshrined in the [Australian] Constitution’, a central tenet of the *Uluru Statement from the Heart*, was being drafted when I first presented the elements of this paper on power, control and citizenship at the 2017 Interdisciplinary Conference of the *Transnational, International and Comparative Law and Policy Network* held at Bond University, which conceived this collection. The true

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significance of what was happening with the 12 First Nations Regional Dialogues was not known to me then but the historic wrong done to Indigenous Australians and their continuing disadvantage and exclusion was written large for me and others at the conference.

With that knowledge, I began my conference paper by acknowledging the people of the Yugambah language, upon whose ancestral lands Bond University now stands. I emphasised the acknowledgement of country as an important statement of reconciliation. Consciously giving attention to the continuing imbalance of power between Indigenous Australians and those who arrived after is to admit the need to remedy this imbalance. Indeed, attention to this reality should underpin all we do, if we are concerned with questions of law and politics and the proper limits upon the exercise of power by those who ‘govern’ in Australia.

This is what the *Uluru Statement from the Heart* calls on us to acknowledge.

The *Uluru Statement from the Heart* is the outcome of the 12 First Nations Regional Dialogues culminating in the National Constitutional Convention at Uluru in May 2017. Here, the First Peoples from across the country were empowered to form a consensus position on the form constitutional recognition should take. This direct involving of Australia’s First Peoples was the first of its kind in Australian history and was a significant response to the historical exclusion of First Peoples from the original process that led to the adoption of the Australian Constitution.¹

In those deliberations, Referendum Council member Galarrwuy Yunupingu, in his essay ‘Rom Watangu’, stated:

What Aboriginal people ask is that the modern world now makes the sacrifices necessary to give us a real future. To relax its grip on us. To let us breathe, to let us be free of the determined control exerted on us to make us like you. And you should take that a step further and recognise us for who we are, and not who you want us to be. Let us be who we are — Aboriginal people in a modern world — and be proud of us. Acknowledge that we have survived the worst that the past had thrown at us, and we are here with our songs, our ceremonies, our land, our language and our people — our full identity. What a gift this is that we can give you if you choose to accept us in a meaningful way.²

In putting brakes upon the exercise of power by those who ‘govern’ in Australia, we need first to define ‘power’ and our understanding of it within a democratic vision of citizenship. I use the term ‘power’ here in the context of Constitutions and how those who have the power to make and execute laws and policies have an impact on its citizenry. US academic Daryl J Levinson gives us helpful markers when discussing the subject:

‘Power’ in public law should be understood to refer to the ability of political actors to control the outcomes of contested decision-making processes and

¹ See Department of the Prime Minister and Cabinet, *Final Report of the Referendum Council* (Australian Government, 2017) iii–iv.

² Cited in Department of the Prime Minister and Cabinet, *Final Report of the Referendum Council* (Australian Government, 2017) iii.

secure their preferred policies. When we talk about power in political life and constitutional law, this is the kind of power we are typically talking about: the ability to effect substantive policy outcomes by influencing what the government will or will not do. Asking who has power in this sense is equivalent to asking, in Professor Robert Dahl's famous formulation, 'Who [g]overns?'³

Who governs and how they govern (how they exercise their power) is central to the questions of power, control and citizenship that I believe are at the core of a democratic society. Yunupingu's words encapsulate the argument of this article that the *Uluru Statement from the Heart* affirms a commitment to 'active citizenship' — a term that will be further explained but draws from a belief in the equal power of the governors and the governed. Active citizenship is a necessary element of maintaining a democratic society. It is as true for Indigenous Australians as it is for all Australians.⁴

This understanding of the *Uluru Statement from the Heart* enables it to be promoted as a document for all Australians, both in the spirit of reconciliation and in its affirmation of a commitment to an equality underpinning Australian citizenship in the 21st century. I make this argument by examining how citizenship in Australia has evolved as a legal concept and by reflecting on how law is a fundamental tool for providing a 'meaningful limitation of the lawgiver's power in favour of the agency of the legal subject.'⁵ I elaborate my definition of active citizenship and examine the *Uluru Statement* as a commitment to the importance of recognising the nature of the proper relationship between the law giver and those subject to the law — the citizenry.

