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## **Working Paper**

### **Navigating the Minefield of Equity Release Products**

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## **Navigating the Minefield of Equity Release Products**

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### **ABSTRACT:**

It is widely accepted that Singapore will be expecting a substantial increase of elders in the coming decades. Governmental policies relating to pensions and housing have resulted in a high proportion of elders being asset-rich but cash-poor. In response to similar situations, a market has developed for equity release products in the UK and Australia. These financial products allow the value of the property to be monetized, thereby providing cash to elders during their silver years. Yet, the elder as a class of consumers may be vulnerable, and to deal with the possible legal issues arising in this market, both the UK and Australia have also introduced a span of legislative and regulatory changes to protect them. This article seeks to set out the developments in the equity release market, and the corresponding legal frameworks in the UK and Australia, and compare these with the current legal framework in Singapore, drawing forth possible steps which may be taken to strengthen the framework for the likely growth of such products.

## I. Introduction

1. The 2013 Population White Paper (“PWP”) released by the National Population and Talent Division of the Prime Minister’s Office highlighted the fact that Singapore had reached a turning point in its population trend. According to the PWP, Singapore would soon experience a significant age shift between 2013 and 2030, with close to 900,000 baby boomers,<sup>1</sup> a quarter of the current population, entering their silver years during this period.<sup>2</sup> As a result of the growing awareness of Singapore ageing population, there have been multiple calls for more elder-friendly policies and regulations, particularly in the areas of healthcare and cost of living.

2. The issues faced by an ageing population are not entirely new. To ensure that elders<sup>3</sup> are able to meet costs of living, markets in the United Kingdom (UK) and Australia have responded by introducing equity release products.<sup>4</sup> Broadly, such financial products allow real property assets to be monetized. As with financial products, there are a variety of equity release products. The three most common are:<sup>5</sup>(1) a reverse mortgage, where the consumer borrows money on the value of equity in his or her home, and the principal and interest are not repaid until the home is sold, usually upon death; (2) a home reversion scheme, where the consumer sells part of his home for less than market value but is allowed to remain in the property until they die or vacate the home voluntarily. The financial institution and the homeowner both benefit from any increase in the property price;<sup>6</sup> (3) a shared appreciation mortgage, where the consumer gives up the right to some capital gain on their property in return for paying reduced or no interest on his or her borrowings. The attraction of equity release products is that an elder borrower is not required to make payment on the loan amount during his or her lifetime. The amounts owed are usually only payable upon death.

3. Such products have been welcomed by those within the baby-boomers bracket who have amassed wealth in the form of real property. These products are also particularly attractive to asset-rich elders who retire from full-time employment but who require liquidity to fund regular day-to-day expenses, lump sum payments for one-off purchases such as vacations, vehicle purchase, emergency funds, home improvement, nursing or health care.

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<sup>1</sup> Generally accepted to be the generation born post-war, between 1946 and 1964.

<sup>2</sup> PWP at 1.

<sup>3</sup> For the purposes of this article, Elders are taken to be persons over the retirement age of 65.

<sup>4</sup> Equity release products are also popular in the U.S.A. and New Zealand, but this article will focus on developments in the UK and Australia given the similarities in the legal framework with Singapore’s.

<sup>5</sup> See Report No. 59 (2005) by the Australian Securities & Investments Commission titled “Equity Release Products: An ASIC report” for an excellent overview of the permutation of such products.

<sup>6</sup> See Fox and Devenney, *Undue Influence, The Elderly and Equity Release Schemes*. Presented at the 7<sup>th</sup> Biennial Conference on Property Law. See also the write up by the Safe Home Income Plan / Equity Release Council website:

<http://www.equityreleasecouncil.com/document-library/raising-money-from-your-home>.

4. Whilst not commonplace, the reverse mortgage is not entirely new to the Singapore market. It surfaced in Singapore in the late 1990s but did not find traction in the local market. Nonetheless, the growth of such products in the UK and Australia, and the re-appearance of such products in the form of the Lease and Buyback Scheme for public housing, suggests that equity release products are likely to increase in popularity in the coming years.

5. In the sections below, this paper seeks to outline the likely importance of equity release products to Singapore's elder population, the nature and function of equity release products. It also seeks to analyze how foreign markets in Australia and the UK have dealt with the legal issues arising from such products and provide suggestions on how to strengthen Singapore's legal framework to prepare for the likely increase in such products.

## II. The Demographic Landscape

### A. *Housing and Housing Finance in Singapore*

6. A survey of the social landscape suggests that equity release products are suitable for elder borrowers in Singapore.

7. Several population trends point to the need for new means to support the elder population. First, the growth in the number and proportion of elders in Singapore would mean a corresponding decrease in the number of working-age adults.<sup>7</sup> According to studies conducted, the PWP states that the current ratio of working-age to retired adults is about 6:1, and disregarding population increase through immigration or other unforeseeable factors, this ratio is likely to dip drastically to 2:1 in the year 2030. Evidently, the burden of economic activity would heighten for those in the working-adult band in 2030. Barring any large scale policy changes, as much as a third of Singapore society in 2030 would be past the age of 65. Unsurprisingly, the Government has thus alluded to the possibility of rising taxes, which will be part and parcel of a heavier economic load on the working-age Singaporean.<sup>8</sup> Further, Singapore's life expectancy has increased from 62 years in 1970 to about 88 years in 2010.<sup>9</sup> According to the World Health Organisation, Singapore ranks 4<sup>th</sup> in the world for life expectancy.<sup>10</sup> The small size of the typical Singaporean nuclear family also means that the elders in this generation are able to rely on less persons for financial support as compared to their predecessors. The likely demographical state in 2030 raises a real concern about the economic and social resources required to sustain a decent quality of life for the population. This would give impetus to search for new means to support the elder population.

8. The above projections are by no means neoteric. Indeed, these trends were foreshadowed in several policy papers. In 2005, the Committee on Ageing Issues ("CAI") was

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<sup>7</sup> Para 1.9 PWP.

<sup>8</sup> Para 1.10 PWP.

<sup>9</sup> Para 1.4 PWP.

<sup>10</sup> 'Singapore Ranks No. 4 for Life Expectancy', Salma Khalik, The Straits Times, 27 May 2013.

set up to analyse and formulate policies in respect of Singapore's ageing population. In February 2006, the CAI released their Report on the Ageing Population. Emphatically, the Report predicted that between 2006 and 2030, Singapore would "witness an unprecedented profound age shift" as persons above 65 will triple from 300,000 to as much as 900,000, which means one in five residents would be an elder.<sup>11</sup> More intriguing was the call for the Government to provide elder-friendly housing through means such as "work[ing] with market players to offer reverse mortgage schemes for the elderly HDB flat leases at commercial terms."<sup>12</sup> Indeed, Chapter 3 of the Report dealt with the topic of elder-friendly housing, and emphasised on the need to allow elder residents to "age-in-place", that is, to allow them to be resident where they are so as to reduce the environmental changes in their silver years.<sup>13</sup> Part of this push to allow elders to age-in-place is to allow them to monetize their real property.<sup>14</sup> The harbingers have clearly sounded out the generational tectonic shifts and the need to adapt to these changes.

9. The call for suitable responses to Singapore's ageing population is made more pressing due the unique nature of pension schemes in Singapore. In the 1950s, the Singapore Government introduced the Central Provident Fund ("CPF") system which is a compulsory retirement savings scheme.<sup>15</sup> Through the system, both employee and employer are required to contribute a portion of the employee's monthly salary to his or her personal CPF account. By and large, the bulk of monies paid into each worker's CPF account is only to be released upon the retirement of the individual. Parallel to the CPF scheme was the Government's push for home-ownership. Singaporean workers who wished to purchase public housing from the Housing and Development Board ("HDB") were allowed to apply their savings in their CPF accounts to purchase of public housing. Currently, CPF monies may also be used in the purchase of private housing. The policy motivation was that bolstering home ownership would in turn foster a sense of public responsibility and public spiritedness.

10. The twin result of the CPF scheme and the policy to allow CPF monies to be utilised for property purchase has resulted in a high level of home ownership in Singapore. According to statistics released by the Ministry of National Development ("MND") in 2013, home ownership in Singapore tripled in the past 50 year to hover at 90%.<sup>16</sup> This has led Singapore to have one of the highest home ownership rates in the world. Other developed nations fall significantly short, with Australia at 69%, the United States at 66%, the United Kingdom at 64% and Japan at 61%.

11. The corollary of this is that much of an average Singaporean's assets are represented by his real property. Relative to total assets, the average Singaporean's ratio of household residential property to total assets is 51%, which for instance, is higher than the average citizen

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<sup>11</sup> Executive Summary of the Report on the Ageing Population.

<sup>12</sup> Para 12 of the Report.

<sup>13</sup> CAI Report, Chapter 3, para 2.

<sup>14</sup> CAI Report, Chapter 3, para 21-24.

<sup>15</sup> For overview on the CPF scheme, see NgeeChoon Chia and Albert KC Tsui ("Chia & Tsui") at 6-10.

<sup>16</sup> The figures are available at: [http://www.mnd.gov.sg/homeSWeethome/home\\_ownership.htm](http://www.mnd.gov.sg/homeSWeethome/home_ownership.htm).

in US (28%), UK (34%) and Japan (40%).<sup>17</sup> Indeed, according to the Government's State of the Elderly report in 2008/2009, about 70% of those surveyed aged 55-74 identified their owner-occupied home as their most important assets, above fixed deposit and other types of saving accounts.

12. Unsurprisingly, according to statistics from the HDB, about 81% of the population owns a Housing Development Board flat, and over 95% of the adult population are homeowners.<sup>18</sup> This is no doubt the result of Singaporeans being allowed to use their CPF monies for property purchase and mortgage payments.

### ***B. Early Introduction of Equity Release Products***

13. The unique importance of real property to the elder generation did result in the reverse mortgage being introduced to the Singapore market. In or around 2006, the Oversea-Chinese Banking Corporation Limited ("**OCBC**") was the first bank to formally introduce the product in Singapore.<sup>19</sup> NTUC Income is likely to have been the only other financial institution carrying the product, and had introduced in the late 90s.<sup>20</sup> However, despite the passage of time since then, equity release products have not gained strong traction in Singapore. This is likely due to a myriad of reasons.

14. A survey done on the perception of the reverse mortgage in Australia showed that the primary reasons why elders did not take up the product include the view that the home was sacred and any potential threats would be treated with extreme caution, fear that they may outlive the reverse mortgage and be evicted, or that they were spending their heirs' inheritance.<sup>21</sup> This is likely to be no different where local elders are concerned. A 2009 law suit involving NTUC Income's attempt to repossess a borrower's home under the terms of a reverse mortgage may have further reinforced some of these fears as well as cast further negativity on the product.<sup>22</sup>

15. In the NTUC income case, the borrowers Mr Derek Chua and his wife, had applied for the reverse mortgage in 1997. At that time, the property in question was valued at about \$2.1 million. A sum of \$1.68 million, being 80% of the property, was to be disbursed to the borrowers

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<sup>17</sup> Supra note 12, Chia & Tsui at Section 2.

<sup>18</sup> McCarthy at 7.

<sup>19</sup> Available at:

<http://www.ocbc.com.sg/assets/pdf/Media/2006/aug/250806ReverseMortgage.pdf>.

<sup>20</sup> NTUC Income introduced the reverse mortgage in or around 1990.

