BOOK REVIEWS

The Law and Practice Relating to Torrens Title in Australasia, Vol. 1, E. A. Francis, Butterworth 1972, $22.50.

The publication of a book by a senior practitioner of Papua New Guinea which is bound to become a standard reference upon a subject of practical and academic importance is noteworthy for this journal. Also noteworthy is the absence of any reference in the book to Papua New Guinea, apart from the foreword and preface, notwithstanding that "torrens" statutes are in force in both Papua and New Guinea governing transactions in some of the key land in the country.

This absence draws attention to a serious problem in the administration of the law in Papua New Guinea and other Pacific countries. For the legal machinery to function effectively it is important that those who work the machinery should have ready access to raw material. This involves not only solving such formidable problems as statute law revision and consolidation, the appropriate "reception" provision, the reporting and dissemination of judgments and the availability of relevant statistics, but just as importantly reliable exposition of and critical opinion concerning the law.

To the writer's knowledge, until recently only occasional articles in journals and one collection of essays had been published concerning the law in Melanesia. This journal does now contribute to both exposition and critical examination but is no substitute for the systematic treatment of a topic or a field of law in a book. The two recent books published by Professor O'Regan and Mr. L. K. Young respectively[1] do not claim to be "bread and butter" texts for the practitioner.

It can be appreciated that both the smallness of the market and the constant prediction of changes in the law (rarely fulfilled) pose difficulties for the commercial publisher. The long-term solution is not easy. The case in point does however give the opportunity to test one alternative. The production of a modest Papua New Guinea supplement to Mr Francis' book, preferably under his experienced supervision, should not be a lengthy or expensive task and would be of great value to Judges, practitioners and teachers alike.

The task that the author set himself in analysing and explaining the law and practice relating to torrens titles throughout Australasia was formidable. Whilst the various versions of the system are in essence similar, the detailed provisions differ in arrangement, in wording and sometimes in substance. There is also a considerable body of authority to accommodate.

The approach of the book is by reference to subject matter rather than by simple annotation. However in both general arrangement and the treatment of individual topics there are some similarities to an annotation. This will no doubt be appreciated by the practical conveyancer, but it does detract from the coherence of the overall analysis of the subject. To take an example, indefeasibility of title is the last chapter in this volume, a place which some would think does not reflect its inherent importance.

The author's practice of quoting passages in judgments and statutes in extenso may assist the careful reader but can obscure the proposition being put forward or the point to be made.

1 *The Common Law in Papua and New Guinea*, R. S. O'Regan, Law Book Co. Ltd. 1971; *Outline of Law in Papua and New Guinea*, L. K. Young, Law Book Co. Ltd., 1971; both reviewed in Vol. 1 No. 2 of this Journal.

It is a pity that the book went to press before the handing down of the important High Court decisions in *Breskvar* v *Wall* (1971) 46 ALJR 68 and *J & H Just (Holdings) Pty. Ltd.* v *Bank of NSW* (1971) 45 ALJR 625, but they do not require any significant revision of the text.

The indexes and tables are adequate but there are two features of the citation of cases which this reviewer finds inconvenient, neither being unique to this publication. The first is the practice of referring to series of reports of the publisher and omitting reference to reports of rival publishers (e.g. omission of reference to W.N. (N.S.W.) where the N.S.W.R. series competes). The second is the absence of a full citation in the table of cases at the front of the book.

There can be no doubt that this volume is a substantial and much needed contribution to the learning on this important subject and will be welcomed by all who have recourse to this area of the law.

R. V. Gyles.

The Common Law in the Sudan, Naki Mustafa, Oxford. University Press, 1971. $10.90.

This book is sub-titled, "An Account of the 'Justice, Equity and Good Conscience' Provision". In the Sudan the major component of the civil law was received by S. 4 of the *Civil Justice Ordinance* 1900 (and again by S. 9 of the *Civil Justice Ordinance* 1929) both of which stipulated that in cases not otherwise provided for, "the Court shall act according to justice, equity and good conscience."