By acting on this commitment, Australia has a better chance of creating a more democratic community. A commitment to democracy includes placing meaningful, lawful limits on the exercise of power. To exercise power within a democratic framework, as opposed to brute force or sheer will over the subject, involves recognising the agency of the citizenry. This idea not only enables reconciliation to be a meaningful and restorative act but one that recalibrates the exercise of power in Australia to benefit all Australians by affirming a commitment to all Australian's equal citizenship as active agents.

³ See Daryl Levinson, 'Foreword in 'Looking for Power in Public Law' (2016) 130 *Harvard Law Review* 31, 39.

⁴ There is another aspect to this idea that is deserving of its own chapter in thinking through these concepts from a feminist perspective. Mary Beard's recent manifesto, *Women and Power* (Profile Books, 2017), challenges us all to think of the gendered way in which power is exercised in the public sphere and it is a constant element to my own life experience of active citizenship. This has been relevant to my work on Australian Women Lawyers as Active Citizens. See Australian Women's Archives Project, *Australian Women Lawyers as Active Citizens* (2016) <<http://www.womenaustralia.info/lawyers/index.html>>.

⁵ Kristen Rundle, *Forms Liberate: Reclaiming the Jurisprudence of Lon L Fuller* (Hart, 2013) 2 ('*Forms Liberate*').

II 'Citizenship' in Australia at Federation

In 1901, when propertied, white, male Australians — those bestowed with formal, active, voting rights — came together to write the Constitution, there was a democratic element to its formation. The participants were elected directly to the Constitutional Conventions established to draft Australia's Constitution, rather than drawing from the existing representative colonial Parliaments. For that reason, those Conventions were known as the 'People's convention'.⁶ That women and Indigenous Australians were not part of the people underlines an imbalance of power from the nation's inception.⁷

This is not to discount the voice of the women who were campaigning for the vote and who, as active citizens, ensured that section 41 of the Constitution guaranteed those who already had the right to vote in the colonies would be able to vote in a new Commonwealth of Australia's federal elections.⁸ This included Indigenous and white women in South Australia who had the vote at that time and, by the time of Federation, white women in Western Australia, too. Indigenous South Australian women would later lose their right to vote when the 1902 Commonwealth Electoral Act, which introduced the franchise for women in federal elections, specifically excluded Indigenous people.⁹ The beliefs around people's equality, or lack of it, influenced the balance of power within society at that time. Indeed, it was not until 1962 that Indigenous Australians' right to vote was passed into the Commonwealth Electoral Act.¹⁰

Formal citizenship status, which Indigenous Australians had by their birth in Australia¹¹, as did women, did not mean they had substantive citizenship rights.¹² The 1967 referendum did not correct formal citizenship, which Indigenous Australians held, but, importantly, as the Uluru statement identified, led them to being counted.¹³ Indeed, formal legal membership status at 1901 was not Australian citizenship, which did

⁶ The full records of these Conventions have now been scanned and are available online. See Parliament of Australia, *Records of the Australian Federal Conventions of the 1890s* <https://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/Records_of_the_Australasian_Federal_Conventions_of_the_1890s>.

⁷ See Deborah Cass and Kim Rubenstein, 'Representations of Women in the Australian Constitutional System' (1995) 17 *Adelaide Law Review* 3.

⁸ Section 41 states: 'No adult person who has or acquires a right to vote at elections for the more numerous House of the Parliament of a State shall, while the right continues, be prevented by any law of the Commonwealth from voting at elections for either House of the Parliament of the Commonwealth.'