<sup>21</sup> R Reed, The Perception of Reverse Mortgages in the Australian Housing Market. Presented at the ISA Housing Conference, 1-4 September 2009, Glasgow.

<sup>22</sup> Couple Sue NTUC Income over Reverse Mortgage Deal Gone Sour, The Business Times, 28 July 2009. See also the official Media Release by NTUC Income, available at: <http://www.income.com.sg/aboutus/releases/2009/jul27.asp>. No further press releases were made thereafter; Ansley Ng, "Its all in the Fine Print", Today, 22-23 August 2009; Jessica Cheam, "Couple Sue over Reverse Mortgage", The Straits Times, 28 July 2009.

by way of \$2,000 sums every month. Due to the SARS crisis in 2003, the value of the property dropped to \$1.1 million. This meant that their loan amount of \$1.68 million had exceeded the total value of the property. The borrowers were then told to make a lump sum payment of about \$46,000 to bring the loan-to-valuation ratio back to 80%. They were also told that the monthly payments of \$2,000 would be reduced to \$1,500. There were subsequent negotiations between the parties regarding the sale of the property which did not materialise. In 2006, NTUC Income took steps to repossess the property and the borrowers filed a lawsuit alleging wrongful seizure of their home. The claim was subsequently resolve out of Court.

16. This blip aside, the calls for appropriate measures to meet elders' needs to monetize their real property led to the Government introducing the Lease and Buyback Scheme ("LBS") for public housing in 2009. As this was a cautious first step by the Government, the eligibility criteria were stringent. Thereafter, the Government augmented the scheme in 2010 and recently again in 2013. Essentially, a retired elder who owns a 3-room or smaller HDB flat may sell a portion of the remaining lease back to the HDB for an annuity. According to the Terms of the Conditions of the LBS available on HDB's infoWeb, the proceeds of the LBS are paid directly to the elder's CPF account. From there, a regular annuity payment is made to the elder. Under the recent enhanced LBS, the eligibility criteria include that:- (1) the citizen household in question must live in a 3-room or smaller HDB flat; (2) all lessees are at least at the CPF draw-down-age of 62 years old; (3) the monthly household income must not exceed \$3,000; (4) the household must not own a private residential property.<sup>23</sup> By HDB's own calculations in 2010 (prior to the recent enhancement), only approximately 35,000 (or 82% of elderly households in 3-room and smaller flats) are potential beneficiaries of the scheme.<sup>24</sup> It may be that some elders would rather not subscribe to the scheme on the count that the sales proceeds would be channelled to their CPF accounts, where they may not have a complete mandate on how and when such proceeds are utilized. As recent as March 2014, the Minister for Housing and Development had announced that the Ministry was looking at ways to broaden the scheme. This lends further support to the ideas underpinning equity release products.

17. The LBS is referred to by way of example. Since the considerations and economic policies in relation to public housing and the private market are vastly different, it goes beyond the scope of this paper to analyse the former. Nonetheless, it is clear that the idea of introducing alternative housing finance to elders is apposite. In a recent Parliamentary Debate, the Minister for National Development informed Parliament that the Ministry "has begun serious study of the [reverse mortgage] option".<sup>25</sup> The LBS appears to be a precursor to possible

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<sup>23</sup> Terms and Conditions of the Enhanced LBS. See:

<http://www.hdb.gov.sg/fi10/fi10218p.nsf/FI10VStatPgLookup/BR05TApplication%20for%20Lease%20Buyback%20SchemeTerms%20and%20Conditions%20for%20Enhanced%20Lease%20Buyback%20Scheme?OpenDocument>

<sup>24</sup> HDB InfoWeb 5 Mar 2010.

<sup>25</sup> Business Times, 11 March 2014, Lynette Khoo, Government Takes Another Look at Reverse Mortgage Scheme. The author thanks Mr Peh Zu Hao for bringing this to his attention.



growth of other equity release products which are an attractive proposition for asset-rich cash-poor elders who wish to live out their glowing years in Singapore comfortably.<sup>26</sup>

### III. Equity Release Products Generally

18. As set out above, the three common forms of equity release products are the reverse mortgage, home reversion schemes and shared appreciation mortgage; the reverse mortgage being the most common.

19. In a conventional mortgage, the borrower is typically obliged to make monthly payments to the lender. Each payment increases the borrower's equity in the property. In a reverse mortgage, there are no regular payments from the borrower to the lender, but instead the lender pays the borrower. The lender agrees to lend the borrower an amount based on the total equity of the property, usually a proportion. This amount may be disbursed by way of regular payments by the lender to the borrower, a lump sum, a credit line, or a combination of these. The attraction of these products is that the borrower is not obliged to make repayment of the loan amount during their lifetime.

20. No financial product is without risk. The principal risk associated with the reverse mortgage is the possibility of negative equity. The lender agrees to a loan amount which is a proportion of the value of the property valued at the time of the contract. Market fluctuations may cause the value to dip, in which case, the lender may wish to reduce the total loan amount. This is termed a 'negative equity' situation, in which the value of the property becomes lower than the actual agreed loan amount. It has also been noted that the interest rates for equity release products tend to be higher than that of conventional mortgages.<sup>27</sup> In other countries such as Australia, a borrower may affect his or her pension eligibility by entering into a reverse mortgage. Other more practical concerns include whether the elder borrower has accurately calculated his or her borrowing needs when the equity release product is entered into.

### IV. Legal and Regulatory Frameworks

#### A. *Australia*

21. In Australia, equity release products were introduced in or around the 1990s. According to a survey done on the perception of the reverse mortgage in the Australian housing market, the product has received steady reception over the past two decades.<sup>28</sup> Such products are now

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<sup>26</sup> Indeed, some members of the public have seen the attraction of the product and have called for the government to back the reverse mortgage by underwriting its risks.

<sup>27</sup> See <https://www.moneysmart.gov.au/superannuation-and-retirement/income-sources-in-retirement/home-equity-release/reverse-mortgages>.

<sup>28</sup> Perception of the Reverse Mortgage in the Australian Housing, by Reed.

commonplace and promoted by major Australian banks such as the Commonwealth Bank of Australia and Suncorp.<sup>29</sup>

22. Since their inception, equity release products have grown in popularity in Australia. In addition to the fact that no repayments need be made during one's lifetime, another primary reason for the popularity of such products is that they allow elderly individuals who are cash-poor asset-rich and who wish to age in place. Other reasons include the gradual increase in essential living expenses such as medical, food, transport, and the introduction of a Goods and Services Tax in Australia.<sup>30</sup> According to the same survey, many elderly Australians regard their place of residence as their single largest asset.

23. Equity release products, as consumer credit instruments, fall under the purview of the Australian Securities Investment Commissions ("ASIC"). The ASIC has actively supervise this segment of the consumer credit market due to the products' burgeoning. In 2005, the ASIC released a report on the reverse mortgage detailing the developments in this sector. The report states that such products showed a significant take up rate from 2004.<sup>31</sup> At the time of the report, "[w]hilst remaining only a tiny fraction of total consumer lending, the reverse mortgage sector has grown significantly in the 12 months to March 2005, going from \$468 million to \$770 million, with 8,899 new loans provided."<sup>32</sup>

24. The 2005 report also warned of the significant risks that "[b]oth target customer groups—the underfunded aged and aspiring first homeowners—will include many who are vulnerable to making poor decisions, whether from financial inexperience, emotional attachment to the idea of owning their own home, or constrained financial circumstances" and that "[e]ach of the ... types of equity release products has a complex legal structure in which the ownership and management of the property is shared between the provider and consumer over an extended period of time."

25. Further, "used at the end of consumers' working lives, the products have significant implications for consumers' overall financial positions because consumers must appropriately manage their existing equity and income to fund their housing, care and other needs for the rest of their lives."

26. In 2007, the ASIC released a further report.<sup>33</sup> In it, it stated that "since [the 2005 Report] was released, the reverse mortgage market has more than doubled...[now] the market is worth

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<sup>29</sup> Perception of the Reverse Mortgage in the Australian Housing, by Reed.

<sup>30</sup> *Ibid.*

<sup>31</sup> ASIC, Equity Release Products, Report No. 59, November 2005 ("ASIC 2005 Report"). Available at [http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/Equity\\_release\\_report\\_exec\\_summary.pdf/\\$file/Equity\\_release\\_report\\_exec\\_summary.pdf](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/Equity_release_report_exec_summary.pdf/$file/Equity_release_report_exec_summary.pdf)

<sup>32</sup> ASIC 2005 Report at p4.

<sup>33</sup> ASIC, 'All we have is this house', Report No. 107, November 2007 ("ASIC 2007 Report"). Available at [http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/Rep109\\_reverse\\_mortgages\\_Nov07.pdf/\\$file/Rep109\\_reverse\\_mortgages\\_Nov07.pdf](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/Rep109_reverse_mortgages_Nov07.pdf/$file/Rep109_reverse_mortgages_Nov07.pdf).

approximately \$1.8 billion, consisting of over 31,000 reverse mortgages.”<sup>34</sup>A more current 2012 report by accounting firm Deloitte<sup>35</sup> in 2012 states that at 31 December 2011, the reverse mortgage market in Australia consisted of more than 42,000 reverse mortgage facilities with total outstanding funding of 3.3 billion. This represented a 22.5% growth from 31 December 2009.

27. In terms of a legal framework, Australia has a robust and comprehensive consumer protection regime. Most recently in 2009, the Australian government passed the National Consumer Credit Protection Act 2009 (“NCCPA”) which replaced prior similar state law and its predecessor the Uniform Consumer Credit Code (“UCCC”). The NCCPA essentially deals with licencing of credit providers. The NCCPA applies to all credit activities which includes consumer leases and mortgages.<sup>36</sup>

28. Pertinently, the NCCPA contains specific provisions dealing with equity release products. This itself is testament to the use of the product in Australia. Section 13A of the National Credit Code (“NCC”), which is incorporated as part of and forms the 2<sup>nd</sup> half of the NCCPA, defines a reverse mortgage as an “arrangement [which] involves a credit contract... and a mortgage over a dwelling or land securing a debtor’s obligations under the contract and ... [where] the debtor’s total liability under the credit contract or mortgage may exceed ... the maximum amount of credit that may be provided under the contract without the debtor being obliged to reduce that liability”.

29. In addition to the NCCPA, Australia also has robust formal and self-regulatory regime. The ASIC act as the national consumer protection regulator for financial services.<sup>37</sup> Of note for present purposes, the ASIC administers the Australian Securities and Investments Commission Act 2001 (“ASIC Act 2001”) and the NCCPA, as well as relevant regulations made under them. The ASIC Act 2001 provides the legal framework for the oversight and enforcement of matters related to consumer financial products.

30. Another piece of legislation which affects equity release products is the Australian Consumer Law (ACL). The closest analogue to this is Singapore’s Unfair Contract Terms Act. The ACL primarily targets consumer goods, although it does apply to financial products. So far as financial products and services are concerned, the ACL reflects similar provisions in the ASIC Act 2001.<sup>38</sup>

31. Due to the maturity of the product, Australia has a strong self-regulatory regime. There is SEQUAL (Senior Australians Equity Release), a key industry body which runs an

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<sup>34</sup> ASIC 2007 Report at p7.

<sup>35</sup> Commissioned by SEQUAL ((Senior Australians Equity Release), a self-regulatory industry body. Deloitte’s reports may be found at: Available at: <http://www.sequal.com.au/media-releases-reports/research-reports>

<sup>36</sup> Section 6 of the NCCPA.

