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**Civil Society Section**

Office of the United Nations High Commissioner for Human Rights

Palais de Nations

CH-1211 Geneva 10 Switzerland

By email: [expertmechanism@ohchr.org](mailto:expertmechanism@ohchr.org)

Dear EMRIP Committee

**Re: Kaurareg nation of Aboriginal peoples submission on access to justice Study**

The senior Kaurareg Aboriginal Elders together with Committee members of the Kaurareg Aboriginal Land Trust (the Land Trust) are pleased to lodge their submission with EMRIP (Expert Mechanism on the Rights of Indigenous Peoples) 2014 on the Study for *Access to justice in the promotion and protection of the rights of Indigenous peoples*.

Despite our limited resources with which to contribute to the EMRIP 2014 Study, with a focus on "restorative justice" and "Indigenous juridical systems", we are excited by the prospect of being invited to submit to this Study and provide third-person content and context prescribed by our first-person experiences.

The Kaurareg nation of Aboriginal peoples are a small population who have suffered from years of marginalization and exclusion on their own lands and seas, from the basic right of dedicated representation to systems of governance and administrative decision making on their quality of life and environment, in a first world nation, in a north/south divide.

Additional to a focus on "restorative justice" and "Indigenous juridical systems" Kaurareg believes parts of its submission may be relevant to the EMRIP Study *The promotion and protection of the rights of indigenous peoples in natural disaster risk reduction and prevention and preparedness initiatives*. In that regard, and where that relevance is deemed to occur, it is hoped EMRIP uses discretion to employ that relevance.

The following submission is divided into two parts, reflecting these two focus points.

Headings in our submission elaborate on discrete subject matters linked to, and pursuant of, "restorative justice" and "Indigenous juridical systems" for the EMRIP 2014 Study on *Access to justice in the promotion and protection of the rights of Indigenous peoples*, especially in the specific ways they relate to the Kaurareg nation of Aboriginal peoples.

To assist Kaurareg in the elaboration of its first-person experiences for this Study, we took occasion to create our own definition of "restorative justice" due to the absence of definitions suitable to our situation, citing its relevance to UN systems of decolonization.

We hope our submission satisfactorily addresses the work of EMRIP and we look forward to continued collaboration with EMRIP and all our Indigenous brothers and sisters in this important work.

Yours faithfully,



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**Allen G Reid**  
Administration Officer

## **A summary of “restorative justice” and “Indigenous juridical systems” for the Kaurareg nation of Aboriginal peoples in Australia**

Kaurareg have searched for a definition of “restorative justice” that has both clarity and is comprehensible to the populations of ESL (English as a Second Language) and CALD (culturally and linguistically diverse) Indigenous peoples who reside in Kaiwalagal (tribal name) region, more popularly known as the Torres Strait (colonial name). But in not finding a suitable definition, Kaurareg has assembled their own working definition fitting their experiences in their homelands. That definition is displayed in a recognizable form by language, by discourse, in constructs and concepts, in policies and practices as found in formats pursuant to the UN system of decolonization.

In any event, in their submission practical decolonization *not* Australia’s failed practical reconciliation, embodies the underlying aspirations for Kaurareg as are described herein, giving form and purpose to their solutions and recommendations for restorative justice. Kaurareg’s definition of “restorative justice” is inextricably linked to “Indigenous juridical systems”. It has been shaped by examples of restorative justice from many practitioners and academics, too many to acknowledge, but gratefully presented in the following:

1. When breaches and violations of rights occur, the individual and groups of peoples who have suffered harm should be the singular witness/s for such occurrences
2. The full spectrum of the human condition should inform the remediation of harm for victims of harm, perpetrators of harm, and the environment where harm thrives
3. All planning on remedial action to implement restorative justice proceeds as above with equity of input, throughput, and output from Indigenous juridical systems

Kaurareg are unwilling to sever links between restorative justice and Indigenous juridical systems. The main reason for their unwillingness arises from their autochthonous human condition comprising connection to country, before the evils of colonization subsequently oversaw perpetuation of trespass on, and theft of, their lands and seas by illegitimate means. In the historic High Court of Australia 1992 decision *Mabo & Others v State of Queensland* we saw the “extinguishment” of the myth of terra nullius where from 1992 to 1993 no-one “owned Australia”. That is, until Australia’s national government enacted its *Native Title Act 1993* which passed the burden of the “extinguishment” principle on to Indigenous peoples. In this single act, the evils of colonization were perpetuated.