⁹ For an explanation of s 41 and the involvement of the South Australian women's role in its evolution, see Elisa Arcioni and Kim Rubenstein, 'R v Pearson; Ex parte Sipka: Feminism and the Franchise' in Heather Douglas et al (eds), *Australian Feminist Judgments* (Hart, 2014) 55.

¹⁰ See Kim Rubenstein, *Australian Citizenship Law* (Thomson Reuters, 2nd ed, 2017) 37–38 [2.220], 374–376 [6.190].

¹¹ *Ibid* 11 nn 67, 71–74 [3.50], 102–104 [4.50], 106–110 [4.70], 127–129 [4.200], 135–136 [4.250], 404–406 [7.8].

¹² *Ibid* 9–10 [1.20].

¹³ For some excellent material online about the 1967 Referendum, see National Library of Australia, *The 1967 Referendum* <<https://www.nla.gov.au/research-guides/the-1967-referendum>>.

not exist at that time, but rather British subject status. A significant aspect of identity that influenced the compact of federal membership in Australia in 1901 was that the white male drafters saw themselves as British subjects, and not as Australian citizens. They did not seek to break their ties with empire at Federation. In creating an Australian Commonwealth, they were establishing a compact that refigured the exercise of power in the Australian territory of the Empire, between a central governing body (a Federal government) and the continuing colonies (the States). Among other things, the male framers wanted to bolster their collective power to exclude immigrants (including non-white British subjects) and to create a uniformity of approach to questions of interstate trade.¹⁴

Ultimately, this led to a clear decision *not* to include a formal legal concept of Australian citizenship in the Australian Constitution,¹⁵ and all those individuals who were born in Australia were British subjects by birth until the introduction of the *Australian Citizenship Act* 1948 on 26 January 1949.¹⁶ When that Act came into effect, Australian citizenship status arose automatically by birth in Australia,¹⁷ and sat alongside the continuing British subject status. Australian citizens were both Australian citizens *and* British subjects until 1987.¹⁸

III From Subject to Sole Citizen

When British subject status was repealed and Australians became solely Australian citizens in 1987 it represented an important shift. This was not only about a change in the relationship between Australia and the UK that had consequences for British subjects resident in Australia who were not Australian citizens,¹⁹ it also reflected a change to Australian conceptions of sovereignty. It was also a time when the Australian executive acknowledged that no matter which country a person came from, they had equal access to applying for Australian citizenship.²⁰

The earlier position of being a 'subject' in a colonial, monarchical setting represented an imbalance of power that underpins British subject status compared to Australian citizenship. Being a British subject was at its core a relationship between the Crown and the subject where the individual is *subjected* to the power of the Crown or the state. This was not only in

¹⁴ See also Helen Irving, *To constitute a nation: a cultural history of Australia's Constitution* (Cambridge University Press, 1997).

¹⁵ See Kim Rubenstein, 'Citizenship and the Constitutional Convention Debates: A Mere Legal Inference' (1997) 25(2) *Federal Law Review* 295.

¹⁶ When first introduced it was called the *Nationality and Citizenship Act 1948* (Cth) and was renamed the *Australian Citizenship Act 1948* (Cth) in 1973. See Rubenstein, *Australian Citizenship Law*, above n 10, 117–118 [4.130].

¹⁷ There are various ways to become an Australian citizen: by birth, descent and naturalisation (now known as conferral). See Rubenstein, above n 10, 127–129 [4.200].

¹⁸ *Ibid* 87–89 [3.120], 118–120 [4.140], 122–124 [4.170], 124–126 [4.180], 126–127 [4.190].

¹⁹ This included British subjects being able to be deported under the *Migration Act 1958*. See also Kim Rubenstein and Niamh Lenagh Maguire, 'Citizenship Law' in H. Selby and I. Freckleton (eds), *Appealing to the Future: Michael Kirby and His Legacy* (Thomson Reuters, 2009) 105–130.

