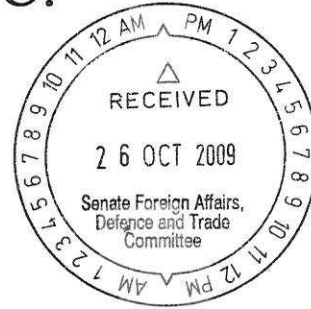


# DAN O'GORMAN S.C.

BARRISTER-AT-LAW

The Committee Secretary  
Senate Foreign Affairs, Defence and Trade  
References Committee  
PO Box 6100  
Parliament House  
CANBERRA ACT 2600



Dear Committee Secretary

## **RE: INQUIRY INTO MATTERS RELATING TO THE TORRES STRAIT REGION\***

### **INDEX**

1. This submission deals with the following topics:

• Executive Summary	Page 1
• Introduction	2
• Background of the Gizra Tribe	3
• Connections with other people	4
• The <i>Treaty</i>	5
• Submissions of the Gizra Tribe	10
• Conclusion	18

### **EXECUTIVE SUMMARY**

2. In summary, the Gizra Tribe submits that:-

- (a) the Gizra Tribe has a very long historical connection with the Torres Strait, and with Torres Strait Islanders;
- (b) consequently, the Torres Strait Treaty should be amended so as to include the Gizra Tribe's villages within its terms; and

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\* This submission is made on behalf of the Gizra Tribe free of charge (that is, this submission has been prepared by the author without seeking or receiving any fee from the Gizra Tribe or from anyone else).

ROMA MITCHELL CHAMBERS  
12<sup>th</sup> FLOOR, QUAY CENTRAL  
95 NORTH QUAY  
BRISBANE QLD 4000  
TEL 00116173236 1431 FAX 00116173236 3949  
MOB 00617418 769 653  
DX 949 BRISBANE  
email: [dogorman@qldbar.asn.au](mailto:dogorman@qldbar.asn.au)  
ABN 96 784 086 439

- (c) this Committee should recommend to the Australian Government that the Australian Government should use its relationship with the Government of Papua New Guinea to have the Gizra Tribe's villages included within the terms of the Torres Strait Treaty
3. That is, the Gizra Tribe seek recognition by Australia of their traditional inherent rights of access to and movement in the Torres Strait region for traditional purposes and for usage and ownership of their traditionally shared resources in the Torres Strait in the same manner as that enjoyed by Torres Strait Islanders (Siepam) and the Australian Aborigines (Malig and Gudang).
  4. The author has visited the Gizra Tribe on numerous occasions in the last three years so as to enable him to act on behalf of the Gizra Tribe whose member, Mr Pende Gamogab, is a respondent to the Torres Strait Regional Seas Claim which is a native title determination application over most of the waters of the Torres Strait made by certain Torres Strait Islanders<sup>1</sup>.

## INTRODUCTION

5. This submission is made at the request of, and on behalf of, the Dangkaloub-Gizra Tribe (hereinafter referred to as "the Gizra Tribe") of the Western Province of Papua New Guinea ("PNG").

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<sup>1</sup> The applicants referred to the claim as the '*Torres Strait Regional Seas Claim*'. The Torres Strait Island communities, on whose behalf the application was brought, comprise the native title claim group and were collectively designated the Torres Strait Regional Seas Claim Group. The area covered by the application is approximately 44,000 square kilometres in the Torres Strait and the Coral Sea seaward of the high water mark around islands in the Torres Strait and it includes beaches, reclaimed areas and inter-tidal zones. For the purposes of defining parts of the Torres Strait which are the subject of the application, the land and waters are divided into two parts, Part A and Part B. Part A claims "*all of the lands, waters, reefs, sandbanks, shoals, seabeds and subsoil on the seaward side of the high water mark contained within*" described external boundaries which include the outer limit of the territorial sea of the islands of Aubusi, Boigu, Moimi, Dauan, Kaumag, Saibai; of Anchor Cay and East Cay; of Black Rocks and Bramble Cay; of Deliverance Island and Kerr Islet; of Pearce Cay; of Turnagain Island and of Turu Cay, while Part B claims "*the waters on the seaward side of the high water mark, but not the seabed or subsoil, exclusive of the territorial seas, of Aubusi, Boigu, Moimi, Dauan, Kaumag and Saibai*", contained within the external boundary so described. The native title rights and interests claimed are divided into two parts. The first part covers areas not subject to certain types of "*public rights' or previous acts*" and in those parts the claim is for exclusive possession. In relation to other areas the native title rights and interests claimed include rights to "*control the access to, and use and enjoyment of, the land and waters and the taking of resources by others*" subject to various exceptions. See, in particular, *Akiba & Others on behalf of the Torres Strait Regional Seas Claim People v State of Queensland (No. 2)* [2006] FCA 1102 especially at [1]-[3], *Akiba & Others on behalf of the Torres Strait Regional Seas Claim People v State of Queensland (No. 2)* (2006) 154 FCR 513 and *Gamogab v Akiba* [2007] FCAFC 74. It is also to be noted that some of the exhibits and oral evidence given in the hearing of this native title determination application before Finn J is referred to in this submission.



6. In making this submission to the *Inquiry into matters relating to the Torres Strait Region* (“the *Inquiry*”), the author has been instructed by the Gizra Tribe to focus on that part of the *Inquiry* that relates to the provisions of the Torres Strait Treaty.
7. More particularly, this submission seeks to address the administration and management of matters relating to Australia’s northern air, sea and land approaches in the region of the Torres Strait, including the provisions of the Torres Strait Treaty.

