Singapore Journal of Legal Studies
[2023] 196–208

# RECENT DEVELOPMENTS IN THE REGULATION OF CONSUMER CREDIT

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Singapore has recently instigated two pieces of regulation related to consumer credit—the Buy-Now, Pay-Later Code of Conduct, and the Debt Collection Act 2022. This article discusses the background of these pieces of regulation, considers their similarities and differences, and analyses the benefits and drawbacks of the two approaches. It concludes by highlighting that, whilst they are both well-meaning and have the ability to improve the lives of vulnerable consumers, further work is necessary for the full potential of both regulatory instruments to be realised.

## I. Introduction

Covid-19 has had unequal and significant consequences on the economic lives of people around the world. Singapore, whilst economically faring very well generally, has not been immune from the inequality experienced. The Key Household Income Trends Report 2020 highlighted that those in the lowest income deciles experienced the brunt of the economic consequences associated with Covid-19. Whilst all income groups saw falls in income, the two lowest deciles were the worst impacted, with the 1st-10th seeing incomes drop by 6.1% and the 11th-20th drop by 3.2%.[1]

It is therefore crucial that, coming out of Covid-19, attention is paid to readjusting the economic and financial inequalities. Outside of welfare and social policy responses, one of the most effective ways to do this is by responding to inequalities and unfairness in the consumer credit regime.[2] It is therefore an excellent step forward to see that Singapore has recently addressed both the creation of debt through the Buy-Now, Pay-Later (BNPL) Code of Conduct, and the collection of debt through the Debt Collection Act 2022.[3]

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1 Department of Statistics, Ministry of Trade & Industry, Republic of Singapore, "Key Household Income Trends, 2020".

2 For a further discussion on this, see Jodi Gardner, *The Future of High-Cost Credit: Regulating Payday Lending* (London: Hart Publishing, 2022) at ch 1 [Jodi Gardner, *The Future of High-Cost Credit*].

3 Debt Collection Act 2022 (Act 7 of 2022) [Debt Collection Act].

This legislative comment will address both of these pieces of 'legislation' (whilst recognising that the Code of Conduct was specifically designed not to be statutory in nature). It will address both the benefits and potential drawbacks of both, as well as considering the similarities and differences in approaches taken to regulating this area of consumer credit.

## II. Buy-Now, Pay-Later Code of Conduct

BNPL has become an increasingly common feature of online shopping. In July 2021, it was estimated that 19% of Singaporeans had used a BNPL product[4]—and it is likely to have increased significantly since that time. It provides the consumer with the opportunity to split the cost of their purchase into several smaller payments to be made at regular intervals in the future. It is most commonly used by younger, technology-enabled consumers on the basis of discounts and promotion offers,[5] or to help deal with the natural ebbs and flows of income and expenses.[6] There are a number of (potential) positives associated with BNPL products; they provide a 'safety net' for those who are underbanked and may not be able to access other credit products, and when used properly and repaid in full and on time, they provide the consumer with an interest-free sale credit.

Unfortunately, the products often do not work in this manner. The development of BNPL products in Singapore has occurred with limited affordability checks, disproportionately allowing young and vulnerable parties to go into (often unnecessary) debt. When the consumer cannot make the scheduled payments, they are subject to significant fees and charges. As people frequently enter into these transactions with optimism bias about their ability to make the payments, there is often little appreciation of the costs associated or the potential fees and charges. The availability of 'easy credit' at the click of a mouse can also drive unnecessary consumerism, particularly with inexperienced or easily influenced individuals.[7]

The regulatory gaps in the BNPL regime have been analysed previously by Sng and Tan. They insightfully outline the need for the Singaporean regime to both identify the risks associated with these products in addition to the potential benefits and develop a regulatory system that maximises the latter whilst addressing—as much

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4 Milieu Insight, "The Big Picture: Payments, Singapore Report" <https://www.mili.eu/insights/big-picture-report-payments-singapore> (July 2021) at 29.

5 *Ibid* at 27.

6 This is a common benefit of different types of consumer credit, particularly those aimed at financially insecure or vulnerable parties: Andrea Finney *et al*, "Easy Come, Easy Go: Borrowing Over the Life-Cycle" *Standard Life* <https://www.bristol.ac.uk/geography/research/pfrc/themes/credit-debt/easy-come.html> (December 2007) at 23.