<sup>37</sup> See “Background to ASIC’s Credit Jurisdiction” at: <http://www.asic.gov.au/asic/asic.nsf/byheadline/Background+to+ASIC's+credit+jurisdiction>

<sup>38</sup> Framework Overview Report at p1.

accreditation protocol and raises professional standards for all lenders, which include major banks and specialist non-bank providers. SEQUAL has emerged with its own Code of Conduct which prescribe acceptable conduct for market players.<sup>39</sup> SEQUAL is an opt-in body, which accredits its members.

32. There is also the Mortgage and Finance Association of Australia (MFAA), which represents and lobbies for credit advisers such as mortgage and finance brokers. The MFAA primarily exists to support and develop the professional body of credit advisers.<sup>40</sup> In relation to equity release products, the MFAA has published a member guide<sup>41</sup> and a code of conduct.<sup>42</sup> Beside the MFAA, CPA Australia has also published its own 'Guidance Notes for advising on reverse mortgages' for CPA members who are involved in credit advice work.

## **B. The UK**

33. Equity release products have slightly more antiquity in the UK. In the 1980s, many retirees took up reverse mortgages and used the income derived therefrom on stock-market related bonds. When the returns on these bonds were not sufficient to cover interest rates and the fall on their property, this resulted in a significant number of borrowers being evicted or embroiled in legal actions.<sup>43</sup> Around this time, many also took up shared appreciation mortgages. Unfortunately, many of these borrowers eventually realized that the appreciation shared with the lender was far higher than the original advance provided due to the subsequent housing market boom.

34. As the home is seen by many UK elders as their repository of wealth,<sup>44</sup> to cope with rising costs and the dearth of income, elders have resorted to equity release product. As with Australia, this sector has burgeoned. In 2007, the equity release market commanded a market share of about £1.279 billion.<sup>45</sup> Up to December 2011, the Safe Income House Plan ("SHIP"), a group of major providers of home income plans, had provided about 270,000 such schemes releasing about £12.12 billion from the homes of persons over 55.<sup>46</sup> According to SHIP's 20<sup>th</sup> Anniversary Report, elders in the UK sit on about £1.9 trillion worth of housing equity,<sup>47</sup> and

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<sup>39</sup> Available online at: [http://www.sequal.com.au/images/SEQUAL\\_Code\\_of\\_Conduct\\_Guidelines/sequal%20code%20of%20conduct%20-%20revised%20oct%202009.pdf](http://www.sequal.com.au/images/SEQUAL_Code_of_Conduct_Guidelines/sequal%20code%20of%20conduct%20-%20revised%20oct%202009.pdf)

<sup>40</sup> See the 'Mission and Objectives' at <http://www.mfaa.com.au/default.asp?menuid=480>.

<sup>41</sup> 'The Equity Release Code of Proper Process' in February 2007. See: <http://www.mfaa.com.au/default.asp?artid=2169>.

<sup>42</sup> It has also worked in tandem with SEQUAL to run the MFAA Equity Release Education program to accredit its members. Indeed, MFAA members are deemed to have breached its code of conduct if they marketed reverse mortgages but are not SEQUAL accredited. See <http://www.mfaa.com.au/default.asp?artid=2169>.

<sup>43</sup> Sally McCrone, 'Release or just a trap' The Guardian, 25 April 2004.

<sup>44</sup> Fox and Devenney, Undue Influence, The Elderly and Equity Release Schemes. Presented at the 7<sup>th</sup> Biennial Conference on Property Law.

<sup>45</sup> Fox O Mahony. At 4

<sup>46</sup> SHIP 20<sup>th</sup> Anniversary Report 2011., at p5.

<sup>47</sup> SHIP 20<sup>th</sup> Anniversary Report 2011., at p5.

the organization foresees that the market would continue to grow. Established global institutions such as Aviva and Prudential have also entered the market.

35. In 2000, the UK Parliament passed the Financial Services and Markets Act (“FSMA”) to deal with “the regulation of financial services and markets”. The FSMA was introduced to usher in a new epoch of centralized financial services regulation - a move from the more laissez-faire approach of self-regulation by a collection of institutions and society. Thus, central to the FMSA is the introduction of the Financial Services Authority (“FSA”), which under Section 2(3) of the FMSA, has as its objects that of market confidence, public awareness, reduction of financial crime, and importantly, the protection of consumers. Following from the 2008 global financial crisis, the HM Treasury published a white paper entitled ‘A new approach to financial regulation’, proposing a blueprint for reform which would ensure tighter supervision and regulation of the financial services sector as a whole. As a result, the UK Government enacted the Financial Services Act 2012 which amended parts of the FSMA and the role of regulating the finance sector was split between three organizations, the newly established Prudential Regulation Authority and Financial Conduct Authority (“FCA”), as well as the Bank of England.

36. Similar to Australia’s NCCPA, UK has consumer protection legislation in the form of the Consumer Credit Act 1974 (“CCA”). The CCA regulates consumer contracts extensively, providing for minute issues such as the provision of information, creditworthiness requirements, and unfair relationship provisions. Unfortunately, the CCA does not regulate mortgages. Section 16(6C) of the CCA states that it does not regulate a consumer credit agreement if it is secured by a land mortgage and entering into the agreement as lender is a regulated activity for purposes of the FMSA. Under Section 23 of the Second Schedule to the FSMA, contracts where one party provides another with credit, and where the obligation to repay is secured on land, are a type of contract regulated by the FMSA. Unlike the NCCPA and CCA, the FMSA does not itself provide substantive forms of relief for unfair practices. What the FMSA does is to empower the Financial Services Authority to investigative powers,<sup>48</sup> and provides for the compulsory jurisdiction of the Ombudsman.<sup>49</sup>

37. Given the paucity of actual regulation, elder consumers have to rely on the common law for remedies, or the Financial Ombudsman to deal with any inequities arising from equity release transactions. All lifetime mortgages and home reversion plans sold in the market are also under the regulatory supervision of the Financial Conduct Authority.

38. Problems with equity release products led to the establishment of a self-regulatory body called the Safe Home Income Plans (SHIP) in 1991. SHIP has since been renamed the Equity Release Council (ERC). The organisation has a strict code of conduct which is adhered to by finance houses or loan providers, thereby ensuring a number of safeguards and guarantees to

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<sup>48</sup> Part XI of the FMSA.

<sup>49</sup> Part XVI of the FMSA.

consumers.<sup>50</sup> According to the ERC's website, all participants in the equity release market are members of the Council. As at the time of this paper, the ERC Code of Conduct<sup>51</sup> enshrines certain consumer rights including that they will be allowed to remain in their properties, that the consumer will be provided with fair, simple and complete presentation of their plans, and crucially, that all ERC plans carry a no negative-equity guarantee, which ensures that the consumer will never owe more than the value of their home. The ERC also runs a Standards Board which is tasked with improving the standards and best practices in this field.

39. Throughout the sea change in the regulatory rules concerning the finance sector, what has remained constant is the availability of the Financial Ombudsman Service as an avenue for complaint and resolution of disputes between consumers and business providing financial services. The Ombudsman Service was introduced in 2000 vide the FMSA, and remains a pillar of the system, its key role being to allow for disputes to be "resolved quickly and with minimum formality by an independent person".<sup>52</sup>

40. Typically, before a matter is referred to the Ombudsman, it is to be dealt with by the relevant service provider. The Financial Conduct Authority has also made publicly available (and regularly updates) a handbook setting out detailed guidelines on internal complaints mechanisms. These guidelines include a time limit of 8 weeks, by which the respondent organisation must provide the complainant a 'final response' in written form, informing the complainant if it accepts the complaint and offers redress or rejects the complaint and proffer reasons for the same.<sup>53</sup> The complainant then has 6 months from the date of the final response to seek redress from the Financial Ombudsman.<sup>54</sup>

41. The Financial Ombudsman covers "nearly all financial services"<sup>55</sup> under its broad-ranging and threefold jurisdiction. First, its compulsory jurisdiction, which applies to all financial services businesses authorised or registered by the Financial Services Authority. About 30,000 businesses are regulated by the Financial Services Authority and may be found on its register.<sup>56</sup> Second, its consumer credit jurisdiction under the Consumer Credit Act 2006, which covers consumer credit complaints against organisations licenced by the Office of Fair Trading. These organisations number about 80,000, and likewise may be found on the register of the Office of Fair Trading.<sup>57</sup> Lastly, voluntary jurisdiction, which allows for parties outside of the two abovementioned jurisdictions to allow the Ombudsman to adjudicate. These typical apply

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<sup>50</sup> See generally: <http://www.equityreleasecouncil.com/equity-release-council/>.

<sup>51</sup> <http://www.equityreleasecouncil.com/document-library/code-of-conduct/>

<sup>52</sup> Section 225(1) of the FSMA

<sup>53</sup> Section 1.6.2 of the FCA Handbook. Available at:

<http://media.fshandbook.info/content/full/DISP.pdf>

<sup>54</sup> *Ibid.*

<sup>55</sup> Statement on the Roles and Responsibilities of the Financial Ombudsman Service and the Lending Standards Board dated 14 March 2012. See in particular, paragraph 1.4 of the Statement. Available at: <http://www.financial-ombudsman.org.uk/about/LSB-MOU-2012.pdf>.

<sup>56</sup> <http://www.fsa.gov.uk/register/home.do>.

<sup>57</sup> <http://www2.crw.gov.uk/pr/Default.aspx>.

to organisations in carrying on business in the European Economic Area but who may not have an office in the UK.

42. As with the EDR in Australia, the Ombudsman's service is free to consumers. Further, the Ombudsman can make awards of up to £150,000. In addition to the 6 months' time limits by which a consumer can lodge a complaint after receiving a 'final response' from its service provider, it must do so within 6 years from the event which gave rise to the complaint.

### C. *Singapore*

43. Compared to the UK and Australia, Singapore is still maturing in its protection of consumers in the area of financial products.

44. The foremost piece of legislation dealing with consumer protection for financial products is the Consumer Protection (Fair Trading) Act.<sup>58</sup> The CPFTA was first enacted in 2003. At that time, the focus of the act was on consumer products such as household electronic goods, mobile devices and jewellery.<sup>59</sup> The need to include financial products in the ambit of the act was raised in the 2003 round of parliamentary debates.<sup>60</sup> However, at the same period of time, several other pieces of legislation concerning the financial markets had been enacted,<sup>61</sup> and Parliament concluded that this should be kept for further review. Eventually, by way of the Consumer Protection (Fair Trading) (Amendment) Act 2008, financial products and financial services were included respectively as "goods" and "services" for purposes of the CPFTA. This is in contrast to the Sale of Goods Act (Cap. 393) where "goods" generally refer to tangibles. The Act is also fairly wide in its ambit as it covers transactions where the supplier or consumer is resident in Singapore, or where the offer or acceptance is made in or sent from Singapore.<sup>62</sup>

45. In addition to the CPFTA, the sale of financial products is regulated by the Monetary Authority of Singapore ("**MAS**"). The MAS was set up in the 1970s as Singapore's central bank. Today, its functions include oversight of monetary policy, the development of Singapore as a financial centre, managing Singapore's foreign reserves, and supervision of financial services. These objects and functions are captured in Section 4 of the MAS Act (Cap 186). Section 27 of the MAS Act also gives MAS the power to issue directions to any financial institution in Singapore. Non-compliance with such directions may result in a financial penalty.

