# NAVIGATING THE MINEFIELD OF EQUITY RELEASE PRODUCTS FOR ELDERS

It is widely accepted that Singapore will face a substantial increase in elders in the coming decades. Government policies on pension and housing have resulted in a high proportion of asset-rich but cash-poor elders. In response to similar situations, markets in Australia and the UK have introduced equity release products. These financial products allow the value of the property to be monetised, thereby providing liquidity to elders during their silver years. Yet, elders are a vulnerable class of consumers, and to deal with the legal issues arising in relation to equity release products, Australia has responded by introducing legislative and regulatory protection, and the UK, with some amount of regulatory oversight, has left it to self-regulatory bodies. This article seeks to analyse the legal issues in relation to such products and compare the current legal and regulatory framework in Singapore with that in Australia and the UK.

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## I. Introduction

1 The 2013 Population White Paper[1] ("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

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1 National Population and Talent Division, *A Sustainable Population for a Dynamic Singapore, Population White Paper* (January 2013) <http://www.nptd.gov.sg/content/NPTD/news/_jcr_content/par_content/download_98/file.res/population-white-paper.pdf> (accessed 1 August 2014).

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900,000 baby boomers,[2] a quarter of the current population, entering their silver years during this period.[3] As a result of the growing awareness of Singapore's ageing population, there have been multiple calls for more elder-friendly policies and regulations, particularly in the areas of healthcare and cost of living.

2 The issues faced by an ageing population are not unique to Singapore. To ensure that elders[4] are able to meet costs of living, markets in Australia and the UK have responded by introducing equity release products.[5] Broadly, such financial products allow real property assets to be monetised. There are broadly three types of equity release products:[6] (a) a reverse mortgage, where the consumer borrows money on the value of equity in his or her home, and the principal and interest are not payable until the home is sold, usually upon death; (b) a home reversion scheme, where the consumer sells part of his or her home for less than market value but is allowed to remain in the property until he or she dies or vacates the home voluntarily. The financial institution and the homeowner both benefit from any increase in the property price;[7] (c) a shared appreciation mortgage, where the consumer gives up the right to some capital gain on his or her property in return for paying reduced or no interest on his or her borrowings.

3 The attraction of equity release products is that an elder borrower is not required to make payment on the loan amount during his or her lifetime. Such products are particularly welcomed by those in the baby-boomers bracket who have amassed wealth in the form of real property. These products are also particularly attractive to asset-rich elders who have retired from full-time employment but require liquidity to fund regular day-to-day expenses or lump sum payments for one-off expenditure such as vacations, vehicle purchase, emergency funds, home improvement, nursing or health care.

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

3 National Population and Talent Division, *A Sustainable Population for a Dynamic Singapore, Population White Paper* (January 2013) at p 1 <http://www.nptd.gov.sg/content/NPTD/news/_jcr_content/par_content/download_98/file.res/population-white-paper.pdf> (accessed 1 August 2014).

4 For the purposes of this article, elders are taken to be persons over the retirement age of 65.

5 Equity release products are also popular in the US and New Zealand, but this article will focus on developments in Australia and the UK.

6 For an excellent overview of the permutation of such products, see Australian Securities and Investments Commission, *Equity Release Products: An ASIC Report* (Report No 59, 2005) <http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/Equity_release_report.pdf/$file/Equity_release_report.pdf> (accessed 1 August 2014).

7 Equity Release Council, "Raising Money from Your Home" (24 May 2012) <http://www.equityreleasecouncil.com/document-library/raising-money-from-your-home> (accessed 1 August 2014).

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

5 In the sections below, this article seeks to outline the likely importance of equity release products to Singapore's elder population and the nature and function of equity release products. It also seeks to analyse how foreign markets in Australia and the UK have dealt with the legal issues arising from such products and provide suggestions on how to strengthen Singapore's legal framework to prepare for the likely increase in such products. It should be pointed out that prior to the introduction of regulatory protection, issues related to equity release products in Australia and the UK such as those relating to contract formation fell to be determined by common law principles. Equity release products were not treated differently in law, and cases involving equity release products did not form a unique body of case law which merits mention in this article. As a result, the focus of this article shall be on the legislative and regulatory changes in Australia and the UK specific to equity release products.

## II. The demographic landscape

### *A. Housing and housing finance in Singapore*

6 A survey of the social landscape suggests that the time is ripe for the introduction of equity release products in Singapore.

7 Several population trends point to the need for new means to support the elder population. First, the growth in the number and proportion of elders in Singapore would mean a corresponding decrease in the number of working-age adults.[8] 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

8 National Population and Talent Division, *A Sustainable Population for a Dynamic Singapore, Population White Paper* (January 2013) at para 1.9 <http://www.nptd.gov.sg/content/NPTD/news/_jcr_content/par_content/download_98/file.res/population-white-paper.pdf> (accessed 1 August 2014).

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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.[9] Further, Singapore's life expectancy has increased from 62 years in 1970 to about 88 years in 2010.[10] According to the World Health Organisation, Singapore ranks fourth in the world for life expectancy.[11] The small size of the typical Singaporean nuclear family also means that the elders in this generation are able to rely on fewer 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 gives the impetus to search for new means to support the elder population.

8 The above projections are by no means neoteric. Indeed, these trends were foreshadowed in several policy papers. In 2005, the Committee on Ageing Issues ("CAI") was 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.[12] Emphatically, the report predicted that between the years 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.[13] 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".[14] Indeed, ch 3 of the report dealt with the topic of elder-friendly housing, and emphasised the need to allow elder residents to "age-in-place", that is, to allow them to be resident where they are so as to reduce

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9 National Population and Talent Division, *A Sustainable Population for a Dynamic Singapore, Population White Paper* (January 2013) at para 1.10 <http://www.nptd.gov.sg/content/NPTD/news/_jcr_content/par_content/download_98/file.res/population-white-paper.pdf> (accessed 1 August 2014).

10 National Population and Talent Division, *A Sustainable Population for a Dynamic Singapore, Population White Paper* (January 2013) at para 1.4 <http://www.nptd.gov.sg/content/NPTD/news/_jcr_content/par_content/download_98/file.res/population-white-paper.pdf> (accessed 1 August 2014).

11 Salma Khalik, "Singapore Ranks No 4 for Life Expectancy" *The Straits Times* (27 May 2013).

12 Committee of Ageing Issues, *Report on Ageing Population* (3 February 2006) <http://app.msf.gov.sg/Portals/0/Summary/research/CAI_report.pdf> (accessed 1 August 2014).

13 Executive Summary of the Committee of Ageing Issues, *Report on Ageing Population* (3 February 2006) <http://app.msf.gov.sg/Portals/0/Summary/research/CAI_report.pdf>(accessed 1 August 2014).

14 Committee of Ageing Issues, *Report on Ageing Population* (3 February 2006) at para 12 <http://app.msf.gov.sg/Portals/0/Summary/research/CAI_report.pdf> (accessed 1 August 2014).

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the environmental changes in their silver years.[15] Part of this push to allow elders to age-in-place is to allow them to monetise their real property.[16] The harbingers have clearly sounded out the generational tectonic shifts and the need to adapt to these changes.

9 The call for suitable responses to Singapore's ageing population is made more pressing due the unique nature of pension schemes in Singapore. In the 1950s, the Singapore government introduced the Central Provident Fund ("CPF") system which is a compulsory retirement savings scheme.[17] Under 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 moneys paid into each worker's CPF account is only to be released upon the retirement of the individual. Parallel to the CPF scheme was the Government's push for homeownership. 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 public housing. The policy motivation was that bolstering home ownership would in turn foster a sense of public responsibility and public spiritedness. Currently, CPF moneys may also be used in the purchase of private housing.

10 The twin result of the CPF scheme and the policy to allow CPF moneys to be utilised for property purchase has resulted in a high level of home ownership in Singapore. According to statistics from the Ministry of National Development ("MND") in 2013, home ownership in Singapore has tripled in the past 50 years to hover at 90%.[18] 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 US at 66%, the UK at 64% and Japan at 61%.

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15 Committee of Ageing Issues, *Report on Ageing Population* (3 February 2006) at ch 3, para 12 <http://app.msf.gov.sg/Portals/0/Summary/research/CAI_report.pdf> (accessed 1 August 2014).