7 See, for example, Di Johnson *et al*, "Analyzing the Impacts of Financial Services Regulation to Make the Case That Buy-Now-Pay-Later Regulation Is Failing" (2021) 13(4) Sustainability at 1992 [Di Johnson *et al*, "BNPL Regulation is Failing"]; Hannah Gdalman *et al*, "Buy Now, Pay Later: Implications for Financial Health" *Financial Health Network* <https://finhealthnetwork.org/research/buy-now-pay-later-implications-for-financial-health/> (March 2022) [Hannah Gdalman *et al*, "Buy Now, Pay Later: Implications for Financial Health"].

as possible—the former.[8] There is therefore no need to repeat these concerns here and the focus will be on the specifics of the Code of Conduct.

### A. *Regulatory Background*

In light of the increased use of BNPL products, there have been concerns about the links between these processes and over-indebtedness and consumerism in Singapore. As a result, there has been mounting pressure from consumer organisations to bring in regulation to limit some of the more questionable business models and exploitative behaviour.

The Monetary Authority of Singapore, the Singapore FinTech Association (SFA), and key Industry Players came together and co-created a BNPL Code of Conduct ("BNPL Code")[9]. As outlined by the drafters:

> The BNPL Code crystallizes industry best practices such as conducting creditworthiness assessments, ensuring fair and ethical marketing practices, accommodating for voluntary exemptions, and ensuring the provision of a hardship repayment plan.[10]

The Working Group Participants included the following parties: Atome, Grab, ShopBack, Ablr, Latitude Pay, Pace, Split and SeaMoney. Whilst it is understandable that there would need to be some industry voices in the room, especially considering the technologically complex and fast-moving nature of these products, the heavy saturation of industry players does raise the potential of regulatory capture. This concern is enhanced by the fact that the Code specifically aims to "crystallize industry best practices".[11] It would be surprising if many of the industry players at the table were happy to admit that their policies and procedures fell short of 'best practice' and therefore needed to be changed in any sort of substantive manner.

### B. *Potential Benefits*

Putting aside the concerns of regulatory capture, there are a number of potential benefits arising from the BNPL Code. First, it creates the ability for parties to voluntarily self-exclude from BNPL products. From a regulatory perspective, this is 'pre-commitment': the notion of constraining the rights and actions of an individual

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8 Allen Sng & Christy Tan, "Buy Now Pay Later in Singapore: Regulatory Gaps and Reform" *SSRN* <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3819058> (1 April 2022) [Allen Sng & Christy Tan, "Buy Now Pay Later in Singapore: Regulatory Gaps and Reform"].

9 Buy Now, Pay Later (BNPL) Working Group, "Buy Now, Pay Later ("BNPL") Code of Conduct" *Singapore FinTech Association* <https://singaporefintech.org/download/184698/> (20 October 2022) [BNPL Code].

10 *Ibid* at 3.

11 *Ibid* at 3.

when they are in a rational state, to protect them from choices they may make when acting in a less rational manner.[12]

There is however little indication of how this self-exclusion would work in practice, or of whether it would be extended to family or third-party exclusion. The latter is particularly important when the actions of the party entering into the BNPL product have the potential to negatively impact those around them, such as family members who are financially dependent on them.

In this regard an analogy could be drawn between gambling and the enticing BNPL products marketed towards easily influenced or financially vulnerable parties. The exclusion process for problem gamblers, run by the National Council on Problem Gambling in Singapore (NCPG), has been widely hailed as a significant success in protecting people and families at risk of being harmed by gambling addiction. It could be useful for those involved in the BNPL Code to consider working with the NCPG for the development of a BNPL exclusion process.

Another benefit arising from the BNPL Code is the assurance that there will be no penalty for early repayment.[13] This encourages people to be financially prudent and to pay their debts at the earliest opportunity. Having a system that discourages or penalises people who wish to pay back BNPL products would go against the entire aim of the regulatory regime, which is to limit over-indebtedness and reduce unnecessary consumerism.

