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A comparative analysis of assurance fund vis-à-vis title insurance: which offers better compensation for victims of land disputes in Malaysia?

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ABSTRACT

Land transactions are fraught with risk because of the nuances of property law and conveyancing practices, as well as skyrocketing land prices. This is demonstrated by the frequent occurrences of land title disputes which often leads to unsatisfactory litigation consequences for landowners. However, some landowners may be able to seek compensation through title insurance or assurance funds. This article explores the differences between assurance funds and title insurance by analysing the benefits and weaknesses of both as implemented in various jurisdictions. This research is critical for developing countries, such as Malaysia which is currently considering implementing a practical and effective scheme, to serve as a buffer against land-related litigation.

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1. Introduction

Several types of land titling systems can be found worldwide. The most common are the recording system, the registration of deeds, and the Torrens system (Arruñada & Garoupa, 2005). Registration of deeds is used in the United Kingdom, while the Torrens system was developed in Australia (Cradduck, 2019) and has been adopted in many countries such as Canada, New Zealand, Singapore, Fiji, Papua New Guinea, and Malaysia (Taylor, 2008b). The objective of having any land registration system is to provide efficiency, certainty, and security of land titling in transferring ownership and interests (Raymond Talinbe Abdulai & Ochieng, 2017; Deininger & Feder, 2009; Viashima, 2017).

Possession of a legal title is considered to be equivalent to tenure security which is a concept developed by economists but has evolved through time as a result of legal anthropological and historical findings (Broegaard, 2005). While arguably the Torrens system provides a better and more secure system, land disputes usually indicate tenure insecurity (van Leeuwen, 2017) and have recently become more prevalent in some countries that use the Torrens method of land registries, for example Malaysia.

Tenure insecurity has adverse effects on the economy (Katila, McDermott, Larson, Aggarwal, & Giessen, 2020; Lovo, 2016; Suchá, Schlossarek, Dušková, Malan, & Šarapatka, 2020) because it not only affects individual landowners and farmers but also

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large-scale companies, which would put land-related investments at risk (Agegnehu et al., 2016; Bellemare, Chua, Santamaria, & Vu, 2020; Brasselle, Gaspart, & Platteau, 2002; Deininger, Jin, Adenew, Gebre-selassie, & Nega, 2003; Lawry et al., 2017; Raoul, 2020; Ren, Zhu, Heerink, Feng, & van Ierland, 2019). Without tenure security, sustainable development is also difficult to achieve (Al-Ossmi & Ahmed, 2016; Bennett, Wallace, & Williamson, 2008; Rashid, 2021). The majority of these property conflicts are often resolved by litigation (Abdulai & Owusu-Ansah, 2014), which results in high litigation expenses, but there has been an increasing tendency toward settling land disputes through administrative procedures.

It is a sign of good governance when land disputes are solved in a consistent manner and not handled on an ad hoc basis (Deininger, Selod, & Burns, 2010). On the international level, best standards and practices in land administration require the establishment of a specific dispute resolution mechanism. For example, such criteria as measured by the World Bank under its annual Ease of Doing Business Registering Property Indicator were analysed to determine the quality of land administration (Nkurunziza et al., 2015). The Registering Property indicator measures the efficiency of a country's land administration through several criteria such as time, cost, and number of procedures required to transfer a commercial property. Since 2015, data on the reliability, transparency, and coverage of a land registration system, as well as dispute resolution, have also been included in the process of determining the quality of land administration.

In 2015, 149 countries across the world provided a state guarantee for land registration (World Bank, 2015). However, it has been shown that when land disputes are brought to court, obtaining judgment may take up considerable time. Even in OECD countries, it will normally take up to a year for such disputes to be resolved. Therefore, establishing a preliminary alternative dispute resolution mechanism through mediation procedures, as done in some countries, reduces the burden on the courts and on landowners

Malaysia does not have a state assurance fund (Abdul Karim, Raja Othman, Ismail, & Maidin, 2011; Abdullah, Ramly, & Ikhsan, 2017), and therefore, all land disputes must be settled through court actions. Owners are expected to spend a substantial amount of money and time to reclaim their rights without any guarantee of success (Abdulai & Owusu-Ansah, 2014), thus defeating Torrens' original purpose of providing security and simplicity to the system of land registration. It can be very costly to dispute a title issue, and most property owners are ill-equipped to cope with the costs of protecting their title (Hayden & Kelner, 2020). This is particularly problematic in a developing country such as Malaysia, where around 21% of the population does not have adequate savings, and household debt is quite high (Edge Markets, 2017; The Malaysian Reserve, 2019). Malaysia is ranked 33 out of 190 countries in the 2020 Ease of Doing Business Registering Property Indicator due to the lack of a formal dispute resolution procedure for land disputes.

Calls from various parties to put in place a state system of guarantee (Zakaria & Hussin, 2012, 2013) led the Malaysian government to consider introducing provisions regarding the insurance principle to compensate for victims of land disputes. However, what has not been considered is whether an assurance fund is in fact the best option for guaranteeing land titles in Malaysia, or whether the title insurance in conjunction with the Malaysian version of Torrens system is preferable.