16 Committee of Ageing Issues, *Report on Ageing Population* (3 February 2006) at ch 3, paras 21–24 <http://app.msf.gov.sg/Portals/0/Summary/research/CAI_report.pdf> (accessed 1 August 2014).

17 For an excellent overview of housing and pension policies in Singapore, see Ngee Choon Chia & Albert K C Tsui, "Reverse Mortgages as Retirement Financing Instrument: An Option for 'Asset-rich and Cash-poor' Singaporeans" (Department of Economics, National University of Singapore, SCAPE Working Paper Series, Paper No 2005/03, April 2005) at pp 6–10.

18 The figures are referred to in the speech of the Minister for National Development <http://www.mnd.gov.sg/budgetdebate2013/speech_kbw.htm> and the press release by the Ministry of National Development dated 13 April 2013 <http://app.mnd.gov.sg/Newsroom/NewsPage.aspx?ID=4419&category=Press%20Release&year=2013&RA1=&RA2=&RA3=> (accessed 24 August 2014).

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11 The corollary of this is that much of an average Singaporean's assets are represented by his real property. Relative to total assets, the average Singaporean's ratio of household residential property to total assets is 51%, which, for instance, is higher than the average citizen in the US (28%), the UK (34%) and Japan (40%).[19] Indeed, according to the Government's State of the Elderly report in 2008/2009,[20] about 70% of those surveyed aged 55–74 identified their owner-occupied homes as their most important assets, above fixed deposit and other types of saving accounts.

12 Unsurprisingly, according to statistics from HDB, about 81% of the population owns an HDB flat, and over 95% of the adult population are homeowners.[21] This is no doubt the result of Singaporeans being allowed to use their CPF moneys for property purchase and mortgage payments.

### *B. Early introduction of equity release products*

13 The unique importance of real property to the elder generation did result in the reverse mortgage being introduced to the Singapore market. In the late 1990s, NTUC Income had introduced the product.[22] Some years later, in or around 2006, the Oversea-Chinese Banking Corporation Limited ("OCBC") also carried the product.[23] However, despite the passage of time since then, equity release products have not gained strong traction in Singapore due to a myriad of reasons.

14 A survey done on the perception of the reverse mortgage in Australia showed that the primary reason why elders did not take up the product was because they viewed the home as a sacred asset. Elders also feared the possibility that they might outlive the mortgage and be evicted, or that they were spending their heirs' inheritance.[24] These reasons may have likewise applied to Singapore elders when the product

19 Ngee Choon Chia & Albert K C Tsui, "Reverse Mortgages as Retirement Financing Instrument: An Option for 'Asset-rich and Cash-poor' Singaporeans" (Department of Economics, National University of Singapore, SCAPE Working Paper Series, Paper No 2005/03, April 2005) at Section 2.

20 Report titled *State of the Elderly in Singapore 2008/2009, Release 2, Employment and Incomes and Assets* <http://app.msf.gov.sg/Portals/0/Summary/research/State%20of%20the%20Elderly_Release%202.pdf> (accessed 1 August 2014).

21 David McCarthy, Olivia S Mitchell& John Piggott, "Asset Rich and Cash Poor: Retirement Provision and Housing Policy in Singapore" (Pension Research Council Working Paper, The Wharton School, University of Pennsylvania, May 2001) at p 7.

22 NTUC Income introduced the reverse mortgage in or around 1990.

23 See <http://www.ocbc.com.sg/assets/pdf/Media/2006/aug/250806ReverseMortgage.pdf> (accessed 1 August 2014).

24 R Reed, "The Perception of Reverse Mortgages in the Australian Housing Market" (paper presented at the ISA Housing Conference, Glasgow, 1–4 September 2009).

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was first introduced. A 2009 lawsuit in Singapore involving NTUC Income's attempt to repossess a borrower's home under the terms of a reverse mortgage may have cast further negativity on the product.[25]

15 In the NTUC income case, the borrowers, Derek Chua and his wife, had applied for the reverse mortgage in 1997. At that time, the property in question was valued at about $2.1m. A sum of $1.68m, being 80% of the property, was to be disbursed to the borrowers by way of $2,000 payments every month. Due to the SARS crisis in 2003, the value of the property dropped to $1.1m. This meant that their loan amount of $1.68m had exceeded the total value of the property, which is what is called a "negative equity" situation. The borrowers were then told to make a lump sum payment to bring the loan-to-valuation ratio back to 80%. They were also told that the monthly payments of $2,000 would be reduced to $1,500. There were subsequent negotiations between the parties regarding the sale of the property which did not materialise. In 2006, NTUC Income took steps to repossess the property and the borrowers counterclaimed alleging wrongful seizure of their home. The dispute was subsequently resolved out of court.

16 This blip aside, the calls for appropriate measures to meet the need of elders to monetise 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. The Government further augmented the scheme in 2010 and recently again in 2013. Essentially, a retired elder who owns a three-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,[26] the proceeds of the LBS are paid directly to the elder's CPF account. From there, a regular annuity payment is made to the elder. Under the recent enhanced LBS, the eligibility criteria include that the citizen household in question must live in a three-room or smaller HDB flat, all lessees are at least at the CPF draw-down-age of 62 years old, the monthly household income must not exceed $3,000, and the household must not own a private residential property.[27]

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25 Chew Xiang, "Couple Sue NTUC Income over Reverse Mortgage Deal Gone Sour" *The Business Times* (28 July 2009); the official Media Release by NTUC Income <http://www.income.com.sg/aboutus/releases/2009/jul27.asp> (accessed 1 August 2014) (no further press releases were made thereafter); Ansley Ng, "It's All in the Fine Print" *Today* (22 August 2009); Jessica Cheam, "Couple Sue over Reverse Mortgage" *The Straits Times* (28 July 2009).

26 Terms and Conditions of the Enhanced Lease and Buyback Scheme <http://www.hdb.gov.sg/fi10/fi10218p.nsf/FI10VStatPgLookup/BR05TApplication%20for%20Lease%20Buyback%20SchemeTerms%20and%20Conditions%20for%20Enhanced%20Lease%20Buyback%20Scheme?OpenDocument> (accessed 1 August 2014).

27 Terms and Conditions of the Enhanced Lease and Buyback Scheme <http://www.hdb.gov.sg/fi10/fi10218p.nsf/FI10VStatPgLookup/BR05TApplication

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17 The LBS is referred to by way of example. Since the considerations and economic policies in relation to public housing and the private market are vastly different, it goes beyond the scope of this article to analyse the former. Nonetheless, it is clear that the idea of introducing alternative housing finance to elders is apposite. As recently as March 2014, the Minister for Housing and Development had announced that the Ministry "has begun serious study of the [reverse mortgage] option" and was looking at ways to broaden the scheme. This lends further support to the ideas underpinning equity release products.[28] The LBS is very much a precursor to possible growth of other equity release products which are an attractive proposition for asset-rich cash-poor elders who wish to live out their glowing years in Singapore comfortably.[29]

## III. Equity release products generally

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

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

20 No financial product is without risk. The principal risk associated with the reverse mortgage is the possibility of having negative equity. The lender agrees to a loan amount which is a proportion of the

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%20for%20Lease%20Buyback%20SchemeTerms%20and%20Conditions%20for%20Enhanced%20Lease%20Buyback%20Scheme?OpenDocument> (accessed 1 August 2014).

28 Lynette Khoo, "Government Takes Another Look at Reverse Mortgage Scheme" *The Business Times* (11 March 2014). (The author thanks Peh Zu Hao for bringing this to his attention.)

29 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. Kuo Hao Nam, "Start Reverse Mortgage Scheme to Help Seniors" *The Straits Times* (21 February 2013).

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value of the property valued at the time of the contract. Market fluctuations may cause the value to dip, in which case the lender may be entitled to reduce the total loan amount. This is termed a "negative equity" situation, in which the value of the property becomes lower than the actual agreed loan amount. It has also been noted that the interest rates for equity release products tend to be higher than that of conventional mortgages.[30] In other countries such as Australia, a borrower may affect his or her pension eligibility by entering into a reverse mortgage. Other more practical concerns include whether the elder borrower has accurately calculated his or her borrowing needs when the equity release product is entered into.