Professor Mustafa, drawing extensively on unreported judgments of the High Court and Court of Appeal of the Sudan, traces the history and interpretation of this provision from 1900, when apparently it was taken over from Indian legislation, to 1970. It is a fascinating story. At first the section was taken as referring to universal justice and the judges consulted a wide variety of legal systems, especially English, French, Egyptian, Muslim and Indian law, in order to find, if possible, universal rules capable of working justice in the cases before them. An interesting exercise for a comparative lawyer but a perilous one for a practitioner instructed to advise his client on the likely outcome of projected litigation! Later the judges, still all English at this stage, made the patriotic assumption that the law of their homeland, both exacted and unexacted, represented "justice, equity and good conscience" and applied those rules accordingly. Thus, without expressing any serious reservations as to their intrinsic merit or their suitability in the Sudan they applied the doctrine of the last clear chance and the rule in *Paradine* v *Jane*. Even after the Sudanisation of the bench in the fifties and sixties, English law was still generally followed, one Sudanese judge in 1957 even remaining loyal to the notorious rule in *Hollington* v *Hewthorn*. More recently, according to Professor Mustafa, the tendency has been to apply English law more selectively and to look to other legal systems for guidance. The book concludes with a prediction that the "justice, equity and good conscience" provision will either be repealed or lose its importance as a justification for importing the common law. This is because the Sudan, now aligned to Arab and socialist states, will probably renounce the common law as the basis of its legal system.

Although in Papua New Guinea and elsewhere in Melanesia the common law has been received explicitly by legislation, not as in the Sudan by judicial improvisation, this book is of considerable interest here. Many features of the administration of justice are much the same—the lack until recently, of official law reports, the inadequancy of library facilities, the tendency of foreign judges to consult the law in which they were trained with perhaps sometimes insufficient concern about its suitability in another environment, the inactivity of the legislation in effecting law reform and the importance of custom in personal law matters.

The book is well organised and attractively produced. I noticed only two misprints, at pages 152 and 227. Unfortunately the author has an extremely busy style and the frequent over-elaboration of simple points tends to make his exposition tedious. In the opinion of this reviewer the book might well have been at

least seventy pages shorter without loss. However, although stretched beyond the dimensions of its subject, it is undoubtedly a notable and original work of legal scholarship and a valuable source of comparative material for students of the laws of Melanesia.

R. S. O'Regan.

The International Legal System. Cases and Material with Emphasis on the Australian Prespective, W. E. Holder and G. A. Brennan, 1st ed., Sydney, Butterworths, 1972. Bound $25.00, Paperback $19.00.

This new position on firmament of the Law of Nations is worth particular attention. It is the first book published in Australia of cases and texts in international law. It is also, and this is more important, the first book of its kind including a more extensive selection of Australian materials.

In the Preface, Messrs Holder and Brennan note that their book is a product of teaching experiences in Australian universities. Indeed, a feeling of these expriences is present throughout the book. This does not mean that the book would be of limited value for students outside the Australian legal system. The selection of included cases is meant to satisfy an international reader, who will also find well chosen descriptive material from under different national flags.

Each of the 36 chapters of the book is preceded with a short introduction and closed by an equally concise comment. These notes are somewhat innovative, for the authors do not attempt to communicate through them their own ideas or positions but rather use them as a function of "memorandum" for the reader. By pointing to the controversies and asking leading questions they provoke a deeper search into essence of international legal institutions.

Included in the chapters are "Notes" from the authors, who use them freely in those places in which they feel the reader may be in need of additional explanation.

The chapters fall into twelve parts. In this division the authors chose to accept a systematics in which Jurisdiction of States (Part 5) is presented after the "bases of power": Territory, Resources and People (Parts 3 & 4). Had the authors followed the example of those writers who either decided to present these problems correspondingly (Briggs, Fenwick) or to introduce jurisdictional problems before the "bases of power" (Green), they would have made the reader much more comfortable and organisation of chapters much clearer. Indeed, in Part 5 they found it necessary to refer to the foregoing chapters. Also, since the elements included in Parts 3 and 4 are not easily separable from the problematics of the exercise of legal authority, acceptance of a different system than the authors' method of presentation would seem more justified.

A further remark is of more a general nature.

There is a clear tendency in textbooks and manuals of international law published in the Common Law countries, not to include a picture of historical background of International Law. This book is not an exception. A Continental European tradition of giving a student of any legal subject a background in historical development is, in my opinion, well worth following. It is proper to note, that there are instances in which the Common Law writers do recognise a necessity of such an introductory background (e.g. Fenwick's *International Law*).

