

Land Assurance Fund Frameworks: An Analytical Study of Relevant Legal Provisions in Malaysia and Australia

Najwa binti Azizun¹, Azni binti Mohd Dian², Azhani binti Arshad³

¹Centre of Foundation Studies, Universiti Teknologi MARA, Cawangan Selangor, Kampus Dengkil, 43800 Dengkil, Selangor, Malaysia

^{2,3}Faculty of Law, Universiti Teknologi MARA, Shah Alam, Malaysia

DOI: <https://dx.doi.org/10.47772/IJRISS.2024.8100136>

Received: 27 September 2024; Accepted: 07 October 2024; Published: 09 November 2024

ABSTRACT

Background and Purpose: Registration of title or interest should confer indefeasibility of title to the landowners or interest holders since the fundamental principle of the Torrens system is supposed to guarantee that. Unfortunately, technology and human greed motivate and cause wrongful deprivation of such rights. When this happens, the issue of compensation or remedy will arise. By not adopting the insurance principle as proposed by Sir Robert Torrens, innocent landowners are at risk of being uncompensated.

Methodology: This study employs doctrinal legal research. This content legal analysis will study the selected land legislations in New South Wales (Real Property Act 1900 No 25), Victoria (Transfer of Land Act 1958), Queensland (Land Title Act 1994), South Australia (Real Property Act 1886), Western Australia (Transfer of Land Act 1893), Tasmania (Land Titles Act 1980), Northern Territory (Land Titles Act 2000) and Australia Capital Territory (Land Titles Act 1925) on three aspects only. They are about sources of the assurance fund, bases for claim and the limitation period.

Findings: An assurance fund exists in all states in Australia, but they bear similarities and differences in their operation and application. As for the sources of fund, some states employ a user-funded scheme, some states use a government-funded approach, and there is also a combination of user and government-funded approach. As for the basis of claim, commonly the law enables claims for the loss that is suffered as a consequence of fraud, and error or mistake of the Registrar. Concerning limitation periods, there are various time limits prescribed by the states, ranging from 6 years, 12 years, 20 years, and to no limit at all.

Contributions: Apart from adding to the body of knowledge, this study significantly assist policymakers to draft legal provisions as regards the creation of an assurance fund in Malaysia. Learning from the experience of various states in Australia, this study emphasizes the elements that must be taken into consideration when formulating Malaysian assurance fund.

Keywords: Assurance fund, compensation scheme, land fraud, limitation period, sources of fund.

INTRODUCTION

Background of the study

Ownership of property is one of the indicators of one's wealth and status in society. Land, as one of the most common assets has economic, social, and sentimental value to a person. To prove ownership of land, one only needs to show that his name appears as the proprietor on the issue document of title ("IDT") produced by the respective land office in Malaysia. This is the fundamental principle of the land registration system in Malaysia where 'registration is everything' as decided by the court in the case of *Teh Bee v K Marutamuthu* [1977].

However, registration of title does not at all times protect landowners from wrongful deprivation of their lands. The infamous case of Adorna Properties [2001] stirred public rage and anxiety when an innocent landowner lost her land due to forgery. Her signature was forged and therefore her land was sold by a fraudster to a third party. Ten years later, the Federal Court in the case of Tan Ying Hong [2010] took another path in interpreting section 340 of the National Land Code and thus, overruled the decision in Adorna Properties. However, it is to be noted that landowners are still exposed to losing their land if their land is bought in good faith for valuable consideration by a subsequent purchaser. In this situation, the landowners may not be able to recover their land from such subsequent purchaser for the fact that the right of the subsequent purchaser must also be protected, or else, it means the indefeasible title granted under section 340 of the National Land Code (“NLC”) is not strong and can be impeached at any time.

There are many instances where landowners lose their land for reasons not caused by their fault. Under section 340 (2) of the NLC, there are several situations where the title or interest is defeasible. They are as follows:

- (2) The title or interest of any such person or body shall not be indefeasible-
 - (a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or
 - (b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or
 - (c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.

In dealing with fraud cases, the Federal court in the case of See Leong Chye [2019] has proposed the creation of an assurance fund. Said the court, the Torrens system will become more credible when the victim of land fraud is financially assured. According to Zakaria and Hussin (2012), an assurance fund refers to a fund that is created and guaranteed by the government to protect landowners from administrative errors or fraud. In other words, this fund is to compensate any innocent landowner who has lost his land due to fraud or administrative errors by the respective authorities. In this regard, Richard Malanjum CJ (as he then was,) one of the Federal Court judges in the case of Rajamani Meyappa Chettiar [2019] also made clear that the law had to be applied as it is, despite the perceived injustice to the original proprietor as the ‘unfortunate loser’. He recognized that the concept of indefeasibility of the Torrens system favors a subsequent bona fide purchaser for value over the original registered proprietor. To address this injustice, he urged the relevant authorities to consider the need for an assurance fund to compensate innocent original proprietors who have been the victim of fraud and/or forgery.