## IV. Legal and regulatory frameworks

21 As alluded to above, prior to the legislative and regulatory changes in Australia, and to a lesser extent, the UK, issues relating to equity release products were determined by the usual common law principles. For instance, the few reported cases involving equity release products mainly concerned issues of fairness in contract terms[31] or contract formation.[32] Equity release products did not attract any special protection in the common law. The following sections therefore focus on the legislative and regulatory aspects dealing with the product.

### *A. Australia*

22 In Australia, equity release products were introduced in or around the 1990s. According to a survey done on the perception of the reverse mortgage in the Australian housing market, the product has received steady reception over the past two decades.[33] Such products are

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30 Australian Securities Investment Commission, "Reverse Mortgages, Selling the Home from Under Your Feet" ASIC Money Smart website https://www.moneysmart.gov.au/superannuation-and-retirement/income-sources-in-retirement/home-equity-release/reverse-mortgages (accessed 1 August 2014).

31 See *Tew v BoS (Shared Appreciation Mortgages) No 1 plc* [2010] EWHC 203 (Ch). This case concerned an application for a group litigation order in relation to whether the terms of a shared appreciation mortgage were unfair under the Unfair Terms in Consumer Contracts Regulations 1994 and ss 140A–140C of the Consumer Credit Act 1974 (c 39) (UK).

32 See *CKM (Mortgages) Ltd v Burtenshaw* [2010] NSWSC 1044. This was an application to set aside a default judgment. One of the grounds of defence put forward by the defendant, which the court accepted as arguable on the evidence, was that unconscionability was involved in the execution of the reverse mortgage.

33 R Reed, "The Perception of Reverse Mortgages in the Australian Housing Market" (paper presented at the ISA Housing Conference, Glasgow, 1–4 September 2009).

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now commonplace and promoted by major Australian banks such as the Commonwealth Bank of Australia and Suncorp.[34]

23 Since their inception, equity release products have grown in popularity in Australia. In addition to the reasons alluded to above, another impetus is the need to make provision for the gradual increase in essential living expenses such as medical, food, transport and the introduction of a goods and services tax in Australia.[35] According to the same survey, many elderly Australians regard their place of residence as their single largest asset.

24 Equity release products, as consumer credit instruments, fall under the purview of the Australian Securities and Investments Commission ("ASIC"). ASIC has actively supervised this segment of the consumer credit market due to the product's increased popularity. In 2005, ASIC released a report on the reverse mortgage detailing the developments in this sector. The report states that such products showed a significant take up rate from 2004.[36] At the time of the report, "[w]hilst remaining only a tiny fraction of total consumer lending, the reverse mortgage sector has grown significantly in the 12 months to March 2005, going from $468 million to $770 million, with 8,899 new loans provided".[37]

25 The 2005 report also warned of the significant risk 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

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34 R Reed, "The Perception of Reverse Mortgages in the Australian Housing Market" (paper presented at the ISA Housing Conference, Glasgow, 1–4 September 2009) at pp 2 and 4.

35 R Reed, "The Perception of Reverse Mortgages in the Australian Housing Market" (paper presented at the ISA Housing Conference, Glasgow, 1–4 September 2009) at pp 2 and 4.

36 Australian Securities and Investments Commission, *Equity Release Products: An ASIC Report* (Report No 59, 2005) <http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/Equity_release_report.pdf/$file/Equity_release_report.pdf> (accessed 1 August 2014).

37 Australian Securities and Investments Commission, *Equity Release Products: An ASIC Report* (Report No 59, 2005) at p 4 <http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/Equity_release_report.pdf/$file/Equity_release_report.pdf> (accessed 1 August 2014).

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property is shared between the provider and consumer over an extended period of time.

26 Further:[38]

> … 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.

27 In 2007, ASIC released a further report.[39] In it, it stated that "since [the 2005 Report] was released, the reverse mortgage market has more than doubled … [now] the market is worth approximately $1.8 billion, consisting of over 31,000 reverse mortgages".[40] A more current 2012 report by accounting firm Deloitte[41] in 2012 states that at 31 December 2011, the reverse mortgage market in Australia consisted of more than 42,000 reverse mortgage facilities with total outstanding funding of $3.3b. This represented a 22.5% growth from 31 December 2009.

28 In terms of a legal framework, Australia has a robust and comprehensive consumer protection regime. Most recently in 2009, the Australian government passed the National Consumer Credit Protection Act 2009 ("NCCPA") which replaced prior similar state law and its predecessor the Uniform Consumer Credit Code ("UCCC"). The NCCPA essentially deals with licensing of credit providers. The NCCPA applies to a variety of credit activities including consumer leases and mortgages.[42]

29 Pertinently, the NCCPA contains specific provisions dealing with equity release products. This itself is testament to the widespread

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38 Australian Securities and Investments Commission, *Equity Release Products: An ASIC Report* (Report No 59, 2005) at p 6 <http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/Equity_release_report.pdf/$file/Equity_release_report.pdf> (accessed 1 August 2014).

39 Australian Securities and Investments Commission, *All We Have is This House* (Report No 107, 2007) <http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/Rep109_reverse_mortgages_Nov07.pdf/$file/Rep109_reverse_mortgages_Nov07.pdf> (accessed 1 August 2014).

40 Australian Securities and Investments Commission, *All We Have is This House* (Report No 107, 2007) at p 7 http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/Rep109_reverse_mortgages_Nov07.pdf/$file/Rep109_reverse_mortgages_Nov07.pdf (accessed 1 August 2014).

41 Commissioned by SEQUAL (Senior Australians Equity Release Association), a self-regulatory industry body. Deloitte's reports may be found at <http://www.sequal.com.au/media-releases-reports/research-reports> (accessed 1 August 2014).

42 National Consumer Credit Protection Act 2009 (Australia) s 6.

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use of the product in Australia. Section 13A of the National Credit Code ("NCC"), which is incorporated as part 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.

30 In addition to the NCCPA, Australia also has a robust formal and self-regulatory regime. ASIC acts as the national consumer protection regulator for financial services.[43] Of note for present purposes, ASIC administers the Australian Securities and Investments Commission Act 2001 ("ASIC Act 2001") and the NCCPA. The ASIC Act 2001 provides the legal framework for the oversight and enforcement of matters related to consumer financial products.[44]

31 Due to the maturity of the product, Australia has a strong self-regulatory regime. There is SEQUAL ("Senior Australians Equity Release"), a key industry body which runs an accreditation protocol and raises professional standards for all lenders including major banks and specialist non-bank providers. SEQUAL has emerged with its own code of conduct which prescribes acceptable conduct for market players.[45] SEQUAL is an opt-in body, which accredits its members. There is also the Mortgage and Finance Association of Australia ("MFAA"), which represents and lobbies for credit advisers such as mortgage and finance brokers. MFAA primarily exists to support and develop the professional body of credit advisers.[46] In relation to equity release products, MFAA has published a member guide[47] and a code of conduct.[48] CPA Australia

43 Australian Securities and Investments Commission, "Background to ASIC's Credit Jurisdiction" (2011) <http://www.asic.gov.au/asic/asic.nsf/byheadline/Background+to+ASIC's+credit+jurisdiction> (accessed 1 August 2014).

44 There is also the Australian Consumer Law which is a close analogue to Singapore's Consumer Protection (Fair Trading) Act (Cap 52A, 2009 Rev Ed), although it applies only to limited categories of financial products such as credit cards or short-term consumer loans.

45 SEQUAL (Senior Australians Equity Release Association), "Code of Conduct" <http://www.sequal.com.au/images/SEQUAL_Code_of_Conduct_Guidelines/sequal%20code%20of%20conduct%20-%20revised%20oct%202009.pdf> (accessed 1 August 2014).

46 Mortgage and Finance Association Australia, "Mission and Objectives" <http://www.mfaa.com.au/default.asp?menuid=480> (accessed 1 August 2014).

47 Mortgage and Finance Association Australia, "The Equity Release Code of Proper Process" (February 2007) <http://www.mfaa.com.au/default.asp?artid=2169> (accessed 1 August 2014).

48 It has also worked in tandem with SEQUAL (Senior Australians Equity Release Association) to run the Mortgage and Finance Association Australia Equity Release Education programme to accredit its members. Indeed, Mortgage and Finance

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has also published its own "Guidance Notes for advising on reverse mortgages" for CPA members who are involved in credit advice work.

