The Yorta Yorta aspirations are to have a society which is economically viable and to provide ongoing employment, training and management, thereby enabling self determination and sustainability for future generations. Creating our own economic base with employment and training, at last acknowledged and recognised as people in our own right and not being beholden to the welfare system, we will see improvements in health, wellbeing and self respect, thus enabling some of our people to get off the welfare merry-go-round.

Eventually it is hoped by the Yorta Yorta Nation to have an even greater say in traditional country with legislation to go hand in hand with caring for country.

My people are genuinely excited by the prospect of entering a new era built on a solid foundation in which a holistic government approach can be taken to not only land and water management but all of the Yorta Yorta people's broader aspirations. This agreement does not take away any political and legal rights of the Yorta Yorta peoples to access native title which may occur in the future.

Johnny Jango & ors v Northern Territory of Australia & ors
An Anthropologist's Comment

James F. Weiner
Visiting Research Fellow, Native Title Research Unit

In 2003-04, Sackville J considered three reports submitted on behalf of an application for native title determination over Yulara township in the Northern Territory. The respondents to the application, "depending upon how one counts… made at least 1,100 separate objections to passages" in the two anthropology reports (at 7). Sackville J opined that "each of the reports, in particular the Yulara Anthropology Report, has been prepared with scant regard for the requirements of the *Evidence Act 1995* (Cth)…" (at 8).

Of the largest and main document, the Yulara Anthropology Report, authored by Peter Sutton and Petronella Vaarzon-Morel, Sackville J complained, "Indeed it is often difficult to discern whether the authors are advancing factual propositions, assuming the existence of particular facts, or expressing their own opinions" (at 11). Lindgren J dealt with this issue last year in the Wongatha native title application (*Harrington-Smith v Western Australia (No. 7)* [2003] FCA 893, where he suggested that lawyers should be "involved in the writing of reports by experts" (*Harrington-Smith* at 19), an opinion with which Sackville J strongly agreed (*Jango* at 10). Sackville also cited *Commonwealth v Yarmirr* ([2001] 208 CLR 1), where Gleeson CJ, Gaudron, Gummow and Hayne JJ said the anthropological report submitted on behalf of that application had been received in evidence "despite it being a document which was in part intended as evidence of historical and other facts, in part intended as evidence of expert opinions the authors held on certain subjects, and in part a document advocating the claimants' case" (*Yarmirr* at 62 [84]).

I wish to offer a specifically anthropological, and hence a partial, perspective on this case, although arguably it is anthropology's role in the native title process that is the main subject of this judgement. I consider two issues.

First, the *Evidence Act (1995)* admits opinion when based on a specialised field of knowledge (s. 79). Consider, however, the anthropologist in the field, attempting to observe everything that is happening in the social life of the community s/he is living in. Anthropological analysis occurs in the back-and-forth movement between the apprehension of the whole of social life and its component individuals, groups, objects and events. How does either the anthropologist, or subsequently, the Court, go about separating which observations are specifically anthropological and which are not? Although this distinction is probably more sustainable under conditions of native title research when the anthropologist is neither co-residing for long periods with a community, nor engaging in open-ended observations and questioning, a great deal of previously-obtained observations and analyses of Aboriginal society recently and currently examined in the Courts were ob-

tained within the framework of conventional anthropological fieldwork.

Second, I wish to relate certain legal glosses such as "argumentative" and "probative" to the methodologies that anthropologists employ in construing both their data and their analysis. After all, both legal and anthropological analyses are verbally and textually constructed, and so as instances of "verbal art" they should be readily comparable.

The Court insists that experts such as anthropologists called to give evidence do so as witnesses for the Court, and not for the Aboriginal claimants—or their "culture"-- for whom they may have been employed to undertake research. The Court insists that only evidence that is probative—that which affords proof of a proposition[1]-- should be admitted into consideration. They eschew conclusions that are overly speculative and that appear to diverge too far from what the balance of evidence might otherwise support. Admittedly, the line here is a subjectively constituted one, on the part of both anthropologists and jurists.

The argumentative and the probative are, however, also glosses for the different ways we deploy and interpret data *internal* to anthropological and ethnographic writing. Our ethnography must be probative—it must rest on some firmly established and generally accepted evidentiary standard. But because our ethnography, at least in its academic guise, is also deployed towards the task of testing or supporting various anthropological theories, to that extent it must also be argumentative. An integral dimension of what makes argumentation possible and necessary is the acceptance that the same evidence can support different theoretical perspectives. But perhaps it would be more accurate to say that every theoretical disposition brought to the ethnographic enterprise inclines the anthropologist in question to focus on some bodies of evidence at the expense of others.