Statement of problem

Since the adoption of the Torrens system, Malaysia has only applied mirror and curtain principles, leaving out the insurance principle which is one of the backbones of the Torrens system itself. Failure to provide economic security has resulted in unfairness to the innocent landowners. Apart from this loophole in the law, the computerized land registration system also has its flaws, since the system is not secured. Therefore, it is pivotal for the government to close this loophole by introducing a comprehensive compensation scheme.

At present, any victim of land fraud must pursue their right against the fraudster in a court of law. However, not all cases will end with the recovery of the land. For example, in Rajamani A/P Meyappa Chettiar [2015], the transfer of the land to the second defendant was procured through fraud and forgery. The registration in the name of the second defendant was therefore defeasible. However, the plaintiff failed to recover the land because the court found that the first defendant was a subsequent purchaser in good faith and for valuable consideration, hence the title of the first defendant is indefeasible.

According to Mohd (2021), it is more devastating for innocent landowners if the fraudster is bankrupt or has passed away. Similarly, there is a possibility that the fraudster cannot be identified or traced. In this situation, the victim will not be compensated and therefore justice is denied.

Apart from judicial remarks on the need to implement an assurance fund into Malaysian land law, Ismail, Zakariah and Ganason (2023) have also highlighted the same. Apart from that, according to Yubaidi, Mohamad and Abd Aziz (2022), without an assurance fund as a means of guarantee by the state, the law cannot protect the aggrieved parties appropriately. This is a type of injustice and must immediately be remedied.

Though the demands of establishing an assurance fund have been repeatedly outspoken, the research on its framework is still an emerging topic of interest. To make sure that the assurance fund can be efficiently created and sustainable, a thorough study of its framework has to be undertaken. Hence, the need to have an assurance fund is undeniable. As a matter of right, any deprivation of property without adequate compensation is wrong under the law. To implement an assurance fund into Malaysian land law, a thorough study of the relevant frameworks has to be undertaken so that the fund not only can be established but can be maintained and sustainable by the government. According to Mohd (2021), the research on the framework of the assurance fund in Malaysia is still at a preliminary stage as compared to other jurisdictions that have long established the fund.

Objectives

This research is conducted to analyze the legal provisions concerning assurance funds in Australia, focusing on three specific aspects: sources of fund, bases for claims, and the limitation period. From this, the researchers aim to explore suitable legal frameworks for the implementation of the Torrens assurance fund in Malaysia for the three abovementioned matters. The rationale for choosing Australia as a subject matter of study is because the Torrens system originates from there, making Australia one of the earliest countries that create an assurance fund. Apart from that, Australia is a suitable reference because it resembles Malaysia in terms of the practice of the federal system. Six states and 2 territories of Australia have their own set of laws about the assurance fund. Hence, the analysis of their law can guide Malaysian relevant authorities to learn and hopefully, to assist in formulating a suitable legal framework.

LITERATURE REVIEW

Legal principles under the Torrens system

Malaysia has adopted the Torrens title system with certain modifications. When the British entered into the Federated Malay States, the local rules and regulations were largely based on the Real Property Act 1857 (South Australia) which introduced the Torrens system whereas many of the substantive provisions in the NLC are in *pari materia* with those of the various Australian states, although certain basic differences occur: for example, there is no assurance fund in the Peninsular Malaysia scheme. Under the Torrens system, the IDT is a piece of concrete evidence to prove ownership.

As generally understood, three cornerstones of the Torrens system are the mirror, curtain, and insurance or guarantee principle. These principles were formulated by Sir Robert Torrens back in 1859. Registration is the basis of the law and it therefore will guarantee the title or interest as registered. Grinlinton and Thomas (2020) reiterated that legal title to land is created once the proprietor's name is registered in the register. How do the three principles work? The mirror principle denotes that the register of the title contains accurate and complete facts that relate to the title. It is what it is, nothing more or less. The title should be free from any burdens, rights, or qualifications unless such burdens, rights, or qualifications are stated in the register of title (Ismail, Zakariah and Ganason, 2023). The curtain principle is supposed to ease the whole process of land ownership because this principle signifies that no further investigation is required to validate the title and know its history. Moreover, Ismail, Zakariah and Ganason (2023) viewed the IDT becomes the conclusive evidence as well as the sole source of information regarding the title and the insurance principle stands as a state guarantee for indemnity or compensation in the event the register of title is in error which has caused the landowner to be deprived of his right.

Sir Robert Torrens (1859) viewed the indemnity fund as meant for persons who may be deprived of rights or interest in land to get compensation because he is barred from recovery of their right in the land due to the operation of law. According to Niblack (1915), the insurance or indemnity fund under the Torrens system is

not for the holder of the certificate of title, but for persons who may be deprived of rights or interests in land by this declaration of indefeasibility.

