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NAVIGATING THE MINEFIELD OF EQUITY RELEASE PRODUCTS

NELSON GOH

Clyde & Co Clasis Singapore Pte Ltd
Associate, Dispute Resolution

nelsongohkt@gmail.com

Adjunct Researcher, Centre for Banking & Finance Law, Faculty of Law, National University of Singapore

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Centre for Banking & Finance Law
Faculty of Law
National University of Singapore
Eu Tong Sen Building
469G Bukit Timah Road
Singapore 259776
Tel: (65) 6516 4382
Fax: (65) 6779 0979
Email: cbfl@nus.edu.sg

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NELSON GOH

Clyde & Co Clasis Singapore Pte Ltd
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nelsongohkt@gmail.com

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,[1] a quarter of the current population, entering their silver years during this period.[2] 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 costs of living.

2. The issues faced by an ageing population are not entirely new. To ensure that elders[3] are able to meet costs of living, markets in the United Kingdom (UK) and Australia have responded by introducing equity release products. Broadly, such financial products allow real property assets to be monetized. Such products have been welcomed by those within the baby-boomers bracket who are known to 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.

3. Whilst not commonplace, the reverse mortgage is not entirely new to the Singapore market. It surfaced in Singapore in the late 1990s, although it 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 by the Housing and Development Board for public housing, suggests that equity release products are likely to increase in popularity in the coming years.

4. In the sections below, this paper seeks to outline:- (1) the utility of equity release product to Singapore's ageing population; (2) potential issues which may arise in relation to such products; (3) the current legal framework in relation thereto; (4) the legal and regulatory models in the UK and Australia; and (5) drawing comparisons from the UK and Australia, suggest possible changes which could allow such products to thrive.

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[1] Generally accepted to be the generation born post-war, between 1946 and 1964.

[2] PWP at 1.

[3] For the purposes of this article, Elders are taken to be persons over the retirement age of 65.

II. THE DEMOGRAPHIC LANDSCAPE

A. Housing and Housing Finance in Singapore

5. A survey of the social landscape may suggests that the equity release products may soon be commonplace in Singapore.

6. First, the growth in the number and proportion of elders in Singapore would mean a corresponding decrease in the number of working-age adults.[4] 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.[5] Further, Singapore's life expectancy has increased from 62 years in 1970 to about 88 years in 2010.[6] Accordingly to the World Health Organisation, Singapore ranks 4th in the world for life expectancy.[7] 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.

7. 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 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.[8] 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."[9] 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 so as to reduce the environmental changes in their silver years.[10] Part of this push to allow elders to age-in-place is to allow them to monetize

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[4] Para 1.9 PWP.

[5] Para 1.10 PWP.

[6] Para 1.4 PWP.

[7] 'Singapore Ranks No. 4 for Life Expectancy', Salma Khalik, The Straits Times, 27 May 2013.

[8] Executive Summary of the Report on the Ageing Population.

[9] Para 12 of the Report.

[10] CAI Report, Chapter 3, para 2.

their real property.[11] The harbingers have clearly sounded out the generational tectonic shifts and the need to adapt to these changes.

8. The call for suitable responses to Singapore's ageing population is made more pressing due the unique nature of pension schemes in Singapore. Since the 1950s, the Singapore Government introduced the Central Provident Fund ("**CPF**") system which is a compulsory retirement savings scheme.[12] 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. In 1968, the Government's push for home-ownership meant that 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.

9. 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%.[13] 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%.

10. 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 in US (28%), UK (34%) and Japan (40%).[14] 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.

11. 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.[15] 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

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[11] CAI Report, Chapter 3, para 21-24.

[12] For overview on the CPF scheme, see Ngee Choon Chia and Albert KC Tsui ("**Chia & Tsui**") at 6-10.

[13] The figures are available at: http://www.mnd.gov.sg/homeSWeethome/home_ownership.htm.

[14] Supra note 12, Chia & Tsui at Section 2.

[15] McCarthy at 7.

12. 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.[16] NTUC Income is likely to have been the only other financial institution carrying the product, and had introduced in the late 90s.[17] 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.

13. A survey done on the perception of the reverse mortgage in Australia showed that the prime 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.[18] 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.[19]

14. In the NTUC income case, the borrowers one Mr Derek Chua and his wife, had applied for the reverse mortgage in 1997, when 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 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 $460,000 to bring the loan-to-valuation ratio back to 80%. There were some discussions subsequently 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.

15. 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

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[16] Available at: http://www.ocbc.com.sg/assets/pdf/Media/2006/aug/250806ReverseMortgage.pdf.

[17] NTUC Income introduced the reverse mortgage in or around 1990.

[18] R Reed, The Perception of Reverse Mortgages in the Australian Housing Market. Presented at the ISA Housing Conference, 1-4 September 2009, Glasgow.

[19] 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.

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.[20] 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.[21] 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.

16. The LBS certainly appears to be a precursor to possible growth of other equity release schemes such as the reverse mortgage. The reverse mortgage and other equity release products will become an attractive proposition for asset-rich cash-poor elders who wish to live out their glowing years in Singapore comfortably.[22]

III. EQUITY RELEASE PRODUCTS GENERALLY

A. Growth of Equity Release Markets in Australia and the UK

17. Of the various forms of financial products allowing elders to obtain cash from their property, the reverse mortgage appears to be the most common. There are in fact, broadly, three types of such products:-[23] (1) the reverse mortgage, whereby the consumer borrows money on equity in his or her home, and the principal and interest are not repaid until the home is sold, usually upon death; (2) home reversion schemes, 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; (3) shared appreciation mortgages, 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.