Finally, the Code has picked up on the issues associated with BNPL products being advertised as 'free' (or similar alternatives, such as 'no fees and charges').[14] These products, theoretically, can be free to use if the consumer pays them back on time and in full. Unfortunately, far too often the impact of optimism bias means that people enter into BNPL contracts that they cannot fulfill and partial and/or late payments are made, which incur interest, fees and charges—sometimes at quite high levels.[15] By restricting the use of the word 'free' in the advertising of BNPL products, there is less of a chance that consumers will be unaware of the costs associated if things do not go according to plan.[16]

It is however notable that the Code does not go as far as banning or removing the ability to use the word 'free' when advertising BNPL products.[17] The relevant

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[12] See further discussion in Jon Elster, *Ulysses Unbound: Studies in rationality, precommitment, and constraints* (Cambridge: Cambridge University Press, 2000); Jon Elster, "Weakness of will and preference reversals" in Jon Elster *et al*, eds, *Understanding Choice, Explaining Behaviour* (Oslo: Fagbokforlaget, 2006).

[13] BNPL Code, *supra* note 9 at para 3.14.

[14] *Ibid* at para 4.2.3.

[15] Di Johnson *et al*, "BNPL Regulation is Failing", *supra* note 7; Hannah Gdalman *et al*, "Buy Now, Pay Later: Implications for Financial Health", *supra* note 7; Allen Sng & Christy Tan, "Buy Now Pay Later in Singapore: Regulatory Gaps and Reform", *supra* note 8.

[16] It is noted that paragraph 4.2.1 of the BNPL Code states that "[w]e will ensure advertisements of our BNPL products and services comply with the Consumer Protection (Fair Trading) Act (Cap. 52A) as well as with the industry-regulated advertising codes set out by the Advertising Standards Authority of Singapore", so there are other protections in place. These, however, clearly have the same restrictions as the BNPL Code provisions, as the term is still commonly used by providers when advertising their products: see BNPL Code, *supra* note 9 at para 4.2.1.

[17] It should be noted also that there are general restrictions in the BNPL Code on using advertising or promotions that are misleading, unclear or deceptive: see BNPL Code, *supra* note 9 at para 4.

provision specifically states that "[w]e will ensure that our terms and conditions exercise caution in the use of the word "free"." No further guidance is provided, and it is unclear what "exercise caution" requires from providers of BNPL services. A review of the advertising material from the industry players quickly shows a very liberal use of the term "interest-free repayments", despite some charging up to $40 in fees for late payments. Unless the enforcement body[18] is willing to take a strong stance on interpreting "exercise caution", it is possible that this well-meaning restriction will have a very limited practical impact on the way products are marketed.

### C. *Caps on Fees and Charges*

One of the most marketed aspects of the BNPL Code has been the fact that it will apparently place a cap on fees and charges.[19] The Singapore FinTech Association specifically states that under the Code "BNPL providers will cap all fees, including late fees and other charges".[20] There is a provision in the Code that does appear to create a cap in this manner, with paragraph 3.5 stating that "[w]e will cap all fees, including late fees and other charges."

The Code does not, however, make any specific references to what those caps are or should be. Instead, it states that:

> each of us shall determine our own fee charges and capping practice and will ensure that the cap strikes a reasonable balance between commercial viability and not unduly increasing your indebtedness.[21]

There are also disclosure requirements that require providers to "ensure that such fees, fee caps, and the related fee structures are communicated in a manner that is clear and transparent to you".[22]

The Code is therefore setting up a system in which there is not *a cap* on fees, charges, and interest, but in which every provider gets to set *their own cap* on fees, charges, and interest. Unless the enforcing body were to take an extreme interpretation of this, it is possible that providers could charge whatever they want, as long as there is a way to justify this as striking a "reasonable balance between commercial viability and not unduly increasing your indebtedness". The key industry players are very unlikely to admit that their current fees and charges structures do not, in fact, already strike this balance. The wording of the cap provision therefore makes it is difficult to see what (if any) change there will be to the amount paid by consumers.

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[18] Enforcement issues will be discussed in more detail in the 'Discretionary Obligations' section below.

[19] See, for example, Singapore FinTech Association, "Buy Now, Pay Later (BNPL) Working Group launches BNPL Code of Conduct for Singapore" <https://singaporefintech.org/buy-now-pay-later-bnpl-working-group-launches-bnpl-code-of-conduct-for-singapore/> (20 October 2022).

[20] BNPL Code, *supra* note 9 at para 3.5.

[21] *Ibid* at para 5.3.

[22] *Ibid* at para 3.5.