²⁰ See Rubenstein, *Australian Citizenship Law*, above n 10, 126–127 [4.190].

the sense that any form of power (whatever it is called, whether the Crown or the executive) has a ‘subject’ to which the power extends. But also because the Crown was entitled, by its own divine foundations, to control the subject. This lies in British subject status’s feudal origins which was tied up in concepts of allegiance, as Peter Spiro explains:

In ‘a medieval world, [where] individuals were identified not so much by primitive national affiliations as by personal allegiances tied to natural law. The notion of personal allegiances persisted as Europe divided into distinct territorial units, each ruled by an individual sovereign. So conceived, early models of nationality and citizenship worked from the putatively personal relationship between the individual and the sovereign.²¹

The Crown could ultimately determine whom it chose to protect and upon whom to bestow its benevolence, and this translated into the common law identifying all people born within the Crown’s dominions as subject to the Crown’s power and benevolence. This was the result of the relationship in feudalism between the individual and the soil upon which they lived (*‘jus soli’*).²² In terms of the subject–sovereign relationship, *‘jus soli’* was justified on the grounds that the child was upon birth indebted to the king for their protection.²³ While subjects gained some benefits from that relationship (although not uniformly, as Indigenous Australians and Chinese Australians’ and women’s experiences affirm),²⁴ there was a fundamental inequality in the relationship.

Becoming solely Australian citizens signified linguistically a move away from that foundational inequality. While Australia still had a Queen as Head of State, she became the Queen of Australia, and this move away from British subject status also changed the concept of power between the executive branch of government (those governing and making the law) and the people (those *subject* to the law). Citizenship, as opposed to ‘subjectivity’, philosophically and legally represents an *equality* between those exercising the power and those subject to that power. In Australia, this also represented a move with parallels in timing to becoming a multicultural society. From that time on, all individuals, whether part of the Commonwealth or not, would have equal access to citizenship, compared to the earlier preference shown towards British (white) subjects.

These changes are integral to the development of a democratic understanding of citizenship. It parallels a commitment to the principle that those exercising power are *subject to the law* in the same way that the

²¹ See Peter Spiro, ‘Dual Nationality and the Meaning of Citizenship’ (1997) 46 *Emory Law Journal* 1411, 1419.

²² Peter Spiro, ‘Dual Nationality and the Meaning of Citizenship’ (1997) 46 *Emory Law Journal* 1411, citing W.E. Hall, *A Treatise on International Law* (The Clarendon Press, 7th ed, 1917) 234.

²³ Peter Spiro, ‘Dual Nationality and the Meaning of Citizenship’ (1997) 46 *Emory Law Journal* 1411, 1436 nn 102, citing William Blackstone, *Commentaries on The Laws Of England*, vol 1, 369–70 (marginal pagination post 10th ed) .

²⁴ See Peter Prince, *Aliens in their Own Land* (PhD thesis, Australian National University, 2015) <<https://openresearch-repository.anu.edu.au/bitstream/1885/101778/1/PRINCE%20Thesis%202015.pdf>>.

citizenry is *subject to the law*. All citizens, those governing and those being governed, are formally equal before the law. While the Indigenous story, even at that point, highlighted some of the flaws in translating this theory to practice, the move to Australian citizenship over British subject status was the first step in moving towards a democratic concept of Australian citizenship.

This change also built upon the growth of the application of administrative law principles in Australia with the ‘new’ administrative law framework introduced in the 1970s.²⁵ Those changes, including the introduction of Freedom of Information laws, the office of the Ombudsman, the creation of Administrative Appeals Tribunals and codified Judicial Review processes, all articulated and implemented clear controls on the exercise of executive power. Individual citizens could challenge government exercises of power and this administrative law foundation amplified this newer understanding of Australian citizenship. Just as the concept of the rule of law emphasises that those who exercise power are ‘subject to the law’, so too was the *sole status* of citizenship central to democratic understandings of citizenship and that those citizens who were exercising power, are ‘subject to the law’.