18. In Australia, the reverse mortgage was 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. Indeed, the reverse mortgage has been promoted by major banks in Australia such as Commonwealth Bank of Australia and Suncorp.[24] The product has grown for a variety of reasons, namely, its suitability for 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

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[20] Terms and Conditions of the Enhanced LBS. Available at

[21] HDB InfoWeb 5 Mar 2010.

[22] 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.

[23] 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.

[24] Perception of the Reverse Mortgage in the Australian Housing, by Reed.

medical, food, transport, and the introduction of a Goods and Services Tax in Australia.[25] According to the same survey, many elderly Australians regard their place of residence as their single largest asset. The attraction of the reverse mortgage to these persons is that whilst the lender is borrowing money, there are no repayments to be made during one's lifetime. Indeed, from 2005 to 2007, the number of reverse mortgages taken out in Australia increased two-fold from about 16,500 to about 33,700. Interestingly, the average size of loan taken was about AUD 60,000, which is about 10-20% of the total value of an average home. It is perhaps the conservative nature of the loan amount which has allowed for the steady acceptance of the reverse mortgage.

19. Due to similar factors, there has been a proliferation of equity release products in the UK. There are predominantly two types of equity release products in the UK. The first, a 'lifetime mortgage'. This is essentially a type of reverse mortgage, which has been outlined above. The second is the home reversion plan, where the bank or a financial institution purchases a part of the property, thus becoming a co-owner, and pays the original homeowner a lump sum, income for life, or both. The homeowner is granted a right to occupation, and the occupier's share may form part of his or her estate for inheritance purposes. Both the financial institution and the homeowner benefit for increases in the property price.[26]

20. In the UK, many elders have identified the home as a repository of their wealth.[27] To cope with rising costs and the dearth of income, elders have resorted to equity release product. This sector has burgeoned. In 2007, the equity release market commanded a market share of about £1.279 billion.[28] 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.[29] According to SHIP's 20th Anniversary Report, elders in the UK sit on about £1.9 trillion worth of housing equity,[30] and the organization foresees that the market would continue to grow. Established global institutions such as Aviva and Prudential have also gotten in on the act.

B. Issues Arising from Equity Release Products

21. As with other financial products, equity release products are not without pitfalls. Arguably, the fact that such products are targeted at elders potentially increases the legal issues which may arise. It is no surprise that elders have been consistently recognised in law as a vulnerable category of persons which require protection.

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[25] *Ibid*.

[26] See Fox and Devenney, Undue Influence, The Elderly and Equity Release Schemes. Presented at the 7th 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.

[27] Fox and Devenney, Undue Influence, The Elderly and Equity Release Schemes. Presented at the 7th Biennial Conference on Property Law.

[28] Fox O Mahony. At 4

[29] SHIP 20th Anniversary Report 2011., at p5.

[30] SHIP 20th Anniversary Report 2011., at p5.

22. In 2007, the Australia Securities and Investment Commission released a report titled 'All We Have Is This House' – Consumer Experiences with Reverse Mortgages',[31] outlining the issues faced by consumers with the product. While the report details findings from interviews with a small sample size of 29 consumer interviewees, the anecdotal evidence points out the key issues facing consumers.

23. The first is the lack of accurate information. As noted in the report, a reverse mortgage is a "complex"[32] instrument, and there is a real danger that elders may agree to such products without a full picture of its pros and cons. There are various aspects of the product in which accurate information is crucial. First is that of whether it is possible for the product to carry a negative equity. In a falling property market, it is altogether possible for the value of the property to dip below the actual valuation, which is when negative equity occurs. A negative equity situation would usually be an event of default allowing the bank to repossess the property or to unilaterally take steps affecting the borrower's regular payouts. This occurred in the NTUC Income case. Regulators in Australia and the UK have moved to quash such situations, and in both jurisdictions, companies carrying the product have to make a no negative equity guarantee. It stands to reason that where a negative equity situation is possible, such a contingent event ought to be clearly spelt out to the consumer.

24. A second aspect is the general impact of the product on an elder. Equity release products tend to ensure that a borrower receives immediate and regular payments from the lender, but this is balanced by the fact that the remaining value of the mortgaged asset decreases with time. In the Asian context, elders who may wish to preserve some inheritance for their heirs may therefore be surprised to discover that there would be little value in their homes, if any, after the loan amount is paid off. 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.[33] In addition, the mortgage documentation tends to specify the amount to be regularly paid out to the borrower, without the borrower having any right to vary this amount. This may pose some problems for elders who have not taken independent financial advice and are not able to properly calculate the cost needed for daily expenses, medical needs, transportation, etc., especially where these regular forms of expenditure are likely to increase in cost over time.

25. The third aspect is of the types of default events which may occur under the instrument. As with a typical mortgage, the lender has the option of repossession on the occurrence of an event of default. The ASIC Report 2007 found that typical default conditions include

[31] Australia Securities and Investments Commissions, Report 107, "All we have is this house – Consumer experiences with Reverse Mortgages", available at: http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/Rep109_reverse_mortgages_Nov07.pdf/$file/Rep109_reverse_mortgages_Nov07.pdf

[32] *Ibid* at p1.