Optimists may state that the disclosure requirements will provide some level of protection to consumers, as they will be able to comprehend the impact of the fees and charges and factor this into their decision-making processes. Unfortunately, there is a long history and a wide range of academic literature highlighting the limited impact of disclosure requirements, especially in situations of financial vulnerability or impulsive decision-making.[23] In light of the ease and quick attainability of the BNPL products, and the fact that the customer has generally already decided to enter into the transaction in question, it is highly unlikely that disclosure obligations will have any real impact on decision-making processes. Even if disclosure is effective and customers have meaningful choices, the information on BNPL products often is presented in a manner that makes it very difficult to usefully compare between providers.[24]

### D. *Discretionary Obligations*

The BNPL Code also includes wording that seems in part to either (a) place a strong burden on consumers or (b) provide significant discretion to businesses and thus avoids clear, enforceable obligations.

When looking at the first issue, the Code places a strict disclosure obligation on consumers, stating:

> *We require* that all your income information remains up to date, and so may request via our Terms and Conditions that *you keep us updated in the event of any significant income change*. We may recalibrate your credit limits, if necessary, upon receiving such information.[25]

It is however unclear what the consequences are if the consumer does not keep the business up-to-date about these changes. It also seems unfair to place such a strict obligation on an individual. If their life events are changed so dramatically, informing their BNPL provider of the change is probably very low down on their priority list.

In contrast, a number of the 'obligations' placed on businesses are worded to provide significant discretion. As an example, the Code states under 3.10 that

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[23] See, for example, Jodi Gardner, *The Future of High-Cost Credit*, *supra* note 2 at para 3.5.1; Amartya Sen, "Rational Fools: A Critique of the Behavioral Foundations of Economic Theory" (1977) 6(4) Phil.& Pub.Aff. 317; Hillel Einhorn & Robin Hogarth, "Behavioural Decision Theory: Processes of Judgment and Choice" (1981) 19 Journal of Accounting Research 1; Gordon Foxall, "A Behaviouralist Perspective on Purchase and Consumption" (1993) 27(8) European Journal of Marketing 7; Justin Malbon, "Shopping for Credit: An Empirical Study of Consumer Decision-Making" (2001) 29 ABLR 44; Wim Dubbink, *Assisting the Invisible Hand: Contested Relations Between Market, State and Civil Society* (Dordrecht: Springer Netherlands, 2003); Larry DiMatteo *et al*, *Visions of Contract Theory: Rationality Bargaining and Interpretation* (Durham, North Carolina: Carolina Academic Press, 2007); Richard Wiener *et al*, "Consumer Credit Card Use: The Roles of Creditor Disclosure and Anticipated Emotion" (2007) 13 Journal of Experimental Psychology 32.

[24] Allen Sng & Christy Tan, "Buy Now Pay Later in Singapore: Regulatory Gaps and Reform", *supra* note 8.

[25] BNPL Code, *supra* note 9 at para 3.7 (emphasis added).

"[i]f you are facing extenuating life events or financial difficulties, we will *assess your request and consider* extending financial hardship assistance". There is no strict obligation on providers to do this and therefore it is difficult to see that there would be any consequences if financial hardship assistance were not provided. This can be contrasted with the legislative regimes in Australia, which have a strict obligation to provide assistance to individuals experiencing hardship.[26]

The discretionary nature of the wording in much of the BNPL Code means that its success or failure will rely largely on enforcement mechanisms, specifically the power and appetite of any enforcement body. There is however currently no mention of enforcement mechanisms. If the Code is to be enforced on specific, defined and mandatory obligations only, then—apart from the limited examples discussed above—it is difficult to see what concrete benefits will be provided to consumers. If, however, the enforcement will occur not only on grounds of legal obligations but also as best business practice such as that in the Financial Ombudsman Service,[27] then the Code may provide significant benefits to individuals as it will require all providers of these services to consider their obligations more holistically.

So far, very little is known about the enforcement process of the BNPL Code. It does however appear that there will be a two-step process. The first is an audit and accreditation process by an independent assessor. BNPL providers who pass this process will be able to display an accredited 'trustmark' indicating that they are compliant with the code for three years, after which they will have to be re-accredited.[28] The substantive basis of the audit and accreditation process is still unknown and therefore it is unclear what requirements the providers will have to comply with to be provided with the 'trustmark'. Secondly, there is an 'oversight committee' that will work as an enforcement body. If a complaint is made, this committee will have the power to request written submissions from the provider. And, if a violation is identified, the provider can be removed from the BNPL registry. This second process however raises some concerns, particularly the 'questionable method of appointment' to the oversight committee.[29]

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[26] See, for example, National Consumer Credit Protection Act 2009 (Cth), Schedule 1 (National Credit Code), s 72; and Energy Legislation (Hardship, Metering and Other Matters) Act 2006 (Vic).