## *B. The UK*

32 Compared with Australia, equity release products have slightly more antiquity in the UK. In the 1980s, many retirees took up reverse mortgages and used the income derived therefrom on stock market related bonds.[49] When the returns on these bonds were not sufficient to cover interest rates and the fall in the value of their property, this resulted in a significant number of borrowers being evicted or embroiled in legal actions.[50] 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.

33 As the home is seen by many UK elders as their repository of wealth,[51] to cope with rising costs and the dearth of income, elders have resorted to equity release products. As with Australia, this sector has burgeoned. In 2007, the equity release market commanded a market share of about £1.279b.[52] Up to December 2011, a group of major providers[53] of home income plans had provided about 270,000 such schemes, releasing about £12.12b on the homes of persons over 55.[54] According to the Safe Home Income Plans' ("SHIP") 20th Anniversary Report, elders in the UK sit on about £1.9tr worth of housing equity,[55] and the organisation foresees that the market would continue to grow. Established global institutions such as Aviva and Prudential have also entered the market.

34 In 2000, the UK Parliament passed the Financial Services and Markets Act 2000[56] ("FSMA") to deal with "the regulation of financial

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Association Australia members are deemed to have breached its code of conduct if they marketed reverse mortgages but are not SEQUAL accredited, see Mortgage and Finance Association Australia, "The Equity Release Code of Proper Process" (February 2007) <http://www.mfaa.com.au/default.asp?artid=2169> (accessed 1 August 2014).

49 Sally McCrone, "Release or Just a Trap" *The Guardian* (25 April 2004).

50 Sally McCrone, "Release or Just a Trap" *The Guardian* (25 April 2004).

51 Lorna Fox O'Mahony & James Devenney, "Undue Influence, the Elderly and Equity Release Schemes" (2006) 5 Elder L Rev 1.

52 Lorna Fox O'Mahony & James Devenney, "Undue Influence, the Elderly and Equity Release Schemes" (2006) 5 Elder L Rev 1 at 4.

53 The Safe Income Home Plans ("SHIP") which has since been renamed the Equity Release Council ("ERC").

54 Safe Income Home Plans, 20th Anniversary Report (2011) at p 5.

55 Safe Income Home Plans, 20th Anniversary Report (2011) at p 5.

56 c 8.

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services and markets". The FSMA was introduced to usher in a new epoch of centralised financial services regulation – a move from the more *laissez-faire* approach of self-regulation by a collection of institutions and society. Thus, central to the FSMA is the introduction of the Financial Services Authority, which, under s 2(3) of the FSMA, has as its objects that of market confidence, public awareness, reduction of financial crime, and importantly, the protection of consumers. Following from the 2008 global financial crisis, the HM Treasury published a white paper entitled "A new approach to financial regulation", proposing a blueprint for reform which would ensure tighter supervision and regulation of the financial services sector as a whole. As a result, the UK government enacted the Financial Services Act 2012[57] 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") (both of which have taken over the roles of the Financial Services Authority), as well as the Bank of England.

35 Similar to Australia's NCCPA, the UK has consumer protection legislation in the form of the Consumer Credit Act 1974[58] ("CCA"). The CCA regulates consumer contracts extensively, providing for minute issues such as the provision of information, creditworthiness requirements, and unfair relationship provisions.

36 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 FSMA. Under s 23 of the Second Sch to the FSMA, contracts where one party provides another with credit, and where the obligation to repay is secured on land, are regulated by the FSMA. Unlike the NCCPA and CCA, the FSMA does not itself provide substantive forms of relief for unfair practices. What the FSMA does is to provide FCA with investigative powers,[59] and for the compulsory jurisdiction of the Ombudsman.[60]

37 Given the paucity of actual regulation, elder consumers have to rely on the common law or other general contract-regulating statutes (such as the Unfair Contract Terms Act 1977[61] ("UCTA")) for remedies, or the Financial Ombudsman to deal with any inequities arising from

57 c 21.
58 c 39.
59 Financial Services and Markets Act 2000 (c 8) (UK) Pt XI.
60 Financial Services and Markets Act 2000 (c 8) (UK) Pt XVI.
61 c 50.

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equity release transactions. All lifetime mortgages and home reversion plans sold in the market come under the regulatory supervision of FCA.

38 Problems with equity release products led to the establishment of a self-regulatory body called 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. According to ERC's website, all participants in the equity release market are members of the Council. As at the time of this article, the ERC Code of Conduct[62] enshrines certain consumer rights including that they will be allowed to remain in their properties, that the consumers 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 consumers will never owe more than the value of their homes. ERC also runs a Standards Board which is tasked with improving the standards and best practices in this field.

39 Throughout the sea change in the regulatory rules concerning the finance sector, what has remained constant is the availability of the Financial Ombudsman Service as an avenue for complaint and resolution of disputes between consumers and business providing financial services. The Ombudsman Service was introduced in 2000 vide the FMSA, and remains a pillar of the system, its key role being to allow for disputes to be "resolved quickly and with minimum formality by an independent person".[63]

### *C. Singapore*

40 Compared to the UK and Australia, Singapore is still maturing in its consumer protection for financial products.

41 The foremost piece of legislation dealing with consumer protection for financial products is the Consumer Protection (Fair Trading) Act[64] ("CPFTA"). 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.[65] The need to include financial products in the ambit of the Act was raised in the 2003 round

62 Equity Release Council, "Code of Conduct" <http://www.equityreleasecouncil.com/document-library/code-of-conduct/> (accessed 1 August 2014).
63 Financial Services and Markets Act 2000 (c 8) (UK) s 225(1).
64 Cap 52A, 2009 Rev Ed. For a comparative review of the Consumer Protection (Fair Trading) Act and its counterparts, see R Chandran, "Consumer Protection (Fair Trading) Act" [2004] Sing JLS 192.
65 Second Reading of the Consumer Protection Fair Trading Bill, *Singapore Parliamentary Debates, Official Report* (10 November 2003) vol 76.

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of parliamentary debates.[66] However, at the same period of time, several other pieces of legislation concerning the financial markets had been enacted,[67] and Parliament concluded that this should be kept for further review. Eventually, by way of the Consumer Protection (Fair Trading) (Amendment) Act 2008,[68] 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[69] where "goods" generally refer to tangibles. The CPFTA 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.[70]

42 In addition to the CPFTA, the sale of financial products is regulated by the Monetary Authority of Singapore ("MAS"). 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 s 4 of the Monetary Authority of Singapore Act.[71] Section 27 of the Act also gives MAS the power to issue directions to any financial institution in Singapore. Non-compliance with its directions may result in a financial penalty.

43 MAS also provides supervision over financial advisers vide the Financial Advisers Act[72] ("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".[73] The FAA was to create a single licensing regime, and institutions selling all types of financial products would have to obtain a licence from MAS.[74]

66 *Singapore Parliamentary Debates, Official Report* (11 November 2003) vol 6 at col 3445 (Dr Ong Seh Hong).
67 Such as the Securities and Futures Act (Cap 289, 2006 Rev Ed) and the Financial Advisers Act (Cap 110, 2007 Rev Ed).
68 Act 15 of 2008.
69 Cap 393, 1999 Rev Ed.
70 Consumer Protection (Fair Trading) Act (Cap 52A, 2009 Rev Ed) s 3.
71 Cap 186, 1999 Rev Ed.
72 Cap 275, 2007 Rev Ed.
73 Second Reading of the Financial Advisers Bill, *Singapore Parliamentary Debates, Official Report* (5 October 2001) vol 73 at col 2163.
74 Second Reading of the Financial Advisers Bill, *Singapore Parliamentary Debates, Official Report* (5 October 2001) vol 73 at col 2167.

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44 The 2008 global financial crisis made the financial industry a focal point for legislators and policy makers alike.[75] Not surprisingly, a slew of regulations and guidelines were issued in its wake. In April 2009, MAS issued its Guidelines on Fair Dealing which outlined five outcomes which all financial institutions should strive for.[76] 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 where relevant, will be scrutinised in the sections below.