[33] ASIC 2007 Report, p7.

fairly minor infringements such as when unauthorised persons were found to be living in the property, if the property was left vacant for 6 months. The ASIC found that borrowers interviewed had no idea that the first two conditions could give rise to a default event.

26. Closely related to the issue of having full and accurate information on such products, is that of mental capacity. As is commonly accepted, some of the more common illnesses facing elders result in memory loss or impairment. When such products are promoted, there is always the question of whether the elder borrower has the mental capacity to understand the product and to execute the contract documents.

27. 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 decision of *Hwang Cheng Tsu Hsu (by her litigation representative Hsu Ann Mei Amy) v Oversea-Chinese Banking Corp Ltd*, [34] where the Singapore High Court ruled that a bank had not breached its contractual duty to adhere to its customer's instruction on the basis of the customer's perceived lack of mental capacity during the time of instructions. The decision was upheld on appeal. What is more apposite to the current discussion is how to determine if a person lacks mental capacity. Interestingly, after the commencement of the suit, the Mental Capacity Act (Cap. 177) was enacted. For present purposes, it is sufficient to note that the Section 5 of the Mental Capacity Act 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.

28. In addition to issues of mental capacity, the *Hwang Cheng Tsu Hsu* decision also brings to the fore the interesting issues of elder fraud and notice. Indeed, the Court of Appeal had 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. This may be a real concern given that the legal test of mental capacity is ability to appreciate, retain and utilise the information provided. A second and equally important concern arises in the form of possible undue influence, where heirs and relatives of a asset-rich elder may potential obtain a windfall from the elder deciding to mortgage his or her property. The idea of elder abuse in relation to financial products is not uncommon, and there has been a growing amount of literature warning against this.[35]

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[34] [2010] 4 SLR 47.

[35] 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

29. Lastly, there is, at least in Singapore, likely to be a lack of protection in relation to equity release products because they are more akin to typical loan agreements as opposed to retail investment products, the latter having come under more scrutiny and regulation after the 2008 financial crisis. This will be more evident in the later section on the legal and regulatory framework in Singapore.

IV. REGULATING EQUITY RELEASE PRODUCTS

30. Naturally, given the steady growth of these products since their introduction in the UK and Australia, and the plethora of issues which potentially surround such products, both markets have seen the emergence of legislative and regulatory frameworks which seek to protect retail consumers.

A. Australia

(1) <u>Legal and Regulatory Framework</u>

31. 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)[36] and "largely incorporates the UCCC" save that it includes amended hardship provisions and introduction of new default notice requirements.[37]

32. 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 2nd 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" and where the product meets the certain prescribed requirements. Section 18A of the NCC also protects a borrower from enforcement proceedings brought on the basis of minor infringements such as where the borrower fails to inform the financial institution that another person is occupying the property, or where the property is left unoccupied. Section 86A also provides that where a borrower intends to end a reverse mortgage, the amount to be paid

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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.

[36] Section 6 of the NCCPA.

[37] See http://www.asic.gov.au/asic/asic.nsf/byheadline/Consumer-Credit-Code.

to the financial institution be worked out on the basis of the market value of the property at that time with certain prescribed adjustments. Section 133DB of the NCCPA also requires that the representatives of a financial institution provide the consumer projections that "related to the value of the dwelling or land that may become reverse mortgaged property, and the consumers indebtedness, over time if the consumer were to enter into a contract for a reverse mortgage. These projections are also to be given to the consumer, along with a "reverse mortgage information statement".[38] This statement should include details about how a reverse mortgage works, how costs are calculated, hat to consider before taking out a reverse mortgage, and useful contacts for more information.

33. Apart from these specific protections, the NCCPA and NCC comprise of other pro-consumer measures. Section 47 of the NCCPA mandates that all licence holders must ensure, *inter alia*, that their representatives are adequately trained and are competent to engage in the credit activities. Section 177 of the NCCPA also empowers the Court to grant injunctions, at the application of the Australian Securities Investments Commission or a consumer, where a party is engaging or proposing to engage in conduct which would contravene the NCCPA. Section 178 enables the court to order one party to pay compensation for any loss and damage occurring from an offence under the NCCPA. Section 179 also allows the court to declare the whole or part of a contract, deed or arrangement void, or void from such time it considers appropriate. The court can also vary a contract or deed, and also refuse to enforce the terms of such contract or deed. Interestingly, Section 180A deals with "unfair or dishonest conduct". Under this provision, 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" 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." This is useful deterrent to protect elders from being taken advantage of by virtue of their age, lack of alertness, or language abilities. 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.

34. In addition to the NCCPA, Australia also has robust formal and self-regulatory regime. In terms of a formal regulatory regime, the Australian Securities & Investments Commission ("**ASIC**") "has been the national consumer protection regulator for financial services since 1998".[39] As a result of the Financial Services Reform Act 2001, from 11 March 2002, it replaced the Australian Competition and Consumer Commission as the Australian Commonwealth government agency overseeing market conduct and consumer protection issues on credit. Of note for present purposes, the ASIC administers the Australian

[38] 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.

[39] See "Background to ASIC's Credit Jurisdiction" at http://www.asic.gov.au/asic/asic.nsf/byheadline/Background+to+ASIC's+credit+jurisdiction

Securities and Investments Commission Act 2001 and the National Consumer Credit Protection Act 2009, as well as relevant regulations made under them.