Restorative justice for Kaurareg cannot succeed without their Kergne lore/law Indigenous juridical system that has survived the evils of colonization, and is still practiced today. Restorative justice also means identifying the numerous breaches and violations of their inalienable rights from 1945, of comparing Kaurareg’s autochthonous human condition of today to before time<sup>1</sup> by a reverse engineering, and recognizing with unqualified support that Kergne lore/law is a valid and legitimate juridical system.

Kaurareg believe anything less is tantamount to Australia perpetuating non-conforming integration of Indigenous Australians with an independent State, which constitutes an ongoing denial of natural justice for their inalienable right of self-determination, and the return of their decision making control.

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<sup>1</sup> “Before time” is a reference to the aeons of time that existed for Kaurareg Aboriginal peoples before colonization.

Recommendations for the **EMRIP 2014 Study** on *Access to justice in the promotion and protection of the rights of Indigenous peoples*, with a focus on:

#### Restorative Justice

*Recommendation 1: that restorative justice for the Kaurareg nation of Aboriginal peoples in Australia be effected to its fullest extent, such that it factors on the:*

- 1. granting of natural justice pursuant to practical decolonization beginning with listing as non-self-governing territory with the United Nations General Assembly*
- 2. return of all territories, known as the Kaurareg archipelago, from the nation State of Australia for the benefit of all its present inhabitants*
- 3. return of decision making control for the quality of their lifestyles and environment, as enjoyed before the onslaught of colonization*
- 4. restoration of what was lost by dispossession and disadvantage, from their everyday human condition of autochthones, caused by the evils of colonization*

and...

#### Indigenous Juridical Systems

*Recommendation 2: that Kaurareg's juridical system of Kergne lore/law be accepted on par with juridical systems practiced by Australia's national and subnational governments, for its integral valid and legitimate input throughout and output to all economic social cultural civil and political developments that benefit the quality of their lifestyles, their built and natural environments.*

## **The recognized origin, and legitimacy, of Kaurareg Aboriginal peoples**

The Kaurareg peoples are recognized as traditional owners of Ngurupai<sup>2</sup> (Horn Island)<sup>3</sup>; Muralag (Prince of Wales Island); Zuna (Entrance Island); Tarilag (Packe Island); Yeta (Port Lihou Island); Damaralag (Dumuralug Islet); Mipa (Pipa Islet also known as Turtle Island) ("the Kaurareg Archipelago") and adjoining waters.

In the *Kaurareg People v Queensland* [2001] FCA 657 case the Federal Court of Australia recognized that the Kaurareg people hold native title over the above islands. The Kaurareg people are also widely acknowledged as the traditional owners of Kerriri (Hammond Island) and are its native title holders. While there is yet to be a formal determination as at this date in respect of Kerriri and for Kaurareg's remaining lands and surrounding seas, Kaurareg people have a registered native title claim over the islands and seas in proceedings QUD 362/10 in the Federal Court as at this date.

Accordingly, Kaurareg has procedural rights under the *Native Title Act* 1991 (Cwth) to be consulted in respect of future land use decisions that will affect those native title rights. Those native title rights exist now at common law.

In the Kaurareg proceedings, the Federal Court recognised that the Kaurareg people hold certain native title rights, including rights to take and hunt fish, to gather and conserve natural resources in the area for such purposes allowed by and under their traditional laws and customs. Their rights to access and preserve sites of spiritual or religious significance, in the lands and waters within their respective traditional territory for the purposes of ritual or ceremony, were also recognized.

Furthermore, under their own laws and customs it is necessary to seek and obtain the permission of the Kaurareg people before entering upon, and exploiting the resources in their country. In the Kaurareg proceedings, Justice Drummond noted that:

*"...the Kaurareg were the original inhabitants of the islands of the Kaurareg Archipelago prior to and at the time of the claim of sovereignty made on behalf of the English Crown in 1770 by Captain Cook and thereafter."*

Accordingly, the Federal Court acknowledged that the Kaurareg people have traditional rights that require people entering their country to respect their traditional laws and customs. Yet in spite of these recognitions by Australia's national government, Kaurareg still sees its lands and seas vested in the Crown and the Crown still continues its practice of integration as population management technique for its colonized Indigenous peoples.