### **BACKGROUND OF THE GIZRA TRIBE**

8. Members of the Gizra Tribe assert that they are the traditional inherent land and resource owners and users as original inhabitants of the customary land on the coast of PNG and in the seas of the Torres Strait, together with their Siepam (Torres Strait Islanders) and Abarsen (Malig and Gudang Aborigines) relatives.
9. The Gizra Tribe occupies and inhabits the area north, north-west and north-east of the Torres Strait Island of Saibai.
10. Members of the Gizra Tribe live in the villages of Barnap, Kulalae, Kupere, Ngomtomo (also known as Togo) and Waidoro in the Western Province of PNG. As at 2000, 28 people lived at Barnap Village, 372 lived at Kulalae, 70 lived at Kupere, 62 lived at Togo and 330 lived at Waidoro Village<sup>2</sup>.
11. The Kupere Village (also known as Kupiru) is located on the edge of the Oriomo Plateau north west of Daru. It is in the South Fly District of the Western Province on the fringe of lowland forest. The Kupere Village stands near an ancient traditional village site (KOB0) where the first white man is said to have met their people.
12. There are three clans or groups of the Gizra Tribe, namely, the Dangkaloub Group (comprising the people of Barnap, Kulalae and Kupere), Zibram Group (comprising the people of Waidoro) and the Gizra Group (comprising the people of Togo).
13. The origins of the Gizra Tribe includes these three Dangkaloub, Zibram and Gizra culture groups. These groups merged at Basir Puerk with whatever socio-magical powers and belief the Gizra valued and used to master their environment as invested and instigated by their creator, Geadap. All was inherited from the creator and the

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<sup>2</sup> Papua New Guinea national census of 2000

people were bound together by common customs and beliefs, whether on the land or on the sea. The Myth of Origin, which is said to have been passed from generation to generation, also stated that the Abarsen (Aborigines) and the Siepams (Western Torres Strait Islanders), the Maligs, the Kutargs and the Gizra had the one common birth place at Basir Puerk, otherwise known as Mabudawan.

14. The traditional land boundaries of the Gizra tribe and ownership of the resources of the intertidal zone on the coastal shoreline were according to a clan allocation. An area of the Torres Strait from the south to the north represented a Dugong called "Gisu" lying from the sea in the Torres Strait towards the PNG mainland where Dugong rituals were performed, and this included Mari Island. Gizra territory hosts the body heart and the head of the Dugong making it a special area within the region. Gizra and Siepam (that is, Torres Strait Islanders) were said to have a common belief about the shape of the Dugong and its role in creation of life in the sea.

### **CONNECTIONS WITH OTHER PEOPLE**

15. The Gizra Tribe has a very long historical connection with the Torres Strait and with Torres Strait Islanders. While this topic will be further dealt with later in this submission, it is useful to highlight some issues at the beginning of this submission.
16. Linguistically and culturally, Gizra is the Papuan group in PNG closest to the Torres Strait Islanders and the Abarsen on the Australian mainland. Research by anthropologist, Professor Wurm, in 1975 revealed Gizra's closest linguistic relative in the Mirim language of the Easter Torres Strait. This was not a trade language but a language inherited from cultural heroes.
17. The customary practice of barter trade between the Torres Strait Islanders and Gizra was initially somewhat informal and ad hoc and was based on a clan or sub-clan totemic relationship. The Gizra Tribe would trade artefacts, garden food, natural edible fruits and crops in return for clothes, knives, axes, cooking utensils and banana leaves for smoking. Major trading took place at Basir Puerk and Agoar Point. Both the Islanders and the Gizra advised when trading was going to take place by sending smoke signals and tallying with broom sticks.
18. Traditional marine tenure was based on a totemic system determining the clan which in turn would determine the ownership and usage rights. The Gizra and Dangaloub of



Kupiru believed that all creatures in the sea were the work of the creator Gisu. The general term which the Gizra and the Dangkaloub used to classify aquatic marine plants and animals is “Maluan Zaa”.

19. The Dangkaloub used the sea and the coast traditionally for their livelihood, and they continue to do so today. Additionally, individual rituals and the application of magical spells is respected and practised in hunting and fishing activities in the sea by both Gizra and the Torres Strait Island community.
20. The Dangkaloub claim a very strong linkage to the Torres Strait marine environment. The local cultural perception of Dugong was widespread throughout the entire Torres Strait region, inland Papuan villages and coastal Papuan villages. The Dangkaloub originally used the sea by walking, by using bamboo rafts and by using canoes. The canoe was invented by their ancestor, Muiam, and when Muiam travelled east he would use the canoe which inspired Kiwai and other people to make their own canoes.

### **THE TREATY**

21. The *Treaty between Australian and the Independent State of Papua New Guinea concerning Sovereignty and Maritime Boundaries in the area between the two Countries, including the area known as Torres Strait, and Related Matters* [1985] ATS 4 (“the *Treaty*”) between Australia and the Independent State of Papua New Guinea was made on 18 December 1978 and entered into force on 15 February 1985.
22. In giving effect to its obligations under the *Treaty*, Australia passed a number of amendments to various Acts by the *Torres Strait Treaty (Miscellaneous Amendments) Act 1984* (Cth). The *Torres Strait Fisheries Act 1984* (Cth) (the *Act*) was also enacted. Its long title was:
 

*‘An Act relating to fisheries in certain waters between Australia and the Independent State of Papua New Guinea.’*
23. It provided for the regulation of fishing and for the issue of licences of various kinds for taking fish in the course of community fishing and for commercial fishing. Section 8 of the *Act* provides:
 

*“In the administration of this Act, regard shall be had to the rights and obligations conferred on Australia by the Torres Strait Treaty and in*

*particular to the individual way of life and livelihood of traditional inhabitants, including their rights in relation to traditional fishing.”*