[27] The Financial Ombudsman Service describes itself as "a free and easy-to-use service that settles complaints between consumers and businesses that provide financial services. We resolve disputes fairly and impartially, and have the power to put things right." See Financial Ombudsman Service, <https://www.financial-ombudsman.org.uk/>. For a discussion, see Elaine Kempson *et al*, "Fair and Reasonable: An Assessment of the Financial Ombudsman Service" *Financial Ombudsman Service* (July 2004) and Jodi Gardner, *The Future of High-Cost Credit*, supra note 2 at para 2.1.4.

[28] Tang See Kit, "'Buy now, pay later' code of conduct launched to protect consumers against debt accumulation" *Channel NewsAsia* <https://www.channelnewsasia.com/singapore/buy-now-pay-later-code-conduct-protect-consumers-debt-3016791> (20 October 2022).

[29] Sharanya Pillai, "Singapore's BNPL code of conduct needs to pave way for independent regulation" *The Business Times* <https://www.businesstimes.com.sg/startups-tech/startups/singapores-bnpl-code-conduct-needs-pave-way-independent-regulation> (24 Oct 2022).

### E. *What Happens if Things go Wrong?*

If a consumer is struggling to repay their BNPL contract, the Code states that they will need to inform the provider of their issues in writing. It appears that the best outcome the consumer can hope for is a new payment plan, as there is no clear mechanism for all or part of debt to be waived. It would however seem to be appropriate to have this outcome in place in certain circumstances, particularly if the provider has breached their obligations to undertake an adequate affordability assessment. In light of the enforcement difficulties highlighted above, it is difficult to see how the Code will be a deterrent for bad behaviour if there is no financial consequence linked to breaches of provider obligations.

The Code also specifically states that providers 'never' initiate bankruptcy proceedings against consumers.[30] This initially appears to be a consumer-friendly prohibition. However, the Singaporean regime only allows bankruptcy to be commenced if unsecured debts owed to a given creditor are valued at more than $15,000.[31] It would be very concerning if an individual were able to enter into a BNPL contract for more than this amount with a single provider.[32] It is therefore unlikely that the prohibition against bankruptcy provides any substantive rights to consumers.

As there is no ability to commence bankruptcy proceedings, it appears that the main way in which BNPL providers will recover unpaid money is through referral to debt collectors, as outlined by 6.2 of the Code. This is highly likely to exacerbate the issues experienced by individuals who are already struggling with problem debts. This in turn leads us onto our second piece of legislation to be considered, the Debt Collection Act 2022.

## III. Debt Collection Act 2022

The Debt Collection Act 2022 was tabled by Minister of State for Home Affairs Sun Xueling and passed by Parliament in September 2022. The Act responds to concerns about inappropriate, potentially criminal behaviour used in the collection of debts.[33] In presenting the Bill, the Minister of State highlighted the high number of potentially criminal debt collection activity instances reported to police, which hit a peak of 590 complaints in 2018.

Responding to inappropriate behaviour used in the collection of debts is important for a number of reasons. If people are struggling to repay their loans, they need

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30 BNPL Code, *supra* note 9 at para 3.7.

31 For a further discussion, see Jodi Gardner, "Rethinking bankruptcy alternatives in Singapore" [2020] Sing JLS 502.

32 It is however noted that the BNPL Code will "permit customers to accumulate no more than SGD 2,000 in outstanding payments at any one time" and only those who have fulfilled additional credit assessment criteria can accumulate more than SGD 2,000 in outstanding payments: see BNPL Code, *supra* note 9 at para 3. However, it remains difficult to see how a single BNPL provider could possibly allow a customer to make purchases of over $15,000 and therefore have the potential to commence bankruptcy proceedings against them.

33 *Singapore Parliamentary Debates, Official Report* (13 September 2012) vol 95 (Sun Xueling, Minister of State for Home Affairs).

to be treated with compassion and assistance; not threatened or shamed into paying money that they cannot afford to pay. When debt collectors act in inappropriate ways, their actions also blur the line between collection of legal debts and *ah long* [illegal lenders/loan sharks] behaviour—something that should be avoided. Finally, it is important for debt collectors to be aware of what they can and cannot do. A regime that merely leaves it up to the criminal law means that collectors are vulnerable to criminal sanctions and penalties if they overstep the (often unclear) boundaries of legal enforcement.