Many Kaurareg now believe Australia's national governments are slowly and methodically winding back the rights at common law that the *Native Title Act 1993* brought them, and are puzzled by the native title jurisprudence presented to traditional owners. With this winding back of basic land rights, e.g. the recent Ward Case 2001, native title is seen in the simplest of terms: rights given with the one hand are taken away by the other hand.

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<sup>2</sup> Ngurupai, and other non-English names in this paragraph, represent the Kaurareg language name for the islands that form part of the Kaurareg archipelago, which are their traditional lands and seas, their homeland

<sup>3</sup> Horn Island is the colonial name given to the same island, as are other colonial names in brackets in this paragraph

## **“Restorative justice” means practical decolonization *not* practical reconciliation**

1. When breaches and violations of rights occur, the individual and groups of peoples who have suffered harm should be the singular witness/s for such occurrences
2. The full spectrum of the human condition should inform the remediation of harm for victims of harm, perpetrators of harm, and the environment where harm thrives

The above definitions of restorative justice both refer to remedies “after the fact” when an injustice has been committed. But what of the act of injustice itself? Kaurareg takes the view that colonization was that act of injustice, one proven to be illegitimate by the 1992 High Court of Australia decision that overturned the myth of terra nullius in regard to the Crown taking possession of the lands on what is today known as Australia.

While the downstream effects of colonization on Indigenous Australians includes many well-researched and documented evils and consequences on a dispossessed peoples, with policies and programs authored by Australian national and subnational governments, the cause of them all begins with the illegitimate possession of the land by the Crown. Terra nullius, as noted above, was overturned by the High Court of Australia. But what of the remedy for colonization?

To answer this question Kaurareg points to Australia managing its indigenous populations with management techniques that parallel, and if not mirror, the legitimate form of self-government listed in the Annex to General Assembly resolution 1541 (VX), 15 December 1960, Principles VIII and IX, known as “integration with an Independent State”. It is to be noted that Australia did not register its Indigenous peoples on the list of non-self-governing in 1945 territories when invited to do so by the UN Secretary General. Rather, it appears Australia chose non-conforming integration<sup>4</sup> for its Indigenous peoples.

As a result of this decision by Australia on behalf of its Indigenous populations, Australia embarked on a population management pathway whose trajectory Kaurareg believes to be as toxic for Indigenous Australians as its past population management techniques of assimilation. At base one is Kaurareg’s assertion that Indigenous Australians have been denied natural justice from the years since 1945, where the practice of non-conforming integration chosen by Australia has exacted the ongoing disadvantage and dispossession and, particularly in the case of Kaurareg, the exclusion and marginalization we still see today.

Principle VIII, one of two guidelines for integration with an independent State reads:

### **Principle VIII**

Integration with an independent State should be on the basis of complete equality between the peoples of the erstwhile Non-Self-Governing Territory and those of the independent country with which it is integrated. The peoples of both territories should have equal status and rights of citizenship and equal guarantees of fundamental rights and freedoms without any distinction or discrimination; both should have equal rights and opportunities for representation and effective participation at all levels in the executive, legislative and judicial organs of government.

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<sup>4</sup> Non-conforming integration in this submission means any practice of integration with an independent State that does not conform with the requirements of General Assembly resolution 1541 (XV) of 15 December 1960.

For the purposes of identifying causal factors that inform remedial actions on restorative justice, when we break down the content of Principle VIII into relevant sub-components, and analyse them, we see there are five in total including:

1. complete equality between the peoples of the erstwhile Non-Self-Governing Territory and those of the independent country with which it is integrated
2. equal status and rights of citizenship
3. equal guarantees of fundamental rights and freedoms without any distinction or discrimination
4. equal rights and opportunities for representation...at all levels in the executive, legislative and judicial organs of government
5. effective participation at all levels in the executive, legislative and judicial organs of government

In analyzing sub-component 1, from 1945 until today it is highly questionable to advance the notion of complete equality between Indigenous Australians and the rest of Australia. Numerous reports by national and subnational governments all point to their ongoing disadvantage, despite the policies and programs developed to alleviate that very same outcome. Complete equality between colonised peoples and the dominant culture of the colonisers is, like terra nullius, a "myth" that is yet to see the light of day.