The need for an assurance fund in Malaysia

At present, Malaysia is using a digitalized land registration system. Land registration acts as a process of managing land tenure to improve the land registration system (Zakariah, Samsudin and Ngadiman, 2020). According to the official website of the Department of Director General of Lands and Mines (n.d.), in Malaysia, e- Tanah system is used to develop an integrated computerized system for effective and transparent administration while boosting integrity. However, the system is not free from weaknesses and thus has opened the door for the commission of fraud. The computerization of the land registration system is problematic in the sense that it provides avenues to those committing fraud. Grinlinton and Thomas (2020) opined that when the paper-based system is turned into a digitalized system, a pivotal question is on the integrity and reliability of the latter. Abdul Hadi and Paino (2016) opined that the vulnerability of security and stability of the register can be questioned because fraud and forgery exist wherever there is a commercial activity. Walsh (1992) previously suggested that under the Torrens system, there must be actual fraud and not merely equitable or constructive fraud. Abdullah, Ramly and Ikhsan (2017) exemplified the situation; a fraudulent person with access to the electronic system can log in to the system using the ID and password he obtained, prepare the necessary documentation, sign the instruments electronically, and apply electronically for registration. Besides, Bakar et al. (2021) added that the weakness of the land registration system is due to the absence of verification procedures before accepting documents for registration.

Apart from that, land fraud can also be committed by using power of attorney (“PA”). Harun, Nazli and Jady@Zaidi (2015) outlined the common misuse of PA includes the use of PA that has already expired or canceled or the donor or the donee of the PA has passed away or through a forged PA as well as fake court seal and forged signature. Additionally, Zakariah and Ngadiman (2020) observed that the fraud and forgery challenges in Malaysia include the (i) limited power of the Registrar or land administrator, (ii) lack of expertise and resources, (iii) computerized land registration system security, (iv) lack of concern among legal practitioners and commissioners of oath, and (v) the abuse of power. Those researchers also inform the land administration authorities and practitioners about the significance and challenges of protecting information against misuse for fraudulent purposes.

Karim, Othman, Ismail and Maidin (2011) and Ismail (2023) believed that from the beginning of a registration process, fraudulent transactions can happen and identify at what stage and types of fraud and forgery conduct may occur during a presentation for the registration process is undergone as shown in Figure 1 below.

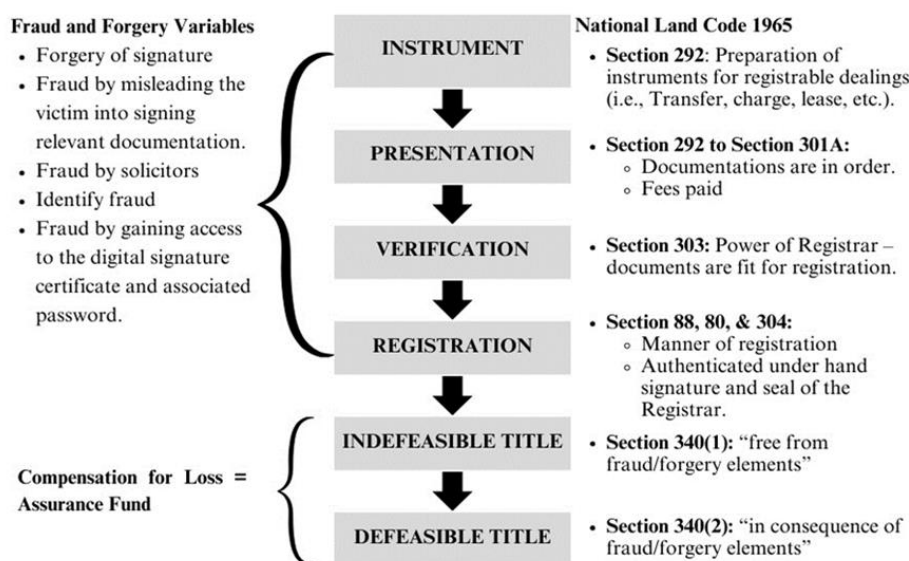


Figure 1: Flow chart on registration of dealings in Malaysia & Fraud & Forgery variables

To tackle the issue of land fraud, as discussed above, much literatures have highlighted the need to create an assurance fund as a monetary compensation to the land owners who have lost their right over the land because of fraud. The assurance fund is an important aspect of the Torrens system whereby the State has to guarantee the indefeasibility of title upon registration. According to Abdullah, Ramly and Ikhsan (2017), the need to incorporate the fund into the land system may enhance integrity by having an accurate register of titles and provide additional efforts to combat fraud and forgery of documentation. Besides, Ismail, Zakariah and Ganason (2023) stated that by having the assurance fund in the system shall also increase public and investor confidence and support in the Malaysian land administration system.

It is unavoidable that if the assurance fund is to be created, the government will incur more financial burden as they will need to provide some amount of money into the fund. Especially in the era of COVID-19 and post-pandemic, the government struggles to assist the aggrieved citizens and at the same time to generate money for the country. For example, Tahajuddin and Sulaiman (2021) reported that the government of Malaysia has lost RM 68,190,364 due to the cancellation of 170,084 hotel room bookings during the period 11 January 2020 until 16 March 2020. Additionally, Shah et al. (2020) stated that the government has to spend more on the health sector, whereby the government announced the RM600 million allocation to MOH in which RM 500 million would be utilized to buy ventilators and personal protective equipment (PPE) and another RM 100 million would be used to appoint 2000 nurses on a contract basis.