35. The ASIC has been active in its supervision of equity release products, in part due to the burgeoning market for such products in Australia. In 2005, it released a report on the Reverse Mortgage detailing the developments in this sector stating that such products only really took off in or around 2004.[40] The report also details that "[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."[41]

36. The 2005 report also warned of the significant risks involved in equity release products as a result of the fact 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." 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."

37. Due to the burgeoning nature of the equity release market, the ASIC released a further report in 2007.[42] It stated that "since that report was released, the reverse mortgage market has more than doubled. Currently the market is worth approximately $1.8 billion, consisting of over 31,000 reverse mortgages."[43]

38. 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. What is more notable about the Act is that it seeks to codify various common law doctrines by way of consumer protection. For instance, the Act has provisions giving recourse for unconscionable conduct in connection with financial services.[44] Unconscionability[45] in contract formation, unconscionable

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[40] 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

[41] ASIC 2005 Report at p4.

[42] 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.

[43] ASIC 2007 Report at p7.

[44] Subdivision C of the ASIC Act 2001.

[45] The doctrine of unconscionability as a defence was established in the 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

contract terms, and unconsiconability in the manner which the contract is carried out are covered by the act.[46] Similar to the Second Schedule of Singapore's Unfair Contract Terms Act,[47] 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 salient provisions such as regarding (1) the relative strengths of the bargaining positions of the supplier and the service recipient;[48] (2) whether the service recipient was able to understand relevant documents;[49] (3) whether any undue influence or pressure was exerted on the service recipient;[50] (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 foreseen would not be apparent to the service recipient);[51] and the extent to which the supplier and the service recipient acted in good faith.[52]

39. To give further teeth to the protective regime, Section 12DA further protects consumers from misleading and deceptive conduct and Section 12DB and 12DC deal with false or misleading representations in relation to the supply of financial services. Further, Section 12ED provides that in contracts for the supply for financial services, there will be an implied warranty that the services will be rendered with due skill and care. The Act also provides for recourse against unfair contract terms.[53]

40. Another piece of legislation which affects equity release products is the Australian Consumer Law (ACL), which is Australia's equivalent of Singapore's Unfair Contract Terms Act. Prior to 2010, Australian unfair contract terms law was governed by the Trade Practices Act (1974). The Trade Practices Act 1974 has been superseded by the Competition and Consumer Act 2010 (Cth).[54] According to an Industry Report by the Australian Competition and Consumer Commission, "[T]he introduction of the Australian Consumer Law (ACL) represents the most significant reform to the consumer law framework in Australia since 1974. The ACL has replaced numerous national, state and territory consumer laws, simplifying the law and improving its accessibility."Australia's unfair contract terms law is contained in Schedule 2 of the Competition and Consumer Act 2010 (Cth). The Australian Government's report titled "The Australian Consumer Law – a Framework Overview" notes that "The ACL replaced provisions spread across at least 20

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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.

[46] Section 12CB(4) of the ASIC Act 2001.

[47] Cap 396., 1994 Rev. Ed.

[48] Section 12CC(1)(a) of the ASIC Act 2001.

[49] Section 12CC(1)(c) of the ASIC Act 2001.

[50] Section 12CC(1)(d) of the ASIC Act 2001.

[51] Section 12CC(1)(i) of the ASIC Act 2001.

[52] Section 12CC(1)(l) of the ASIC Act 2001.

[53] Subdivision BA of the ASIC Act 2001.

[54] By way of the Trade Practices Amendment (No.1) 2010.

Commonwealth, state and territory consumer laws with one law."[55] So far as financial products and services are concerned, the ACL reflects similar provisions in the ASIC Act 2001.[56] The ACL also set outs parameters for the sale of consumer goods, which is not relevant for present purposes.

41. The key tenets of the ACL are the prevention of misleading or deceptive conduct and unfair terms in consumer contracts, and a robust regime for enforcement and redress.[57] In relation to financial products and services, Section 2 of the ACL defines services to include "(v) a contract between a banker and a customer of the banker entered into in the course of the carrying on by the banker of the business of banking; or (vi) any contract for or in relation to the lending of money." Section 3(3) of the ACL further identifies a "consumer" as a person who has acquired particular services where the amount payable did not exceed $40,000, or if it did, where the services were of a kind ordinarily acquired for personal, domestic or household use or consumption.

42. As regards substantive law, the ACL deals with equity release products in three major respects. First, Section 18 of the ACL prohibits "misleading or deceptive" conduct. This deals primary with the provision of information to consumers.[58] Further, Section 18 is drafted in the same way at Section 52 of the Trade Practices Act 1974, save for the substitution of the word 'corporation' with 'person'. Section 52 of the Trade Practices Act 1974 is also mirrored by Section 12DA of the ASIC Act (which essentially prohibits deceptive and misleading conduct). 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. At the risk of over-simplification, Section 52 is a statutory form of the common law doctrine of misrepresentation, with its own nuances.[59] In relation to misleading conduct, Section 29 also protect consumers against false or misleading representations about goods and services.

43. Secondly, the ACL protects consumers from unconscionable conduct. Section 20 of the ACL prohibits any person from engaging in unconscionable conduct "within the meaning of the unwritten law from time to time", thereby importing the relevant case law on unconscionability which was first established in *Commercial Bank of Australia v Amadio*.[60] Section 21 specifies in deciding whether there has been unconscionable conduct in relation to the supply of goods and services, a Court may have regard to factors including the

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[55] Commonwealth of Australia, The Australian Consumer Law – A Framework Overview, 2013, ("**Framework Overview Report**") at page v. Available at: http://www.consumerlaw.gov.au/content/the_acl/downloads/ACL_framework_overview.pdf.