## V. Legal issues related to equity release products

### *A. Information*

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

46 In 2007, ASIC released a report titled "All We Have Is This House – Consumer Experiences with Reverse Mortgages",[77] outlining the

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75 See the following parliamentary debates discussing financial products and the sale of financial products: *Singapore Parliamentary Debates, Official Report* (20 October 2008) vol 85 at col 333; *Singapore Parliamentary Debates, Official Report* (17 November 2008) vol 85 at col 681; *Singapore Parliamentary Debates, Official Report* (19 January 2009) vol 85 at col 1064; and *Singapore Parliamentary Debates, Official Report* (20 July 2009) vol 86 at col 800.

76 Monetary Authority of Singapore, "Guidelines on Fair Dealing" (3 April 2009) <http://www.mas.gov.sg/~/media/resource/legislation_guidelines/fin_advisers/fin_advisers_act/guidelines/Guidelines%20on%20Fair%20Dealing.ashx> (accessed 1 August 2014). The five fair dealing outcomes are: Fair Dealing Outcome 1: customers have confidence that they deal with financial institutions where fair dealing is central to the corporate culture; Fair Dealing Outcome 2: financial institutions offer products and services that are suitable for their target customer segments; Fair Dealing Outcome 3: financial institutions have competent representatives who provide customers with quality advice and appropriate recommendations; Fair Dealing Outcome 4: customers receive clear, relevant and timely information to make informed financial decisions; and Fair Dealing Outcome 5: financial institutions handle customer complaints in an independent, effective and prompt manner.

77 Australian Securities and Investments Commission, *All We Have is This House* (Report No 107, 2007) <http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/Rep109_reverse_mortgages_Nov07.pdf/$file/Rep109_reverse_mortgages_Nov07.pdf> (accessed 1 August 2014).

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issues with the product faced by elder consumers. The report is drawn from a small sample size of 29 interviewees but the anecdotal evidence suggests that the key issues faced by elder consumers are a consistent few.

47 One key issue is the lack of accurate or complete information about the product. As noted in the report, the reverse mortgage is a "complex"[78] instrument.[79] Although the report does not explain how so, it is safe to assume that this is largely because the product is not a plain vanilla mortgage and most elders would therefore require time to appreciate the intricacies of a novel product. The product also carries significant impact on an elder's life and well-being and requires the elder borrower to have a holistic appreciation of a plethora of factors.

48 The foremost piece of information an elder should be made aware of is whether the product is subject to a negative equity. As mentioned above, a negative equity situation occurs when the value of the property decreases, often due to market forces, causing the loan-to-valuation ratio to become negative. This turned out to be the problem in the NTUC Income dispute mentioned above. In the recent two decades, property prices in Singapore have fallen drastically in tandem with market crises. The SARS crisis in 2003 and the 2008 global financial crisis are two examples. In addition, it is not uncommon for privately-owned land to be compulsorily acquired by the Government under the Land Acquisition Act.[80] This may be another potential unforeseen event which could negatively affect the value of an elder's property.

49 A negative equity situation creates a real risk that the elder would be subject to unilateral changes in the loan amount and regular payouts from the lender, or even the consequences of an event of default under the agreement. The drastic effect of a potential negative equity occurrence led industry bodies in Australia and the UK to require that companies carrying the product make a no negative equity guarantee.[81]

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78 Australian Securities and Investments Commission, *All We Have is This House* (Report No 107, 2007) at p 1 <http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/Rep109_reverse_mortgages_Nov07.pdf/$file/Rep109_reverse_mortgages_Nov07.pdf> (accessed 1 August 2014).

79 Equity release products are also described on Australian Securities and Investments Commission's Money Smart website as "complex" products: <https://www.moneysmart.gov.au/superannuation-and-retirement/income-sources-in-retirement/home-equity-release/reverse-mortgages>(accessed 1 August 2014).

80 Cap 152, 1985 Rev Ed.

81 In Australia, SEQUAL (Senior Australians Equity Release Association) is the accreditation body for financial institutions selling equity release products. They have made it as part of their accreditation requirements that lenders are to carry a "no negative equity" guarantee. SEQUAL's Code of Conduct is available at <http://www.sequal.com.au/images/SEQUAL_Code_of_Conduct_Guidelines/sequal

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Whether equity release products in Singapore will carry such a guarantee ultimately depends on the market. Lenders will probably shift the cost of having no negative equity to the borrower, though it may be better for an elder to pay an upfront premium for this than to face drastic consequences such as repossession or unilateral changes in the loan amount. Incorporating such costs in the product also avoids ugly social repercussions which may arise during a time of financial crisis. The 2009 sub-prime crisis in the US tells a cautionary tale. Assuming equity release products do allow for a negative equity situation, this would be a material piece of information of which the elder should be duly informed.

50 Another important piece of information is a projection of the elder's indebtedness over time. Without explaining how their indebtedness increases, elders may be in ignorant bliss as to their true financial position since the general purport of the product is that all indebtedness is usually only payable upon death. A borrower's total debt based on the principal sum and interest may also be of significance to Asian elders who may wish to bequeath some part of their property to their heirs.[82]

51 In addition to overall indebtedness, lenders should be obliged to explain the general impact of the product on an elder. Obviously, borrowers must be responsible for seeking out their own financial and legal advice. Nonetheless, because of the unique traits of elders, lenders should explain in general terms how entering into a reverse mortgage, for instance, would affect the borrower's finances and well-being. Equity release products tend to ensure that a borrower receives immediate, regular payments from the lender, but this is balanced by the fact that the remaining value of the mortgaged asset decreases with time. Elders should also be made aware of the importance of properly calculating their borrowing needs. Indeed, the ASIC 2007 report cites that one third of the borrowers interviewed said they obtained a loan larger than that actually required.[83] Mortgage documentation tends to provide that the

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%20code%20of%20conduct%20-%20revised%20oct%202009.pdf> (accessed 1 August 2014).See also the terms governing the no negative equity pledge at <http://www.sequal.com.au/images/SEQUAL_Code_of_Conduct_Guidelines/sequal%20guideline%20no%20negative%20equity%20guarantee%20and%20default%20conditions.pdf> (accessed 1 August 2014). In the UK, the same role is played by the Equity Release Council, or ERC, also formerly known as the Safe Home Income Plans or SHIP.

82 Indeed, this was the case for Australian elders who were interviewed for the report by the Australian Securities and Investments Commission, *All We Have is This House* (Report No 107, 2007) <http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/Rep109_reverse_mortgages_Nov07.pdf/$file/Rep109_reverse_mortgages_Nov07.pdf> (accessed 1 August 2014).

83 Australian Securities and Investments Commission, *All We Have is This House* (Report No 107, 2007) at p 7 <http://www.asic.gov.au/asic/pdflib.nsf/LookupBy

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borrower has no right to vary this amount. Without an appreciation that they are locked-in, elders may not have taken independent financial advice and are not able to properly calculate the amount needed for daily expenses, medical needs, transportation, and other costs of living and expenditure which are likely to increase over time.

52 In Australia, elders are statutorily protected in this respect. Section 133DB of the NCCPA obliges representatives of a financial institution to provide the consumer with projections "related to the value of the dwelling or land that may become reverse mortgaged property, and the consumer's indebtedness, over time if the consumer were to enter into a contract for a reverse mortgage". The NCCPA also requires elders to be given a "reverse mortgage information statement"[84] which is a concise one to two-page document setting out how a reverse mortgage works, how costs are calculated, what elders should consider before taking out a reverse mortgage, and useful contacts for more information. To assist elders with calculating their needs, ASIC has also set up a reverse mortgage calculator to assist elders in estimating the loan amount required.[85] Apart from these specific protections, the NCCPA also includes other general 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.

53 In Singapore, there are currently no specific laws requiring financial institutions to set out information on key aspects of a financial product. By and large, retail consumers of financial products are expected to pay heed to the principle of *caveat emptor*. In the wake of the 2008 financial crisis, where many retail consumers complained that they were misled as to the terms and nature of the Lehman mini bonds, MAS has responded by issuing certain guidelines for the sale of investment products.[86] These are the Fair Dealing Guidelines issued by

FileName/Rep109_reverse_mortgages_Nov07.pdf/$file/Rep109_reverse_mortgages_Nov07.pdf> (accessed 1 August 2014).