46. MAS also provides supervision over financial advisers vide the Financial Advisers Act (Cap. 275) ("**FAA**"). The FAA was introduced in 2001, as a result of recognition that "product innovation has resulted in the emergence of new and complex products that have blurred

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<sup>58</sup> Cap 52A. For a comparative review of the Consumer Protection (Fair Trading ) Act (Cap. 52A) ("**CPFTA**") and its counterparts, see R Chandran, "Consumer Protection (Fair Trading) Act" [2004] SJLS 192.

<sup>59</sup> See generally the parliamentary debates on the Consumer Protection Fair Trading Bill, 2<sup>nd</sup> reading, Vol 76, 10 November 2003, and 11 November 2003.

<sup>60</sup> Parliamentary debates, 11 November 2003, Vol 76, Col.3445, Dr Ong Seh Hong

<sup>61</sup> Such as the Securities and Futures Act (Cap. 289) and the Financial Advisers Act (Cap. 110).

<sup>62</sup> Section 3 of the CPFTA.

product lines” resulting in “financial institutions ... not just offer[ing] plain-vanilla instruments”.<sup>63</sup> The FAA was to create a single licencing regime, and institutions selling all types of financial products would have to obtain a licence from the MAS.<sup>64</sup>

47. The 2008 global financial crisis made the financial industry a focal point for legislators and policy makers alike.<sup>65</sup> Not surprisingly, a slew of regulations and guidelines were issued in its wake. In April 2009, the MAS issued its Guidelines on Fair Dealing which outlined 5 outcomes which all financial institutions should strive for.<sup>66</sup> As a major caveat, the Guidelines were directed at investment products and not mortgage loans (which equity release products are more akin to). Nonetheless, the Guidelines are likely to affect how financial institutions market and sell financial products in general, and were relevant, will be scrutinized in the sections below.

## V. Legal Issues related to Equity Release Products

### A. Information

48. Compared to other financial instruments, equity release products face a unique set of issues because its consumer target audience is elders. Elders may struggle with being given too much information, and struggle to process and appreciate the information they receive. In particular, a portion of Singapore’s current crop of elders may be less educated and financially savvy than their successor generations.

49. In 2007, the ASIC released a report titled ‘All We Have Is This House’ – Consumer Experiences with Reverse Mortgages’,<sup>67</sup> outlining the issues faced by elder consumers with the

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<sup>63</sup> Second reading of the Financial Advisers Bill, 5 October 2001, Vol. 73, Session 2, Sitting 19, at column 2163.

<sup>64</sup> *Ibid* at column 2167.

<sup>65</sup> See for instance, the Parliamentary Debates concerning the sale of structure notes and financial products generally: Parliamentary Debates, 20 October 2006, Sale of Structured Financial Products, Oral Answers to Questions, Vol 85, Sitting 3, Session 1; Parliamentary Debates, 17 November 2008, Investigations into alleged mis-selling of structured products by financial institutions, Vol 85, Sitting 5, Session 1; Parliamentary Debates, 19 January 2009, Misselling of Structured Products by Financial Institutions (Update on investigations by MAS), Vol 85, Sitting 7, Session 1; Parliamentary Debates, 20 July 2009, Vol 86, Sitting 7, Session 2.

<sup>66</sup> MAS, Guidelines on Fair Dealing, 3 April 2009 (“FDG”). Available at: [http://www.mas.gov.sg/~media/resource/legislation\\_guidelines/fin\\_advisers/fin\\_advisers\\_act/guidelines/Guidelines%20on%20Fair%20Dealing.ashx](http://www.mas.gov.sg/~media/resource/legislation_guidelines/fin_advisers/fin_advisers_act/guidelines/Guidelines%20on%20Fair%20Dealing.ashx). The five fair dealing outcomes are:- (1) Fair Dealing Outcome 1: Customers have confidence that they deal with financial institutions where fair dealing is central to the corporate culture. (2) Fair Dealing Outcome 2: Financial institutions offer products and services that are suitable for their target customer segments. (3) Fair Dealing Outcome 3: Financial institutions have competent representatives who provide customers with quality advice and appropriate recommendations. (4) Fair Dealing Outcome 4: Customers receive clear, relevant and timely information to make informed financial decisions. (5) Fair Dealing Outcome 5: Financial institutions handle customer complaints in an independent, effective and prompt manner.

<sup>67</sup> Australia Securities and Investments Commissions, Report 107, “All we have is this house – Consumer experiences with Reverse Mortgages”, available at:



product. The report is drawn from a small sample size of 29 interviewees but the anecdotal evidence highlights the key issues facing elder consumers.

50. One key issue is the lack of accurate or complete information about the product. As noted in the report, the reverse mortgage is a “complex”<sup>68</sup> instrument.<sup>69</sup> Although the report does not explain why, it is safe to assume that this is largely because the product is not a plain vanilla mortgage and most elders would take time to appreciate its intricacies. The product also carries significant impact on an elder’s life and wellbeing and requires the elder borrower to make a holistic appreciation of these factors.

51. The foremost piece of information an elder should be made aware of is whether the product is subject to negative equity. As abovementioned, a negative equity situation occurs when the value of the property decreases, often due to market forces, causing the loan-to-valuation ratio to be negative. This turned out to be the problem in the NTUC Income dispute mentioned above. In the recent two decades, property prices in Singapore have fallen drastically in tandem with market crises. The SARS crisis in 2003 and the 2008 global financial crisis are two examples. In addition, it is not uncommon for privately-owned land to be compulsorily acquired by the Government under the Land Acquisition Act. This may be another potential unforeseen event which would negatively affect an elder’s property value.

52. A negative equity situation creates a real risk that the elder would be subject to unilateral changes in the loan amount or regular payouts from the lender or even the consequences of an event of default under the agreement. Because of the drastic effect, regulators in Australia and the UK have moved to quash such situations. In both jurisdictions, companies carrying the product have to make a no negative equity guarantee as part of their accreditation requirements with SEQUAL and the ERC. SEQUAL’s Code of Conduct<sup>70</sup> include that lenders are to ensure their products carry ‘no negative equity’.<sup>71</sup> Whether or not equity release products in Singapore would carry such a guarantee ultimately depends on the market. Lenders will likely shift the cost of having no negative equity to the borrower, though it may be better for an elder to pay an upfront premium for this than to face drastic consequences such as repossession. Incorporating such costs in the product also avoids ugly social repercussions which may arise during a time of financial crises. The 2009 sub-prime crisis in the U.S.A. tells a

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[http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/Rep109\\_reverse\\_mortgages\\_Nov07.pdf/\\$file/Rep109\\_reverse\\_mortgages\\_Nov07.pdf](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/Rep109_reverse_mortgages_Nov07.pdf/$file/Rep109_reverse_mortgages_Nov07.pdf)

<sup>68</sup> *Ibid* at p1.

<sup>69</sup> Equity release products are also described on ASIC’s Money Smart website as “complex” products. See: <https://www.moneysmart.gov.au/superannuation-and-retirement/income-sources-in-retirement/home-equity-release/reverse-mortgages>

<sup>70</sup> Available online at:

[http://www.sequal.com.au/images/SEQUAL\\_Code\\_of\\_Conduct\\_Guidelines/sequal%20code%20of%20conduct%20-%20revised%20oct%202009.pdf](http://www.sequal.com.au/images/SEQUAL_Code_of_Conduct_Guidelines/sequal%20code%20of%20conduct%20-%20revised%20oct%202009.pdf)

<sup>71</sup> See

[http://www.sequal.com.au/images/SEQUAL\\_Code\\_of\\_Conduct\\_Guidelines/sequal%20guideline%20no%20negative%20equity%20guarantee%20and%20default%20conditions.pdf](http://www.sequal.com.au/images/SEQUAL_Code_of_Conduct_Guidelines/sequal%20guideline%20no%20negative%20equity%20guarantee%20and%20default%20conditions.pdf)

cautionary tale. Assuming equity release products do allow for a negative equity situation, this would then be a material piece of information which the elder should be duly informed of.

53. Another important aspect of information is a projection of the elder's indebtedness over time. Without explaining how their indebtedness increases, elders may be in ignorant bliss as to their true indebtedness since the main benefit of the product is that all indebtedness is usually only payable upon death. A borrower's indebtedness based on the principle sums and interest, may also be of significance to Asian elders who wish to bequeath some part of their property as inheritance.<sup>72</sup>

54. In addition to the overall indebtedness, lenders should be obliged to explain the general impact of the product on an elder. Obviously, borrowers must be responsible to seek out their own financial and legal advice. Nonetheless, because of the unique traits of elders, lenders should explain in general terms how entering into a reverse mortgage, for instance, would affect the borrower's finances and wellbeing. Equity release products tend to ensure that a borrower receives immediate, regular payments from the lender, but this is balanced by the fact that the remaining value of the mortgaged asset decreases with time. Elders should also be made aware of the importance of properly calculating their borrowing needs. Indeed, the ASIC 2007 report cites that one third of the borrowers interviewed said they obtained a loan larger than that actually required.<sup>73</sup> Mortgage documentation also tends to provide that the borrower has no right to vary this amount. Without an appreciation that they are locked-in, elders may not have taken independent financial advice and are not able to properly calculate the cost needed for daily expenses, medical needs, transportation. This is of particular importance where the costs of living and expenditure is likely to increase over time.

55. In Australia, elders are statutorily protected in this respect. Section 133DB of the NCCPA obliges representatives of a financial institution to provide the consumer projections "related to the value of the dwelling or land that may become reverse mortgaged property, and the consumer's indebtedness, over time if the consumer were to enter into a contract for a reverse mortgage". The NCCPA also requires elders to be given a "reverse mortgage information statement"<sup>74</sup> which is a concise 1 to 2 page document setting out how a reverse mortgage works, how costs are calculated, what elders should consider before taking out a reverse mortgage, and useful contacts for more information. To assist elders with calculating their needs, the ASIC in Australia have set up a reverse mortgage calculator to assist elders in estimating the loan amount they need.<sup>75</sup> Apart from these specific protections, the NCCPA also comprise of other pro-consumer measures. Section 47 of the NCCPA mandates that all licence

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<sup>72</sup> Indeed, this was the case for Australian elders who were interviewed for the ASIC 2007 report.

<sup>73</sup> ASIC 2007 Report, p7.

<sup>74</sup> Section 133DC and DD of the NCCPA. See for instance, the Reverse Mortgage Information Statement of Commonwealth Bank of Australia:  
<https://www.commbank.com.au/content/dam/commbank/personal/home-loans/fact-sheets/key-information-reverse-mortgages.pdf>.

<sup>75</sup> <https://www.moneysmart.gov.au/tools-and-resources/calculators-and-tools/reverse-mortgage-calculator>

holders must ensure, *inter alia*, that their representatives are adequately trained and are competent to engage in the credit activities.

56. In Singapore, there are currently no specific laws requiring financial institutions to set out information on key aspects of a financial product. By and large, retail consumers of financial products are expected to pay heed to the principle of *caveat emptor*. In the wake of the 2008 financial crisis, where many retail consumers complained that they had been misled as to the terms and nature of the Lehman minibonds, the MAS has responded by issuing certain guidelines for the sale of investment products. These are the Fair Dealing Guidelines issued by MAS in April 2009.<sup>76</sup> Fair Dealing Outcome 4<sup>77</sup> is particularly relevant - it requires financial institutions to ensure that customers receive clear, relevant and timely information to make informed decisions. In terms of clarity, financial institutions are to ensure that disclosure is made in plain language, avoiding the use of technical terms. Information should also be presented in a format that is simple and easy to understand.