[56] Framework Overview Report at p1.

[57] Framework Overview Report at p1.

[58] For instance, Section 19 of the ACL sets out various limitations to liability on the part of information providers.

[59] 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.

[60] (1983) 151 CLR 447

relative strength and bargaining position of the supplied and consumer,[61] whether the consumer was required to comply with conditions which were not necessary for the protection of the supplier,[62] whether the consumer was able to understand any documents relating to the supply of goods or services,[63] whether any undue influence or pressure or unfair tactics were used against the consumer.[64]

44. The third and perhaps most robust protection offered to consumers under the ACL is that against unfair contract terms. Section 23 makes clear that an unfair term in a standard form contract is deemed to be void, although the remainder of the contract subsists insofar as operable. Section 24 explains that a term would be unfair if it causes a "significant imbalance in the parties' rights and obligations"[65] and "is not reasonably necessary to protect the legitimate interest"[66] of the protected party, and "would cause detriment to a party"[67] if relied upon. In determining whether a term is unfair, a Court is bound to consider the contract as a whole, and the transparency of the said term.[68] Section 24(4) further provides a presumption that a term in a consumer contract would not be reasonably necessary to protect the legitimate interests of the protected party, unless proven otherwise. Section 25 further sets out a list of examples of unfair terms, which include, terms which allow one party but not the other to limit performance of,[69] terminate,[70] levy penalties for breach of,[71] and vary the terms of the contract.[72] Section 27 further sets out a presumption that a contract alleged to be in standard form shall be so, unless proven otherwise.

45. The above forms of consumer protection are further girded by robust enforcement and civil penalties in the ACL. Section 224 of the ACL provides that a breach of Part 2-2 (concerning unconscionable conduct) and Part 3-1 (unfair practices) may lead to a maximum penalty of AUD1,100,000 and AUD220,000 for a corporate body and individual respectively. Such fines are paid to the state, although Section 227 mandates that the Court must prefer making an order of compensation if the liable party is unable to make compensation and pay the penalty to the state. Further, while the ASIC is the proper party for enforcement of the ACL in relation to financial services, Section 236 of the ACL provides a right for a person to apply to a court for damages to compensate them for their loss or damage resulting from a contravention of the ACL.

[61] Section 21(2)(a) of the ACL. This tracks the language in paragraph (a) of the Second Schedule of Singapore's Unfair Contract Terms Act (Cap 396) (Rev. Ed. 1994) and Second Schedule of the UK's Unfair Contract Terms Act 1977 (Cap 50).
[62] Section 21(2)(b) of the ACL.
[63] Section 21(2)(c) of the ACL.
[64] Section 21(2)(d) of the ACL.
[65] Section 24(1)(a) of the ACL.
[66] Section 24(1)(b) of the ACL.
[67] Section 24(1)(c) of the ACL.
[68] Section 24(2) and 24(3) of the ACL.
[69] Section 25(1)(a) of the ACL.
[70] Section 25(1)(b) of the ACL.
[71] Section 25(1)(c) of the ACL.
[72] Section 25(1)(d) of the ACL.

(2) Self-Regulatory Bodies

46. The equity release market has matured in such a way that in addition to the ASIC's oversight, self-regulation has developed in the form of private bodies which deal with this area of consumer investments. For instance, there is SEQUAL (Senior Australians Equity Release), a key industry body which runs an 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.[73] Key terms of the code of conduct include that lenders are to ensure that products carry "a clear and transparent 'no negative equity' " and that all lenders are to "strongly encourage customers to … seek independent financial advice" and to "ensure that the customer obtains independent legal advice". SEQUAL is an opt-in body, which accredits its members.

47. From 2006, SEQUAL commissioned Deloitte to produce annually a report on the state of the equity release market in Australia.[74] In its latest report of June 2012, Deloitte stated 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.

48. SEQUAL's various guidelines also address the perennial problems with equity release products. For instance, its 'No Negative Equity' guideline[75] which came into operation in January 2008 requires that all members offer a No Negative Equity Guarantee (or NNEG). This ensures that a borrower shall never owe more than the value of the property mortgaged, which as flagged, was one of the crucial problems with equity release products at its early stages. As part of the same guideline, all SEQUAL members are required to follow the process of notifying the borrower as set out under the Uniform Consumer Credit Code as regards notice (save except where there is an immediate threat to the value of the underlying security).

49. In addition, 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.[76] In relation to the equity release market, the MFAA published 'The Equity Release Code of Proper Process' in February 2007 to ensure its members sold reverse

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[73] Available online at: http://www.sequal.com.au/images/SEQUAL_Code_of_Conduct_Guidelines/sequal%20code%20of%20conduct%20-%20revised%20oct%202009.pdf

[74] Available at http://www.sequal.com.au/media-releases-reports/research-reports

[75] See http://www.sequal.com.au/images/SEQUAL_Code_of_Conduct_Guidelines/sequal%20guideline%20no%20negative%20equity%20guarantee%20and%20default%20conditions.pdf

[76] See the 'Mission and Objectives' at http://www.mfaa.com.au/default.asp?menuid=480.

mortgages appropriately.[77] 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.[78] All MFAA members also belong to an ASIC approved External Disputes Resolution Scheme. Beside the MFAA, the CPA Australia has also published its own 'Guidance Notes for advising on reverse mortgages' for CPA members who are involved in credit advice work.