Having said that, it is never a good excuse to deny a person’s right simply because of a lack of resources. The government is the protector of fundamental rights. According to Article 13 of the Federal Constitution, “no person shall be deprived of property save in accordance with law”. The failure of the government to establish an assurance fund as a compensation mechanism against wrongful acts by the relevant authorities or by operation of law amounts to deprivation of property rights. To date, no law allows for the neglect of a landowner's legal right without adequate compensation, especially when the loss is due to the weaknesses of the land registration system.

Therefore, as proposed by Mohd (2021), before the assurance fund is to be implemented, a thorough study must be done primarily on the financial implications that may befall the state if the scheme were to be implemented. This aspect is pivotal to ensuring the success and sustainability of the fund. More importantly, the analysis of a comprehensive legal framework to govern the assurance fund in the context of federalism in Malaysia is still growing and far from being said to have been completed.

Conceptual framework

In this regard, Mohd (2021), has proposed a framework for the implementation of an assurance fund in Peninsular Malaysia. The findings of that research recommended several aspects of the assurance fund, which are about (1) the procedures, (2) the bases of claim, (3) limitation of liability, (4) limitation of time, (5) source of fund and (6) dispute settlement. More recently, Ismail, Zakariah and Ganason (2023) suggested that the framework should consist the following; (1) the source of fund, (2) the state’s right of subrogation, (3) who can claim, (4) who cannot claim, and (5) limitation period. Combining these two studies conclude that there are similarities and differences of elements that should be considered in formulating the framework are as shown in Figure 2.

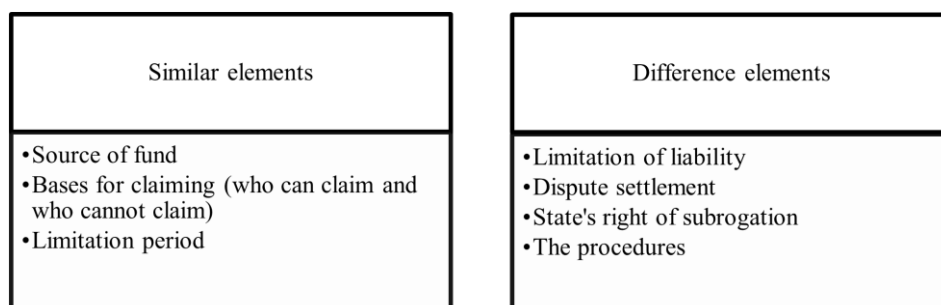


Figure 2: Similarities and differences of elements for a proposed framework for the implementation of an assurance fund in Malaysia

Based on Figure 2, both studies agreed that the source of fund, bases for claiming, and limitation period must be present in the framework of an assurance fund. While Mohd (2021) added the element of limitation of liability, dispute settlement, and the procedure, Ismail, Zakariah and Ganason (2023) suggested adding the state’s right of subrogation.

For this research, the researchers were confined to examining the legal provisions of the states in Australia regarding similar elements only.

METHODOLOGY

The research employs a qualitative research design. This method is chosen because the subject matter of this research does not involve any form of scientific study or empirical research. This is doctrinal and library-based research. The researchers will analyze the legal provisions of the assurance fund in New South Wales, Victoria, Queensland, South Australia, Western Australia, Tasmania, Northern Australia, and Australia Capital Territory since they have their own sets of laws and regulations about the assurance fund with some similarities and differences. Specifically, the law for each State is as follows:

- New South Wales –Real Property Act 1900 No 25
- Victoria- Transfer of Land Act 1958
- Queensland- Land Title Act 1994
- South Australia- Real Property Act 1886
- Western Australia- Transfer of Land Act 1893
- Tasmania- Land Titles Act 1980
- Northern Territory- Land Titles Act 2000
- Australia Capital Territory - Land Titles Act 1925

The purpose of examining the legal provisions is to enable the identification of relevant elements to be included when formulating and implementing the assurance fund in Malaysia. The content analysis will allow the researchers to provide suggestions as to what can be learned from the Australian practice. For clarity, this study will only seek to explore three aspects; sources of fund, bases for claiming, and the limitation period.

RESULT AND DISCUSSION

The analysis of the legal provisions of the states in Australia is divided into three subheadings which are i) source of fund, ii) bases of claim and iii) limitation period. In addition, this part will also examine various challenges that may occur in the course of introducing the assurance fund in Malaysia.

1. Source of fund

Table 1: Sources of fund

State	Law	Content
New South Wales	Real Property Act 1900 NO 25 + Real Property Amendment (Compensation) Act 2000	User funded + allocation by the government (approval by the Legislature)
Victoria	Transfer of Land Act 1958, section 107	User funded *Assurance fund has been repealed by the Public Account (Trust Funds) Act 1982 and now any compensation is charged to and paid by the Consolidated Fund
Queensland	Land Title Act 1994 + Queensland Future Fund (Titles Registry) Act 2021	User funded

South Australia	Real Property Act 1886 Section 201	Assurance levy not exceeding two dollars (however, assurance levy is not payable from 31 December 1988 based on subsection 7) + advanced money from the Treasurer + interest payment
Western Australia	Transfer of Land Act 1893 Section 201 (4)	All claims for compensation are charged to the Consolidated Fund
Tasmania	Land Titles Act 1980, section 150	User-funded + the Treasurer will invest the money to augment the fund. If the fund contains less than \$2 000 000, the Governor, by regulation, increases the fees payable by users.
Northern Territory	Land Titles Act 2000, section 192 (2) + section 193 (2)	Charged to and paid by the Territory
Australia Capital Territory	Land Titles Act 1925, section 155	Charged to and paid by the Territory