This study compares assurance funds and title insurance by exploring their benefits and weaknesses to determine the preferred model for Malaysia in terms of individual title holders. The remainder of this paper is organised as follows: part two consists of literature review; part three provides an overview of Malaysia's existing land administration structure and land dispute occurrences; part four discuss the assurance funds; part five considers title insurance; part six compares the two schemes to determine the preferred model for adoption in Malaysia; and part seven concludes the article.

2. Literature review

Title insurance and assurance funds offer similar objectives in providing an indemnity scheme for landowners. The differences between the two schemes reflect the differences between a Torrens land registration system and a recording system. Title insurance refers to a contractual agreement whereby the insured agrees to pay the insurer a premium where the insurer offers to guarantee or cover the insured property title against any loss (Arruñada, 2002; Russell, 2004; Viashima, 2017). In the United States, conveyancers played an active role in establishing the title insurance industry, which earned them a lot of profits as it grew into a profitable business (Burke, 1973). Title insurance was soon ensuring a growing market for the industry despite immense criticism (Hanstad, 1997; Lobel, 1977; Nwogugu, 2010). However, claiming that title insurance only prospered in the United States because of the faulty land recording system seems inaccurate because the Canadian provinces of Alberta, British Columbia, and Ontario (Calder & Compton, 2004) which operates title insurance scheme have Torrens titling systems. Although there was opposition to the initial arrival of American title insurance firms, the number of title insurance policies issued in Canada witnessed a steady annual increase (Ziemer, 2011).

Title insurance triumphed over land title registry systems as a mechanism for protection of interests in land, as title insurers created a nationwide demand for their policies (Bitinger, 1991). Furthermore, attempts to implement a Torrens titling system with its associated assurance fund, in the United States more generally proved unsuccessful due to the lack of support, due to the fact that an enormous amount of judicial labour was required to bring land under the system. This was because titles had to be carefully examined and hearings were required to be conducted with the attendance of all interested parties (Olmstead, 1892). In those states that adopted the Torrens system, applies to only approximately one-tenth of one percent of the States' land's assessed value. Since it is not mandatory for the public to register under Torrens, the sum in the assurance fund is insufficient to cover claims for losses.

Several attempts to compare the assurance fund with the title insurance have been made over the years. The earliest literature comparing these two schemes was made by an American scholar in 1936. Although the basis of such a comparison was particularly limited to the operation of the Torrens assurance fund in the United States, which was deemed a failure (Cushman, 1937), it serves as a useful lesson that not all jurisdictions can replicate the success of the Torrens system in its entirety, such as that in Australia.

Another study comparing the Torrens system and the recording system available in the United States suggested that both systems promote efficient assignment of titles after considering the land transaction costs. However, the argument that the Torrens system is much more cost-efficient is not entirely accurate as the two systems involve almost the same amount of financial costs in closing (Miceli & Sirmans, 1995).

Subsequently, another study compared the assurance fund and title insurance by looking at different factors such as the market role, loss avoidance and administrative cost (Griggs, 2002). Griggs' analysis suggests that the assurance fund is the best option in a Torrens jurisdiction because of its immense cost-saving element and ease of implementation by the current Titles' Office.

Ziemer explored the operations of title insurance in both the United States and Canada to determine whether it could apply in Australia (Ziemer, 2011). Despite countless objections from Australian legislators, as apparent from the New South Wales Property Committee statement in 2004 that title insurance does not have any significant additional benefit, several American title insurance companies successfully started operating in Australia (Ziemer, 2011). He concluded that although title insurance can assist in managing conveyancing risks, its application particularly in the state of Victoria, Australia should be carefully considered by regulators (Ziemer, 2011). It was also suggested that the Torrens system in Australia is adequate for the time being without the adoption of title insurance.

An important study compared the recording system and the Torrens registration from an economist point of view, and discussed in detail the merits and pitfalls of both systems (Nwogugu, 2010). It proposed several decision models based on factors such as the probability of a claim under the Torrens and the recording system, the registration fee in the Torrens system, and the cost of title insurance in the recording system. It determined that in terms of social welfare, the Torrens system outperforms the recording system, and the existence of title insurance creates issues of antitrust violations (Nwogugu, 2010).

Interestingly, a few years later another study explored the application of title insurance in Canada and New Zealand and its implications for Australia where the issuance of title insurance had increased (Lynden Griggs, Low, & Thomas, 2016). Although it was suggested that title insurance may have negative consequences if conveyancing lawyers or agents are not diligent enough, the authors concluded that title insurance has its own merits and is applicable even in a Torrens system. Therefore, there are benefits from both systems, which, in the context of Malaysia's needs, warrant further consideration.