This means that a clear, enforceable, and transparent blueprint for socially and legally acceptable debt collection guidelines benefits everyone involved—the collectors, the debtors, and society more generally. It is a worthy goal, and this author is delighted that Singapore has recognised the importance of this type of legislation. The Debt Collection Act, as it currently stands, however, is inherently procedural in nature. It covers the structural issues associated with a debt collection regime but does not provide any of the important—but difficult—details of what will be prohibited.

## F. *What Does the Legislation Involve?*

The key provision of the Debt Collection Act requires all debt collectors to be licensed.[34] It is an offence for parties to engage in debt collection activity without a licence, and transgression can result in penalties of up to $20,000 and/or up to two years imprisonment for first offence and $100,000 and/or up to five years imprisonment for subsequent offences.[35]

The Act creates a structure around debt collection regulation, including licensing officers and compliance officers, and procedures for appointment.[36] It also creates a process for granting and renewing licences, including the creation of class licences.[37] Finally, the Act outlines available regulatory actions against licencees including the ability to commence proceedings and to immediately suspend licences.[38]

A review of the Debt Collection Act 2022 identifies two issues that are worthy of further analysis—what does 'fit and proper' mean, and what activities will be prohibited by the Act?

## G. *'Fit and Proper'*

Licences will be provided only to people who are classified as 'fit and proper' people.[39] It is however not clear what 'fit and proper' means and how strict the requirements will be for them to engage in debt collection activities. A balance will

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[34] Debt Collection Act, *supra* note 3, s 6(1).

[35] *Ibid*, s 6(5).

[36] *Ibid*, Part 1.

[37] *Ibid*, Part 3 and Part 2, Division 2.

[38] *Ibid*, Part 4.

[39] *Ibid*, s 8(2)(a).

need to be struck as it is important that the criteria are not so onerous as to exclude people, whilst not being so lax so that undesirable individuals can obtain licences.

The Banking Act has the same wording for individuals involved in key positions in the banking industry, and the Monetary Authority of Singapore has created detailed *Guidelines on Fit and Proper Criteria* (FSG-G01). It is quite possible that these guidelines will be inappropriately strict, as they are designed for the appointment of directors, chief executive officers, deputy chief executive officers, chief financial officers, and chief risk officers.

Lessons can be learnt from other jurisdictions. For example, the previous regulator of consumer credit in the UK, the Office of Fair Trading (OFT), oversaw the licensing regime of high-cost credit providers and required individuals to be 'fit'.[40] OFT published guidance on how it determined whether a person was 'fit' to obtain a licence. The guidelines were however disturbingly vague and focused on whether the individual had "personal integrity" and "credit confidence" without providing adequate clarification of these requirements.[41]

Significant concerns were quickly raised about the licensing system developed under the OFT, and there was evidence that it did not provide a sufficient safety net for potentially vulnerable borrowers. As an example of a potential oversight, Olivier Larholt was given a consumer credit licence despite the fact he had served 20 days in jail for possessing a flare pistol with intent to cause fear of violence.[42] Larholt went on to establish Toothfairy Finance, which continued to lend for a number of years despite numerous allegations of harassment,[43] being the subject of a dedicated Consumer Action Group fraud warning webpage,[44] and being the subject of official action from the OFT to address its unsatisfactory business practices.[45]

The Public Accounts Committee (PAC) later reviewed the OFT and was scathing of its regulation of the industry, particularly the regulator's lax licensing regime. It reported that:

> The OFT told us that it *ran a 'licensing regime' rather than a 'supervisory regime'* meaning that it didn't look at the firms' activities regularly. Instead the OFT relied on information received from customer complaints and other third parties such as Citizen's Advice, the FSA and the Financial Ombudsman Service. Although it relied on others to supply it with intelligence the OFT claimed that it was also able to be proactive by picking up emerging themes from this

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40 It should be noted that the OFT, and later the FCA, regulate both credit providers and debt collectors, but not bailiffs.