(3) <u>Dispute Resolution Avenues</u>

50. 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. In addition to the NCCPA, the Corporation Act also requires that Australia financial services licencees likewise have internal and external dispute resolution mechanisms.

51. Under the Corporations Act 2001 and the NCCPA,[79] Australian financial services licensees, unlicenced product issuers and secondary sellers are required to have ASIC-approved forms of dispute resolution processes.[80] This typically includes an internal dispute resolution process, and membership to an external dispute resolution scheme,[81] 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.[82]

52. 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."[83] Any "complaint" (under the Corporations Act) or "dispute" (under the NCCPA) must receive a 'final response' from the complainant or

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[77] See http://www.mfaa.com.au/default.asp?artid=2169.
[78] *Ibid*.
[79] 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 unlicenced 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.
[80] http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rg139-published-13-June-2013.pdf/$file/rg139-published-13-June-2013.pdf.
[81] ASIC Regulation 139 provides that licencees under the Corporations Act
[82] *Ibid*. Reg 139.6 and Reg 139.9.
[83] Reg 165.71. See: http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rg165-published-13-June-2013.pdf/$file/rg165-published-13-June-2013.pdf.

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.[84]

53. As regards EDR, Regulation 139[85] states that it is in place to "provide a forum for consumers and investors to resolve complaints (or disputes) that is quicker and cheaper than the formal legal system and an opportunity to improve industry standards or industry conduct and to improve relations between industry participants and consumers / investors".[86] The two main ASIC-approved schemes are the Financial Ombudsman Service[87] and Credit Ombudsman Service.[88] 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.

54. To further gird the dispute resolution processes available for consumers, under the relevant Corporation and National Credit regulations,[89] the ASIC acts as the body approving and overseeing all external dispute resolution processes for organisations, to ensure that such processes remain accessible, independent, fair and effective. All external dispute resolution schemes must be free of charge to the complainant to provide accessibility.[90] Separately, issues of mental capacity fall outside the scope of the aforesaid services but are governed by the existing state and territory guardianship law complaint mechanisms (i.e. state or territory courts, tribunals and guardianship boards)."[91]

B. The United Kingdom

(1) <u>Legal and Regulatory Framework</u>

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[84] Reg 165.91. *Ibid.*

[85] http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rg139-published-13-June-2013.pdf/$file/rg139-published-13-June-2013.pdf

[86] Rg 139.33. *Ibid* at page 11.

[87] See 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 at paragraph 28.

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

[89] 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.

[90] Reg 139.46 and Reg 139.47.

[91] Page 5 of the Regulatory Guide 139, http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rg139-published-13-June-2013.pdf/$file/rg139-published-13-June-2013.pdf.

55. In 2000, the UK Parliament passed the Financial Services and Markets Act ("**FSMA**") "to make provision about the regulation of financial services and markets". The FSMA was introduced to usher in a new epoch where financial services in the UK would be regulated by a single body - 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. As expected, the FSA was also empowered with general rule-making and enforcement functions.

56. 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 organisations, the newly established Prudential Regulation Authority and Financial Conduct Authority ("**FCA**"), as well as the Bank of England.

57. Similar to Australia's NCCPA, UK has consumer protection legislation in the form of the Consumer Credit Act 1974 ("**CCA**"). Like the NCCPA, the CCA regulates consumer contracts extensively, providing for minute issues such as how much information a debtor must receive, and that creditors must undertake creditworthiness tests before agreeing to lend. The CCA also contains unfair relationship provisions. As with the unconscionability provisions in Australia, Section 140A of the act allows a court to determine that an agreement is unfair because its terms are unfair, the enforcement of rights are unfair, or because of any act done before or after the agreement was entered into was or is unfair. An unfair contract may be varied. The court could also reduce any amount payable by the borrower, or reduce the duties placed on the borrower under the contract. 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,[92] and provides for the compulsory jurisdiction of the Ombudsman.[93]

58. Given the paucity of actual regulation, elder consumers have to rely on the common law for remedies, or the Financial Ombudsman (discussed later) to deal with any inequities arising from equity release transactions.

(2) <u>Self-Regulatory Bodies</u>

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[92] Part XI of the FMSA.

[93] Part XVI of the FMSA.

59. In the United Kingdom, equity release products have slightly more antiquity, dating back to the late-1970s. 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.[94] Around this time, many also took up shared appreciation mortgages. Unfortunately, many of these borrowers eventually realised that the appreciation shared with the lender was far higher than the original advance provided due to the subsequent housing market boom.

60. Along with others, these 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 consumers.[95] 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[96] 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. All lifetime mortgages and home reversion plans sold in the market are also under the regulatory supervision of the Financial Conduct Authority.

(3) Dispute Resolution Avenues

61. 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".[97]

62. 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

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[94] Sally McCrone, 'Release or just a trap' The Guardian, 25 April 2004

[95] See generally: http://www.equityreleasecouncil.com/equity-release-council/.

[96] http://www.equityreleasecouncil.com/document-library/code-of-conduct/

[97] Section 225(1) of the FSMA

complaint and proffer reasons for the same.[98] The complainant then has 6 months from the date of the final response to seek redress from the Financial Ombudsman.[99]

63. The Financial Ombudsman covers "nearly all financial services"[100] 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.[101] 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.[102] Lastly, voluntary jurisdiction, which allows for parties outside of the two abovementioned jurisdictions 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.

64. 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.