3. The structure of land administration in Malaysia

Malaysia's National Land Code 1965 is based on the Torrens system introduced in South Australia in 1858 and adapted from the provisions for the registration of ships under the Merchant Shipping Act 1854 (Bhandar, 2015; LD; Griggs, 2009; Raff, 2009; Taylor, 2008b). There are three underlying principles under the Torrens system; the mirror principle, the curtain principle, and the insurance principle that differs significantly from the deed system. Under the mirror principle, the register is said to be a complete reflection of the state of the title in terms of explicitly stating all rights in the register. Establishing the register as a priority above all else achieves the objective of the Torrens

system to provide security to the title (LD Griggs, 2009). Torrens therefore is said to confer an indefeasible title, although there may still be disputes over the issue of immediate or deferred indefeasibility (Crown, 2010; November & Rendell, 2010).

Under the curtain principle, purchasers are not required to go behind the register to investigate the title, since the register is the main source of information for potential buyers who should not be concerned with hidden trusts and equities (Crown, 2010; Mandhu, 2014; November & Rendell, 2010). This element of simplicity differentiates the Torrens system from the English deed system of conveyancing, which required decades' worth of documents to be checked to be satisfied of title rights

The third principle, which is the insurance principle, refers to the state guarantee of the title. Under the insurance principle, the registered proprietor is given a guarantee of their rights or interest in land (Low & Griggs, 2014). If they lose their interests by the operation of the system or through the occurrence of any omission, mistake, or misfeasance of the Registrar of titles or any of his officers, then the person is entitled to compensation. The State guarantee provisions were included to appease lawyers and money-lenders who criticised the Torrens bill during its inception in South Australia (Taylor, 2008a).

The purpose of introducing the Torrens system was to overcome the uncertainty and complexities of the deed system propounded by the English system of conveyancing (Cradduck, 2019). Under the old deed system, an investigation of the chain of transactions relating to a title is common, which makes real estate conveyancing a lengthy and complicated process. It is evident that the difficulties of the deed system discouraged other jurisdictions from adopting it, and thus, British colonies and principalities opted to implement other types of land systems. In addition to simplicity, a main difference between the deeds system and the title system of land registration, is that the deed system does not provide a guarantee of title to the land and is simply regarded as a method of collecting information more precisely as a land database. Therefore, scholars tend to regard the Torrens system as "not a system of registration of title but a system of title by registration" (Bhandar, 2015; Burns, 2009; Keenan, 2017).

In Malaysia, however, registration does not automatically guarantee that the title will be indefeasible under Malaysian laws (Edwards & O'Reilly, 1999; Keang Sood, 2002; O'Connor, 2009; Xavier, 2011).

Fraud cases in property transfers are a common occurrence (Harun, 2012; Harun, Ismail Nawang, & Hassim, 2015), and the land registration process in Malaysia is complex, rigid, and costly (Abdul Karim et al., 2011; Wu & Chung, 2011). Fraud and misrepresentation, registration obtained through forgery, insufficient or void instrument, or title or interest obtained illegally via the exercise of any power or authority authorised by statute are all exceptions to the National Land Code 1965's premise of indefeasibility of title. The Malaysian system does not include an insurance provision in the National Land Code 1965 which makes the original Torrens promise of security, economy, simplicity and convenience (Bucknall, 2008; Havelock, 2019) misleading.

In the landmark case of *Boonsom Bonyanit*[1] in 1988, a photocopied version of the owner's passport, a fraudulent declaration that the original title deed was lost, and a legislative declaration correcting the owner's name in the title from Sun Yok Eng or Boonsom Bonyanit to only Boonsoom Bonyanit were used to impersonate the legitimate owner of two pieces of land in the Island state of Penang. These documents were used to

effectively transfer the land to a third-party purchaser. In 1989, a newspaper advertisement alerted Boonsom's son to the scam. The land's rightful owner then took legal action against the buyer, Adorna Properties Sdn. Bhd., which had already paid RM1.8 million for the property. Despite the fact that Boonsom had established forgery beyond a reasonable doubt, the defendants were able to secure an indefeasible title to the property under section 340(3) of the National Land Code 1965 which protects any title or interest gained in good faith and for valuable consideration.

Subsequently, the Court of Appeal reversed this decision of the High Court. Unfortunately, when the case was brought to Malaysia's highest court in 2001, the Federal Court delivered a controversial decision[2] by conferring the *bona fide* purchasers with an immediate indefeasible title (Keang Sood, 2002; O'Connor, 2009). The same court reversed the ruling 10 years later in another case,[3] proclaiming that deferred indefeasibility should apply instead (Keang Sood, 2010). The adoption of deferred indefeasibility in Malaysia based on this ruling is conditional on the transferee acting in good faith, as a bona fide purchaser, and for valuable compensation. The subsequent transferee must also show that there was a genuine dealing in order to secure ownership of any land title, and that he or she was not a careless or negligent purchaser (Harun, Bidin, Hamid, & Salleh, 2021). However, it is uncertain whether a chargee bank receiving an interest from an immediate proprietor is considered an immediate interest holder or a subsequent interest holder (Perumal, 2016).

Similar cases involving fraudulent land transfers were recorded in Malaysia in the following years. Table 1 presents the statistics of reported police cases involving land fraud from 2015 to 2019.