24. Pursuant to s. 3 of the *Act*, the definitions of “*traditional inhabitants*” and “*traditional fishing*” incorporated the definitions of those terms in the *Treaty*.
25. The *Treaty* outlines the agreement reached between Australia and Papua New Guinea as to their respective sovereignty over certain islands, maritime boundaries and certain other matters including rights of fishing and protection of the marine environment<sup>3</sup>.
26. The *Treaty* deals with, among other things, “*Maritime jurisdiction*”<sup>4</sup>. The “*seabed jurisdiction*” involves sovereign rights over the continental shelf, including over low-tide elevations, in accordance with international law, and the “*fisheries jurisdiction*” refers to sovereign rights for the purpose of exploring and exploiting and conserving and managing fisheries resources, other than sedentary species. There are map coordinates given for a “*seabed jurisdiction*” line and a “*fisheries jurisdiction*” line. A review of the coordinates provided as Annexures to the *Treaty* suggests that, for the most part, the lines run together and form a single boundary. This appears to be borne out by a map accompanying the *Treaty* which refers to the “*Seabed Jurisdiction line and the Fisheries Jurisdiction line*”. The result is that in the area to the north of the boundary affected, PNG has sovereign rights, in the nature of both seabed and fisheries jurisdiction and Australia has jurisdiction with respect to the area to the south of those lines.
27. Some of the other important provisions of the *Treaty* include the following:
  - Papua New Guinea recognises Australia’s sovereignty over all islands south of a seabed jurisdiction line referred to in Article 4(1) of the *Treaty* (defined in Annexure 5 of the *Treaty* and shown on a map comprising Annexure 6) and recognises Australia’s sovereignty over specified islands and cays north of the line, namely Aubusi, Boigu, Dauan, Deliverance, Kaumag, Kerr, Moimi, Saibai and Turnagain Islands<sup>5</sup>;

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<sup>3</sup> Recitals of the *Treaty*

<sup>4</sup> Article 4 of the *Treaty*

<sup>5</sup> Article 2(1) of the *Treaty*



- Australia recognises Papua New Guinea’s sovereignty over all islands north of the seabed jurisdiction line and three islands south of the line, being Kawa, Mata Kawa and Kussa Islands<sup>6</sup>; and
  - establishes a Protected Zone.
28. The *Treaty* also defines a ‘*Protected Zone*’ comprising all the land, sea, airspace, seabed and subsoil within an area bounded by a line described in Annex 9 to the *Treaty* and shown in a map comprising Annex 7<sup>7</sup>. The *Protected Zone* lies both to the north and south of the seabed jurisdiction line in the area between the two mainlands, and its purpose is outlined thus<sup>8</sup>:
- “The principal purpose of the Parties in establishing the Protected Zone, and in determining its northern, southern, eastern and western boundaries, is to acknowledge and protect the traditional way of life and livelihood of the traditional inhabitants including their traditional fishing and free movement.”*
29. The background to the creation of the *Protected Zone* was referred to by Mr H Burmester<sup>9</sup>:
- “In the past, there was freedom of movement between the islands and the coast of Papua New Guinea. Traditional activities were pursued without concern for the niceties of international boundaries or customs and immigration formalities. During the negotiations, the islanders made very clear to the Australian Government their concern that traditional practices and freedom of movement be allowed to continue. The islanders insisted that ‘traditional boundaries’ in fact existed between their areas and areas belonging to the inhabitants of Papua New Guinea. These boundaries were similar to, but not identical with, the 1879 line referred to above. At the time of negotiations, it was apparent that the use of the Strait by islanders and coastal Papuans involved considerable movement of both groups through the area. While not great in numbers, the islanders and coastal Papua New Guineans who lived in the Strait or its vicinity depended largely on its resources for their livelihood. Their traditional way of life closely linked to the special features of the area.”*
30. The stated principal purpose of the Treaty Parties, in establishing the *Protected Zone*, was said to be “*acknowledge and protect the traditional way of life and livelihood of the traditional inhabitants including their traditional fishing and free movement*”.
31. Of further importance is the following provision of the *Treaty*<sup>10</sup>:

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<sup>6</sup> Article 2(3) of the *Treaty*

<sup>7</sup> Article 10 of the *Treaty*

<sup>8</sup> Article 10(3) of the *Treaty*

<sup>9</sup> in his article ‘The Torres Strait Treaty: Boundary Delimitation by Agreement’, *American Journal of International Law*, vol 76, no 321, 1982 pp 329-30

<sup>10</sup> Article 12 of the *Treaty*

*“Where the traditional inhabitants of any Party enjoy traditional customary rights of access to and usage of areas of land, seabed, seas, estuaries and coastal tidal areas that are in or in the vicinity of the Protected Zone and that are under the jurisdiction of the other Party, and those rights are acknowledged by the traditional inhabitants living in or in proximity to those areas to be in accordance with local tradition, the other Party shall permit the continued exercise of those rights on conditions not less favourable than those applying to like rights of its own traditional inhabitants.”*

32. The term “*traditional activities*” is defined<sup>11</sup> to mean activities performed by the traditional inhabitants in accordance with local tradition, and includes, when so performed:
- (a) activities on land, including gardening, collection of food and hunting;
  - (b) activities on water, including traditional fishing;
  - (c) religious and secular ceremonies or gatherings for social purposes, for example, marriage celebrations and settlement of disputes; and
  - (d) barter and market trade.
33. The term “*traditional fishing*” is defined<sup>12</sup> to mean the taking, by traditional inhabitants for their own or their dependents’ consumption or for use in the course of other traditional activities, of the living natural resources of the sea, seabed, estuaries and coastal tidal areas, including dugong and turtle.
34. The term “*traditional inhabitants*” in relation to Papua New Guinea, includes persons who<sup>13</sup>:
- (a) live in the Protected Zone or the adjacent coastal area of Papua New Guinea,
  - (b) are citizens of Papua New Guinea, and
  - (c) maintain traditional customary associations with areas or features in or in the vicinity of the Protected Zone in relation to their subsistence or livelihood or social, cultural or religious activities.
35. However, the definition of “*traditional inhabitants*” in relation to Papua New Guinea in the *Treaty* did not lend itself to a straightforward identification of the PNG nationals who would benefit from the *Treaty*<sup>14</sup>. A list of villages whose inhabitants

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<sup>11</sup> Article 1(k) of the *Treaty*

<sup>12</sup> Article 1(l) of the *Treaty*

<sup>13</sup> Article 1(m) of the *Treaty*

<sup>14</sup> see the comments of French J (as he then was) in *Akiba and Others on behalf of the Torres Strait Regional Seas Claim People v State of Queensland (No. 2)* (2006) 154 FCR 513 at [26]



were to be regarded as “*traditional inhabitants*” for the purposes of the *Treaty* were also outlined by Exchange of Notes in 2000, the result of which was that Australia and Papua New Guinea acknowledged “*traditional inhabitants*” from an agreed list of 13 villages, namely (in alphabetical order):

- Bula;
- Buzi/Ber;
- Jarai;
- Kadawa;
- Katatai;
- Mabuduan;
- Mari;
- Old Mawatta;
- Parama;
- Sigabaduru;
- Sui;
- Tais; and
- Tureture.