57. Unfortunately, the Fair Dealing Guidelines deal primarily with investment products. Arguably, equity release products are more akin to a consumer credit product, which should not invite the same level of protection. Nonetheless, the Guidelines prod the financial industry in the right direction. It is hoped that the Guidelines will affect institutional culture in such a way that all retail financial products, investment or otherwise, are marketed with the same level of information disclosure.

## ***B. Mental Capacity and Decision-Making***

58. Closely related to having complete and accurate information is that of the elder's ability to make decisions. Like many other developed nations, Singapore is not unique in having to deal with mental impairment issues for elders. In a speech at the 3rd Neurocognitive Symposium, the Minister of Health stated that Singapore "currently [has] about 28,000 elderly aged 60 years and above with dementia, and this is expected to more than double to 80,000 by 2030."<sup>78</sup> Along with Dementia, Alzheimer's Disease and other forms of mental impairment raise the concern of whether elders are able to appreciate the financial products they enter into.

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<sup>76</sup> Available at:

[http://www.mas.gov.sg/~media/resource/legislation\\_guidelines/fin\\_advisers/fin\\_advisers\\_act/guidelines/Guidelines%20on%20Fair%20Dealing.ashx](http://www.mas.gov.sg/~media/resource/legislation_guidelines/fin_advisers/fin_advisers_act/guidelines/Guidelines%20on%20Fair%20Dealing.ashx)

<sup>77</sup> Fair Dealing Outcome 3 is also helpful in this regard. It requires financial institutions to have competent representatives who provide customers with quality advice and appropriate recommendations. Financial institutions are to ensure their staff undergo structured training programs covering the advisory and sales process, and be fully trained on the features and risk-reward characteristics of any investment product distributed by the financial institutions and on the profile of the target customer segments of the product, before they are allowed to advise on and sell the product to customers.

<sup>78</sup> Speech by Minister for Health, Mr Gan Kim Yong, at the 3rd Singapore International Neurocognitive Symposium, 5 April 2013. Available at: [http://www.moh.gov.sg/content/moh\\_web/home/pressRoom/speeches\\_d/2013/speech-by-minister-for-health--mr-gan-kim-yong--at-the-3rd-singa.html](http://www.moh.gov.sg/content/moh_web/home/pressRoom/speeches_d/2013/speech-by-minister-for-health--mr-gan-kim-yong--at-the-3rd-singa.html)

59. On proper analysis, a lack of mental capacity simply means that the borrower lacks the requisite consent in entering the transaction. This is exemplified in the case of *Hwang Cheng Tsu Hsu (by her litigation representative Hsu Ann Mei Amy) v Oversea-Chinese Banking Corp Ltd*<sup>79</sup> where the Singapore High Court ruled that a bank did not breach its contractual duty to adhere to its customer's instruction on the basis that the customer was perceived to lack mental capacity at the time of instructions. The decision was upheld on appeal.

60. In addition to the common law position, issues of mental capacity are governed by the Mental Capacity Act (Cap. 177) ("MCA") which came into force in 2010. The MCA seeks to provide for issues relating to mental capacity such as treatment, abuse, and guidelines in decision making. The MCA was introduced to provide a framework broader than its predecessor the Mental Disorders and Treatment Act which dealt with the limited scope of mental disorders. Parts of the MCA were adapted from the UK Mental Capacity Act 2005.

61. The centrepiece of the MCA is Section 3, where a list of cardinal principles guide the outworking of the Act. First, every individual is assumed to have mental capacity unless proven otherwise.<sup>80</sup> A person is also not to be treated as unable to make a decision unless all practicable steps to help that person have been taken without success.<sup>81</sup> Evidently, the Act does not seek to invalidate a person's decision unless it can be convincingly shown that capacity was lacking. This prevents the possibility of having an overwhelming number of transactions invalidated on the mere appearance of incapacity. Indeed, Section 4(3) echoes this: a lack of capacity cannot be established merely by reference to a person's age or appearance or a condition or aspect of behaviour which might lead others to make unjustifiable assumptions about the person's capacity.

62. Moving to the specifics, Section 4 of the MCA defines a lack of capacity as an inability to make a decision in relation to a matter, at a material time, whether because of an impairment or disturbance in the functioning of the mind. Therefore, the fact that the mental disbursement is temporary or permanent is not entirely conclusive. Section 5 explains that incapacity is the inability of a person:- (a) to *understand* the information relevant to a decision; (b) to *retain* that information; (c) to *use or weigh* that information as part of the process of making that decision; or (d) to communicate the decision. The fact that a person is able to retain the information relevant to a decision for a short period only does not prevent him from being regarded as able to make the decision.<sup>82</sup> Information relevant to a decision includes information about the "reasonably foreseeable consequences" of making the decision, or failing to make that decision.<sup>83</sup>

63. The MCA is further fleshed out in the Office of Public Guardian's Code of Practice (the "Code") which was released in 2010. For instance, the Code makes clear that capacity is

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<sup>79</sup> [2010] 4 SLR 47.

<sup>80</sup> Section 3(2) of the MCA.

<sup>81</sup> Section 3(3) of the MCA.

<sup>82</sup> Section 5(3) of the MCA.

<sup>83</sup> Section 5(4) of the MCA.

decision specific<sup>84</sup> and a general appearance of a lack of lucidity does not render one incapable of all decisions. Further, the Code delineates three types of incapacity, permanent, temporary and fluctuating. For the latter, the Code goes as far as to suggest that elders suffering from dementia should be approached at the time of the day when they are more alert and better able to comprehend matters. The Code also explains that mental capacity is said to be 2-stage test: one first asks if the person is suffering from some form of impairment or disturbance in the functioning of the brain; one then asks if that impairment or disturbance causes the person to be unable to make the relevant decision, when called upon.

64. In *Hwang Cheng Tsu Hsu (by her litigation representative Hsu Ann Mei Amy) v Oversea-Chinese Banking Corp Ltd*<sup>85</sup> the Singapore High Court had to deal with the issue of whether an elder customer had the requisite mental capacity to provide instructions on the opening of a joint account and the closing of all her accounts. Strictly speaking, the issue was whether the bank was right to reject her purported instructions based on certain ‘red flags’ they noticed. Nonetheless, the Court had to examine if in the circumstances, notwithstanding whether the customer was medically proven to be sound, whether the bank had breached its contractual duty. The High Court found that the bank acted rightly based on its observations that the elder looked to be in a daze when she first visited the bank with her daughter, and when interviewed, the elder could not identify where she was, did not know how much money was in her account, confirmed that there was no need to close her bank account, and gave differing answers as to the identify of her daughter.

65. Fortunately, banks are no longer left in the dark as to how to proceed when similar issues arise. The Code explains that any person dealing with the elder may conduct an informal assessment as to the person’s mental capacity in relation to a specific matter. If the bank is not satisfied it may request for a formal assessment. In this regard, the Office of Public Guardian has a list of accredited medical practitioners able to conduct formal assessments. Whilst asking a customer or potential customer may appear to be a public relations faux pas, any such embarrassment could be reduced by reference to the Code. This, in the long run, safeguards such transactions from being set aside at a later stage on questions of capacity.

66. Further, the advent of the Lasting Power of Attorney in Singapore (“LPA”) further acts to ease the concerns on the part of the bank. The LPA, which was introduced in Singapore on or

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<sup>84</sup> This tracks the position in the Australian decision of *Re MV* [2005] QGAAT 46 where the Queensland Guardianship and Administrative Tribunal found that the question of whether a person had capacity was strictly limited to the task in question. Undoubtedly, it is then an open question of how much capacity is required for each type of task or transaction. Notably, the same proposition was raised in the case of *Hsu Ann Mei Amy (personal representative of the estate of Hwang Cheng Tsu Hsu, deceased) v Oversea-Chinese Banking Corporation Ltd* [2011] SGCA 3. On the facts, the Court of Appeal declined to agree that the mental capacity required for the elder in that case to open a joint-account or close all her bank accounts, was more complex than the elder’s decision to make a will (which she had done previously). This is likewise recognised in the Code of Practice of the Office of Public Guardian, which explains that capacity is decision-specific and not of a blanket application. See paragraph 4.3.1 of the Code of Practice of the Office of Public Guardian.

<sup>85</sup> [2010] 4 SLR 47.

around 2010, is a means by which any person above the age of 21, could in advance grant powers to a donee for that donee to make decision(s) on behalf of the donor during a period of mental incapacity. This grant of power may be revoked at any time prior to the donor's incapacity. LPAs are registered with the Office of Public Guardian and should a bank deal with a donee who seeks to execute a financial product on behalf of the donor, the bank is entitled to require the donee to furnish a certificate from a registered doctor stating that the donor's capacity in relation to the decision at hand is likely to be permanent. If no such certificate is furnished, the bank may refuse to accept the donee's purported power to act under the LPA.

### C. *Unfair Practices, Misleading Conduct and Unconscionability*

67. Contract law textbooks are filled with instances where contracts have been struck down because one contracting party, typically of a vulnerable class, was taken advantage of. Depending on the factual matrix, vitiating factors include undue influence,<sup>86</sup> duress,<sup>87</sup> and unconscionability,<sup>88</sup> and the theoretical basis for these grounds are constantly subject to academic discourse. At the risk of generalizing, the law recognizes that at times, it needs to deter wrongful and inequitable conduct of a defendant or protect the vulnerable if indeed there was no true consent to the contract.

68. Elders neatly fall into a class of vulnerable persons. For the reasons already discussed, it is not difficult to conceive of elders being misled or pressured into agreeing to mortgage their property.

69. Australia's legislation protects elders in relation to financial products in several ways. First, Section 180A of the NCCPA protects the elder borrower from "unfair or dishonest conduct" by a credit service provider.<sup>89</sup> This deals primarily with intermediaries and brokers who market a bank or financial institution's product to a consumer.<sup>90</sup> In deciding whether there was unfair or dishonest conduct which led to a consumer entering into a credit contract, the court should have regard to a myriad of matters, including whether the consumer was at a "special disadvantage"<sup>91</sup> or whether the consumer "was a member of a class whose members were more likely than people who were not members of the class to be at such a disadvantage".<sup>92</sup> Conduct that is unfair or dishonest is conduct that "should not have in good

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<sup>86</sup> The seminal case being the House of Lords' decision in *Royal Bank of Scotland plc v Etridge (No. 2)* [2002] 2 AC 773. See pp827-881 of *The Law of Contract in Singapore*, Gen Ed. Andrew Phang Boon Leong for a comprehensive treatment of this vitiating factor.

<sup>87</sup> See for instance, *Universe Tankships Inc of Monrovia v International Transport Workers Federation* [1983] 1 AC 366, *Pao On v Lau Yiu Long* [1980] AC 614, *Third World Development v Atang Latief* [1990] SLR 20.

<sup>88</sup> In Australia, the leading case for this is *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447. For the position in English law, which adopts a narrower version of the doctrine, see *Alec Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd* [1985] 1 WLR 173. Singapore tracks the English position: Per Prakash J at 858 of *Rajabali Jumabhoy v Ameerli R Jumabhoy* [1997] 3 SLR 802.

<sup>89</sup> Section 180A of the NCCPA.

<sup>90</sup> Section 7 of the NCCPA.

<sup>91</sup> Section 180A(4)(a) of the NCCPA.