4. The torrens titling assurance fund

The founder or the Torrens system, Sir Robert Richard Torrens (1814–1884), proclaimed that the purpose of State guarantee is complementary to the concept of indefeasibility of title. Because indefeasibility provides protection against deprivation, a guarantee against loss is required and provides financial aid in the event of such deprivation (Toomey, 1995). Since the assurance fund warrants or guarantees the title against losses which may

Table 1. Statistics of reported police cases involving land fraud from 2015 to 2019 according to states in Malaysia.

	2015	2016	2017	2018	2019
PERLIS	0	1	0	0	0
KEDAH	1	6	11	6	1
PENANG	4	6	3	2	0
SELANGOR	14	27	26	9	1
K. LUMPUR	6	3	4	2	1
N. SEMBILAN	4	6	7	3	1
MELAKA	3	2	0	0	0
JOHOR	13	7	8	4	2
PAHANG	6	2	2	0	0
TERENGGANU	3	4	0	1	1
KELANTAN	4	8	4	5	2
SABAH	16	19	10	18	3
SARAWAK	2	6	6	9	1
TOTAL	**81**	**102**	**91**	**59**	**76**

flow from the operation of the system of title by registration, it is suggested that there exists a paradox (Bucknall, 2008; Stein, 1983). The concept of indefeasibility is replaced by that of guarantee, where one provides security against deprivation, while the other assumes the possibility of such deprivation and grants financial assistance (Stein, 1983).

However, most scholars agree that providing a fund from which rightful heirs and others may be compensated for the value of land that they are barred from claiming against people who have obtained the title through the law – whether as purchasers, mortgagees, or otherwise – is an important part of registration of title (Hanstad, 1997; Mccormack, 1992). Others, however, caution that it is wrong to assume that the assurance fund is intended as an indemnity for mistakes or omissions in the performance of the Registrar's many and varied responsibilities, or that all such omissions or errors are compensated by the fund.

The compensation provisions of the Real Property Act 1900 in New South Wales are the most detailed and closely scrutinised provisions in Australia and would prove a valuable guide for Malaysia. The original text makes mention of the title insurers' rights, and the fees for conversion of deeds titles to the Torrens system and the transfer of land following the death of a registered owner were deposited into the assurance fund. Nowadays, a levy of $4.00 is included in the lodgment charge for each deal under the Real Property Act 1900 (Stilianou, 2013).

There are several situations in which compensation is made available under an assurance fund. Under the various Torrens legislations in Australia, the compensation provisions allow loss to be recovered if it results from the deprivation of land on the grounds of fraud, land brought under the provisions of the Act through Crown grants or private applications, the registration of another party, and loss resulting from a mistake, omission, or misdescription in the register.

All Australian jurisdictions have limitations on the proceedings for compensation. For example, in New South Wales there is a six-year limitation period in which to bring an action for compensation under the fund from the date of deprivation of an interest.[4] Apart from limitations related to time, there are other limitations in accessing the compensation procedure. One of the most common limitations provided by all statutes is that there is no compensation provided if the loss arises from a breach of any trust by the registered proprietor.[5]

Malaysia's National Land Code 1965 section 418 (1) provides that any person or body aggrieved by any decision of the Registrar may at any time within the period of three months beginning with the date on which it was communicated to him, appeal to the High Court. Some examples of "decision" of the Registrar that can be brought for an action under section 418(1) are for the entering of the Registrar's caveat,[6] order for sale[7] and order of forfeiture for defaulting of payment of rent to the State.[8]

Despite its original objective of guaranteeing titles, it is not always easy to gain access to these compensation provisions. There have been many failed attempts by landowners and interested parties in claiming funds. What is of utmost concern is that sometimes the reason behind these failures is due to the rigidity and complexity of the procedures involved in submitting the claims not because they are not otherwise genuine (O'Connor, 2003a). The tenacitysome jurisdictions show in resisting even legitimate claims upon the fund can lead to delays by owners in seeking compensation under the state guarantee of title (Ziemer, 2011).

In New South Wales, the previous legislative scheme caused significant practical difficulties in the form of complicated and technical proceedings where claims against the assurance fund was strongly defended.[9] Under section 126 of the Real Property Act 1900 (NSW), any claimant is required to proceed against the person responsible for the loss before he can take action against the Registrar-General under section 127. The assurance fund became a "last resort" for claimants under the New South Wales statute, whereas claimants in Victoria and Western Australia may bring an action against the Registrar or Commissioner as a nominal defendant or make an application for compensation to the Registrar or Commissioner without bringing an action that appeared to be a "first resort" for claimants. Aside from Australia, assurance funds were established in several other countries such as Canada, Singapore, and Papua New Guinea. In Canada, the assurance fund was implemented in several provinces such as Alberta, British Columbia, and Ontario. The assurance fund was established in the *Land Titles Act, R.S.A. 1980* of the province of Alberta based on the guiding principle that compensates a rightful owner by money instead of allowing him to recover the land. This principle commends itself to the sense of natural justice, in contrast to the principle of English law. Similar to Australia, the main purpose of the assurance fund is to satisfy users who rely on the system for compensation and for such funds to be accessible to persons with valid claims (Hurlburt, 1992).