In analyzing sub-component 2, we see the background reasons why Australia pursued its 1967 Referendum with such vigour. Those reasons point to the absolute requirement of changes to sections of Australia's Constitution, in order to comply with its obligations for international law and decolonization, and legitimate forms of self-government applying to its Indigenous peoples. Before the 1967 Referendum, Section 51 (xxvi) of the Australian Constitution discriminated against Australian Indigenous peoples, as it did not permit the exercise of constitutional powers to make special laws for Aboriginal peoples and Torres Strait Islanders in the States of Australia, as it did for "the people of any race."

For Section 127, not "reckoning" Indigenous Australians with other Australian citizens as part of "the numbers of the people of the Commonwealth" effectively meant Australia was practicing discrimination against them. And both Sections 51 (xxvi) and Section 127 effectively meant Aboriginal peoples and Torres Strait Islanders did *not* have the same equal status and rights of citizenship as other Australians, and were being discriminated against. At that time the factors of compliance for Australia, in relation to international law, is that the Commonwealth of Australia was the member of the United Nations and therefore the responsible party.

In analyzing sub-component 3, we see the *Racial Discrimination Act 1975* was Australia's response to the *International Covenant on Civil and Political Rights* (ICCPR). But in spite of the *Racial Discrimination Act 1975*, Kaurareg believes from first-hand experience that discrimination and distinction are still present in Australia, and are hidden and covert in Australia's practice of non-conforming integration which parallels the UN systems of decolonization. Before the 1967 Referendum, discrimination was overt and blatantly out in the open. Now it is hidden and covert.

In analyzing sub-component 4, while it is one thing for Australia after many years since the 1967 Referendum to point to evidence in legislation and policy of righting the wrong, e.g. through the *Aboriginal & Torres Strait Islander Commission Act 1989* and *Council for Aboriginal Reconciliation Act 1991* and to present such forms of evidence in reporting to the United Nations, it is entirely another matter of Indigenous peoples not possessing the economic base for people centred and infrastructure centred development for their communities, because of policies that up until 1970 continued to “steal” the legitimately earned wages of the same peoples it was reporting on. The Stolen Wages debacle.

And in analyzing sub-component 5, the effective participation by Indigenous Australians “at all levels in the executive, legislative and judicial organs of government” is minimal at best, and non-existent at worst, for all the reasons outlined above. It is the case for the Kaurareg nation of Aboriginal peoples, in their own homelands, that they still suffer exclusion from the decision making table and they still suffer from not having dedicated electoral representation in the governance and administration systems that manage their region. We turn now to Principle IX of the Annex.

Principle IX, one of two guidelines for integration with an independent State reads:

**Principle IX**

Integration should have come about in the following circumstances:

(a) The integrating territory should have attained an advanced stage of self-government with free political institutions, so that its peoples would have the capacity to make a responsible choice through informed and democratic processes;

(b) The integration should be the result of the freely expressed wishes of the territory's peoples acting with full knowledge of the change in their status, their wishes having been expressed through informed and democratic processes, impartially conducted and based on universal adult suffrage. The United Nations could, when it deems it necessary, supervise these processes.

For the purposes of identifying causal factors that inform remedial actions on restorative justice, when we break down the content of Principle IX (a) and (b) into their relevant sub-components, and analyse them, we see that (a) contains two sub-components while (b) contains three, as follows.

(a)...

1. The integrating territory should have attained an advanced stage of self-government with free political institutions,
2. its peoples would have the capacity to make a responsible choice through informed and democratic processes

(b)...

1. integration should be the result of the freely expressed wishes of the territory's peoples acting with full knowledge of the change in their status
2. their wishes having been expressed through informed and democratic processes
3. impartially conducted and based on universal adult suffrage



In analysing sub-component (a) 1, at this date the closest form Indigenous Australians have of "an advanced stage of self-government" "with free political institutions" is where e.g. Australia's subnational government of Queensland has Indigenous local governments under its *Local Government Act 2009*. In this submission, Kaurareg notes Australia's subnational government of Queensland but acknowledges that subnational governments of Australia may have similar examples of Indigenous local government that parallel or mirror their chosen pathway of non-conforming integration with an independent State.