84 National Consumer Credit Protection Act 2009(Australia) ss 133DC and 133DD. See, *eg*, the Reverse Mortgage Information Statement of the Commonwealth Bank of Australia at <https://www.commbank.com.au/content/dam/commbank/personal/home-loans/fact-sheets/key-information-reverse-mortgages.pdf> (accessed 1 August 2014).

85 See <https://www.moneysmart.gov.au/tools-and-resources/calculators-and-tools/reverse-mortgage-calculator> (accessed 1 August 2014).

86 More generally, there has been a spate of recent reforms for financial products. For an overview, see Low Kee Yang, "Product Suitability, Due Diligence and Management Responsibility" (2012) 24 SAcLJ 298.

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MAS in April 2009.[87] Fair Dealing Outcome 4[88] is particularly relevant – it requires financial institutions to ensure that customers receive clear, relevant and timely information to make informed decisions. In terms of clarity, financial institutions are to ensure that disclosure is made in plain language, avoiding the use of technical terms. Information should also be presented in a format that is simple and easy to understand.

54 Unfortunately, the Fair Dealing Guidelines deal primarily with investment products. Arguably, equity release products are more akin to a consumer credit product, which should not invite the same level of protection. Nonetheless, the guidelines prod the financial industry in the right direction. It is hoped that the guidelines will affect institutional culture in such a way that all retail financial products, investment or otherwise, are marketed with the same level of information disclosure. Further, should equity release products be reintroduced in Singapore, in the absence of legislation to regulate the sale of this select group of financial products, it is hoped that the Fair Dealing Guidelines be made applicable, in particular because the elders are a unique category of borrowers who require more protection.

### *B. Mental capacity and decision-making*

55 Closely related to having complete and accurate information is the issue of the elder's ability to make decisions. Like many other developed nations, Singapore is not unique in having to deal with mental impairment issues for elders. In a speech at the 3rd Neurocognitive Symposium, the Minister for Health stated that Singapore "currently [has] about 28,000 elderly aged 60 years and above with dementia, and this is expected to more than double to 80,000 by 2030".[89] Along with dementia, Alzheimer's Disease and other forms of mental impairment raise concerns as to whether elders are capable of appreciating the financial products they enter into.

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87 Monetary Authority of Singapore, "Guidelines on Fair Dealing" (3 April 2009) <http://www.mas.gov.sg/~/media/resource/legislation_guidelines/fin_advisers/fin_advisers_act/guidelines/Guidelines%20on%20Fair%20Dealing.ashx> (accessed 1 August 2014).

88 Fair Dealing Outcome 3 is also helpful in this regard. It requires financial institutions to have competent representatives who provide customers with quality advice and appropriate recommendations. Financial institutions are to ensure their staff undergo structured training programmes 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.

89 Minister for Health, Gan Kim Yong, Opening Address at the 3rd Singapore International Neurocognitive Symposium (5 April 2013) <http://www.moh.gov.sg/content/moh_web/home/pressRoom/speeches_d/2013/speech-by-minister-for-health--mr-gan-kim-yong--at-the-3rd-singa.html> (accessed 1 August 2014).

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56 On proper analysis, a lack of mental capacity simply means that the borrower lacks the requisite consent in entering the transaction. This is exemplified in the case of *Hwang Cheng Tsu Hsu v Oversea-Chinese Banking Corp Ltd*[90] where the Singapore High Court ruled that a bank did not breach its contractual duty as the customer was rightly perceived to be lacking in mental capacity and did not consent to the relevant transaction.[91] The decision was upheld on appeal.

57 Since it came into force in 2010, the Mental Capacity Act[92] ("MCA") is the legislation which governs issues concerning mental capacity. The MCA seeks to provide for issues relating to mental capacity such as treatment, abuse, and guidelines in decision-making. The MCA was introduced to provide a framework broader than its predecessor, the Mental Disorders and Treatment Act, which dealt with the limited scope of mental disorders. Parts of the MCA were adapted from the UK Mental Capacity Act 2005.[93]

58 The centrepiece of the MCA is s 3, where a list of cardinal principles guide the outworking of the Act. First, every individual is assumed to have mental capacity unless proven otherwise.[94] A person is also not to be treated as unable to make a decision unless all practicable steps to help that person have been taken without success.[95] Evidently, the Act does not seek to invalidate a person's decision unless it can be convincingly shown that capacity was lacking. This prevents the possibility of having an overwhelming number of transactions invalidated on the mere appearance of incapacity. This is again echoed in s 4(3): a lack of capacity cannot be established merely by reference to a person's age or appearance or aspect of behaviour.

59 Moving to the specifics, s 4 of the MCA defines a lack of capacity as an inability to make a decision in relation to a matter, at a material time, whether because of an impairment or disturbance in the functioning of the mind. Therefore, the fact that the mental disturbance is temporary or permanent is not entirely conclusive. Section 5 explains that incapacity is the inability of a person: (a) to *understand* the information relevant to a decision; (b) to *retain* that information; (c) to *use or weigh* that information as part of the process of making that decision; or (d) to *communicate* the decision. Information relevant to a decision includes information about the "reasonably foreseeable

90 [2010] 4 SLR 47.
91 This point was upheld on appeal in *Hsu Ann Mei Amy v Oversea-Chinese Banking Corp Ltd* [2011] 2 SLR 178.
92 Cap 177A, 2010 Rev Ed.
93 c 9.
94 Mental Capacity Act (Cap 177A, 2010 Rev Ed) s 3(2).
95 Mental Capacity Act (Cap 177A, 2010 Rev Ed) s 3(3).

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consequences" of making the decision, or failing to make that decision.[96] The fact that a person is able to retain the information relevant to a decision for a short period only does not prevent him from being regarded as able to make the decision.[97] Although the High Court and Court of Appeal in the suit by Hwang Cheng Tsu Hsu against OCBC[98] did not expressly apply the s 5 criteria (because the material events occurred before the MCA was in force), both the High Court and Court of Appeal held that the defendant bank rightly perceived the elder customer to be lacking in mental capacity on account that she looked to be in a daze when she first visited the bank, and when interviewed, the elder could not identify where she was, did not know how much money was in her account, confirmed that there was no need to close her bank account, and gave differing answers as to the identity of her daughter.

60 The MCA is further fleshed out by the Office of Public Guardian's Code of Practice[99] ("Code") which was released in 2010. For instance, the Code makes clear that capacity is decision specific[100] and a general appearance of a lack of lucidity does not render one incapable of all decisions. Further, the Code delineates three types of incapacity: permanent, temporary and fluctuating. For the latter, the Code goes as far as to suggest that elders suffering from dementia should be approached at the time of the day when they are more alert and better able to comprehend matters. The Code also explains that mental capacity is said to be two-stage test: one first asks if the person is suffering from some form of impairment or disturbance in the functioning of the brain; one then asks if that impairment or

96 Mental Capacity Act (Cap 177A, 2010 Rev Ed) s 5(4).

97 Mental Capacity Act (Cap 177A, 2010 Rev Ed) s 5(3).

98 The High Court decision is reported at *Hwang Cheng Tsu Hsu v Oversea-Chinese Banking Corp Ltd* [2010] 4 SLR 47 and the Court of Appeal decision at *Hsu Ann Mei Amy v Oversea-Chinese Banking Corp Ltd* [2011] 2 SLR 178.

99 Office of Public Guardian, "Code of Practice, Mental Capacity Act 2008" <http://www.publicguardian.gov.sg/Resources/Flipbooks/COP/English/index.html> (accessed 1 August 2014).

100 This tracks the position in the Australian decision of *Re MV* [2005] QGAAT 46 where the Queensland Guardianship and Administrative Tribunal found that the question of whether a person had capacity was strictly limited to the task in question. Undoubtedly, it is then an open question of how much capacity is required for each type of task or transaction. Notably, the same proposition was raised in the case of *Hsu Ann Mei Amy v Oversea-Chinese Banking Corp Ltd* [2011] 2 SLR 178. On the facts, the Court of Appeal declined to agree that the mental capacity required for the elder in that case to open a joint account or close all her bank accounts, was more complex that the elder's decision to make a will (which she had done previously). This Code of Practice of the Office of Public Guardian likewise explains that capacity is decision-specific and not of a blanket application. See para 4.3.1 of the Office of Public Guardian, "Code of Practice, Mental Capacity Act 2008" <http://www.publicguardian.gov.sg/Resources/Flipbooks/COP/English/index.html> (accessed 1 August 2014).