36. This effectively restricted the definition of the term “*traditional inhabitants*” to people from one of the 13 listed “*Treaty villages*”. This created two classes of PNG nationals who might seek access to Australian waters, the first are those nationals who are from *Treaty* villages and who are accepted as beneficiaries of the *Treaty*, while the second consists of nationals who did not have the benefit of the *Treaty*. Put another way, it is only persons from these 13 villages to whom “*free movement*” is accorded under the *Treaty*. Hence, persons from the Gizra Villages of Barnap, Kulalae, Kupere, Ngomtomo and Waidoro do not have the right of such “*free movement*”.

37. In the said Australian High Commission’s Note No. 221/00<sup>15</sup>, the Australian High Commission stated:

*“The Australian Government notes that the thirteen villages listed above are located “in the vicinity of the Torres Strait Protected Zone”, lying south of the parallel of latitude 9 degrees South and west of the meridian of longitude 144 degrees East. These boundaries were agreed at discussion between the two Governments on 21 May 1984. The Australian Government further notes that*

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<sup>15</sup> which confirmed an understanding reached between the governments of PNG and Australia and the purpose of which was said to be to “*formalise the full list of Treaty villages to benefit from the free movement provisions*” of the *Treaty*

inhabitants of those villages have engaged in traditional cross-border movements since before Papua New Guinea's Independence in 1975 to the present day. The Australian Government also observes that free movement into the Torres Strait by Traditional Inhabitants from the 13 villages listed above has, in practical terms, been acknowledged amongst Traditional Inhabitants in Papua New Guinea and Australia and accepted by the Governments of both countries.

*The Australian High Commission proposes that the list of 13 villages should be included in the local-level guidelines. The Australian High Commission further proposes that the identification of these villages should not exclude the application of free movement provisions to Traditional Inhabitants of additional villages, if at some point in the future their inclusion is deemed appropriate by the Traditional Inhabitants of Papua New Guinea and Australia, in consultation with the Governments of both countries, consistent with the provisions of the Torres Strait Treaty.” (emphasis added).*

38. Members of the Gizra Tribe respectfully submit that it would be entirely appropriate to have the villages of Barnap, Kupere, Kulalae, Ngomtomo, Togo and Waidoro included in the *Treaty* because, for no apparent logical reason, those villages are not currently included in the *Treaty*.

#### **SUBMISSIONS OF THE GIZRA TRIBE**

39. The Gizra Tribe do not assert any rights and interests over any area covered by the *Treaty* to the exclusion of others with rights and interests over areas covered by the *Treaty*. Rather, the Gizra Tribe asserts that their rights and interests are a qualification upon the rights and interests asserted by others where such rights and interests asserted by others interfere with or restrict those rights and interests asserted by the Gizra Tribe.
40. The criteria for the recognition of native title rights and interests at common law do not exclude the possibility that the common law could recognise the traditional rights and interests of persons who are neither Australian residents or Australian citizens<sup>16</sup>. Hence, it is possible that PNG nationals such as the members of the Gizra Tribe living in PNG who are a traditional inhabitants of the claim area may have rights and interests capable of recognition by the common law<sup>17</sup>.

<sup>16</sup> *Akiba and Others on Behalf of the Torres Strait Regional Seas Claim People v State of Queensland (No 2)* (2006) 154 FCR 513 per French J at [35]

<sup>17</sup> *Akiba and Others on Behalf of the Torres Strait Regional Seas Claim People v State of Queensland (No 2)* (2006) 154 FCR 513 per French J at [35]



41. There is a great deal of evidence in support of the contention of the Gizra Tribe that they have had, and continue to have, rights and interests in the *Treaty* area. It appears to be non-controversial that the Gizra Tribe was and is a part of the society to which the Torres Strait Islanders belong. For example, Professor Jeremy Beckett (Anthropologist) states that “(t)he Indigenous tradition that (Torres Strait Islanders) were settled from Papua is supported by the Islanders’ physical appearance”<sup>18</sup>. He also states that “(i)n material culture, the Papuan influence was again dominant”<sup>19</sup>, and that “...economically and culturally, if not politically, (Torres Strait Islanders) had been dependent on their Papuan neighbours before colonization. Indeed, without the canoes which their trading partners sent them they could not have lived on their islands”<sup>20</sup>.
42. Johannes & MacFarlane (Anthropologists) have noted<sup>21</sup>:
- Papuans had traditionally fished and traded into the strait far south of the existing PNG/Australia border;
  - “*Speaking on behalf of Papuan dugong hunters in Torres Strait, Olewale and Sedu (1980) said:*  
  
*Older people know a lot about the biology of these animals. We want to work with scientists, but we do not want to see money wasted on finding out things we already know. We can provide this information if we are asked.....We are not saying that we know everything about them, but that we, the village people, and you, the scientists, must co-operate and share knowledge, because we want to learn more too.*” (emphasis added);
  - green turtles are also harvested in the Torres Strait by Papuan fisherman;
43. As to trading, Professor Beckett has noted that before the Europeans, “...trade with Papua was much more important than with Australia, in particular that to secure the dugouts from which the Islanders made their canoes (Haddon 1904: 295; 1908: 186-7)”<sup>22</sup>. He also refers to the people of Saibai buying canoes from their Papuan neighbours as recently at 1980<sup>23</sup>.