It is wrong to assume that the assurance fund created in British Columbia is an indemnity for mistakes or omissions in the performance of the registrar's many and varied responsibilities, or that all such omissions or errors are compensated by the fund (Robinson, 1952). The structure of the assurance fund will compensate those who are wrongfully deprived of an interest in land, but not the innocent purchaser who acquires an interest from a rogue (Harris, 2006).

The Torrens system was also adopted in Ontario due to many favourable conditions such as valuable lands, a satisfactory system of surveys, the existence of reputable solicitors, and a booming population (McLeod, 1909). As such, the assurance fund was established under Part V of the Ontario *Land Titles Act R.S.O. 1990, Chapter L.5* which provides compensation for certain financial losses due to real estate fraud, omission, and errors of the land registration system.

In Singapore, the provision for the assurance fund can be found in section 151(1) of the Land Titles Act which authorises the Registrar to set aside a portion of the fees collected for the fund. The objective of the assurance fund in Singapore is to compensate for any amount required to pay claimants under section 155, and any other disbursements that are ordered or authorised to be paid, or that are expressly stated to be recoverable. A claim against the assurance fund in the first instance can be made by any person who has been deprived of land worth less than $1,000, or suffered loss or harm worth less than $1,000. In such a case the Registrar may resolve or compound the claim.[10] Payment from the fund for any compensation may be authorised by the Registrar but is limited to $1,000.[11] A demand for compensation in excess of $1,000 can be received from the fund with the Minister of Law's written approval or after a court ruling.[12]

It is apparent from the provisions of Singapore's Land Titles Act that the types of claims, as well as the amount claimable under the assurance fund, are very limited. Surprisingly, a Singaporean scholar argued that the insurance principle is not essential to the operation of a Torrens system by pointing to the Malaysian land law which did not provide for any such assurance fund (Crown, 2010).

Under Papua New Guinea's Land Registration Act (Ch No 191), a person can bring an action against the Registrar if he or she suffers loss or damage through an omission, mistake, or misfeasance of the Registrar or other officers in the exercise of their duty (Mugambawa & Amankwah, 2002). The damages are payable from the assurance fund which is established through the contributions and fees levied against persons on registration of interests established under Section 138 of the Land Registration Act.

5. Title insurance

Under title insurance, private insurance providers issue policies against losses (Pelkey, 1927) after completing due diligence, including a title search (Arruñada, 2001), by examining the records and history of the title to ensure that the title is clear from any dispute and objections. The due diligence process involves extensive capital and careful examination of the documents, which may take more than a week (Guha & Samanta, 2021). It is only after this thorough and careful process that the title insurance company will issue its policy (Bouslog, 1920; Hanstad, 1997).

The case of *Watson v Muirhead*[13] was considered as the catalyst for the establishment of title insurance in the United States (Dumm, Macpherson, & Sirmans, 2007; Sirmans & Dumm, 2006), this was because the purchaser suffered a loss after buying a property based on the conveyancer's advice and was denied any damages by the court when it was deemed that there was no negligence on the conveyancer's part. As a result of this case, anAct providing for the establishment of title insurance companies was passed by the Pennsylvania legislature in 1874. Consequently, the first title insurance company, The Real Estate Title Insurance and Trust Company, was established in 1876 (Sirmans & Dumm, 2006) by the conveyancer Joshua Morris.

An increasing number of title insurance companies, primarily in metropolitan cities like Chicago, Los Angeles, Minneapolis, New York, and San Francisco, were then founded. A national organisation of title insurance companies was established in 1907, known as the American Association of Title Men (AATM), later changed to the American Land Title Association (ALTA), with the purpose of unifying the profession and the organisation of abstracters and title men in States where no such organisation existed. Nowadays, almost all States in the United States have title insurance, except for Iowa where it is prohibited and title is guaranteed by the attorney's abstract opinion and the Iowa Guaranty Division (Strickler, 2003).

In 1999, it was estimated that almost 85% of residential sales and purchases in the United States included title insurance (Arruñada, 2002), resulting in substantial growth from around $4 billion in 1995 to $15 billion in 2004 (Dumm et al., 2007). Many factors contributed to the development of title insurance in the real property market in the United States. The increase in housing demand in relation to the property boom as well as the costs and availability of title insurance companies are some of the factors that have led to the success of title insurance (Ford, 1982; Rosenberg, 1977; Villani & Simonson, 1982).

Since each State is responsible for regulating title insurance in the United States, statutes and regulations differ (Burman, 2020; Nyce & Boyer, 1998). Unlike other insurance providers, title insurance companies in the United States are prohibited from offering other types of insurance in certain states (Jaffee, 2006), thus making it a highly specialised and niche market monopolised by property agents with the knowledge of the real estate.