V. SINGAPORE'S CURRENT LANDSCAPE

A. Legal and Regulatory Framework

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

66. The foremost piece of legislation dealing with consumer protection for financial products is the Consumer Protection (Fair Trading) Act.[103] 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.[104] The need to include financial products in the ambit of the act was raised in the 2003 round of parliamentary debates.[105] However, at the same

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[98] Section 1.6.2 of the FCA Handbook. Available at: http://media.fshandbook.info/content/full/DISP.pdf
[99] *Ibid.*
[100] 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.
[101] http://www.fsa.gov.uk/register/home.do.
[102] http://www2.crw.gov.uk/pr/Default.aspx.
[103] 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.
[104] See generally the parliamentary debates on the Consumer Protection Fair Trading Bill, 2nd reading, Vol 76, 10 November 2003, and 11 November 2003.
[105] Parliamentary debates, 11 November 2003, Vol 76, Col.3445, Dr Ong Seh Hong

period of time, several other pieces of legislation concerning the financial markets had been enacted,[106] 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.[107]

67. 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,*[108] the Singapore High Court enunciated the principles governing Section 4(a) of the act. In coming to its conclusion, it reviewed literature relating to Australian, Canadian and New Zealand statutes on which the CPFTA was based. The Court held that where Section 4(a) was concerned, 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".

68. 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.

69. 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. In the context of equity release products, this may impinge on claims that there are no repayments ever to be made or in relation to whether the product can carry a negative equity.

70. Next, 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.

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[106] Such as the Securities and Futures Act (Cap. 289) and the Financial Advisers Act (Cap. 110).

[107] Section 3 of the CPFTA.

[108] [2010] 2 SLR 1065.

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).[109] Provisions in similar foreign statutes are also wider in their wording, and not entirely analogous for use in interpreting the subsection.[110]

71. 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 "[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.

72. 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*,[111] the High Court found that Section 5(3) acts as a defence if the supplier is found to have acted reasonably in the circumstances.[112] 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

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[109] There is the decision of of Als 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 Als Memasa, 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.

[110] 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.

[111] [2010] 2 SLR 1065.

[112] *Freely Pte Ltd v Ong Kaili and ors* [2010] 2 SLR 1065 at [47]-[48].

clear the risks inherent in their product. If they do so, their actions are more likely to pass muster under Section 5(3)(a).

73. 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.[113] 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.[114]

74. 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. Given the generally high property prices in Singapore, the CPFTA would naturally exclude such claims, and consumer would have to resort to civil suits. Further, the restrictive nature of the right to cancel a contract also suggests that it is not easy to unravel an equity release transaction. Further, disputes in relation to equity release products would commonly arise where the bank seeks to repossess the property on the occurrence of a default event. The CPFTA does not provides a substantive defence to a consumer in such situations.

75. By comparison, the CPFTA appears to provide weaker protection than its Australian. For instance, under the ACL, contracts which are found to be unconscionable may even be declared void by the Court. The CPFTA does not have a similar provision.

76. 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.

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[113] Section 9(1) of the CPFTA.

[114] 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.

77. MAS has been kept busy in the recent past. Following the global financial crisis, many retail investors cried foul over the alleged misselling of financial products. These resulted in a thorough investigation leading to the Investigation Report on the Sale and Marketing of Structured Notes linked to Lehman Brothers dated 7 July 2009, where MAS dealt with the involvement of 10 financial institutions.[115]

78. 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 product lines" resulting in "financial institutions … not just offer[ing] plain-vanilla instruments".[116] 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.[117]

79. The 2008 global financial crisis made the financial industry a focal point for legislators and policy makers alike.[118] 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.[119] 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 bears some scrutiny.

80. Of the five outcomes, three are of particular relevance to financial products for the elders, namely, that (1) financial institutions offer products and services that are suitable for their target customer segments; (2) financial institutions have competent representatives who provide customers with quality advice and appropriate recommendations; (3) customers receive clear, relevant and timely information to make informed financial decisions.

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[115] Available online at: http://www.mas.gov.sg/~/media/resource/news_room/press_releases/2009/INVESTIGATION%20REPORT_7%20JUL%2009.ashx

[116] Second reading of the Financial Advisers Bill, 5 October 2001, Vol. 73, Session 2, Sitting 19, at column 2163.

[117] *Ibid* at column 2167.

[118] See for instance, the Parlimentary 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.

[119] 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

81. Some of the common issues surrounding elder financial products are precisely those targeted by these Fair Dealing Outcomes.[120] For instance, in the Guidelines, MAS explained that "making financial decisions can be a complex process that has a significant impact on the livelihood of customers… For customers with limited knowledge of investment products, they often focus too much on the short-term or headline returns, while not fully understanding the risk-reward characteristics of the product."

82. Fair Dealing Outcome Two requires that financial institutions offer products and services suitable for target customer segments. MAS has advised that financial institutions undertake formal due diligence on any investment product in order to assess and fully understand the features and risk-reward characteristics of the product. Financial institutions should also identify customer segments for which the product is clearly not suitable. The Guideline on outcome two also states that when a financial institution intends to distribute a new product, it should consider whether the target customer segments are able to understand the product, given its risk-reward characteristics and level of complexity.[121] When conducting due diligence on the new product, the financial institutions are required to ensure that frontline supervisory staff familiar with the needs and profile of its customer.