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<sup>18</sup> Jeremy Beckett: “*Torres Strait Islanders: Custom and Colonialism*” (Cambridge University Press, 1987) at p 25.6

<sup>19</sup> Jeremy Beckett: “*Torres Strait Islanders: Custom and Colonialism*” (Cambridge University Press, 1987) at p 25.9

<sup>20</sup> Jeremy Beckett: “*Torres Strait Islanders: Custom and Colonialism*” (Cambridge University Press, 1987) at p 109.1

<sup>21</sup> in *Traditional Fishing in the Torres Strait Islands* by RE Johannes and JW MacFarlane

<sup>22</sup> Jeremy Beckett: “*Torres Strait Islanders: Custom and Colonialism*”, (Cambridge University Press, 1987) at pp 25.9 - 26.1

<sup>23</sup> Jeremy Beckett: “*Torres Strait Islanders: Custom and Colonialism*”, (Cambridge University Press, 1987) at p

Use of the waters

44. Mr Gamogab has outlined the Gizra Tribe's use of the sea thus<sup>24</sup>:

- [148] *To the Gizra Tribe the sea has traditionally been a marine garden that must be used, managed and harvested in very special ways.*
- [149] *The Gizra Tribe has a very strong and a very long linkage to the Torres Strait marine environment.*
- [150] *The Gizra people believe that Australia was once connected to PNG through Cape York. That is, we believe that Australia and PNG were one land mass in the past.*
- [151] *Gizra refer to Warrior Reef as markukus, a submerged land bridge extending from Aguarr on the PNG coast to Ait on the eastern tip of Saibai then due east and south into Mari Island and into Malubarr, the Great Barrier Reef and then into Cape York, Auma Malu.*
- [152] *Warrior Reef is actually a part of the sacred pathway of Gisu. It is the sacred route Gisu uses to visit Dungaloubs and return and it is the route he follows when he detects signals sent to him in malubarr (the Great Barrier Reef).*
- [153] *Traditional marine tenure is based on a totemic system which determines the clan which in turn determines the ownership and the usage rights of the seas.*
- [154] *The Gizra Tribe believes that all creatures in the sea, including fish, animals and plant life, is the creation work of Gisu.*
- [155] *The general term which the Gizra Tribe uses to classify the aquatic plants and animals is "Maluan Zaa".*
- [156] *The Gizra Tribe has traditionally used the sea and the coast to sustain the livelihood of the Gizra people.*
- [157] *The individual rituals and the application of magical spells is very much respected and practised in the hunting and fishing activities carried out in the sea by the Gizra Tribe and, I believe, by the Torres Strait Island communities.*
- [158] *The Daroar Kumzam clan of Kupiru (Kupere) perform these rituals at Mugur Malu to call fish from Maza and beyond to lessen waves and breakers. The Gizra's garden Maza (Zoo) in Mulabarr (Great Barrier Reef) is believed to be Gisu's home.*
- [159] *The dugong is regarded as a very important animal among the Gizra Tribe generally. It is known as "Gisu" or "malubarr pam" meaning man of the deep sea. Gisu we believe is a human being in a form of a dugong. The dugong resembles a human being in many ways in appearance and in behaviour and senses.*
- [160] *Dangal rituals are done in the sacred shrines on the land at Urie, Duo-Olongal, Numunmuot, Aildum, Ngemkio, Ammer-Obb and Basirbarr. Gisu the sacred dugong can be contacted in the sea at Mari Island (Murray Island), Markukus (sunken land bridge) between Ammer (Warrior Reef), Malubarr (area of sea around Barrier Reef), Bolmuot (around Beka Maza) and Buru.*



- [161] *When rituals are performed telepathic messages are also sent to Gisu in the sea and he visits the Dangkaloub people at Kupere, where he is summoned to do certain acts.*
- [162] *The dangal ritual includes the following:*
- (1) *It involves certain plants and sacred songs to call the sacred dugong and the young boys meet him and acquire physical power and strength to become men in the society;*
  - (2) *To begin the yearly act to sustain the environment in the sea and on the land;*
  - (3) *To sustain plant and animal life in the sea and on the land by playing Gisu's sacred hour called "Agur";*
  - (4) *Maza (reef) is a special garden out in the sea where there is an abundance of fish, animal and plant life that has to be sustained to give continuity to nature and reproduction and life;*
  - (5) *When the sacred bow of Gisu called "agur" is played it makes the sound that strengthens and nourishes the natural weather cycles and seasonal weather patterns for natural reproduction;*
  - (6) *The sound of agur also fertilises the food gardens, reefs and the environment;*
  - (7) *At the ritual celebrations, young boys are taught the origin of the Gizra Tribe, the clans, the Siepam, the Malig, the Gudangs and the Kauaroug and the neighbouring tribes of Mlobo (Bine) and Agob (Paipam); and*
  - (8) *At the rituals, boys are taught clan secrets, traditions, customs, stories, behaviour and traditional laws.*
- [163] *Members of the Gizra Tribe are not permitted to eat the dugong for food. Because of the dugong's large size and strength, many islanders and inland groups believe that use of certain parts in ritual ceremonies would make plants and humans strong and healthy and so they claim it as a totemic animal. They believe the dugong has magical religious powers associated with agriculture fertility rituals. It is used to fertilize the Gizra Tribe's gardens and crops.*
- [164] *The dugong is a totem animal for some clans of inland villages like Dimiri and Kupiru (Kupere).*
- [165] *The local cultural perception of the dugong is unbelievably widespread throughout the entire Torres Strait Region, the inland Papuan villages and the coastal Papuan villages.*
- [166] *Dugongs sense movements of men during the day and in the night. It has acute hearing and sensing ability. The dugong's behaviours show that they can sense tide movements, the weather and different feeding areas.*
- [167] *Many traditional sacred rites and fertility rites involved the dugong. This has always been the way, and it remains the way today.*
- [168] *The Gizra Tribe has always used the sea, initially by walking, then by use of bamboo rafts, and then by use of canoe. In fact, the canoe was invented by our ancestor Muiam, and when Muiam travelled east, the canoe used by him was seen by Kiwai's and other people who then used their observations to make their own canoes.*
- [169] *Originally, when the canoe was invented it was used to carry bigger loads of garden produce to last longer periods of time. The traditional basket is in a shape of a canoe.*