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disturbance causes the person to be unable to make the relevant decision when called upon.

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

62 Further, the advent of the Lasting Power of Attorney ("LPA") in Singapore acts to ease some of the concerns on the part of the bank. The LPA, which was introduced in Singapore in or around 2010, is a means by which any person above the age of 21 can grant in advance powers to a donee for that donee to make decision(s) on behalf of the donor during a period of mental incapacity.[101] This grant of power may be revoked at any time prior to the donor's incapacity. LPAs are registered with the Office of Public Guardian, and should a bank deal with a donee who seeks to execute a financial product on behalf of the donor, the bank is entitled to require the donee to furnish a certificate from a registered doctor stating that the donor's capacity in relation to the decision at hand is likely to be permanent. If no such certificate is furnished, the bank may refuse to accept the donee's purported power to act under the LPA. It is understood that the Office of Public Guardian is soon to issue new forms for the LPA. In these forms, it may not be possible for a donor to grant powers to a donee to execute a mortgage without an order of court. Should this be in place, it provides further protection for the elder, and more assurance for the bank.

### *C. Unfair practices, misleading conduct and unconscionability*

63 Contract law textbooks are filled with instances where contracts have been struck down because one contracting party, typically of a

101 It should be pointed out that the Office of Public Guardian has two forms. Form 1 is a standard form by which a donor provides wide powers to a donee "to make decisions and act for [the donor] in respect of ALL matters relating to [the donor's] property and affairs of every description as fully and effectively as I could do if I had the mental capacity" [emphasis in original]. Form 2 is a form which allows customisation and requires a solicitor to assist with the drafting of the powers to be granted.

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vulnerable class, was taken advantage of. Depending on the factual matrix, vitiating factors include undue influence,[102] duress[103] and unconscionability,[104] although theoretically the bases for these grounds are constantly subject to academic critique. At the risk of generalising, the law recognises that, at times, it needs to deter wrongful and inequitable conduct of a defendant or protect a vulnerable plaintiff if there was no genuine consent to the contract. Elders neatly fall into a class of vulnerable persons. For the reasons already discussed, it is not difficult to conceive of elders being misled or pressured into agreeing to mortgage their property.

64 Australia's legislation protects elders in relation to financial products in several ways. First, s 180A of the NCCPA protects the elder borrower from "unfair or dishonest conduct" by a credit service provider.[105] This deals primarily with intermediaries and brokers who market a financial institution's product to a consumer.[106] 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"[107] 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".[108] Conduct that is unfair or dishonest is conduct that "should not have in good conscience been used" or which "manipulated the plaintiff".[109] Ostensibly, the test is broad and provides a great deterrent against sharp practice. Where unfair and dishonest conduct is found to be present, the court may, *inter alia*, order that the defendant pay the plaintiff a specified amount, order that a specified amount is not due or owing from the plaintiff or any other order which the court considers appropriate to redress the unfairness or dishonesty except an order which affects the underlying

102 The seminal case being the House of Lords' decision in *Royal Bank of Scotland plc v Etridge (No 2)* [2002] 2 AC 773. See also *The Law of Contract in Singapore* (A Phang ed) (Singapore: Academy Publishing, 2012) at pp 827–881 for a comprehensive treatment of this vitiating factor.

103 See, for instance, *Universe Tankships Inc of Monrovia v International Transport Workers Federation* [1983] 1 AC 366; *Pao On v Lau Yiu Long* [1980] AC 614 and *Third World Development Ltd v Atang Latief* [1990] 1 SLR(R) 96.

104 In Australia, the leading case for this is *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447. For the position in English law, which adopts a narrower version of the doctrine, see *Cresswell v Potter* [1978] 1 WLR 255 and *Alec Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd* [1985] 1 WLR 173. Singapore tracks the English position: *Rajabali Jumabhoy v Ameerali R Jumabhoy* [1997] 2 SLR(R) 296 at [198], *per* Prakash J.

105 National Consumer Credit Protection Act 2009 (Australia) s 180A.

106 National Consumer Credit Protection Act 2009 (Australia) s 7.

107 National Consumer Credit Protection Act 2009 (Australia) s 180A(4)(a).

108 National Consumer Credit Protection Act 2009 (Australia) s 180A(4)(b).

109 National Consumer Credit Protection Act 2009 (Australia) s 180A(4)(e).

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contract (given the conduct is of a third-party intermediary). Section 181 also provides that if the court imposes a fine as well as an order for compensation, the latter should be preferred if the party at fault does not have the resources to pay both the fine and compensation.

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

66 The ASIC Act 2001 protects consumers in relation to financial products or financial services. For instance, it protects borrowers from unconscionable conduct practiced in connection with financial services.[110] The act provides the court with wide powers to deal with unconscionability,[111] whether during the time of contract formation, in the terms of the contract, or in the enforcement of such terms.[112] 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.[113] These include the relative strength of the bargaining positions of the parties,[114] whether the customer was able to understand relevant documents,[115] whether any undue influence or pressure was exerted on the service recipient,[116] the extent to which the lender unreasonably failed to disclose to the customer any intended conduct of the lender that might affect the interests of the customer,[117] and the extent to which the supplier and the service recipient acted in good faith.[118]

110 Australian Securities and Investments Commission Act 2001 (Australia) Subdivision C.

111 *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447. This doctrine has also been enshrined in various Australian statutes such as the Contracts Review Act 1980 (NSW). For a comprehensive review on the doctrine and its relation to the elderly see F Burns, "Statutory 'Unconscionability': the Application of the Contracts Review Act 1980 (NSW) to the Elderly" (2005) *Journal of Business Law* 1.

112 Australian Securities and Investments Commission Act 2001 (Australia) s 12CB(4).

113 This is similar to the Second Sched to Singapore's Unfair Contract Terms Act (Cap 396, 1994 Rev Ed).

114 Australian Securities and Investments Commission Act 2001 (Australia) s 12CC(1)(a).

115 Australian Securities and Investments Commission Act 2001 (Australia) s 12CC(1)(c).

116 Australian Securities and Investments Commission Act 2001 (Australia) s 12CC(1)(d).

117 Australian Securities and Investments Commission Act 2001 (Australia) s 12CC(1)(i).

118 Australian Securities and Investments Commission Act 2001 (Australia) s 12CC(1)(l).

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67 Further to the issue of unconscionable conduct, the ASIC Act 2001 also protects a consumer from unfair terms. Where a contract is a standard form contract,[119] a term which is unfair may be declared void by the court.[120] A term of a consumer contract is unfair if it would cause a significant imbalance in the parties' rights and obligations arising under the contract, if it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term, and if it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.[121] In deciding if a term is unfair, the court should also consider if it is transparent to the other contractual party.[122] The Act provides a multitude of examples of unfair terms, including terms which allow one party but not the other to limit performance, terminate the contract, vary the contract, or limit evidence to be adduced in proceedings.[123] These affect very common terms in loan contracts such as entire agreement and non-reliance clauses.

68 If the court finds that there has been unconscionable conduct or an unfair term, it may order the financial institution to pay a pecuniary penalty to the State.[124] Where a body corporate is concerned, this may be a maximum of 10,000 penalty units. The monetary value of a penalty unit varies from state to state, although the figure is around A$100 *per* unit, which brings the maximum penalty close to A$1m. This pecuniary penalty is in addition to an action for damages which a victim may commence under s 12GF. The ASIC Act 2001 states that preference must be given to compensation for victims. If the defendant does not have sufficient financial resources to pay both the penalty and the compensation, preference should be given to an order for compensation.[125]

69 The ASIC Act 2001 also gives consumers a statutory right to seek recourse against "misleading and deceptive conduct".[126] The Act

119 Whether a contract is a standard form contract depends on the factors listed in s 12BK of the Australian Securities and Investments Commission Act 2001 (Australia).

120 Australian Securities and Investments Commission Act 2001 (Australia) s 12BF.

121 Australian Securities and Investments Commission Act 2001 (Australia) s 12BG(1).

122 Australian Securities and Investments Commission Act 2001 (Australia) s 12BG(2). A term is transparent if it is in plain language, legible, presented clearly and readily available to the party affected: s 12BG(3).