The majority of the major title insurance providers create title plants using available public record sources. Title plants are databases used to assess ownership of said property by abstractors, title insurers, title insurance brokers, and others (Hayden & Kelner, 2020; Hemphill, 2019). Generally, title insurance consists of two types: lender policies and owner policies. The owner's policy, sometimes known as fee policy, refers to the policy that the property owner's or seller's duty to normally purchase an insurance as part of their transfer of property responsibility to insure the owner or buyer against the risk that the title is other than those stated in the policy document (O'Connor, 2003b). The owner policy will remain enforceable until the said property is sold to another party by the current buyer (Jaffee, 2006). Such policies sometimes also include marketability clauses to protect if a property becomes unmarketable (McKillop, 1955).

Under the lender's policy, the lender's security interest is guaranteed in the policy which covers the amount of the mortgage. Lenders' title insurance is similar to mortgage insurance in that the rate of coverage reduces over time with the amount of the loan (Nyce & Boyer, 1998). It is usually mandatory to take out a lender's policy as it is a requirement set by the banks (Murray, 2007; Sirmans & Dumm, 2006), and the policy will be enforceable until the mortgage is repaid.

Over the years, due to public pressure and the accumulation of risk expertise by the industry, title insurance coverage has increased (McKillop, 1955). For example, a variety of policies are available under the title insurance. The common standard average policy protects the insured against defects disclosed by public records. There is also title insurance for leasehold coverage for tenants, but it is not widely subscribed because of the difficulties in determining the exact premium to be paid by the tenant (Temkin, 2002).

Title insurance policy should cost less than 1% of the property value (Eaton and Eaton, 2007), but in reality, premiums differ according to State. Premiums also differ between the two types of policy. Any premium, however, does not include the cost of conducting guaranteed searches, abstracts, other miscellaneous searches, document preparation, and closing services (Arruñada, 2002). These extra costs will be paid by the owner or seller of the property.

Title insurance is essentially retrospective in nature, in the sense that it covers the insured from future damages attributable to undiscovered claims or hidden perils that have existed before the policy date (Johnson, 1966). Its main objective is to protect against future events and indemnify the insured if the title is defective but usually excludes defects that arise after the date of the policy (Hayden & Kelner, 2020). However, it does not protect the insured from known and existing risks, such as environmental regulations (Sirmans & Dumm, 2006) and zoning requirements.

There are many elements that make title insurance unique to other types of insurance. For example, title insurance is considerably different from traditional insurance policy which is based on actuarial computations.[14] This is reflected in the title insurance premium which is not calculated for a future event and not forward-looking.[15] Moreover, title insurance only covers damages caused by errors in title and explicitly restricts the insurer's responsibility in protecting claims that fall under the policy's coverage, unlike general liability insurance which has broad indemnity and defence responsibilities.[16]

6. Assurance fund *vis-à-vis* title insurance

Title insurance and assurance fund contain many distinguishing elements, although title insurance and assurance fund both provide property player efficiency, safety, and security in property transfer (DeWitt, 2000). It is necessary to compare both schemes in order to determine which is more suited to Malaysia. Table 2 presents a brief description of the differences between assurance fund and title insurance. These differences are in terms of coverage period, risks, parties who are covered, costs as well as procedures.

Coverage period

Title insurance covers retrospective risks, including those that occurred before the date of the title insurance policy. The assurance fund does not cover retrospective risk since the Torrens system of land registration prioritised registration, and indefeasibility can only be attained after instruments are registered (Harun et al., 2021; Havelock, 2019; Xavier, 2011).

Risk coverage

There are so many different types of policies available under the title insurance, and the coverage can be broader than the coverage under the assurance fund. Title insurance generally protects the insured against defects disclosed by only the public records, but there are also those which protect the insured against defects through inspections, surveys or by inquiring parties in possession (Stapley, 2018). The Torrens assurance fund does not cover any of these risks to buyers and lenders during the pre-registration phase (O'Connor, 2003a). Title insurance also protects from risks such as lack of access, unmarketable title, forged signature on the deed, previous claim of ownership from an heir, and also instruments presented by a forged power of attorney (Gendron & Bourdeau-Brien, 2012; Oshe, 1930).

The assurance fund covers loss resulting from the deprivation of land on the grounds of fraud, land brought under the provisions of the Act through Crown grants or private applications, the registration of another individual, and loss resulting from a mistake, omission, or misdescription in the Register to be recovered. There is also an indemnity clause for losses incurred during the search process,[17] which implies that persons with

Table 2. Differences between the assurance fund and title insurance.

Assurance Fund	Title Insurance
Title Insurance	Covers retrospective risks such as those that occurred even before the date of the title insurance policy.
Compensation is allowed for deprivation of land on the grounds of fraud, land brought under the provisions of the Act through Crown grants or private applications, the registration of another individual, and loss resulting from a mistake, omission, or misdescription in the Register.	Title insurance protects from risks such as lack of access, unmarketable title, defects disclosed by only the public records but also those defects through inspections, surveys or by inquiring parties in possession.
The fund only covers registered property owners.	Extensive coverage of the insured includes heirs and limited partnership.
A portion of the registration fees is deposited into the assurance fund.	High cost of the insurance premium which is paid by the landowners.
Most legislation requires the claimant to exhaust all possible legal recourse before submitting a claim	The insurance company is obliged to pay compensation without legal action taken against the company.

unregistered interests are able to claim from the fund. In Malaysia, section 386 of the National Land Code 1965 provides that any person can claim against the Registrar in instances where they suffered damages in respect of any error in an official search.