Table 1 shows various sources of fund used by respective states in Australia. A common method is funding that comes from users whereby the money comes from the collection of fees payable by the users. This user-funded approach is practiced in New South Wales, Victoria, Queensland, and Tasmania. Apart from that, an assurance levy is another way of generating money into the fund and this is used by South Australia. In addition to fees payable by the users, in New South Wales and South Australia, the government also contributes a certain amount of money to the fund. Interestingly, Tasmania allows the Treasurer to invest the money in the assurance fund to augment the fund. Last but not least, Western Australia, Northern Territory, and Australia Capital Territory will pay the compensation from their consolidated fund.

Learning from these practices, there are several alternatives that the Malaysian government may consider in the aspect of the source of fund; user-funded, government-funded, or a hybrid approach. Mohd (2021) suggested user funded approach as it will not financially overburden the government. The users will also benefit since there will be an economic guarantee for their land with a minimal amount of levy imposed.

However, if the fund is only funded by the fees payable by the users, there is a risk that the fund is not enough to pay for claims of compensation in case there are many claims are received by the states. Therefore, it is suggested that there should have been another source of funding by the government. In other words, a hybrid approach is suggested by combining money contributed by the users of the land registration system as well as financial support by the government. In this case, a reference to South Australia and Tasmania can be helpful. If allocating a certain amount of money yearly will put the government in financial difficulty, then the government may advance money to make enough for the claims. In addition, the government may also want to invest the money so that the fund can benefit from the profit of the investment.

2. Bases of claim

Table 2: Bases for claim

State	Law	Content
New South Wales	Real Property Act 1900 NO 25, section 120	<ul style="list-style-type: none"> · fraud · any error, misdescription or omission in the Register · the land being brought under the provisions of this Act · the registration (otherwise than under section 45E) of some other person as proprietor of the land, estate, or interest

Victoria	Transfer of Land Act 1958, section 110	<ul style="list-style-type: none"> · the bringing of any land under this Act · a legal practitioner's failure to disclose in a legal practitioner's certificate a defect in title or the existence of an estate or interest in land · any amendment of the Register · any error omission or misdescription in the Register or the registration of any other person as proprietor · any payment or consideration given to any other person on the faith of any recording in the Register · the loss or destruction of any document lodged at the Office of Titles for inspection or safe custody or any error in any official search · any omission mistake or misfeasance of the Registrar or any officer in the execution of his duties · the exercise by the Registrar of any of the powers conferred on him in any case where the person sustaining loss or damage has not been a party or privy to the application or dealing in connection with which such power was exercised
Queensland	Land Title Act 1994, section 188	<ul style="list-style-type: none"> · fraud of another person · the incorrect creation of an indefeasible title in the name of another person · incorrect registration · an error in an indefeasible title or in the freehold land register · tampering with the freehold land register · loss, destruction or improper use of a document deposited or lodged at the land registry or held by the land registry for safe custody · an omission, mistake, breach of duty, negligence or misfeasance— <ul style="list-style-type: none"> (i) of or by the registrar or a public service employee of the department performing a function or carrying out a duty under this Act; or (ii) of or by the titles registry operator or an employee of the operator in relation to the performance of a titles registry function under the Queensland Future Fund (Titles Registry) Act 2021 · the exercise by the registrar of a power in relation to an application or dealing with which the person had no connection.
South Australia	Real Property Act 1886, Section 203 + section 208	<ul style="list-style-type: none"> · fraud · the bringing of land under the Torrens system · the registration of any other person as proprietor · any error, omission, mistake, misfeasance or misdescription in the Register Book
Western Australia	Transfer of Land Act 1893, section 201 + section 205	<ul style="list-style-type: none"> · fraud · the bringing of such land under the operation of this Act · the registration of any other person as proprietor of such land estate or interest · any error or misdescription in any certificate of title or in any entry or memorandum in the Register · any omission mistake or misfeasance of the Registrar or any other officer or clerk in the execution of their respective duties

Tasmania	Land Titles Act 1980, section 152 + section 153	<ul style="list-style-type: none"> · fraud · the bringing of that land under this Act · the registration of another person as proprietor of that land, estate, or interest · any error, omission, or misdescription in the Register · omission, mistake, or misfeasance of the Recorder or any of the Recorder’s officers in the execution of their duties
Northern Territory	Land Titles Act 2000, section 192	<ul style="list-style-type: none"> · fraud · the incorrect creation of an indefeasible title in the name of another person · incorrect registration · an error in an indefeasible title or in the land register · tampering with the land register · loss, destruction or improper use of a document deposited or lodged at the Land Titles Office or held by the Land Titles Office for safe custody · an omission, mistake, breach of duty, negligence or misfeasance of or by the Registrar-General or a member of the staff in the Land Titles Office · the exercise by the Registrar-General of a power in relation to an application or dealing with which the person had no connection.
Australia Capital Territory	Land Titles Act 1925, section 154	<ul style="list-style-type: none"> · through the bringing of the land under this Act · the registration of any other person as proprietor of the land or interest · any error, omission or misdescription in any grant or in any entry or memorial in the register