41 Jodi Gardner, *The Future of High-Cost Credit*, *supra* note 2 at 58.

42 Carl Packman, *Loan Sharks: The Rise and Rise of Payday Lending* (Searching Finance Ltd, 2012) at 69.

43 Carl Packman, "OFT Writes to 240 Payday Lenders to Warn Them Over Poor Practices: The Legal Loan Sharks Have Been Cautioned" *The New Statesman* <www.newstatesman.com/economics/2012/11/oft-writes-240-payday-lenders-warn-them-over-poor-practices> (21 November 2012).

44 Consumer Action Law Group, "Consumer Action Group Fraud Warning: Toothfairy Finance Limited" <www.consumeractiongroup.co.uk/forum/forumdisplay.php?334-Toothfairy-Finance-Limited> (2013).

45 Office of Fair Trading, "OFT Acts to Improve Lending Practices" <https://webarchive.nationalarchives.gov.uk/ukgwa/20140402191006/http://www.oft.gov.uk/news-and-updates/press/2010/116-10> (9 November 2010).

> information. However the OFT acknowledged that this approach was not picking up all the problems in the market. The OFT recognised that many people who had problems did not come forward to complain, and we were also concerned that many local Citizens Advice Bureaux did not have the resources to pick up all debt issues and look into debt problems so information they supplied would be incomplete.[46]

Between its inception in 1973 and transfer of the jurisdiction to the Financial Conduct Authority (FCA) in 2015, the OFT only revoked 25 licences, representing approximately 0.03 per cent of the 72,000 licences awarded.[47]

When oversight of consumer credit in the UK was transferred from the FCA, the landscape changed dramatically. The authorisation regime under the FCA is significantly more proactive than the OFT's approach.

The basic conditions of authorisation are found in the Financial Services and Markets Act 2000 (Threshold Conditions) Order 2013.[48] This Order sets out a range of "threshold conditions" that firms must meet. These conditions involve a wide range of requirements, including having an office located in the UK,[49] undertaking activities and providing products that can be effectively supervised by the FCA,[50] ensuring that the business has adequate financial and non-financial resources,[51] and making sure that the individual is a fit and proper person with adequate skills and experience.[52] These conditions reflect the OFT's previous licensing regime, but provide more detail on what is required by firms and individuals, and what 'fit and proper' involves. The FCA also states that the firms' "business model (that is … strategy for doing business) must be suitable for a person carrying on the regulated activities".[53] Factors that the FCA will consider in determining whether the business model is suitable include whether the model is operating in a sound and prudent manner, the interests of consumers, and the integrity of the financial system.[54]

The criteria, wording, and enforceability of the requirement to be 'fit and proper' will therefore be crucial to the success of the Debt Collection Act. It will be important to look not just at other approaches in Singapore but also at international jurisdictions with similar challenges.

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46 Public Accounts Committee, "Eighth Report: Regulating Consumer Credit*" UK Parliament* (20 May 2013) at para 2.8.

47 *Ibid* at para 2.9.

48 This Order amends the Financial Services and Markets Act 2000 (c 8) (UK) [Financial Services and Markets Act] and came into effect on 1 April 2013.

49 Financial Services and Markets Act, *supra* note 48, Schedule 6, Part 1B, r 2B.

50 Financial Conduct Authority, "FCA Handbook, COND Threshold Conditions" <https://www.handbook.fca.org.uk/handbook/COND.pdf> (February 2023), COND 2.3 'Effective Supervision'.

51 Financial Services and Markets Act, *supra* note 48, Part 1B, r 2D.

52 *Ibid*, Part 1B, r 2E.

53 *Ibid*, Part 1B, r 2F.

54 *Ibid*, Part 1B, r 2F(2)(a)-(e).

### H. *What is Prohibited?*

The Debt Collection Act provides that the Licensing Office "may … issue one or more codes of practice".[55] Whilst this is worded in discretionary language, it is clear that without a code of practice there is nothing to enforce under the Act as the code of practice outlines what is and is not prohibited when undertaking debt collection activities.

The development of the relevant code(s) of practice will be the most controversial—but important—part of the legislative regime. It is also likely to be surprisingly challenging. There are certain activities that clearly should be prohibited: physical or verbal threats, entering property without permission, harassment of borrowers, et cetera. These actions are designed to elicit payment by causing fear and coercion and cannot be tolerated. They are also highly likely to already be prohibited by the criminal law and/or the Protection Against Harassment Act 2014.