Kaurareg is of the view that the highest form of integration with the independent State of Australia are the subnational governments of its six States and two Territories, with "self-government" and "free political institutions" in full integration with the independent State of Australia. On the other hand, Indigenous local government is the lowest form of integration with the independent State of Australia, a subset of subnational government whose structure conforms to non-conforming integration arrangements that Australia chose for its Indigenous peoples.

It is asserted by Kaurareg that the key reason for the slow progress of these Indigenous local governments to achieve "an advanced stage of self-government" "with free political institutions", of discarding their distinction from "mainstream" local government, is due to non-conforming integration arrangements with an independent State chosen for them, but not by them. In other words, non-conforming integration was chosen for them, then it was forced on them. Kaurareg believe this to be a denial of natural justice.

In analyzing sub-component (a) 2, we see a contingency which clearly links this to sub-component (a) 1, where (a) 1 reads as follows:

"The integrating territory should have attained an advanced stage of self-government with free political institutions, so that..."

it links to sub-component (a) 2 in the following manner,

"its peoples would have the capacity to make a responsible choice through informed and democratic processes."

In other words, sub-component (a) 2 only has force from the successful outcome of sub-component (a) 1. It is clear that without the success of sub-component (a) 1 Indigenous peoples would not acquire the "capacity to make a responsible choice through informed and democratic processes." which sub-component (a) 2 defines. In terms of restorative justice, Kaurareg deplores the decision "non-conforming integration with an independent State" that Australia made for them, without being given the opportunity of choosing their own futures and of exercising their inalienable right to self-determination.

There are many other decolonizing options and avenues Australia could choose from if it had listed its Indigenous Australians with the General Assembly as "non-self-governing territories" in 1945, or again in 1960, and yet again in 1992. In spite of the numerous times since 1945 where Australia could have implemented restorative justice, Australia has chosen not to take that pathway.

In analyzing sub-component (b) 1, in the normal course of events applying to a country that is obliged to transmit information under Article 73e of the United Nations Charter, the requirements in Principles VIII and IX of the Annex to General Assembly resolution 1541 (XV) would have commenced after the resolution had been passed. But this is not what happened with Indigenous Australians.

To Kaurareg's knowledge, no Indigenous Australian person can remember having freely expressed their wishes, or of acting with full knowledge of the change in their status, for "a responsible choice through informed and democratic processes;" such as are described in sub-component (a) 2, effectively moving them away from assimilation policies before the 1960 Declaration, to integration policies after the 1960 Declaration. Indigenous Australians cannot remember, since 1960 of, having ever attained to the requirements and their contingencies of sub-components (a) 1 and 2.

In analyzing sub-component (b) 2, since the 1960 Declaration, no Indigenous Australians can remember expressing their wishes for integration through informed and democratic processes. For example, it was not until 1962 when Australia's *Commonwealth Electoral Act* enfranchised Indigenous people by repealing the exclusion clause of the 1902 Act. For that reason, since Australia's 1967 Referendum, the only opportunity that Indigenous Australians had of voting in any way remotely like that as described in sub-component (b) 2, was in the Aboriginal & Torres Strait Islander Commission elections.

In analyzing sub-component (b) 3, apart from elections for the Aboriginal & Torres Strait Islander Commission, which are the closest examples that could be argued of Indigenous Australians voting on a decision for their integration with an independent State, there is no event in Australia's history where an Indigenous Australian can remember voting on integration with an independent State. Kaurareg believes there has been no impartially conducted voting, based on the principle of universal adult suffrage, where Indigenous Australians nation-wide have with the full knowledge of a change in their status, freely expressed their wishes to be integrated through informed and democratic processes.