IV Fuller’s Interpretation of ‘Subject to the Law’ and Active Citizenship

But what does ‘subject to the law’ mean? My argument requires venturing into legal philosophy. As Kristen Rundle asks in a symposium on law in Nazi Germany: ‘What is it that is possessed by a legal subject within the distinctive mode of governance that is law? How might an exploration of this question illuminate the particular qualities of the social condition that law creates, and that is not possible in its absence?’²⁶ In asking those questions, she was drawing upon her work on legal philosopher Lon Fuller. Fuller’s insights are a guide to the democratic concept of citizenship I have outlined above. Rundle explains how, for Fuller, ‘legal power over subjects is something to be distinguished from mere power over subjects’.²⁷ Moreover, ‘Fuller’s legal subject ... is not just an individual possessed of choices or a planner with regard to her own interests, but akin to the Greek conception of the *citizen*, is envisaged as an active participant in the legal order.’²⁸ Thus,

[t]o be a legal subject, on Fuller’s account, is not merely to be a member of ‘a subservient populace ready to do what they are told to do’, but rather to be a

²⁵ See Peter Cane, Leighton McDonald and Kristen Rundle, *Principles of Administrative Law* (Oxford, 3rd ed, 2018).

²⁶ Kristen Rundle, ‘Law and Daily Life — Questions for Legal Philosophy from November 1938’ (2012) 3(2) *Jurisprudence* 429, 433 (‘*Law and Daily Life*’).

²⁷ *Ibid* 439.

²⁸ *Forms Liberate*, above n 5, 99-100.

participant in a distinctly constituted social condition in which one is respected as an agent.²⁹

I have emphasised the word *citizen* in Rundle's references to Fuller's work because the term active citizenship evolves from this notion of being 'an active participant in the legal order' and demands that each citizen be 'respected as an agent'. But what does an active citizen look like? How does one participate? How does one know that they are respected as an agent? This is essential to understanding constitutional frameworks and the necessary limits on the exercise of power that underpins a democratic conception of citizenship.

The concept of active citizenship is linked to the legal status of citizen. Much discussion around citizenship often assumes a singular meaning when in fact there are variations of meaning. I began my discussions in this article in the context of the *legal status* of the citizen — whom the State acknowledges as a full member of the nation-state. But there are other ways in which the term *citizen* is used; indeed, I draw from US academic Linda Bosniak's work in developing the central thesis in my book, *Australian Citizenship Law*, to highlight the differences between the legal status of citizenship and other understandings of the term. There are four clear ways to explain these differences: (1) citizenship as *legal status*; (2) citizenship as *rights*, including social and economic rights as articulated by T H Marshall in the 1950s; (3) citizenship as *political participation*, which speaks more to the traditional way of thinking about 'active citizenship'; and (4) citizenship as *identity*, which focusses on the ways in which individuals frame their identity through connection to a nation-state. It is my view that legal status should sit well with those other understandings, and that the state, in determining who is accorded legal status, and what rights should be linked to that status, should be conscious of the impact of those 'benefits' on an individual and her sense of connection to (i.e. identity) with the state.³⁰

Active, democratic citizenship involves a meaningful relationship between the governors and the governed (the citizenry). Rundle writes:

[P]erhaps the most important way in which the legal subject's agency becomes visible to us, and through which we also come to appreciate the centrality of her status ... lies in the clear message ... about how the possibility of law depends on its *acceptance* by the subject'.³¹

When Rundle uses the word 'agency', we can substitute the word 'citizen.' So to repeat, substituting my words in italics, 'perhaps the most important way in which the legal subject's *citizenship* becomes visible to us, and through which we also come to appreciate the centrality of their *citizenship*, lies in the clear message about how the possibility of *law depends on its acceptance by the citizen.*' I would also add that it requires the governors to recognise the need for that acceptance to govern lawfully.

²⁹ *Law and Daily Life*, above n 26, 2.