Party coverage

Who is covered under title insurance is also quite extensive because title insurance also covers limited partnerships. This is compared to the assurance fund, where compensation is only available to the rightful owner or parties with certain interests in the land such as through lease or mortgage. Title insurance coverage, however, can also include limited partnerships and heirs by succession.

Cost

Despite its benefits in guaranteeing the rights of registered owners, the high cost of procuring the insurance policy discourages the general public (Ford, 1982), as title insurance companies are known to frequently overcharge their customers (Quiner, 1973). The assurance fund, however, has the advantage of being substantially cheaper to maintain and does not unduly burden the public.

Procedure

Proponents of title insurance, claim that compensation is relatively easier and faster to obtain and that it can complement the assurance fund scheme. Some also argue that the advantages of title insurance, such as no-fault coverage for damages covered by the policy, outweigh the disadvantages of not having it (Murray, 2007). Most Torrens legislation, on the other hand, compels the claimant to exhaust all legal options before presenting a claim to the assurance fund.

When analysing these benefits and weaknesses it becomes clear that there are advantages and disadvantages in both schemes. Scholars from countries with established Torrens systems, such as Australia, have argued that title insurance is of limited value in a land titles system because it duplicates the compensation provided through the assurance fund. Furthermore, the Torrens land registration system has already provided easy access to land registers, thus making conveyancing practice relatively easy (O'Connor, 2003b; Sherry, 1996; Winton, 2007).

In comparison, early American scholars touted the benefits of title insurance, particularly in the mortgage business which includes securing investment (Haymond, 1928) since it frees the mortgage broker from all worry or possible loss because of a defective title. The lure of title insurance for banks and financial institutions is that if the title is contested, the title insurer can fight at its own expense, leaving the mortgage holder with no financial loss due to costs or attorney's fees (Higgins, 1927).

A significant difference between the assurance fund and the title insurance is the financial or economic factor. Title insurance can only be developed in a robust market with active participation by property agents and conveyancers, such as in the United States. Because of the low take-up of various insurance products in Malaysia (Lim, 2015; Wijayanti & Ramsay, 2016), with the exception of motor insurance which is mandatory by government's regulation, implementing a new form of insurance such as title insurance might not

be well received by the general public. The current property or household insurance available in Malaysia offers varying levels of coverage and premiums, with the most common being fire, floods, and lightning damage. However, the percentage of households with such voluntary insurance is unclear as *Bank Negara*; Malaysia's central bank only discloses figures such as annual income and claims ratio on general insurance which includes property insurance as well as other types of insurances.

On the other hand, the assurance fund has always been associated with a more economic form of compensating land disputes because it is largely subsidised by the government, with a portion of the land registration fees diverted into the specified fund. Even the judiciary have recommended that an assurance fund should be established to mitigate the damages experienced by registered owners as a result of fraud or forgery, as has been done in other jurisdictions with the Torrens system of land registration.[18] Vernon Ong FCJ in a recent Federal Court case also suggested that the Torrens system of land registration in Malaysia would also benefit from an assurance fund as it would add to its legitimacy.[19]

However, it would take some time for the fund to be sufficient to be able to pay out compensation if needed. Several other issues must be considered if the assurance fund was to be developed in Malaysia, since the Constitution mandates power to the State governments to manage land administration (Alias & Daud, 2006). There are 13 States and three federal territories in Malaysia, with property markets of varying sizes which would impact on the growth of the fund. The bigger and more developed States, such as Selangor and Johor, will certainly have more land transactions, as presented in Table 3 which would probably speed up the collection of the assurance fund. However, smaller states have less transactions and would therefore have less growth.

However, land disputes are also more common in bigger states, and whether or not the fund is adequate to cover damages and risks involving land with such a high land value should be considered. The proposed assurance fund may be extracted from a percentage of all fees paid on all dealings or a percentage of land value levies that impact dealings under the National Land Code 1965. It is the researchers' view that if the government chooses to implement an assurance fund, then it must be ensured that the fund has at least RM1 million before compensation can be allowed. Since the final decision to establish the assurance fund lies with the various State governments, there is

Table 3. The number of land transfers in Malaysia according to states in 2019.

States	Land transfer
Negeri Sembilan	11,066
Perlis	2797
Perak	34,739
Federal Territory of Kuala Lumpur	3596
Terengganu	21,596
Pahang	20,586
Johor	39,327
Selangor	68,881
Penang	10,884
Kelantan	25,030
Kedah	31,764
Melaka	14,590
Total	284,856

Source: Department of Director General of Lands and Mines, Malaysia.

a possibility that the smaller States with lower property transaction volumes might decide to opt out from establishing a fund altogether. Land revenue has long been the principal source of revenue for state governments, and diverting a portion of it may be disastrous for their already meagre finances.