What is more difficult to define and prohibit are actions that are designed to elicit payment by causing embarrassment or stigma. These actions are often more subtle and involve calling the borrowers' home at unsociable hours, contacting family, friends, or employers, or leaving notices about the debt in public places. These actions can often be just as effective as those designed to cause fear and coercion, and are frequently used by *ah longs* in their collection activities as they are less likely to be reported to the police, and if prosecuted will result in lower penalties.[56] These actions are also less likely to already be covered by existing legal prohibitions.

If a collector cannot elicit payment through fear or coercion, or embarrassment and stigma, it must be clearly outlined what they can do when people initially refuse to pay their debts. It will be important for the code of practice to strike a balance between the rights of debtors and those of creditors. In light of the serious penalties for breaches of the code of practice—including up to two years imprisonment—it is also crucial that the guidelines provided are clear and transparent. The drafters of the code should aim to be as prescriptive as possible and avoid vague terms, such as "reasonable" and "with due care and skill". The sheer number of cases involving contractual interpretation highlights that one person's view on reasonableness might be very different from that of another. It is important for both borrowers and collectors that there is clarity on what is and is not allowed.

Again, lessons can be learnt from international approaches to this issue. A model can be drawn from Australia, where the Australian Competition and Consumer Commission and the Australian Securities and Investment Commission came together to draft the April 2021 debt collection guideline for collectors and creditors.[57] This document is over 60 pages long and goes into very helpful detail about

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55 Debt Collection Act, *supra* note 3, s 16(1).

56 When compared with *ah long* activity that involves clear criminal behaviour, such as setting fire to the debtor's premises; for further discussion, see Jodi Gardner, "Regulating Moneylending in Singapore: Looking at All Sides" *Centre for Banking & Finance Law, Faculty of Law, NUS* <https://law.nus.edu.sg/wp-content/uploads/2020/04/CBFL-Rep-1505.pdf> (July 2015).

57 Australian Competition & Consumer Commission and Australian Securities & Investments Commission, "Debt collection guideline: for collectors and creditors" <https://www.accc.gov.au/system/files/Debt%20collection%20guideline%20for%20collectors%20and%20creditors%20-%20April%202021.pdf> (13 April 2021).

when debtors can be contacted, how they can be contacted, how frequent the contact can be, and where it can occur. The details mean that debtors will be aware of when the collector has acted inappropriately, and collectors will be aware of what they can and cannot do in the debt collection process, thus reducing the risk of inadvertently breaching the guidelines and facing crushing penalties in the process.

## IV. Concluding Thoughts

This legislative comment has focused on two regulations—the BNPL Code and the Debt Collection Act 2022. Whilst they, at first blush, appear to be quite different instruments, there are significant overlaps and similarities. In light of the increased concern with problem debt and the financial implications of Covid-19, it is commendable that Singapore has a renewed focus and concern about both the creation and collection of consumer debt. Like so many things in the legal world, however, the devil will be in the detail, and unfortunately most of that information has not yet been finalised or released to the general public.

The BNPL Code was drafted by the Monetary Authority of Singapore, the Singapore FinTech Association (SFA), and key Industry Players, who all came together and co-created a BNPL Code of Conduct, which is designed to "crystallize industry best practices". It has a number of restrictions on the advertisement and form of BNPL products, particularly in relation to people experiencing financial hardship. The Code has the potential to stop vulnerable or inexperienced people from getting into an unnecessary, consumer-driven debt spiral. However, enforcement mechanisms are needed to ensure that the concerns of regulatory capture can be overcome.

The Debt Collection Act 2022 was a response to increasing reports of abusive, inappropriate, and exploitative debt collection practices. It creates a licensing regime, and significant penalties for individuals who engage in debt collection activities without a licence. It also creates the ability for "codes of practice" to be developed, which will prohibit certain types of debt collection activities. The details for these have not, however, been provided and it remains unclear what will be outlawed. The Act is an excellent step forward to combat exploitative and harmful practices that prey on the weak and financially vulnerable. Drawing a distinction between acceptable and illegal debt collection practices is however likely to be more difficult than anticipated.

In developing both the BNPL Code and the Debt Collection Act 2022 going forward, it will be crucial to engage with consumer organisations and advocates. Whilst academics, lawyers, and industry have useful insights into the legal details and technical operation of the issues, it is important not to overlook the valuable input of those who have the on-the-ground expertise to understand how these issues impact the day-to-day lives of Singaporeans. This is because, at the end of the day, the aim of both the BNPL Code and the Debt Collection Act 2022 is to create a fairer, more transparent situation for consumers.