³⁰ See Rubenstein, *Australian Citizenship Law*, above n 10, ch 1.

³¹ *Forms Liberate*, above n5, 100.

This idea is central to a democratic notion of citizenship. Acceptance by the ‘citizen’ is a key aspect of active citizenship and is also essential to the proper exercise of power by those in government. It is what citizenship is about compared to subject status. The subject of the law becomes a citizen when there is an *acceptance* by those being governed. This can be best seen through a commitment to active citizenship — a commitment to being an active participant in the legal order. The *Uluru Statement from the Heart* is, therefore, an inspired step forward for a democratic Australia. It is the Indigenous community saying to those in power, ‘we stand here ready to be active citizens, ready to take on board an expression of citizenship that affirms our relationship with those in government – we are not merely subjects of the law (which we have been in law since 1901), but we are citizens in the fullest sense of the word’.

V The Uluru Statement from the Heart

The *Uluru Statement from the Heart* is a rousing call to *all Australians* to rethink their own citizenship. It speaks to each of the ways we think and talk about citizenship: as legal status, human rights, as political participation and as identity. Each is essential to maintaining a democratic Australian society.

Looking closely at the statement, it begins by recognising ‘Our Aboriginal and Torres Strait Islander tribes were the first sovereign Nations of the Australian continent and its adjacent islands, and possessed it under our own laws and customs.’ This recalibrates the story and acknowledges the foundational imbalance of power at the time of Federation — the failure to recognise the existing sovereignty, or power that the Indigenous community held over itself. This is an honest, transparent statement providing a foundation for moving forward. It also reaffirms Indigenous Australian’s continuing identity linked to the land.

It then affirms: ‘It has never been ceded or extinguished, and co-exists with the sovereignty of the Crown.’ How fitting that a nation that saw Australian citizenship status sitting happily with British subject status (rights sitting side by side), is now also able to affirm the co-existing sovereignty with Indigenous citizenship.

The statement continues: ‘With substantive constitutional change and structural reform, we believe this ancient sovereignty can shine through as a fuller expression of Australia’s nationhood.’ This speaks to an inclusive understanding of all aspects of citizenship, in its structural framing in order to provide a meaningful expression of their formal *legal status*, through a ‘First Nations Voice enshrined in the Constitution’ as well as empowering them to seek to exercise their *rights* and *participate* with a positive affirmation their *identity*. ‘walk[ing] in two worlds’ with ‘their culture’ as ‘a gift to their country’.

And the specifically active contribution — of citizenship as *political participation* — is identified directly with this very powerful ending: ‘In 1967 we were counted, in 2017 we seek to be heard.’ This is a strong

statement that should be affirmed by all Australians. It is Indigenous Australia's call to move from formal Australian citizen status to substantive Australian citizens — active citizens — to a true acceptance of their rightful place in our nation.

VI Conclusion

Questions of law and politics and the proper limits upon the exercise of power by those who 'govern' in Australia are central to its democratic makeup. They are also central to our understanding of Australian citizenship as a formal legal status, as a framework for rights protection, as an affirmation of political participation, and as a mirror to one's identity. The *Uluru Statement from the Heart* provides a fresh looking-glass through which to reflect upon these issues in Australia today.

However, at the time of writing this article, the Prime Minister, Malcolm Turnbull, has rejected the advice from the Reconciliation Council on the grounds that a new advisory body 'would inevitably become seen as a third chamber of Parliament.' In his view, our

democracy is built on the foundation of all Australian citizens having equal civic rights, all being able to vote for, stand for and serve in either of the two chambers of our national Parliament — the House of Representatives and the Senate ... A constitutionally enshrined additional representative assembly for which only Indigenous Australians could vote for or serve in is inconsistent with this fundamental principle.³²

There have been many disappointed responses to this outright rejection of the proposals that represent Indigenous active citizenship on an unparalleled level. There is something concerning about referring to 'equal civic rights' when those rights do not equate with social and economic rights, or fully realised political rights, and which also undermines the identity of its First Peoples. And when those in power and who are governing do not properly engage with the agency of the citizenry, the impression we are left with is that of established brute power resisting new forms of constrained power.