- [170] *The canoe was made out of candlewood and the name of the first canoe was Munil. This word is now used to move heavy load on canoes.*
- [171] *The sea remains of central importance to the culture of the Gizra Tribe right up to the present day. This has always been the case, and it will always be the case.*
- [172] *Traditionally, the Torres Strait region included the marine environment on the mangrove fringed shore, creeks and rivers on the coast, the seas, reefs, bays, islands and atolls in the open sea and the deep sea area of the Torres Strait.*
- [173] *The Gizra Tribe has always used the sea area between the mangroved fringed shoreline and the sea for fishing, hunting, camping, collection of firewood and edible foods, travelling, barter trade, canoe landing and rituals.*
- [174] *We traditionally travelled the open sea and the deep sea area on canoes and rafts. We now travel on dinghies.*
- [175] *We also use the sea for rituals when contacting Gisu, for hunting turtles, for fishing, collecting of edible sea foods, shells and snails.*
- [176] *The Gizra Tribe use sea, sea weeds, sea shells and sea grass for ritual purposes associated with garden and environmental fertility rituals, visiting friends and collecting eggs from birds.*
- [177] *Some areas well known to the Gizra Tribe are Wammer (Ammer Reef Zone), Waraber (Warubar Reef Zone), Mer (Mier Reef Zone), Gebar Area and the Beka and Buru area."*

45. Johannes & MacFarlane have noted<sup>25</sup>:

- Papuans had traditionally fished and traded into the strait far south of the existing PNG/Australia border<sup>26</sup>;
- "*Speaking on behalf of Papuan dugong hunters in Torres Strait, Olewale and Sedu (1980) said:*

*Older people know a lot about the biology of these animals. We want to work with scientists, but we do not want to see money wasted on finding out things we already know. We can provide this information if we are asked.....We are not saying that we know everything about them, but that we, the village people, and you, the scientists, must co-operate and share knowledge, because we want to learn more too."*<sup>27</sup> (emphasis added).

### Trade

46. Mr Gamogab has outlined the Gizra Tribe's history of using the relevant waters for trading purposes thus<sup>28</sup>:

<sup>25</sup> in *Traditional Fishing in the Torres Strait Islands* by RE Johannes and JW MacFarlane at exhibit JWM2 to exhibit 35A2 (affidavit by James Wallace MacFarlane)

<sup>26</sup> exhibit JWM2 at 21

<sup>27</sup> exhibit JWM2 at 34

<sup>28</sup> (affidavit of Pende Gamogab) at [178] - [223]



- “[178] *The barter trade between the Torres Strait Islanders and the original traditional inhabitants of the south west coast of Papua New Guinea initially began with the Dangkaloub-Gizra and Gizra-Gizra on one side and the Siepam on the other.*
- .....
- [180] *The Gizra Tribe believes the barter trade derived from a huge build up of material wealth on Daudai (Gizra land) on the mainland of Papua New Guinea, that in turn resulted from “Ake Terre” cultural practice. The huge accumulation of wealth was a traditional way of sharing resources and wealth and was based on a traditional belief that the more you give away, the more you will have in return as a reward and a blessing.*
- [181] *It was a traditional customary way of life of helping Torres Strait Islander relatives with surplus of material and supplies to help our Siepam relatives with items of support, for subsistence livelihood and survival in the unique island environment as they were now cut off from the mainland after flooding and drowning of the Sahul Shelf and help them with food and material for building houses and canoes and canoe oars.*
- [182] *Marine trips were not always short and brief visits. They were usually properly arranged and organised trips of both long and short term duration and they were often tied to cultural events such as the “pail terre”, pig fat tasting, festivals, crop harvesting festivals, funeral feasting, marriage feasting and many other celebrations and some very important events of mainly clan visits and Agoad totemic rituals or ceremonies.*
- [183] *These festival and activities were monitored on a traditional Gizra calendar called Melpal calculated on the lunar months.*
- [184] *Surplus of garden produce and material was conveyed to the Siepam by the Gizra on backs and shoulders and was delivered to them at the designated points of contact. Such delivery spots, known as Gagat, were located at Kuikupat, Larldae, Arki, Butu, Basir Puerk, Agoar, Gebar, Karbasir or Karubab, Gagat and Kulalae.*
- [185] *Arrangements to convey such help were made in advance between the two barter trading groups and was always done between two clans identified by Augad totemic symbols such as Ariaugad, Kadalauad, Debaugad, Samuaurad or Uruiaugad.*
- [186] *Similar clan arrangements prevailed when Siepam or Abarsen were involved in other cultural activities and in the “ako terre” ritual ceremony and practice celebrations.*
- [187] *Most of these trips were conducted during the dry months between the months of Agurolen (August) and Giro (December) each year when the sea was low, calm and fine. Siepam refers to it as Baidam while we refer to it as ogo/pail.*
- [188] *We assisted Siepam with cultivated crops from the surplus of our cultivated crops. We also assisted them with artefacts, plumes, bow and arrows, logs for canoe and canoe prow, timber for housing and other various uses, bamboo for various uses, including making rafts, rosewood and ebony and hardwood for making harpoons, berri for houses, sago, timber for house floor, and plants and suckers for gardening.*
- [189] *In these trades we were personally in contact with Aitalean, Butulean, Saibalgan, Duanalgan and Boigulgan.*