Kaurareg believe that Australia made the unilateral decision for Indigenous Australians to be integrated to itself (as independent State) but did not inform Indigenous Australians of that decision. Not back then, and not to this date, as far as Kaurareg are aware. And as appointed member of the first Special Committee, General Assembly resolution 1654 (XVI), Australia had responsibility for implementing the *Declaration on the Granting of Independence to Colonial Countries and Peoples*. Australia was in place to:

1. make a decision for Indigenous Australians on integration with an independent State without conforming to General Assembly resolution 1541 (XV), and
2. keep information about the requirements and obligations that such a "decolonization decision" demands, away from the public arena

It is extremely difficult, for example, to find easily accessible material in public libraries on decolonization as it applies to Australia. But if Indigenous Australians were granted their inalienable human right to make such a profound decision about their future, as described in General Assembly resolutions 1514 (XV) and 1541 (XV), public information on how that process of integration was implemented would be found everywhere.

Such a profoundly significant matter as "integration with an independent State" *would* have been in the public interest because it would have affected all Australians and would arguably have profoundly influenced civil political economic social and cultural constructs of race relations in this country. That it did not happen this way gives Kaurareg all the reasons to assert their belief that they, and all Indigenous Australians, have been denied natural justice. Implementation would have highlighted, for example, the historical fact that Australia had chosen to acknowledge and deal with its Indigenous peoples as a race of people, rather than as a nation of peoples.

That Australia conducted itself in this manner, of the unilateral decision for Indigenous Australians to be integrated, is believed a serious violation of their inalienable human rights. And possibly one that Kaurareg believes to yet be contested in the International Court of Justice, given the disadvantage and other life threatening circumstances that indigenous Australians have experienced since colonization, and continue to be subject to, under the forced policies and practices of non-conforming integration.

Presumably using its influence as an appointed member to the first Special Committee on the *Situation with regard to Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples*, Kaurareg believes Australia was able to "disguise" this serious violation of the inalienable human rights of Indigenous Australians from the United Nations General Assembly through non-conforming integration.

Kaurareg also believe that as a Special Committee member, Australia was able to avoid publicly announcing to the United Nations and to its own citizens, the unilateral decision on its changes to Indigenous population management. From assimilation to integration. And importantly, it also avoided the obligation to transmit decolonization information to the Secretary-General, as prescribed by Article 73e of the United Nations Charter.

The complicity in Australia's history of imposing a population management technique of a non-conforming integration arrangement with an independent State, is what Kaurareg believes to constitute a serious violation of the inalienable human rights of Indigenous Australians. Kaurareg thus describes Australia's non-conforming integration actions as "invalid and illegitimate" by virtue of the fact it deliberately did not follow the guidelines enshrined in Principles VIII and IX of the Annex, General Assembly resolution 1541 (XV).

And in terms of restorative justice, rather than Australia's national government making any attempt to correct violations of Indigenous Australians' rights by undertaking what should rightfully be "catch-up", by reintroducing the requirements of General Assembly resolution 1541 (XV) Principles VIII and IX to correct the deception and to start afresh, Australia has opted instead to continue the subjection of Indigenous Australians to long-term subservience of non-confirming integration with an independent State. As noted elsewhere in this submission, Kaurareg believes it amounts to the ongoing perpetuation of denial of their natural justice.

In this year 2014 reporting continues in the latest Overcoming Indigenous Disadvantage: Key Indicators 2011, where Australia through its Productivity Commission delivers its key blueprint for national and sub-national governments that demonstrate to the world they are genuinely dismantling colonialism. Three important reporting aspects of the Council of Australian Governments work is mutual responsibility, shared resource agreements, and expenditure by national and subnational governments for Indigenous Australians.

Kaurareg are of the belief that mutual responsibility and shared resource agreements are mechanisms that perform two key functions. In the first function, mutual responsibility satisfies the requirements for decolonization's actions and processes at the international level, demonstrating that Australia's obligations are in this Third International Decade of the Eradication of Colonialism, genuinely on dismantling of colonialism. In the second function, shared resource agreements satisfies onshore requirements that Australia has of implementing and embedding, of substantiating and maintaining, its arrangements of non-conforming integration with an independent State imposed on Indigenous Australians since the 1960 Declaration.

Kaurareg firmly believes it has been denied natural justice and seeks appropriate remedy to the evils of colonization through a focus on restorative justice, to right the wrongs that are still being implemented on Indigenous Australians by Australia's non-conforming integration with an independent State.