83. The Guidelines to outcome 2 are clearly apposite to equity release products. Given equity release products are relatively new to the market, the guidelines go some way to ensure that a financial institution which decides to distribute the product would consider the needs of elders, the unique risks posed to them, as well as ensure that more is done for them to understand the nature of the product.

84. Fair Dealing Outcome 3 is also relevant. Financial institutions are to have competent representatives who provide customers with quality advice and appropriate recommendations. To ensure this is the case, financial institutions are to ensure their staff undergo structured training programme 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.

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[120] 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.

[121] Para 2.23 of the FDG.

85. Fair Dealing outcome four 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 to customers are in plain language and avoid the use of technical terms. Such information is also to be presented in a format that is simple and easy to understand.

86. Subsequent to the Fair Dealing Guidelines, in July 2011, the Financial Advisers Regulations were amended to add further bite.[122] The key amendment is the insertion of new regulation 18B. 18B provides that before selling or marketing any new product in Singapore to any targeted client, a financial adviser shall carry out a due diligence exercise to ascertain whether the new product is suitable for the targeted client. This due diligence exercise includes an assessment of whether the type of targeted client the new product is suitable for and whether the new product matches the client base of the financial adviser, the key risks that a targeted client who invests in the new product potentially faces.

87. Regulation 18B also provides that no financial adviser shall sell or market any new product to any targeted client unless every member of the senior management of the financial adviser has, on the basis of the result of the due diligence exercise carried out on the new product, *personally satisfied* himself that the new product is suitable for the targeted client. Any financial adviser which, without reasonable excuse, contravenes this regulation shall be guilty of an offence and shall be liable on conviction to a fine not exceeding $25,000.

88. The regulation defines a ''new product'' broadly as any investment product other than those relating to foreign exchange trading, futures trading or for securities, that have not been sold or marketed previously. Under the regulation, a ''targeted client'' means any client, other than an accredited investor, expert investor or institutional investor.

89. It is not clear whether equity release products are investment products under the Act. The FAA defines investment products to include any capital markets product under the Securities and Futures Act, any life policy, or any other product as may be prescribed. So far as this author is aware, similar types of financing to equity release products have not been prescribed. Nonetheless, the wave of changes from the Fair Dealing Guidelines to the Financial Advisers (Amendment) Regulations 2011 bode well for the elder investor. At the very least, they create a culture of fair dealing in financial institutions who market retail financial products.

B. Dispute Resolution Avenues

90. 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.

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[122] Financial Advisers (Amendment) Regulations 2011 S433/2011. For an overview of the amendment, see *Product Suitability, Due Diligence and Management Responsibility* , (2012) 24 SAcLJ 298.

91. Notably, FIDRec is not a government body but a public company limited by guarantee. FIDRec is funded by the financial sector.[123] 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.[124] Appropriate for a dispute resolution body, some of FIDReC's Key guiding principles include accessibility, fairness, independence and efficiency.[125] To ensure independence and fairness, its board comprises of an independent director,[126] 3 directors representing consumers, 1 director each representing the financial institutions, insurers and financial advisers.[127]

92. 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.[128] Subscription means a submission to FIDReC's jurisdiction and an agreement to be bound by the FIDReC Terms of Reference.[129] Members of FIDReC are also required to pay levies and fees to the Centre.[130] Crucially, the Terms of Reference cannot be amended without approval of the MAS.[131] FIDReC is also obliged to send regular qualitative reports on the types and number of disputes brought to FIDReC.

93. The FIDReC process is uncomplicated and therefore suitable for retail investors. Under Clause 6 of the Terms of Reference, a complainant is allowed to file a FIDReC complaint after the matter has been referred to the financial institutions'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. 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.[132]

94. 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. 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

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[123] MAS, Policy Consultation on the Financial Industry Disputes Resolution Centre, October 2004, at [1].
[124] *Ibid* at [5].
[125] *Ibid* at p3.
[126] Currently, retired High Court Judge Mr Goh Joon Seng.
[127] *Ibid* at [8].
[128] *Ibid* at [12].
[129] Available online at (last accessed on 4 March 2014): http://www.fidrec.com.sg/website/termsref.html.
[130] *Supra* note 116 at [13].
[131] FIDReC Terms of Reference, Section 3, Clause 7(3).
[132] *Ibid*, Clause 13(2).

adjudicators who are retired "judges, lawyers with many years of experience and retired industry professionals."[133] 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."[134]

95. 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.[135]

96. The adjudicator's decision is binding on the financial institution but not on the complainant.[136] 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.[137] 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.[138]

VI. THE WAY AHEAD

97. 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.

98. 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.[139] 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.

99. 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

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[133] See: http://www.fidrec.com.sg/website/adjudicators.html
[134] See: http://www.fidrec.com.sg/website/faq.html
[135] See: https://fidrec.com.sg/website/processdisp.html
[136] See: http://www.fidrec.com.sg/website/faq.html
[137] See: https://fidrec.com.sg/website/processdisp.html, para 5.
[138] See: https://fidrec.com.sg/website/processdisp.html, para 12.
[139] Conrad Tan, Business Times, 'Over 1,000 Lehman-linked disputes solved: FIDReC', 1 December 2009.

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.

100. In terms of positive reinforcement, the Fair Dealing Guidelines and Section 18A of the FAA, which certainly promote consumer protection amongst financial institutions, should be extended from investment products to equity release products, which are more akin to credit agreements.

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 undermines. 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 FAA, Fair Dealing Guidelines and general MAS oversight also provide assurance to consumers. The FAA amendments and 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.