<sup>92</sup> Section 180A(4)(b) of the NCCPA.

conscience been used” or which “manipulated the plaintiff”.<sup>93</sup> Ostensibly, the test is broad and provides a great deterrent against sharp practice. Where unfair and dishonest conduct is found to be present, the Court may *inter alia* order that the defendant pay the plaintiff a specified amount, order that a specified amount is not due or owing from the plaintiff or any other order which the Court considers appropriate to redress the unfairness or dishonest except an order which affects the underlying contract (given the conduct is of a third party intermediary). Section 181 also provides that if the Court imposes a fine as well as an order for compensation, the latter should be preferred if the party at fault does not have the resources to pay both the fine and compensation.

70. In addition to the NCCPA, Australian elders are further protected under the ASIC Act 2001. The ASIC Act 2001 provides the legal framework for the oversight and enforcement of matters related to consumer financial products. Section 12BAA sets out the laundry list of financial products governed by the Act. Equity release products are likely to be considered financial products under Australian Securities and Investments Commission Regulations 2001 Regulation 2B(1)(f).

71. The ASIC Act 2001 seeks to protect consumers in relation to financial products or financial services. For instance, it protects borrowers from unconscionable conduct practiced in connection with financial services.<sup>94</sup> The act provides the Court wide powers to deal with unconscionability,<sup>95</sup> whether during the time of contract formation, unconscionability in the terms of the contract, as well as unconscionability in the enforcement of such terms.<sup>96</sup> Somewhat similar to the Second Schedule of Singapore’s Unfair Contract Terms Act,<sup>97</sup> Section 12CC of the ASIC Act 2001 sets out an extensive list of matters which the court may have regard to for the purpose of determining whether there has been unconscionable conduct. These include:- (1) the relative strength of the bargaining positions of the supplier and the service recipient;<sup>98</sup> (2) whether the service recipient was able to understand relevant documents;<sup>99</sup> (3) whether any undue influence or pressure was exerted on the service recipient;<sup>100</sup> (4) the extent to which the supplier unreasonably failed to disclose to the service recipient any intended conduct of the supplier that might affect the interests of the service recipient and any risks to the service recipient arising from the supplier’s intended conduct (being risks that the supplier should have

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<sup>93</sup> Section 180A(4)(e) of the NCCPA.

<sup>94</sup> Subdivision C of the ASIC Act 2001.

<sup>95</sup> The doctrine of unconscionability in Australia may be found in the leading decision of *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447. This doctrine has also been enshrined in various Australian statutes, such as Contracts Review Act 1980 (NSW) (the Act). For a comprehensive review on the doctrine and its relation to the elderly, see F Burns, *Statutory ‘Unconscionability’: the Application of the Contracts Review Act 1980 (NSW) to the Elderly*, (2005) Journal of Business Law 1.

<sup>96</sup> Section 12CB(4) of the ASIC Act 2001.

<sup>97</sup> Cap 396., 1994 Rev. Ed.

<sup>98</sup> Section 12CC(1)(a) of the ASIC Act 2001.

<sup>99</sup> Section 12CC(1)(c) of the ASIC Act 2001.

<sup>100</sup> Section 12CC(1)(d) of the ASIC Act 2001.

foreseen would not be apparent to the service recipient);<sup>101</sup> and (5) the extent to which the supplier and the service recipient acted in good faith.<sup>102</sup>

72. In addition to unconscionable conduct, the ASIC Act 2001 also protects a consumer from unfair terms. Where a contract is a standard form contract,<sup>103</sup> a term which is unfair may be declared void by the Court.<sup>104</sup> A term of a consumer contract referred to in subsection is unfair if it would cause a significant imbalance in the parties' rights and obligations arising under the contract, it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term, and it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.<sup>105</sup> In deciding if a term is unfair, the Court should also consider if it is transparent to the other contractual party.<sup>106</sup> The act provides a multitude of examples of unfair terms, including terms which allow one party but not the other to limit performance, terminate the contract, vary the contract, limits evidence to be adduced in proceedings.<sup>107</sup> These affect very common terms in loan contracts such as entire agreement and non-reliance clauses.

73. If the Court finds that there has been unconscionable conduct or an unfair term, it may order the financial institution to pay a pecuniary penalty to the state.<sup>108</sup> Where a body corporate is concerned, this may be a maximum of 10,000 penalty units. The monetary value of a penalty unit varies from state to state, although the figure is around AUD 100 per unit, which brings the maximum penalty close to AUD 1,000,000. This pecuniary penalty is in addition to an action for damages which a victim may commence under Section 12GF. The ASIC Act 2001 states that preference must be given to compensation for victims. If the defendant does not have sufficient financial resources to pay both the penalty and the compensation, preference should be given to an order for compensation.<sup>109</sup>

74. The ASIC Act 2001 also creates a statutory right to consumers to seek recourse against "misleading and deceptive conduct".<sup>110</sup> The act itself does not prescribe pecuniary penalties. Nor does the relevant section set out the criteria because it mainly refers to the Australian law

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<sup>101</sup> Section 12CC(1)(i) of the ASIC Act 2001.

<sup>102</sup> Section 12CC(1)(l) of the ASIC Act 2001.

<sup>103</sup> Whether a contract is a standard form contract depends on the factors listed in Section 12BK of the ASIC Act 2001.

<sup>104</sup> Section 12BF of the ASIC Act 2001.

<sup>105</sup> Section 12BG(1) of the ASIC Act 2001.

<sup>106</sup> Section 12BG(2). A term is transparent if it is in plain language, legible, presented clearly and readily available to the party affected: Section 12BG(3)

<sup>107</sup> Section 12BH of the ASIC Act 2001.

<sup>108</sup> Section 12GBA of the ASIC Act 2001.

<sup>109</sup> Section 12GCA of the ASIC Act 2001.

<sup>110</sup> Section 12DA of the ASIC Act 2001. This doctrine is also enshrined in Section 18 of the Australian Consumer Law ("ACL"). Section 18 is materially similar to Section 52 of the Trade Practices Act 1974, which is the predecessor of the ACL. Accordingly, jurisprudence relevant to Section 52 of the Trade Practice Act 1974 and the ASIC Act 2001 are likewise apposite for the interpretation of Section 18 of the ACL. For a comparison between the Section 52 of the Trade Practices Act and the common law tort of negligent misstatement, see P Gillies, *Actions for breach of s 52 and for negligent misstatement at common law -- some observations on their relative competitiveness*, (2003) 11 *Competition and Consumer Law Journal* 43.



doctrine by that name. The closest analogue is that of misrepresentative in English law. Effectively, a consumer who has entered into a contract for financial services or a financial product may seek damages in respect of loss suffered. The ASIC Act 2001 also reflects the common law idea of contributory negligence (where tortious misrepresentation is concerned), stating that there be a reduction in damages to reflect any contributory fault of the victim.<sup>111</sup>

75. By adding to what is available to consumers in the common law, the above statutory protections in the NCCPA and ASIC Act 2001 add to the armoury of a victim of sharp practice and acts as strong deterrents to such inequitable conduct.

76. The foremost piece of legislation dealing with consumer protection for financial products is the Consumer Protection (Fair Trading) Act.<sup>112</sup> The CPFTA was first enacted in 2003. At that time, the focus of the act was on consumer products such as household electronic goods, mobile devices and jewellery.<sup>113</sup> The need to include financial products in the ambit of the act was raised in the 2003 round of parliamentary debates.<sup>114</sup> However, at the same period of time, several other pieces of legislation concerning the financial markets had been enacted,<sup>115</sup> and Parliament concluded that this should be kept for further review. Eventually, by way of the Consumer Protection (Fair Trading) (Amendment) Act 2008, financial products and financial services were included respectively as "goods" and "services" for purposes of the CPFTA. This is in contrast to the Sale of Goods Act (Cap. 393) where "goods" generally refer to tangibles. The Act is also fairly wide in its ambit as it covers transactions where the supplier or consumer is resident in Singapore, or where the offer or acceptance is made in or sent from Singapore.<sup>116</sup>

77. Section 4 of the act sets out four main grounds on which a transaction can be impugned as an unfair practice. The first limb, Section 4(a), states that it is an unfair practice or a supplier in relation to a consumer transaction "to do or say anything, or to omit to do or say anything, if as a result a consumer might reasonably be deceived or misled." In *Freely Pte Ltd v Ong Kaili and ors*,<sup>117</sup> the Court held that whether a consumer might reasonably be deceived or misled was an objective test which was to be analysis by considering "all who fall within an identified section of the public, including the astute and the gullible, the intelligent and the not so intelligent, the well educated as well as the poorly educated, men and women of various ages pursuing a variety of vocations".

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<sup>111</sup> Section 12GR of the ASIC Act 2001.

<sup>112</sup> Cap 52A. For a comparative review of the Consumer Protection (Fair Trading ) Act (Cap. 52A) ("CPFTA") and its counterparts, see R Chandran, "Consumer Protection (Fair Trading) Act" [2004] SJLS 192.

<sup>113</sup> See generally the parliamentary debates on the Consumer Protection Fair Trading Bill, 2<sup>nd</sup> reading, Vol 76, 10 November 2003, and 11 November 2003.

<sup>114</sup> Parliamentary debates, 11 November 2003, Vol 76, Col.3445, Dr Ong Seh Hong

<sup>115</sup> Such as the Securities and Futures Act (Cap. 289) and the Financial Advisers Act (Cap. 110).

<sup>116</sup> Section 3 of the CPFTA.

<sup>117</sup> [2010] 2 SLR 1065.

78. Evidently, the need to objectively ascertain whether a discrete section of people might reasonably have been deceived acts to provide further protection for vulnerable groups, who may be more gullible and less astute in protecting their own interest. The Court also held that Section 4(a) makes no express reference to knowledge or intention, and accordingly, no fault element was required for there to be an unfair practice under Section 4(a). The Court made clear that the focus of Section 4(a) was on the effect on a consumer, rather than the fault of the supplier, the latter being the basis for analogous common law causes of action. Where financial products are concerned, Section 4(a) provides a robust protection to the elderly.

79. The second limb, Section 4(b), is more straightforward. It defines an unfair practice to be the making of a false claim in relation to a consumer transaction. Section 4(c) provides that an unfair practice occurs when the supplier takes advantage of the consumer when the supplier *knows or reasonable ought to know* that the consumer is not in a position to protect his interests, or not reasonably able to understand the "character, nature, language or effect of the transaction or matter related to the transaction". In contrast with Section 4(a), the knowledge of the supplier is pertinent here. Similar to Section 4(a), an objective test is likely to be applied to decide if the consumer is not reasonably able to understand the transaction. There are no locally reported decisions dealing with Section 4(c).<sup>118</sup> Provisions in similar foreign statutes are also wider in their wording, and not entirely analogous for use in interpreting the subsection.<sup>119</sup>

80. Section 4(d) provides a catch-all. Section 4(d) states that it is an unfair practice to do anything listed in the Second Schedule. The Second Schedule lists about twenty different fact scenarios in which an unfair practice may occur. Relevant to equity release transactions are Clauses 9, 11 and 20. Clause 9 states that it is an unfair practice to represent that "a transaction involving goods or services involves or does not involve rights remedies or obligations where that representation is deceptive or misleading." In relation to equity release products, this may be relevant to whether a supplier informs the elder of the bank's right to repossess the property, and the types of default events on which the right arises. Clause 11 states that it is an unfair practice to "[take] advantage of a consumer by including an agreement terms or conditions that are harsh oppressive or excessively one-sided so as to be unconscionable." This may apply to default provisions based on minor infringements. Clause 20 states that it is an unfair practice to

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<sup>118</sup> There is the decision of *Al Memasa and anor v UBS AG* [2012] 4 SLR 992 may inform our understanding of Section 4(c). This decision concerned the purchase of Russian bonds by the appellant, one Tjio Bun Khai and his daughter AlsMemasa, who were age 95 and 60 at the time of the judgment. Both were not competent in the English language. These bonds were bought through their relationship manager, under accounts with the Respondent, UBS. The decision dealt primarily with whether the appellant's claim should be struck out. The respondent bank had argued that the non-reliance clauses in the contract documents protect the bank from the claim. In reversing the decision to strike out the claim, the Court of Appeal found that there was a question on whether such non-reliance clauses should be upheld especially where the customers may be unsophisticated and illiterate: see [26]-[29] of the decision.