It is much easier for a student of international or comparative law (including in many cases foreign legal institutions) to cope with an unknown material, if he is introduced to it through a prism of history. It also makes it much easier for a teacher to explain those institutions, that had been shown to have their roots in development of the system.

Obviously, Messrs Holder and Brennan should not be blamed for following a more-or-less established pattern of teaching international law and I would rather reserve my suggestions *de ferenda*. Accordingly, I feel free to say that, in my opinion, their book presents a fine piece of work, worth every recommendation for both students and teachers of the subject.

Marek Z. Tufman.

The British Ombudsman, Frank Stacey, Clarendon Press, Oxford, 1971. $12.50.

This book is a study of the promotion, passage, and implementation of the *British Parliamentary Commissioner Act*, 1967. This Act created the institution popularly known as the Ombudsman. At first glance therefore, the book is of great interest to lawyers and administrators in the Melanesian area, for the office of Ombudsman has been created in Fiji, and the terms of reference of the Constitutional Planning Committee of the House of Assembly of Papua New Guinea require that Committee to investigate whether the constitution should provide for an Ombudsman.

The bulk of the book however, is concerned with the history of the promotion of the concept of the Ombudsman and with the passage of the Bill through both Houses of the British Parliament. In both respects, the author's work has been painstaking. The history of the matter is traced from Professor F. H. Lawson's attempt to raise the issue in the letter columns of *The Times* in 1957 to the granting of the Royal Assent to the Bill in March 1967. Most of this history is concerned with Parliament's treatment of the Bill, and the author has assiduously mined *Hansard* for every variation of opinion concerning the Bill in the various forms that it took. One is led to question the value of this lengthy historical treatment, but it would appear to be of value in three respects. Firstly, some of the criticisms of the Ombudsman, and in particular the fears expressed that this institution would have a disturbing effect on the role of the civil servant and of the Member of Parliament, are related by the author to his evaluation of the performance of the Ombudsman. Generally, it would appear that these fears were groundless and that some opponents of the Bill have subsequently modified their positions. Secondly, the historical analysis deals with the role and influence of "Justice", the British Section of the International Commission of Jurists. It is clear that this group can claim credit for popularising the idea of the Ombudsman, and that the Whyatt Report, commissioned by 'Justice', laid a firm basis for concrete proposals. The book's study of the influence of this legal professional pressure group is therefore of interest. Thirdly, the last three pages of the book attempt to relate the study of the Bill to some general views of the nature of the legislative process. On the basis of the evidence that "the discussion of the Parliamentary Commissioner Bill led to important changes in the Bill, both in the Commons and the Lords" (p. 341), the author asserts that his study of the Parliamentary Commissioner Bill rebuts the thesis that legislation "is not now effectively a Parliamentary function".[1] However, the author concedes that the Bill was of a rather particular kind, and that it was not of a partisan nature (p. 341). It may be doubted therefore that this study makes an important contribution to a study of the legislative process.

Part III of the book, entitled "The Parliamentary Commissioner in Operation", is of more interest to Melanesian readers. The most interesting aspect of this part is the comparison that is drawn between the British Ombudsman and the New Zealand Parliamentary Commissioner. The New Zealand scheme had been in operation since October 1962, and the Ombudsman schemes in the developing countries of the Commonwealth have been heavily influenced by this model.[2] The British Act however departs from the New Zealand Act in a number of significant ways, and it is interesting to note that the author concludes that comparison is "not favourable" to the British (p. 307). This conclusion would suggest that the New Zealand legislation is a more useful model. There are however, some lessons to be drawn from the British experience. A Select Committee of the House of Commons reviews the periodic reports of the Commissioner and reports to Parliament, and this procedure would appear to be more effective than a system of direct

1 S. A. Walkland, *The Legislative Process in Great Britain*, (1968), 8.
2 See Bayne, "Controls over the administration: the Ombudsman", Paper delivered at the *Sixth Waigani Seminar*, 1972.

reporting by the Commissioner to the Parliament.[3] It is also to be noted that the British have not accepted that the Ombudsman is a *sufficient* answer to the problem of redress against administrative bodies, and that moves for reform in other directions have not been ignored.

P. J. Bayne.

[3] The former Ombudsman in Tanzania has suggested that such a scheme might be effective in that country: Chief Erasto Mang'enya, "The Permanent Commission of Enquiry in Tanzania", (1970) 2 *Journal of the Denning Law Society* 57, 69.