- [190] *We were in the barter trade since the time when it began until 1987, when we were forced to discontinue for unknown reasons.*
- [191] *Sea resources were usually not part of the barter trade as each group used and shared the land and resources on and along the coast and in the sea equally. Sharing of other forms of traditional activities also continued and usage of Gagat became less frequent and soon forgotten with use of dinghies and engines.*
- [192] *The need for other items of trade surfaced as more and other people were attracted to the barter trade leading to exchange of manufactured goods.*
- [193] *Two places where major barter trading took place were at Basir Puerk and Agoar Point (Augarmuba) that later extended to Larldae, Kulalae, Togo and Karabasir. Both the Torres Strait Islanders and the Gizra Tribe knew when trading were going to take place because smoke signals and tallying with broom sticks took place.*
- [194] *Our traditional Gizra calendar (Melpal) was used for this purpose.*
- [195] *The Torres Strait Islanders were the first people who introduced the white man's items such as axes and knives. Gizra Tribesman also exchanged trade goods with explorers and Malays.*
- [196] *This era refers to a period prior to the occupation and settlement of the unsettled coastal land by the migrant Kiwais of the Fly River origin. Kiwais, more volatile and greater in number, brought with them a maritime technology alien to the Dangkaloub or Gizra, and this allowed them to interrupt and exploit and gave them the advantage to monopolise the ongoing trade to their use and benefit which began about 1956 after the invention of a new sailing by Kebei Dabu of Mawatta.*
- [197] *With the occupation of our unoccupied land on the coast by the Kiwais of the Fly origin with the establishment of the Government Station at Mabudawane (Basir Puerk) in 1887 our unoccupied land on the vicinity of the station and surrounding area became the subject of squatter settlement and unscrupulous use of land and resources began as they settled to create Mabudauan.*
- [198] *They too wanted to have items such as axes and knives. So they became engaged in the barter trade so they infiltrated inland in quest of raw material fur trade.*
- [199] *The Dangkaloub and Gizra People refused access and tribal fighting broke out between the Geba or Gebarubi settlers at Mabudauane and us.*
- [200] *The continuous barter trade between us and the Siepam ceased while we fought. The fighting ended when Gebarubi or Kadawarubi Tribe of Mabudauan entered into a peace agreement with our people by giving three ladies namely Kapa, Diwe and Baini to be married by Gizra Tribesmen to seal the peace agreement.*
- [201] *By the time the fighting ended, the settlers had already capitalised on our ongoing trade to their own use, advantage and benefit.*
- [202] *Then with the invention of a new, faster sea-faring canoe named sea mullet by Kebei Dabu in 1951, the settlers had an advantage to monopolise our ongoing trade to their own use and benefit with all forms of contemporary links and ties built into it to see the case as it is now.*



- [203] *After the fighting, the Gizra Tribe joined in the barter trade again but as a second party. Since rejoining in the barter trade, we have continuously and actively remained in the trade.*
- [204] *Our customary way of helping Siepam continued until about 1901 when the Torres Strait Region came under direct rule and control of Australia. Our visits became less frequent and we became more separated as our links disappeared and became forgotten while new migration, customs and quarantine laws came into existence reinforcing the separation to conceal the true link and pretend to find that things have never changed - to say that Torres Strait Islanders are different people and that we have no kinship ties and links.*
- [205] *The customary exchange of barter goods between the Torres Strait Islanders and the Gizra Tribe was less systematic and less formal. It was conducted on an on-and-off basis dependant on arrangements of those particular clans concerned.*
- [206] *Amongst other things, the Gizra Tribe were trading were artefacts, garden food, natural edible fruits and crops in exchange for clothes, knives, axes and cooking utensils, and banana leaves for smoking.*
- [207] *The long sea-faring with new type of sailing canoe invented by Kebei Dabu in 1951 provided Kiwais with faster, more sophisticated, comfortable and effective means of sea travel and harvest of sea resources. This eventually reduced the traditional barter trade between the Gizra Tribe and the Sepams."*

47. As to trading, Professor Beckett has noted that before the Europeans, "*....trade with Papua was much more important than with Australia, in particular that to secure the dugouts from which the Islanders made their canoes (Haddon 1904: 295; 1908: 186-7)*"<sup>29</sup>. He also refers to the people of Saibai buying canoes from their Papuan neighbours as recently at 1980<sup>30</sup>.

48. As to trade and trading, Johannes & MacFarlane noted<sup>31</sup>:

*"In the monsoon season the population of Yorke Island increases substantially with the arrival of relatives from Daru Island, Papua New Guinea, for the Christmas holidays (eg over 90 people in the 1986-87 summer). They generally arrive around December and return to Daru in January or February. At these times exploitation of surrounding waters and turtle and bird rookeries rises markedly. Many of the Papuan men are divers in the commercial crayfish fishery. Under the Torres Strait Treaty this activity is illegal; Papuans may not fish commercially in waters south of the Torres Strait Fisheries Jurisdiction Line (Fig 3, Chapter 1) without an Australian endorsement of their Papuan New Guinea commercial fishing licences. None of the Papuans had such licences, as of 1986, let alone Australian endorsements.*

<sup>29</sup> Jeremy Beckett: *"Torres Strait Islanders: Custom and Colonialism"*, (Cambridge University Press, 1987) at pp 25.9 - 26.1

<sup>30</sup> Jeremy Beckett: *"Torres Strait Islanders: Custom and Colonialism"*, (Cambridge University Press, 1987) at p 69.5

<sup>31</sup> in *Traditional Fishing in the Torres Strait Islands* by RE Johannes and JW MacFarlane

49. Sweatman has remarked of Erub, "*The canoes are procured from New Guinea, there being no trees on the islands of sufficient size to make them.*"<sup>32</sup> (emphasis added).