In the native title process, although it is not phrased in these terms, there is only one theoretical position possible. What this means is that there is no theory at all, for, like culture itself, theory only becomes visible when it is juxtaposed with one or more contrastive and alternative theories. Perhaps we would not recognize the Courts' theory as such, because it is a simple empirical assessment of different kinds of evidence—written and oral—and the adjudication of the varying weight that should be given to such evidence, given the circumstances of its collection. The evidence itself is deployed towards one end only—to determine whether it makes a case for continuing connection to country by a community of Aboriginal people according to a set of traditional laws and customs held to have been extant at the time of sovereignty.

The problem posed by the native title process is not the implicit empiricism of the Courts as such. Empiricism has to be a moment of analysis through which we all must pass at some point or another. The problem is that the native title process refuses to recognise a defining component of anthropology-- the use of ethnographic data in anthropology in support of the testing of theories.

Why is having a theory or constructing a theory important? A theory is not just an aesthetic exercise—making a theory visible is the demonstration of the manner in which one's intellectual predispositions and assumptions contour one's location of and perception of "data". If the task of theory-making is kept out of the adjudication process in, for example, the assessment of a case for native title, then fully half of what the task of anthropology is all about is left out.

Take, for example, the important recent debate between Peter Sutton, Sandra Pannell and Daniel Vachon concerning the salience of individualistic and collective definitions of Aboriginal connection to country, or considerably earlier, the debate between Hiatt and Stanner on the nature of the Aboriginal local group and its territorial configuration. Sackville and Lindgren JJ would have us believe that they are not only peripheral to what is required from anthropologists in support of

[1] OED defines "probative" as: "Having the quality or function of testing; serving or designed for trial or probation; probationary. Now *rare*."

native title applications in court; they positively obscure and unnecessarily complicate the process of adjudicating evidence in native title hearings. But for anthropologists to prise these moments of argumentation away from our resultant assessments of fact and evidence would be to relinquish the very perspective that differentiates anthropology from jurisprudence.

What can either of these two observations contribute to promoting the desired synergy between lawyer and anthropologist? Sackville J has not indicated that he understands the nature of anthropological evidence in *Jango*. It is necessary for the lawyer to advise the anthropologist as to how to make his/her evidence address the requirements of the *Native Title Act (1993)* and the *Commonwealth Evidence Act (1995)*. But the anthropologist still has to construe the evidence for the nature and function of Aboriginal social institutions and to adduce such evidence towards interpretations of the cultural world within which those institutions acquire meaning and reality.

Honour Among Nations? Treaties and Agreements with Indigenous People

By Marcia Langton, Maureen Tehan, Lisa Palmer and Kathryn Shain (eds), Melbourne University Press, Melbourne, 2004.
Book reviewed by Stuart Bradfield.

This book represents a detailed and comprehensive contribution to a subject of national and indeed international importance – relationships between Indigenous and non-Indigenous peoples in Australia. In 19 chapters, as well as several commentaries, the book addresses a diverse range of issues which arise from the interaction between Indigenous Nations and settler peoples.

After a detailed introduction from the editors, Part 1 (of 4) gives a historical overview of agreement making and governance. Marcia Langton and Lisa Palmer look at treaties and agreement making as mechanisms used to recognise Indigenous peoples as 'polities', or political communities. International perspectives are offered by Bradford Morse and Julie Evans, while in Australia, Noel Pearson looks at the failure of native title to fulfil the promise seen by many following the Mabo case. Aaron Corn and Neparrna Gumbula then provide fascinating detail on the historical development of one of Australia's more politically assertive peoples, the Yolngu.

Part 2 looks at issues of recognition and resolution in treaty making in settler states. Long time visitor to Australia, and Canadian Royal Commissioner, Paul Chartrand, describes how the reality and relevance of treaty relationships was central to the findings of the comprehensive Royal Commission on Aboriginal Peoples. Also included are two chapters on the British Columbian treaty process by Ravi de Costa and Maureen Tehan, as well as an analysis of treaty making in Aotearoa/New Zealand by the Chief Justice of the Maori Land Court, Joe Williams.

Part 3 then looks specifically at (and beyond) native title. Graeme Neate points to the possibilities of agreement making under the Native Title Act, while Lisa Strelein looks beyond the limits of the law, identifying positive case studies where Indigenous peoples are using the idea of native title to move negotiations towards 'self-government'. Other chapters look in detail at the process of statewide negotiations in South Australia, as well as questions of customary marine tenure, and the increasing role of industry in native title agreement making.

As Lisa Palmer suggests in the introduction to this section, part 4 assesses the emerging culture of agreement making in Australia, in the diverse areas of health, race relations, publishing and mining. Ian Anderson praises the development of health framework agreements, while Hannah McGlade and Michelle Grossman suggest that agreements have had fewer successes in areas of racial discrimination and copyright, respectively. Following Ciaran O'Fairchellaigh's chapter on evaluating the outcomes of native title agreements, the book concludes with a timely contribution on negotiation of the Timor Sea Treaty between Australia and East Timor by Gillian Triggs.