Table 2 outlines bases for claiming based on relevant legislation in the respective states. Almost all states (except for Victoria) allow a claim for compensation from the states based on the loss suffered as a consequence of fraud. Apart from that, other similar grounds for a claim among the states are if the loss is a consequence of the bringing of the land under the legislation or Torrens system and also if there is any error, omission, or misdescription in the Register. Most states also explicitly enable a claim for any omission, mistake, breach of duty, or negligence by the staff in the Land Office.

State guarantee of title is one of the fundamentals in the Torrens system. However, to balance the interest of the people and to safeguard the state from improper claims, the law has to be very clear on what kind of losses should be indemnified by the states. Fraud is one of the most common situations of wrongful deprivation of land. As seen from Table 2, all states except Victoria will protect landowners from such unfortunate losses. Even so, in Victoria, Francis (1972) opined that a case of fraud would be pursued in a civil suit. Additionally, Mohd (2021) suggested that based on “the registration of any other person as proprietor” would justify a defrauded person to claim compensation against the fund.

In this regard, the researchers opine that a loss suffered as a consequence of fraud should be explicitly mentioned as one of the enabling reasons for a claim against the assurance fund. The main purpose of a compensation scheme is to remedy innocent landowners, and fraud is one of the most common causes of wrongful deprivation of land ownership. Apart from fraud, losses that have resulted from insufficient or void instruments, as well as forgery and misrepresentation should also be covered by the assurance fund. The assurance fund should also compensate for losses caused by any error, omission, or misdescription in the

Register. This goes back to the proposition by Sir Robert Torrens when he introduced title registration. Since the system is made and controlled by the state, any error in the Register has to be guaranteed by the state itself. This suggestion is supported by Ismail, Zakariah and Ganason (2023) whereby they have proposed that the bases for claim should be consistent with the circumstances that may make a title defeasible under section 340 (2) of the NLC.

From time to time, the law has been amended to be at par with the current situations and developments. For example, there have been changes in several states in Australia where the states have shifted the risk to pay compensation by the states to other professional insurers in cases of negligence by solicitors or mortgagees (Grinlinton and Thomas, 2020). Mortgagees, who usually have more financial strength as compared to mortgagors are responsible for taking steps to verify the identity of the mortgagor or guarantor and such failure will prohibit them from indemnity by the states, at least in New South Wales, and Queensland. This approach will decrease states' exposure to compensate for wrongful deprivation of land or interest based on fraud or forgery cases. This is a true lesson learned for our policymakers to consider.

3. Limitation period

Table 3: Limitation period

State	Law	Content
New South Wales	Real Property Act 1900 NO 25, section 131	Within 6 years from the act or omission that gave rise to the loss or within 6 years from the date that the loss was suffered.
Victoria	Transfer of Land Act 1958 Section 27 of the Limitation Act 1958	No specific period is stated under the Transfer of Land Act 1958, but section 5 (1) (d) of the Limitation Act 1958 limits an action “to recover any sum recoverable by virtue of enactment,” is within 6 years from the date of cause of action accrues. However, section 27 of the same Act postpones the limitation period in cases of fraud
Queensland	Land Title Act 1994, section 188C	(a) within 12 years after the person becomes aware, or ought reasonably to have become aware, of the circumstances giving rise to the entitlement to compensation; or (b) within a longer period the court considers just.
South Australia	Real Property Act 1886, section 215	within 20 years from the time the right to make an application or bring action first accrued
Western Australia	Transfer of Land Act 1893 section 211	within 6 years from the date of deprivation
Tasmania	Land Titles Act 1980, section 158	Within 6 years under s. 4(1) (d) of the Limitation Act 1974
Northern Territory	Land Titles Act 2000, section 198	No time limit is mentioned under the Land Titles Act 2000. However, section 198 of the Act that ‘no title for adverse possession’. See also section 42 of the Limitation Act 1981
Australia Capital Territory	Land Titles Act 1925, section 69	Statute of limitations not to run against land under the Land Titles Act 1925

Table 3 presents the limitation period for bringing any application for compensation against the assurance fund in respective states. New South Wales and Victoria do not prescribe any limitation period under their respective land legislations. However, under the Act relating to the limitation period, the time limit for New

South Wales and Victoria is 6 years. This would be similar to Western Australia and Tasmania, limiting such action to only 6 years also. Meanwhile, Queensland provides for a 12-year time frame and the time runs only after the person becomes aware, or ought reasonably to have become aware, of the circumstances giving rise to the entitlement to compensation. South Australia extends the time limit to 20 years. Interestingly, there is no provision prescribing a limitation period in Northern Territory's Land Titles Act 2000. Instead, section 198 of their 2000 Act states that there is no time limit for a registered owner to recover his land from adverse possession. Moreover, section 42 of the Limitation Act 1981 has no time limit for a cause of action based on fraud or deceit. Last but not least, in Australia Capital Territory, there is also no provision on the limitation period to claim against the Territory for compensation, and in fact, section 69 of the Land Titles Act 1925 excludes the application of the statute of limitation.