<sup>119</sup> For instance, Chandran points out that the equivalent under the Australian Trade Practices Act 1974, Section 51AB, is the prohibition of unconscionable conduct, which imports a much wider and flexible concept. In comparison, the wording of Section 4(c) appears to be more restrictive.

"[use] small print to conceal a material fact from the consumer or to mislead a consumer as to a material fact" in connection with the relevant transaction".

81. To counterbalance the wide protections afforded under Section 4 and the Second Schedule, Section 5 provides further guidelines for the Court or tribunal on how to determine whether a person has been engaged in an unfair practice. This include the "reasonableness of the actions of that person in those circumstances." In *Freely Pte Ltd v Ong Kaili and ors*,<sup>120</sup> the High Court found that Section 5(3) acts as a defence if the supplier is found to have acted reasonably in the circumstances.<sup>121</sup>In relation to financial products, Regulation 4 of the Consumer Protection (Fair Trading) (Regulated Financial Products and Services) Regulations 2009 provides that "for the purposes of section 5(3)(a) of the Act, a court may, in considering the reasonableness of the actions of a supplier of regulated financial products or services, take into account the inherent risks of the financial products or services supplied, if all relevant information concerning such risks has been provided to the consumer in good faith." This encourages all suppliers of financial products to make clear the risks inherent in their product. If they do so, their actions are more likely to pass muster under Section 5(3)(a).

82. Where Section 4 is engaged, Section 6 entitles the consumer to bring an action under the Act. Under Section 7(4) of the CPFTA, the Court (or Small Claims Tribunal) may, *inter alia*, order restitution of any money, property or other consideration given or furnished by the consumer, award the consumer damages for any loss or damage suffered, or make an order of specific performance. In such actions, the Courts are also given wide powers to issue declarations that the conduct in question is an unfair practice, grant an injunction to prevent such further conduct, and what is more damaging towards financial institutions, is the power to order the supplier to publicized terms of such declaration or injunction to its consumers.<sup>122</sup> There is also a general right to cancel the contract within a prescribed timeline, and any sum paid by the consumer is to be repaid.<sup>123</sup>

83. The promise provided by the CPFTA in relation to financial products however, is somewhat limited. Section 6(2) of the act states that the right to commence an action under the act does not apply where the claim exceeds the prescribed limit, unless the excess is abandoned. Section 6(6) states that the prescribed limit is \$30,000. Where equity release products are concerned, this amount is likely to be surpassed several fold. No similar limits fetter the Court's powers in the NCCPA or ASIC Act 2001. Given the generally high property prices in Singapore, the CPFTA would naturally exclude such claims, and consumer would have to resort to civil suits.

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<sup>120</sup> [2010] 2 SLR 1065.

<sup>121</sup> *Freely Pte Ltd v Ong Kaili and ors* [2010] 2 SLR 1065 at [47]-[48].

<sup>122</sup> Section 9(1) of the CPFTA.

<sup>123</sup> See generally Consumer Protection (Fair Trading) (Cancellation of Contracts) Regulations 2009. Regulation 3(h) excludes financial products which already carry a right of cancellation conferred under laws administered by the MAS or under the Securities and Futures Act (Cap.289). The former category may include insurance policies which generally allow the consumer to cancel the contract for free within 14 days.

#### D. *Elder Abuse and Undue Influence*

84. Examining the growing literature<sup>124</sup> on elder abuse would go beyond the scope of this paper. However, this is a real area of concern for elders. In addition to issues of mental capacity, the *Hwang Cheng Tsu Hsu* decision highlights the real risk of elder abuse. There, the defendant bank argued that it observed certain red flags of possible elder abuse, which led it not to heed its elder customer's purported instructions. The Court of Appeal pointed out that where certain red flags are present, a banker dealing with the elder should be put on notice of either the lack of mental capacity or possible undue influence.

85. It appears that for now, elder borrowers may have sufficient protection from the common law doctrine of undue influence, or where elder abuse is concerned, protection by way of contractual terms, express or implied, that give rise to a duty by its banker not to heed purported instructions if the elder appears to be under the pressure or duress of another person.

#### E. *Dispute Resolution Forums*

86. Disputes arising from equity release products are not likely to be different from mortgage disputes, the most common and drastic action being a home repossession. Having alternative dispute resolution (ADR) channels may assure elders of a low cost and potentially less adversarial alternative. In this regard, the ADR schemes in Australia and the UK for financial products provide a welcome function in reducing litigation costs.

87. As mentioned above, the NCCPA is the omnibus legislation dealing with consumer credit laws. The NCCPA was a part of a larger reform process that introduced a licensing regime for lenders and brokers which included obligations such as responsible lending and mandatory internal and external dispute resolution processes. Under the NCCPA,<sup>125</sup> Australian financial services licensees, unlicensed product issuers and secondary sellers are required to

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<sup>124</sup> At paragraph 29 of the Court of Appeal decision in *Hsu Ann Mei Amy (personal representative of the estate of Hwang Cheng Tsu Hsu, deceased) v Oversea-Chinese Banking Corporation Ltd* [2011] 2 SLR 178, the Court cited the following pieces of literature before enumerating a list of possible red flags for elder abuse: (1) Susan J Heakes, "Fraud Against Elders: Is the Bank on the Hook?"; (2) Sandra L Hughes, "Can Bank Tellers Tell? – Legal Issues relating to Banks Reporting Financial Abuse of the Elderly", American Bar Association's Commission on Law and Aging, 2003; (3) Ministry of Community Development, Youth and Sports on "Understanding Elder Abuse and Neglect – Detecting and Helping". See also HW Tang, "The Prevention of Financial Elder Abuse" *Law Gazette*, Vol 3, May 2010; Jessica Silver-Greenberg, "Banks Seen as Aid in Fraud Against Older Consumers" *The New York Times*, 10 June 2013; Ashley Bray, "Watching out for our Elders", *ABA Banking Journal*, Bank Notes, August 2012; Mary Joy Quinn, "Friendly Persuasion, Good Salesmanship or Undue Influence", (2000-2001) 2 *Elder's Advisor* 49; Andrew Fischer, "Elder Abuse: A Private Problem that Requires Private Solutions", (2012) 8 *Journal of Health and Biomedical Law* 81; Fiona Burns, "Elders and Undue Influence Inter Vivos: Lessons from the United Kingdom?", (2003) 24 *Adelaide Law Review* 37; Moore & Schaefer, "Remembering the Forgotten Ones: Protecting the Elderly from Financial Abuse", (2004) 41 *San Diego Law Review* 505.

<sup>125</sup> Specifically, disputes resolution mechanisms are made mandatory for:- (1) Australian Financial Services licencees vide Sections 912A(1)(g) and 912A(2) of the Corporations Act; (2) an unlicensed product issuer or secondary seller vide Section 1017G of the Corporations Act; and (3) for a credit licencee vide Section 47 of the National Consumer Credit Protection Act 2009.

have ASIC-approved forms of dispute resolution processes.<sup>126</sup> This typically includes an internal dispute resolution (IDR) process, and membership to an external dispute resolution (EDR) scheme,<sup>127</sup> with the latter a further possible avenue of complaint for the consumer. Indeed, such institutions are required to inform customers of their right to bring an unsuccessful internal dispute resolution complaint to an external dispute resolution process.<sup>128</sup>

88. IDR mechanisms which are set up by financial institutions are supervised and approved by the ASIC. The benefit of IDR procedures are that they may allow an organisation “(a) the opportunity to resolve complaints or disputes quickly and directly; (b) the ability to identify and address recurring or systemic problems (which can then lead to product or service improvements); (c) the capacity to provide solutions to problems rather than have remedies imposed by an external body; and (d) the chance to improve levels of customer and investor confidence and satisfaction.”<sup>129</sup> Any “complaint” (under the Corporations Act) or “dispute” (under the NCCPA) must receive a ‘final response’ from the complainant or disputant within 45 days, which comprises of the final outcome of their complaint and notice given to the consumer that they may take their complaint or dispute to EDR.<sup>130</sup> As regards EDR, the two main ASIC-approved schemes are the Financial Ombudsman Service<sup>131</sup> and Credit Ombudsman Service.<sup>132</sup> Both services consolidate previously disparate groups of ombudsman services under their respective umbrellas. Effectively, a consumer would gain assurance by knowing that the credit company or bank it is dealing with are under the supervision of these services. Under the relevant Corporation and National Credit regulations,<sup>133</sup> the ASIC acts as the body approving and overseeing all EDR processes for organisations, to ensure that such processes remain accessible, independent, fair and effective. All EDR schemes must be free of charge to the complainant to provide accessibility.<sup>134</sup> Issues of mental capacity fall outside the scope of the

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<sup>126</sup> [http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rg139-published-13-June-2013.pdf/\\$file/rg139-published-13-June-2013.pdf](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rg139-published-13-June-2013.pdf/$file/rg139-published-13-June-2013.pdf).

<sup>127</sup> ASIC Regulation 139 provides that licencees under the Corporations Act.

<sup>128</sup> *Ibid.* Reg 139.6 and Reg 139.9.

<sup>129</sup> Reg 165.71. See: [http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rg165-published-13-June-2013.pdf/\\$file/rg165-published-13-June-2013.pdf](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rg165-published-13-June-2013.pdf/$file/rg165-published-13-June-2013.pdf).

<sup>130</sup> Reg 165.91. *Ibid.*

<sup>131</sup> See [www.fos.org.au](http://www.fos.org.au). The Financial Ombudsman Service encompasses the following schemes:- Financial Ombudsman Service (FOS); the Banking and Financial Services Ombudsman (BFSO); the Insurance Ombudsman Service (IOS); the Financial Industry Complaints Service (FICS); the Credit Union Dispute Resolution Centre (CUDRC); the Insurance Brokers Disputes Limited (IBDL). In ASIC’s Regulation Impact Statement titled “Dispute Resolution requirements for consumer credit and margin lending”, May 2010, it reports that the FOS provides dispute resolution services for closer to 90% of all Australian financial services complaints: [http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/RIS-dispute-resolution-for-credit-and-margin-lending.pdf/\\$file/RIS-dispute-resolution-for-credit-and-margin-lending.pdf](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/RIS-dispute-resolution-for-credit-and-margin-lending.pdf/$file/RIS-dispute-resolution-for-credit-and-margin-lending.pdf) at paragraph 28.

<sup>132</sup> See [www.cosl.com.au](http://www.cosl.com.au). The Credit Ombudsman Service encompasses the following schemes:- (1) Credit Ombudsman Service Limited; (2) Financial Co-operative Dispute Resolution Scheme.

<sup>133</sup> See Reg 7.6.02(3)-(4), 7.9.77(3)-(4) of the Corporations Regulations and Reg 10(4)(a)-(c) of the National Credit Regulations.