*Recommendation 1: that restorative justice for the Kaurareg nation of Aboriginal peoples in Australia be effected to its fullest extent, such that it factors on the:*

- 5. granting of natural justice pursuant to practical decolonization beginning with listing as non-self-governing territory with the United Nations General Assembly*
- 6. return of all territories, known as the Kaurareg archipelago, from the nation State of Australia for the benefit of all its present inhabitants*
- 7. return of decision making control for the quality of their lifestyles and environment, as enjoyed before the onslaught of colonization*
- 8. restoration of what was lost by dispossession and disadvantage, from their everyday human condition of autochthones, caused by the evils of colonization*

## **“Indigenous juridical systems” Kergne is Kaurareg’s surviving lore/law system**

3. All planning on remedial action to implement restorative justice proceeds as above with equity of input, throughput, and output from Indigenous juridical systems

Item 3 above forms part of Kaurareg’s three-part restorative justice definition on page 3.

Similar to other autochthonous peoples, Kaurareg have a very well-defined and coherent system of governance and administration. One that has been practiced for generations before time (see footnote page 3). In Kaurareg language, that juridical system is called Kergne (its closest pronunciation is care-nay). In Kergne, the roles and responsibilities of Kaurareg, their entitlements and benefits by gender and age are all very well defined and coherent, and all ordered to ensure their relevance and continuity to all adherents.

Kergne possesses punitive measures for persons who break the lore/law, and it provides a critical connection for all tribal groups, clan groups, and extended families to the lands and the surrounding seas. Resources of Kaurareg lands and seas are bound by Kergne lore/law bearing visible territorial markers well known to adherents. For these reasons, trespass by mistake is virtually impossible in Kergne, and Indigenous mercantile customs with practices of bartering for the purposes of trade are Kergne compliant and universal.

Kaurareg are well aware their territory in the Asia-Pacific region is strategically located between the three international countries of Australia, Papua New Guinea, and Indonesia (West Papua). Today the world sees a US pivot to Asia with the movement of 60% of its US Sixth Fleet into the Asia-Pacific region, the embedding of US marines on Australian soil, Australia’s focus on defence of its northern borders and airspace, and the protection of vital shipping routes for trade. With the potential of PNGs defence system estimated to last four days in the event of invasion, the retreat of Australia’s neighbours and allies will route through Kaiwalagal and Kaurareg, presenting allied forces with a small window of opportunity.

In this regard it is to be noted that Kaurareg have always defended their borders, long before the claim of sovereignty by the Crown, but over the intervening years have been overlooked as the most appropriate human resources on the ground to defend against hostilities. And whether the siting of assets on Kaurareg traditional land, the hosting of allied forces as part of Australia’s northern defences, or the training of Indigenous locals to defend their lands and seas, Kaurareg holds a developmental potential in its land and human resources pursuant to defence of their own lands and seas that it firmly believes should not be overlooked *again* as it has been many times in the past.

All of the above public arena information, as troubling as it appears, does not deter the urgency that Kaurareg has of taking its rightful place with all Australia to defend its own, and Australia’s, interests. Rather, this knowledge spurs them on. It is asserted again that Kaurareg’s enthusiasm and positive energy to defend Australia’s northern borders should not be overlooked. Adding to this point, their ordered systems of Kergne lore/law applied to the defence of their territory should not be discounted as a potent logistic and meaningful resource for the defence of lands and seas.

At the apex of Kergne are senior Elders who delegate their collected wisdom to ranks of delegated leaders below them, who filter it down to younger warriors, then on to parents and children. In the Kergne juridical system the importance of border protection is their shared responsibility for maintaining Kaurareg territorial integrity. These few details are the broad outlines of Kaurareg's Kergne lore/law, the content of which is passed down by the initiate father to his initiate son and by mother to daughter.

Understandably, Kergne cannot be committed to visible records and symbols inscribed on surfaces displaying their lore/law and customs for all to see. Equally as understandable, their oral transmission of lore/law and customs cannot be included in this submission or be recorded in any other medium, whether in writing audio and/or visual. Kergne must remain an oral custom and tradition. It is therefore a profound relief for senior Elders that the resilience of their autochthonous human condition has survived the onslaught of colonization and in spite of Australia's continuing practice of integration, Kergne lore/law continues its relevance and growth amongst its peoples.