The *Uluru Statement from the Heart* proposal only adds to, rather than takes away from, our democratic frameworks. A voice to the Parliament that is not determinative is an ingenious device to enable participation *without* dictating to the majority. However, the existing system enables the majority to dictate to the minority in ways that do not fully take into account the agency of all its citizenry. To repeat Rundle's description of Fuller's insight, 'legal power over subjects is something to be distinguished from mere power over subjects'.³³ If the majority can simply dictate to the minority by its mere power or numbers, without considering the needs of

³² Prime Minister Malcom Turnbull, 'Response to Referendum Council's Report on Constitutional Recognition' (Media Release, 26 October 2017) <<https://www.pm.Sgov.au/media/response-referendum-council%E2%80%99s-report-constitutional-recognition>>.

³³ Rundle, *Law and Daily Life*, above n 26, 439.

the minority citizenry, then we must think of new ways to curtail that power. Being allowed to be heard and recognised as ‘an active participant in the legal order’ will enhance the lawful conditions upon which power rests.

Rather than relying on understandings of formal democracy — which neither take into account substantive citizenship in its fullest sense nor reflect deeply enough on the power of those in government to dictate without fully accepting the agency of its citizens — the *Uluru Statement from the Heart* should be brought back onto the table. Its implementation is not only constitutionally sound, it is also affirming of our collective Australian move from subject to citizen. This move, which saw its early start with Federation in 1901, was clarified formally in 1949, further amplified in 1987 and is now open for essential fulfilment for all Australians, including its First Peoples and all those who followed.

ULURU STATEMENT FROM THE HEART

We, gathered at the 2017 National Constitutional Convention, coming from all points of the southern sky, make this statement from the heart:

Our Aboriginal and Torres Strait Islander tribes were the first sovereign Nations of the Australian continent and its adjacent islands, and possessed it under our own laws and customs. This our ancestors did, according to the reckoning of our culture, from the Creation, according to the common law from 'time immemorial', and according to science more than 60,000 years ago.

This sovereignty is a *spiritual notion: the ancestral tie between the land, or 'mother nature', and the Aboriginal and Torres Strait Islander peoples who were born therefrom, remain attached thereto, and must one day return thither to be united with our ancestors. This link is the basis of the ownership of the soil, or better, of sovereignty.* It has never been ceded or extinguished, and co-exists with the sovereignty of the Crown.

How could it be otherwise? That peoples possessed a land for sixty millennia and this sacred link disappears from world history in merely the last two hundred years?

With substantive constitutional change and structural reform, we believe this ancient sovereignty can shine through as a fuller expression of Australia's nationhood.

Proportionally, we are the most incarcerated people on the planet. We are not an innately criminal people. Our children are alienated from their families at unprecedented rates. This cannot be because we have no love for them. And our youth languish in detention in obscene numbers. They should be our hope for the future.

These dimensions of our crisis tell plainly the structural nature of our problem. This is *the torment of our powerlessness.*

We seek constitutional reforms to empower our people and take a *rightful place* in our own country. When we have power over our destiny our children will flourish. They will walk in two worlds and their culture will be a gift to their country.

We call for the establishment of a First Nations Voice enshrined in the Constitution.

Makarrata is the culmination of our agenda: *the coming together after a struggle.* It captures our aspirations for a fair and truthful relationship with the people of Australia and a better future for our children based on justice and self-determination.

We seek a Makarrata Commission to supervise a process of agreement-making between governments and First Nations and truth-telling about our history.

In 1967 we were counted, in 2017 we seek to be heard. We leave base camp and start our trek across this vast country. We invite you to walk with us in a movement of the Australian people for a better future.