<sup>134</sup> Reg 139.46 and Reg 139.47.

aforesaid services and are governed by the existing state and territory guardianship law complaint mechanisms (i.e. state or territory courts, tribunals and guardianship boards).<sup>135</sup>

89. In the UK, the Financial Ombudsman Service is the avenue for complaint and resolution of disputes between consumers and business providing financial services. The Ombudsman Service was introduced in 2000 vide the FMSA, and remains a pillar of the system, its key role being to allow for disputes to be “resolved quickly and with minimum formality by an independent person”.<sup>136</sup>

90. Typically, before a matter is referred to the Ombudsman, it is to be dealt with by the relevant service provider. This is similar to the IDR scheme in Australia. The Financial Conduct Authority has also made publicly available (and regularly updates) a handbook setting out detailed guidelines on internal complaints mechanisms. These guidelines include a time limit of 8 weeks, by which the respondent organisation must provide the complainant a ‘final response’ in written form, informing the complainant if it accepts the complaint and offers redress or rejects the complaint and proffer reasons for the same.<sup>137</sup> The complainant then has 6 months from the date of the final response to seek redress from the Financial Ombudsman.<sup>138</sup>

91. The Financial Ombudsman covers “nearly all financial services”<sup>139</sup> under its broad-ranging jurisdiction. First, its compulsory jurisdiction, which applies to all financial services businesses authorised or registered by the Financial Services Authority. About 30,000 businesses are regulated by the Financial Services Authority and may be found on its register.<sup>140</sup> Second, its consumer credit jurisdiction under the Consumer Credit Act 2006, which covers consumer credit complaints against organisations licenced by the Office of Fair Trading. These organisations number about 80,000, and likewise may be found on the register of the Office of Fair Trading.<sup>141</sup> As with the EDR in Australia, the Ombudsman’s service is free to consumers. Further, the Ombudsman can make awards of up to £150,000. In addition to the 6 months’ time limits by which a consumer can lodge a complaint after receiving a ‘final response’ from its service provider, it must do so within 6 years from the event which gave rise to the complaint.

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<sup>135</sup> Page 5 of the Regulatory Guide 139:  
[http://www.asic.gov.au/asic/pdf/lib.nsf/LookupByFileName/rg139-published-13-June-2013.pdf/\\$file/rg139-published-13-June-2013.pdf](http://www.asic.gov.au/asic/pdf/lib.nsf/LookupByFileName/rg139-published-13-June-2013.pdf/$file/rg139-published-13-June-2013.pdf).

<sup>136</sup> Section 225(1) of the FSMA

<sup>137</sup> Section 1.6.2 of the FCA Handbook. Available at:  
<http://media.fshandbook.info/content/full/DISP.pdf>

<sup>138</sup> *Ibid.*

<sup>139</sup> Statement on the Roles and Responsibilities of the Financial Ombudsman Service and the Lending Standards Board dated 14 March 2012. See in particular, paragraph 1.4 of the Statement. Available at:  
<http://www.financial-ombudsman.org.uk/about/LSB-MOU-2012.pdf>.

<sup>140</sup> <http://www.fsa.gov.uk/register/home.do>.

<sup>141</sup> <http://www2.crw.gov.uk/pr/Default.aspx>. The Ombudsman also has voluntary jurisdiction over parties outside of its compulsory and consumer credit jurisdiction to allow the Ombudsman to adjudicate. These typical apply to organisations in carrying on business in the European Economic Area but who may not have an office in the UK.

92. Singapore's ADR schemes for the financial services industry stands its ground compared to its Australian and English counterparts. On 31 August 2005, the MAS launched the Financial Industry Disputes Resolution Centre ("FIDReC") to provide consumers with an independent and affordable avenue for resolving retail disputes with financial institutions in the banking, insurance and capital markets sector.

93. Notably, FIDRec is not a government body but a public company limited by guarantee, funded by the financial sector.<sup>142</sup> Some of FIDReC's Key guiding principles include accessibility, fairness, independence and efficiency.<sup>143</sup>

94. FIDReC is empowered by the MAS. The MAS requires all regulated financial institutions which have dealings with retail customers to subscribe as members of FIDReC.<sup>144</sup> Subscription means a submission to FIDReC's jurisdiction and an agreement to be bound by the FIDReC Terms of Reference.<sup>145</sup> Members of FIDReC are also required to pay levies and fees to the Centre.<sup>146</sup> Crucially, the Terms of Reference cannot be amended without approval of the MAS.<sup>147</sup> FIDReC is also obliged to send regular qualitative reports on the types and number of disputes brought to FIDReC. This is similar to the mandatory oversight of ASIC in Australia and compulsory jurisdiction of the Financial Ombudsman in the UK.

95. The FIDReC process is uncomplicated and therefore suitable for retail investors. As with IDR in Australia, a complainant is allowed to file a FIDReC complaint after the matter has been referred to the financial institution's internal dispute resolution department without resolution, but no later than 6 months after the complainant has received a "final reply letter" from the financial institution.<sup>148</sup> The final reply letter is where the financial institution notifies the complainant of its final position on the matter and informs the complainant that it can bring the matter to FIDReC within 6 months of the letter.<sup>149</sup>

96. The initial application to FIDReC is free of charge. Upon an application, a FIDReC case manager will assess if the Centre has the jurisdiction to hear the claim. Under Clause 21 of the Terms of Reference, FIDReC is allowed to refer to adjudication claims of up to \$50,000. There are two exceptions to this rule, viz, where the claimant agrees to cap his claim to \$50,000, or where the financial institution agrees to the claimant's claim amount which is above \$50,000.

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<sup>142</sup> MAS, Policy Consultation on the Financial Industry Disputes Resolution Centre, October 2004, at [1]. FIDRec is not entirely new. It subsumes and builds on the dispute resolution functions of the Consumer Mediation Unit and the Insurance Disputes Resolution Organisation.

<sup>143</sup> *Ibid* at p3. To ensure independence and fairness, its board comprises of an independent director, 3 directors representing consumers, 1 director each representing the financial institutions, insurers and financial advisers.

<sup>144</sup> *Ibid* at [12].

<sup>145</sup> Available online at (last accessed on 4 March 2014):  
<http://www.fidrec.com.sg/website/termsref.html>.

<sup>146</sup> *Supra* note 116 at [13].

<sup>147</sup> FIDReC Terms of Reference, Section 3, Clause 7(3).

<sup>148</sup> See Cl 6 of the FIDRec Terms of Reference.

<sup>149</sup> *Ibid*, Clause 13(2).

Where FIDReC has jurisdiction, the case manager will, where appropriate, direct the parties to mediation. If the dispute is not resolved there, the parties will then be referred to an adjudication process. An adjudicator from FIDReC's list of adjudicators will then adjudicate over the process. According to FIDReC's website, it currently has 26 adjudicators who are retired "judges, lawyers with many years of experience and retired industry professionals."<sup>150</sup> If the matter proceeds to adjudication, the complainant will have to pay a relatively affordable fee of \$50. There is no stipulated timeframe by which a dispute is to be resolved. However, FIDReC "seeks to resolve all disputes as expeditiously as possible."<sup>151</sup>

97. FIDReC also does not allow parties to be legally represented. This is a bid to keep the process affordable and accessible to the consumer. Accordingly, neither the financial institution nor the consumer is allowed to be assisted by lawyers formerly retained. It is not a bar however for in-house counsel to be involved, or for the consumer to be assisted by a legal trained friend or family member.<sup>152</sup> The adjudicator's decision is binding on the financial institution but not on the complainant.<sup>153</sup> Another helpful aspect is the use of nominees. Under the Terms of Reference, a retain consumer may, by way of a power of attorney, appoint a nominee to represent him or her at the relevant hearings.<sup>154</sup> This assists elders who may not have the ability or energy to put their best foot forward. This also removes the language barrier for elders who may not be conversant in the English language.<sup>155</sup>

## VI. The Way Ahead

98. Singapore's current legal and regulatory framework provides a meaningful starting point for the regulation of equity release products for elders. The CPFTA already provides recourse for unfair practices. In one sense, it is no different from Australia's NCCPA. However, the CPFTA needs to increase the monetary value in respect of financial products. The current limit of \$30,000 is helpful but perhaps inadequate, especially where most equity release agreement would involve sums larger than that.

99. This is a similar gap where Singapore's dispute resolution mechanism is concerned. In the wake of the 2008 financial crisis, FIDReC has proven itself to be an effective and efficient dispute resolution by the large number of minibond-related disputes being resolved.<sup>156</sup> By limiting the centre's reach to claims of up to \$50,000 necessarily excludes the bulk of equity release disputes. Elders who have taken up such mortgages are not likely to have the means to launch costly civil suits which for now remain their only viable dispute resolution option.

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<sup>150</sup> See: <http://www.fidrec.com.sg/website/adjudicators.html>

<sup>151</sup> See: <http://www.fidrec.com.sg/website/faq.html>

<sup>152</sup> See: <https://fidrec.com.sg/website/processdisp.html>

<sup>153</sup> See: <http://www.fidrec.com.sg/website/faq.html>

<sup>154</sup> See: <https://fidrec.com.sg/website/processdisp.html>, para 5.

<sup>155</sup> See: <https://fidrec.com.sg/website/processdisp.html>, para 12.

<sup>156</sup> Conrad Tan, Business Times, 'Over 1,000 Lehman-linked disputes solved: FIDReC', 1 December 2009.



100. Taking a leaf out of Australia's book, Singapore could consider specific legislation for equity release product, if they find traction in the coming years. At the substantive end of the spectrum, the CPFTA or other future legislation dealing with equity release products could enshrine more substantive concepts such as "unconscionability", which give the Courts wide-ranging powers to vary the contract, reduce borrower obligations, or declare contract void. As with the NCCPA, and foreshadowed in *Freely Pte Ltd v Ong Kaili and ors*, the Courts should have regard to the special disadvantage a consumer may have during contract negotiations, or whether the consumer "was a member of a class whose members were more likely than people who were not members of the class to be at such a disadvantage". Such provisions would provide a deterrent to elders being taken advantage of during contractual negotiations. Unfair conduct in the enforcement of contractual terms should also be disapproved of by the Court. Legislating against negative equity, onerous default provisions on the basis of minor infringements, and requiring projections on the equity of the property over time, are sound and reasonable steps to protect the elder community.

## **VII. Conclusion**

101. As may be seen, Singapore's legal and regulatory framework for equity release products can develop to better welcome the likely growth of the product. The CPFTA creates substantive grounds on which financial products can be undermined. However, the monetary limits are too low – especially where equity release products are concerned. This is adequate if, as in Australia, in the coming early days for the product the loan amounts are relatively modest. This may not be adequate if where elders which to liquidate a huge proportion of their real property.

102. The Fair Dealing Guidelines and general MAS oversight also provide assurance to consumers. The Fair Dealing Guidelines, whilst not directly applicable to equity release products, are likely to have fostered a stronger fair dealing culture within financial institutions since their introduction. MAS's active oversight after the 2008 financial crisis also suggests that if such products take off, the Authority is likely to actively regulate the same. Nonetheless, amendments to the relevant legislation and regulations to include equity release products would bode better, in terms of actual protection for vulnerable elders.

103. A leap to enshrine the levels of protection affordable in Australia and the UK would be unrealistic and unlikely. That may not be required for now. But there may come a time in the not so far future that Singapore may need to consider adapting parts of the NCCPA to better protect the baby boomers.