In contrast to the well-ordered system of Kergne lore/law, the three tiers of national and subnational government in the Kaiwalagal region maintain their jurisdictions with many overlaps and gaps. Waibene (Thursday Island) is the administrative centre of the entire region and is an island of about 1.5kms wide and 1km long, with co-location of over 30 national and subnational government departments and agencies. The key reason for this number is Kaiwalagal is located between the three international countries of Australia, Papua New Guinea, and West Papua (Indonesia) as noted earlier, and justifiably referred to as the gateway between Australia, the South East Asian region, and beyond.

With so many government departments and agencies representing their jurisdictions in the region, one could easily think their presence translates to a thriving and contented population. Sadly, this is not true. There is instead a wide-spread unhappiness amongst locals because basic needs are not being adequately met in the housing health education and most sectors, in spite of the magnificent efforts by skilled and semi-skilled workers in those sectors, and for all of the reasons as outlined in the earlier chapter on non-confirming integration with an independent State.

Here the Kaurareg nation of Aboriginal peoples, who in spite of recognition by Australia's Federal Court as traditional owners and as holders of native title territory, do not enjoy discrete electoral representation. Not the centripetal electoral systems for the national institution of the Torres Strait Regional Authority (TSRA), nor the subnational institutions of Torres Strait Island Regional Council (TSIRC) and Torres Shire Council (TSC). The recognition is not lost on Kaurareg of the need to articulate their unique circumstances in the electorates, and their voices to be heard and counted in discrete electoral systems through their own chosen representatives.

Indigenous peoples who are appointed to represent the electorates named above are not traditional owners of the lands and seas. That is, they are not of Kaurareg descent, but routinely make decisions on quality of lifestyles and environment of Kaurareg peoples. Protests about the relevance and rigor of decisions are politely acknowledged but with not having discrete electoral representatives are mostly ignored and unresolved.

It would seem that Kaurareg's long-held aspiration for discrete electoral recognition has not been considered relevant or worthy of inclusion in the national or subnational, nor in the regional, interest. Kaurareg firmly disagrees.

Consequently, the non-Kaurareg Indigenous decision makers and management of these institutions bear the brunt of local unhappiness when the quality of life circumstances and their built environment needs are not adequately met. Increasingly being seen as puppets for legislators and policy makers located in far-away distant capitals, this new wave of decision makers continue their population management control techniques from their former bosses, on other Indigenous peoples. Lateral violence is the obvious result of such techniques, whose impact is often borne by the health and welfare sectors.

This new wave of neo-colonialism, where non-Kaurareg Indigenous Australians continue in the same trajectory of implementing non-conforming integration on Kaurareg peoples as did their colonial masters on them, while manifestly sad is a critical evidence of why Kergne lore/law must be accepted on par with all juridical systems populating national and subnational systems of governance and administration on Kaurareg lands and seas.

And in the area of trade and commerce, Kaurareg peoples believe the gap between their Indigenous technology and Australia's technology is rapidly closing as the land and sea management techniques and practices by Australia more closely resemble those practiced by Kaurareg before time, and where pharmacopeia research yields the active ingredients in bush medicines which have been used for countless generations. The Kaurareg nation of Aboriginal peoples have much to offer the nation State of Australia, as has been listed in this submission, if the rules of engagement are founded on equitable terms amongst all parties and stakeholders.

This is Kergne.

For all of these reasons and more, Kaurareg seek nothing less than the full recognition and appreciation of their Kergne lore/law at equitable levels of contribution and access to development of all economic social cultural civil and political and processes inhering in national and subnational governments. Kaurareg strongly believe that Kergne lore/law is the key element to successfully engage with their autochthonous peoples.

This, too, is Kergne.

*Recommendation 2: that Kaurareg's juridical system of Kergne lore/law be accepted on par with juridical systems practiced by Australia's national and subnational governments, for its integral valid and legitimate input throughput and output to all economic social cultural civil and political developments that benefit the quality of their lifestyles, their built and natural environments.*

Kaurareg humbly tender this submission to EMRIP's Study on *Access to justice in the promotion and protection of the rights of Indigenous peoples*, and hope it may be of some use for all the world's Indigenous peoples.