Additionally, learning from the practice in Western Australia, under section 211 (2) of the Transfer of Land Act 1893, there is another provision for "any person being under the disability of infancy or unsoundness of mind may bring such action within 6 years from the date on which such disability shall have ceased so however that such action be brought within 30 years next after the date of such deprivation".

In general, the limitation period can act as a shield to prevent any claim because the claimant takes so long to commence an action. However, in the interest of justice, Whalan (1982) opined that there should not be any limitation of time to bring an action for compensation against the assurance fund because the issue of deprivation of rights or interest over the land may not be discovered easily by the landowners. Mohd (2021) stated that this reason is justifiable and further relied on section 341 of the NLC which stated that the Limitation Act 1953 ["Act 254"] will not extinguish any title to, or interest in, land for cases of adverse possession. However, in her research, as an alternative, Mohd (2021) proposed a 12-year time limit, starting from the discovery date of the deprivation because a 6-year time frame is too short and may burden the innocent landowner.

As far as Malaysia is concerned, section 9 of Act 254 prescribes a 12-years limit from the date the cause of action accrued for any claim to recover land. In addition, section 29 of the same Act deals with actions founded on fraud and mistake, the limitation of 6 years will run after such fraud or mistake have been discovered, or could have been discovered by a due diligence.

Paragraph 5.11 of the New South Wales Law Reform Commission Report 76. (1996) suggested that the limitation period should not start until the aggrieved person becomes aware of the deprivation. This approach benefits the innocent party and can ensure that the compensation claim is not barred by a limitation period. If the limitation period starts to run from the date of the deprivation, but the landowner is not aware of that, by the time he realizes the deprivation may have been too late for him, hence would cause injustice to him. Therefore, if the policymakers decide to prescribe a limitation period for any claim against the assurance fund, be it 6, 12, or 20 years, the time should not be calculated from the date of the cause of action accrued, but instead, the date when the landowner becomes aware (or should have been aware) of the deprivation.

4. Challenges to implement an assurance fund

Introducing an assurance fund as a compensation mechanism is not just a legal concern, but also involving policy and administrative decision. Unlike Australia, the states in Malaysia do not have full autonomy on land matters because the NLC is a federal law. This dual governance complicates the creation of an assurance fund since federal law, i.e. NLC, needs to be amended to establish such a fund, while at the same time, land administration remains largely under the jurisdiction of individual states. The process of amending the law to establish the assurance fund will be lengthy as well as involving various stakeholders like landowners, legal practitioners and staff in all land offices. In addition to that, finding a sustainable funding mechanism is pivotal in ensuring that the assurance fund can last long and runs effectively. Besides, from administrative point of view, training the staffs to handle any claims from the assurance fund as well as monitoring mechanism must be provided. Another critical issue that needs to be addressed is on the issue of balancing state autonomy with federal control, in respect of the compensation funding mechanisms. Malaysia will need to determine how the

fund will be financed—whether through contributions from landowners, land transactions, or a combination of state and federal funding.

Therefore, forming a special committee to undertake the task to engage with the stakeholders and drafting the framework for the creation of the assurance fund is necessary. It is also important to form an effective collaboration between the federal and to reach consensus among states in Malaysia pertaining to the funding mechanism since this matter will implicate financial resources of the states.

CONCLUSION

After examining the legal provisions in all states in Australia, it can be concluded that all those states have similar aspects of the framework of the assurance fund, however, they vary in their application and operation. All of the states have provisions about the source of fund, bases for making a claim, and the limitation period. As for the sources of fund, some states prefer a user-funded scheme, some states use a government-funded approach, and there is also a combination of user and government-funded approach. As for the basis of claim, commonly the law enables claims for the loss that is suffered as a consequence of fraud, error or mistake of the Registrar, or for by the application of the legislation of their land law. Concerning limitation periods, there are various time limits prescribed by the states, ranging from 6 years, 12 years, 20 years, and to no limit at all.

This finding significantly adds to the body of knowledge and serves as relevant guidance for the policymakers to take note of and consider when making decisions and formulating our assurance fund. However, the researchers suggest further analysis of the different elements of the framework of the assurance fund that have not been covered by this study. More importantly, after all relevant elements of the legal framework are established, there should be a critical examination of the question of the suitability of the assurance fund to be created by respective states in Malaysia or the scheme should have been centralized as a federal fund instead.