50. Hadden has stated:

- "*The natives of Saibai were largely the 'middle men' between the Western Islands and the [New Guinea] villages*"<sup>33</sup>;
- as a result of his research on Mabuiag he stated, "*Trade ....primarily....consisted of (1) intra-insular trade, (2) trade with New Guinea, (3) trade with Cape York; and secondarily (4) trade with white men*" and some items, such as canoes, dugong harpoons and certain shells, had "*a recognised value*"<sup>34</sup>.
- the *people* of Saibai were not the only "*middle men*" in Torres Strait Islanders acquiring canoes from PNG<sup>35</sup>:

*"If a Muralug man wanted a canoe, he would communicate with a relative at Moa who would speak to a friend of his at Badu; possibly the Muralug man might himself go to Badu. The Badu man would cross to Mabuiag to make arrangements and a Mabuiag man would some time or other proceed to Saibai, or at all events let a Saibai man know about it. If there was no canoe available at Saibai work would be passed along the coast that a canoe was to be sent down. The canoe would then retrace the course of the verbal order, and ultimately find its way to Muralug.....Payment was usually made annually until the canoe was a little broken; generally instalments were paid. When a piece came off the canoe it was forwarded together with the final payment as a proof of the statement as to condition of the canoe...The intermediaries were paid for their services by 'charging on', the amount depending upon individual cupidity, or they might be recompensed for their trouble by presents from the purchaser. there would appear to be considerable opportunities for cheating, but this was guarded against by the vigilance of the intermediary traders, who were themselves looked after by the [New Guinean] men....If cheating occurred, the supply of canoes would cease, thus putting a stop to all fishing."*

## CONCLUSION

51. The Gizra Tribe are "*traditional inhabitants*"<sup>36</sup> of the Torres Strait and it has traditional connections with the Torres Strait Islanders.

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<sup>32</sup> in Allen and Corris 1977:35

<sup>33</sup> 1904: 295

<sup>34</sup> 1904: 293

<sup>35</sup> 1904: 296

<sup>36</sup> as that term is defined in the *Treaty*



52. Hence, the Gizra Tribe seeks recognition by the executive governments of Australia and PNG for *Treaty* purposes, a recognition that has been denied them to the present as a result of the current terms of the *Treaty*. Put another way, the exclusion of the Gizra Tribe's villages from the *Treaty* is a matter of serious concern to the Gizra Tribe and is a matter that the Gizra Tribe seeks to have rectified.
53. There can be little doubt that members of the Gizra Tribe have always fished in the Torres Strait and have always exercised other rights in the Torres Strait.
54. Members of the Gizra Tribe are concerned that the acquisition of sovereignty in the waters of the Torres Strait as a result of the *Treaty* has meant that all common law and statutes applicable to the area over which sovereignty extended applied to persons who accessed that area from the date of sovereignty. Consequently, there is a concern that Australian migration, fishers and associated legislation made it unlawful, at least for Papua New Guinea villages not covered by the *Treaty*, to access the claim area and was inconsistent with their continued use of the claim area in accordance with their customary law. It is thought that the effect is to render nugatory any customary law rights such Papua New Guinea non-*Treaty* villages, such as those of the Gizra Tribe, may have once had in certain areas of the Torres Strait. There is a concern that members of the Gizra Tribe, not being members of a *Treaty* village, cannot access any part of the claim area without such access being unlawful and would not be rendered or regarded as lawful by or under the *Treaty* or any relevant municipal laws of Australia.
55. As outlined above, the 13 Papua New Guinea villages currently included in the *Treaty* as a result of the definition of "*traditional inhabitants*" for the purposes of the *Treaty*, were said to have been so included because "...*inhabitants of these villages have engaged in traditional cross-border movements since before Papua New Guinea's Independence in 1975 to the present day*", and because those villages have "...*been acknowledged amongst Traditional Inhabitants in Papua New Guinea and Australia and accepted by the governments of both countries*".
56. However, residents of the five villages occupied by members of the Gizra Tribe have also been engaged in traditional cross-border movements since long before Papua New Guinea's Independence in 1975 through to the present day. Further, residents of

those four villages have been acknowledged amongst traditional inhabitants in Papua New Guinea and Australia. However, residents of the five villages of Barnap, Kupere, Ngomtomo, Togo and Waidoro occupied by members of the Gizra Tribe have also been engaged in traditional cross-border movements since long before Papua New Guinea's Independence in 1975 through to the present day and residents of those five villages have been acknowledged amongst traditional inhabitants in Papua New Guinea and Australia.

57. It is of some importance and relevance that the Gizra Tribe was not consulted with respect to the *Treaty* which resulted in their rights to use the Torres Strait being severely curtailed and they were banned from exercising their traditional rights relating to barter trade, fishing, the sharing of resources and the use of the Torres Strait for traditional purposes.
58. It is acknowledged that the question whether a PNG village whose members are not treated as "*traditional inhabitants*" by the executive governments of PNG and Australia for the purposes of the *Treaty* should be so treated is a matter for those executive governments of PNG and Australia<sup>37</sup>.
59. However, for the reasons outlined herein, the Gizra Tribe submits that:
- (a) the *Treaty* should be amended so as to include within its terms the Gizra Tribe's villages of Barnap, Kulalae, Kupere Ngomtomo and Waidoro; and
  - (b) this Committee should recommend to the Australian Government that the Australian Government should use its relationship with the Government of Papua New Guinea to urge the latter to have the Gizra Tribe's villages of Barnap, Kulalae, Kupere Ngomtomo and Waidoro included within the terms of the definition of "*traditional inhabitants*" as that term appears in the *Treaty*.
60. If you or members of your Committee have any questions in relation to any of these matters, please do not hesitate to contact me. Similarly, if members of the Committee believe that the author and/or members of the Gizra Tribe (such as Mr Pende

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<sup>37</sup> *Akiba and Others on behalf of the Torres Strait Regional Seas Claim People v State of Queensland (No. 2)* (2006) 154 FCR 513 per French J (as he then was) at [47]



Gamogab) could further assist the Committee by personally appearing before the Committee, please contact the author who will make the necessary arrangements.

Yours faithfully

**DAN O'GORMAN**

Chambers

19.10.09