Currently, Malaysia's National Land Code 1965 is more adaptable to use to adopt an assurance fund. These processes, on the other hand, must be thoroughly explored. Should the assurance fund be the first or last resort for parties in a property ownership dispute? If the assurance fund is established as a last resort for aggrieved parties, similar to the law in New South Wales, it will most likely add another layer of bureaucracy to the public's ability to claim damages, thus making recompense more difficult (Ziemer, 2011).

The overall administrative framework should also be clearly spelled out under the proposed legislation. It was previously suggested that an assurance fund board consisting of a president, deputy presidents, and representatives be appointed by the State Authority to hear and decide, the amount of any claim that should be allowed. Only if the board's decision is not satisfactory to the claimant, could an appeal to the court be made.

The current appeal process for land acquisition is a good reference. For example, under the Land Acquisition Act 1960, if either party is dissatisfied with the land administrator's decision on the land acquisition matter, they may take it to the court. A judge and two appointed assessors would preside over the hearing under Section 40 of the Land Acquisition Act 1960, with the intention of assisting the judge in assessing the objection and arriving at a fair and equitable amount of compensation. The subrogation of the rights of the government to the claimant to claim compensation should also be clearly spelt out if court proceedings are commenced in relation to a claimant's compensable loss, against any other person in relation to that loss.

Another option is to implement a hybrid compensation system in which the assurance fund and title insurance can be used together to eliminate certain risks from land transfers, as suggested in the New South Wales Law Reform Commission 1996 Report. The proposed assurance fund in Malaysia could only cover losses from actions and errors by the land registration staff, while private insurers would cover losses such as fraud, surveyors' errors, and others. This would potentially limit the compensation paid by the government through the assurance fund, and enable the parties involved to directly submit a claim to the relevant authority instead of through a normal litigation process. The advantage of this choice is that the government will be able to pass higher risks to private title insurers, save money on claims, and avoid lawsuits and subrogation rights.

Interestingly, most of the jurisdictions which implemented either system are high-income countries. Papua New Guinea is an example of a developing country which has implemented an assurance fund (Mugambawa & Amankwah, 2002). However, the functional application of the assurance fund and the government's dedication and financial capability to the scheme's implementation is unclear.

7. Conclusion

This research has established that both assurance funds and title insurance have their own merits. Although the assurance fund is a considerably less expensive choice for title holders, it does not cover all risks and is not retrospective, unlike title insurance. Title insurance appears to be superior to the assurance fund in terms of risk coverage.

The high number of fraud cases in Malaysia might affect the successful implementation of the assurance fund in the future. Therefore, proposed revisions to the National Land Code 1965 should consider adopting a hybrid compensation structure to prevent the proposed assurance fund from becoming too rigid and difficult to access.

A clear land policy, legislative structure, and regulatory and administrative environment with sufficient legal recognition are important in ensuring tenure security. Having a specific compensation mechanism in place is a step in the right direction and shows that the government is committed to maintaining the integrity of the land registry. If the government fails to take immediate action to remedy the current situation, another disastrous case like *Boonsom Bonyanit* is very likely to happen again.

Notes

1. *Boonsom Bonyanit v Adorna Properties Sdn Bhd* [1990] 3 MLJ 444.
2. *Adorna Properties Sdn Bhd v Boonsom Boonyanit* [2001] 1 MLJ 241.
3. *Tan Ying Hong v Tan Sian Sang* [2010] 2 MLJ 1.
4. Section 131(2) of the Real Property Act 1900 No 25 [NSW].
5. Section 129(2)(f)(i) of the Real Property Act 1900 No 25 [NSW].
6. *Public Bank Bhd v Pengarah Tanah dan Galian & Anor [1990] 2 MLJ 510.*
7. *Se Ching Thian and Ors v Maybank Berhad and Ors [2011] MLJU 62.*
8. *Pemungut Hasil Tanah, Kota Tinggi v United Malayan Banking Corp Bhd [1981] 2 MLJ 264.*
9. For example, see – *Challenger Managed Investments Ltd v Direct Money Corp Pty Ltd* (2003) 59 NSWLR 452.
10. Section 156 (5) of the Land Titles Act.
11. Section 151 (2) of the Land Titles Act.
12. Section 151 (3) of the Land Titles Act.
13. (57 Pa. 161).
14. *Kinski v. Archway Motel* 21 Wn. App. 555 (Wash. Ct. App. 1978)
15. *Federal Deposit Insurance Corporation v. The Mortgage Zone, Inc.* (E.D.N.Y., Oct. 12. 2010).
16. *Philadelphia Indemnity Insurance Company v. Chicago Title Insurance Company, 771 F.3d* 391 (7th Cir. 2014).
17. Section 129(1)(f) of the Real Property Act 1900 No 25. [NSW].
18. See for example – Richard Malanjum CJ's judgment in *Pushpaleela a/p R Selvarajah & Anor v Rajamani d/o Meyappa Chettiar and other appeals* [2019] 2 MLJ 553.
19. *See Leong Chye @ Sze Leong Chye & Anor v United Overseas Bank (Malaysia) Bhd and another appeal* [2021] MLJU 739.

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Data availability statement

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