REFERENCES

1. Abdul Hadi, K. A., & Paino, H. (2016). Legal perspectives towards forgery, fraud and falsification of documents: recent development. *Management & Accounting Review (MAR)*, 15(2), 93–109.
2. Abdullah, N. C., Ramly, R., & Ikhsan, M. I. (2017). Land registration of titles at stake: West and East Malaysia compared. *Environment-Behaviour Proceedings Journal*, 2(6), 197–203.
3. *Adorna Properties Sdn Bhd v Boonsom Boonyanit @ Sun Yok Eng* [2001] 1 MLJ 241
4. Bakar, N. A., Omar, H., Ab Hamid, N., Mansoor, M., Abdullah, S. M., Sulaiman, S. S., ... & Mansor, H. (2021). Securing land registry by blockchain: At the crossroads against land fraud registration. In A. Mahmood et al. (Eds.), *E-Book of Extended Abstract (i-CLaS 2021)* (pp. 108–111). Shah Alam, Malaysia: Faculty of Law, Universiti Teknologi MARA.
5. Department of Director General of Lands and Mines. (n.d.). *E-Tanah system*. Retrieved from: <https://www.jkptg.gov.my/en/sumber/e-tanah-system> [Accessed 22 November 2023].
6. Francis, E. A. (1972). *The law and practice relating to Torrens Title in Australasia*. Sydney: Butterworths.
7. Grinlinton, D., & Thomas, R. (Eds.). (2020). *Land registration and title security in the digital age: New horizons for Torrens*. New York, NY: Taylor & Francis.
8. Harun, N., Nazli, I., & Jady@Zaidi, H. (2015). Land scams involving the power of attorney in land dealings in Malaysia. *Pertanika Journal of Social Sciences and Humanities*, 23(S11), 97–106.
9. Ismail, M. S. (2023). Measures undertaken to safeguard against fraud in land dealings. *Jurnal LAND*, 1(1), 85–99.
10. Ismail, M. S., Zakariah, Y., & Ganason, A. (2023). Land administration system in Malaysia: The Torrens Assurance Fund. *Jurnal LAND*, 3(1), 53–60.
11. Karim, N. S. A., Othman, R. A. R., Ismail, M. S., & Maidin, A. J. (2011). Identifying and overcoming the risk of fraud in the Malaysian electronic land administration system. *2011 International Conference on Research and Innovation in Information Systems*, 1–6.

12. Mohd, K. W. (2021). *Establishing a compensation scheme under the Malaysian Torrens System* (Unpublished doctoral dissertation). International Islamic University Malaysia.
13. National Land Code (Act 828), Malaysia
14. National Land Code (Act No 56 of 1965). *LexisNexis Malaysia*. Retrieved from <https://www.jkptg.gov.my/images/pdf/perundangan-tanah/NLC1956DIGITAL-VER1.pdf> [Accessed 20 January 2024].
15. New South Wales Law Reform Commission Report 76. (1996). *Torrens title: Compensation for loss*. Retrieved from: <https://lawreform.nsw.gov.au/documents/Publications/Reports/Report-76.pdf> [Accessed 20 January 2024].
16. Niblack, W. C. (1915). Pivotal points in the Torrens system. *Yale Law Journal*, 24(4), 274–285.
17. *Pushpaleela R Selvarajah & Anor v. Rajamani Meyappa Chettiar & Other Appeals* [2019] 3 CLJ 441
18. *Rajamani A/P Meyappa Chettiar v Eng Beng Development Sdn Bhd & Ors* [2015] MLJU 148
19. Real Property Act 1857 (South Australia)
20. *See Leong Chye & Anor v United Overseas Bank (Malaysia) Berhad* (2019) 1 MLJ 25
21. Shah, A. U. M., Safri, S. N. A., Thevadas, R., Noordin, N. K., Abd Rahman, A., Sekawi, Z., ... & Sultan, M. T. H. (2020). COVID-19 outbreak in Malaysia: actions taken by the Malaysian government. *International Journal of Infectious Diseases*, 97(1), 108–116.
22. Tahajuddin, S., & Sulaiman, N. N. (2021). Malaysian government choice of fiscal and monetary policies during covid-19 pandemic: preliminary insight. *International Journal of Advances in Engineering and Management*, 3(1), 248–253.
23. *Tan Ying Hong v Tan Sian Tan & Ors* [2010] 2 MLJ 1
24. *Teh Bee v K Marutamuthu* [1977] 2 MLJ 7
25. Torrens, R. R. (1859). The South Australian system of conveyancing by registration of title with instruction for the guidance of parties' dealings. Retrieved from: <http://arisp.files.wordpress.com/2009/06/thesouthaustraliansystemofconveyanc.pdf> [Accessed 3 December 2021].
26. Walsh, J. (1992). Fraud and personal equities under the Queensland Torrens System. *Bond Law Review*, 4(2), 228–234.
27. Whalan, D. J. (1982). *The Torrens system in Australia*. Sydney: Law Book Company.
28. Yubaidi, R. S., Mohamad, M., & Abd Aziz, S. N. (2022). Land registration acceleration in Indonesia: a lesson-learned guideline from land registration issues in Malaysia. *UUM Journal of Legal Studies*, 13(1), 155–174.
29. Zakaria, S. R. A., & Hussin, K. (2012). Assurance fund as a new mechanism in protecting landowners in Malaysia. *3rd International Conference on Business and Economic Research (3rd ICBER 2012) Proceeding*, 1616–1626.
30. Zakariah, Y., Samsudin, S., & Ngadiman, N. (2020). An overview of the fraud and forgery challenges in land registrations system. *European Journal of Molecular & Clinical Medicine*, 7(3), 274–282.