123 Australian Securities and Investments Commission Act 2001 (Australia) s 12BH.

124 Australian Securities and Investments Commission Act 2001 (Australia) s 12GBA.

125 Australian Securities and Investments Commission Act 2001 (Australia) s 12GCA.

126 Australian Securities and Investments Commission Act 2001 (Australia) s 12DA. This doctrine is also enshrined in s 18 of the Australian Consumer Law ("ACL"). Section 18 is materially similar to s 52 of the Trade Practices Act 1974, which is the predecessor of the ACL. Accordingly, jurisprudence relevant to s 52 of the Trade Practice Act 1974 and the Australian Securities and Investments Commission

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itself does not prescribe pecuniary penalties. Nor does the relevant section set out the criteria because it mainly refers to the Australian law doctrine by that name. The closest analogue is that of the doctrine of misrepresentation in English law. Effectively, a consumer who has entered into a contract for financial services or a financial product may seek damages in respect of loss suffered. The ASIC Act 2001 also reflects the common law idea of contributory negligence (where tortious misrepresentation is concerned), stating that there be a reduction in damages to reflect any contributory fault of the victim.[127]

70 By adding to what is available to consumers at common law, the above statutory protection provided by the NCCPA and ASIC Act 2001 adds to the armoury of a victim of sharp practice and acts as a strong deterrent to such inequitable conduct.

71 As mentioned above, the CCA in the UK does not specifically regulate mortgages. Elder consumers would therefore have to seek common law remedies, or other contract-regulating statutes such as the UCTA. It should be noted that the FCA does, however, retain supervisory jurisdiction over the institutions marketing such products, and has the power to take action if necessary.

72 In Singapore, the CPFTA is the foremost consumer protection legislation and, as its name suggests, the CPFTA seeks to deter unfair practices. Its Australian equivalent would be s 180A of the NCCPA which seeks to prevent "unfair and dishonest conduct". Section 4 of the CPFTA sets out four main grounds on which a transaction can be impugned as an unfair practice.

73 The first limb, s 4(*a*), states that it is an unfair practice for 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*,[128] the court held that whether a consumer might reasonably be deceived or misled was an objective test which was to be analysed 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.

Act 2001 are likewise apposite for the interpretation of s 18 of the ACL. For a comparison between s 52 of the Trade Practices Act 1974 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.

127 Australian Securities and Investments Commission Act 2001 (Australia) s 12GR.

128 [2010] 2 SLR 1065.

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This appears to mirror the guidelines used to determine "unfair and dishonest" under the NCCPA, where the courts are minded to ask if the category of consumers were at a special disadvantage or belonged to a class more likely to be disadvantaged. 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 interests. The court also held that s 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 s 4(*a*). The court made clear that the focus of s 4(*a*) was on the effect on a consumer, rather than the fault of the supplier. Where financial products are concerned, s 4(*a*) provides a robust protection for the elderly.

74 The second limb, in s 4(*b*), is more straightforward. It defines an unfair practice as the making of a false claim in relation to a consumer transaction. Section 4(*c*) provides that an unfair practice occurs when the supplier takes advantage of the consumer when the supplier *knows or reasonably 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 to s 4(*a*), the knowledge of the supplier is pertinent here. Similar to s 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 specifically with s 4(*c*).[129] Provisions in similar foreign statutes are also wider in their wording, and not entirely analogous for use in interpreting the subsection.[130]

129 Although it is not a case concerning s 4(*c*), the decision in *Als Memasa v UBS AG* [2012] 4 SLR 992 suggests that the court is sympathetic to vulnerable consumers and may, in certain circumstances, take into account peculiar weaknesses such as illiteracy. This decision concerned the purchase of Russian bonds by the appellant, one Tjio Bun Khai and his daughter Als Memasa, who were aged 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 protected 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.

130 R Chandran, "Consumer Protection (Fair Trading) Act" [2004] Sing JLS 192. Chandran points out that the equivalent under the Australian Trade Practices Act 1974, s 51AB, is the prohibition of unconscionable conduct, which imports a much wider and flexible concept. In comparison, the wording of s 4(*c*) of the Consumer Protection (Fair Trading) Act (Cap 52A, 2009 Rev Ed) appears to be more restrictive.

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75 Section 4(*d*) is a catch-all provision. Section 4(*d*) states that it is an unfair practice to do anything listed in the Second Sched. The Second Sched lists about 20 different fact scenarios in which an unfair practice may occur. Relevant to equity release transactions are cll 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, particularly if the default events arise from minor infringements. Clause 11 states that it is an unfair practice to "[take] advantage of a consumer by including in an agreement terms or conditions that are harsh, oppressive or excessively one-sided so as to be unconscionable". Section 12BH of the ASIC Act 2001 may be helpful in this regard. Terms that allow only the lender to limit performance, terminate the contract, vary the contract, and limit evidence to be adduced in proceedings are deemed to be unfair terms under the ASIC Act 2001. Clause 20 of the Second Sched to the CPFTA 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". This helps to deter a lender from taking advantage of oppressive terms lurking in the morass of legal jargon and dense language in the contract document.

76 To counterbalance the wide protections afforded under s 4 and the Second Sched, s 5 provides further guidelines for the court or tribunal on how to determine whether a person has been engaged in an unfair practice. This includes the "reasonableness of the actions of that person in those circumstances". In *Freely Pte Ltd v Ong Kaili*,[131] the High Court found that s 5(3) acts as a defence if the supplier is found to have acted reasonably in the circumstances.[132] In relation to financial products, reg 4 of the Consumer Protection (Fair Trading) (Regulated Financial Products and Services) Regulations[133] provides that:

> … for the purposes of section 5(3)(*a*) of the Act, a court may, in considering the reasonableness of the actions of a supplier of regulated financial products or services, take into account the inherent risks of the financial products or services supplied, if all relevant information concerning such risks has been provided to the consumer in good faith.

This encourages all suppliers of financial products to make clear the risks inherent in their product. If they do so, their actions are more likely to pass muster under s 5(3)(*a*).

131 [2010] 2 SLR 1065.
132 *Freely Pte Ltd v Ong Kaili* [2010] 2 SLR 1065 at [47]–[48].
133 GN No S 64/2009.

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77 Where s 4 is engaged, s 6 entitles the consumer to bring an action under the Act. Under s 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 publicise the terms of such declaration or injunction to its consumers.[134] 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.[135]

78 The protection 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 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. This may only assist elders who enter into an equity release transaction with a conservative loan amount. Otherwise, where equity release products are concerned, this amount is likely to be surpassed several fold given the value of private property in Singapore. No similar limits fetter the court's powers in the NCCPA or ASIC Act 2001. In this regard, it may be time for Parliament to reconsider the prescribed limit under the CPFTA, with particular reference to financial products.

### *D. Elder abuse and undue influence*

79 Examining the growing literature[136] on elder abuse would go beyond the scope of this article. However, this is a real area of concern

134 Consumer Protection (Fair Trading) Act (Cap 52A, 2009 Rev Ed) s 9(1).

135 See generally Consumer Protection (Fair Trading) (Cancellation of Contracts) Regulations 2009 (GN No S 65/2009). Regulation 3(*h*) excludes financial products which already carry a right of cancellation conferred under laws administered by the Monetary Authority of Singapore or under the Securities and Futures Act (Cap 289, 2006 Rev Ed). The former category may include insurance policies which generally allow the consumer to cancel the contract for free within 14 days.

136 In *Hsu Ann Mei Amy v Oversea-Chinese Banking Corp Ltd* [2011] 2 SLR 178 at [29], the Court of Appeal cited the following pieces of literature before enumerating a list of possible red flags for elder abuse: (a) Susan J Heakes, "Fraud Against Elders: Is the Bank on the Hook?" (Canada); (b) 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); and (c) guidelines issued by the Ministry of Community Development, Youth and Sports on "Understanding Elder Abuse and Neglect – Detecting and Helping". See also H W Tang, "The Prevention of Financial Elder Abuse" *Law Gazette*, vol 3 (May 2010); Mary Joy Quinn, "Friendly Persuasion, Good Salesmanship or Undue

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for elders. Due to their age and declining faculties, elders may be easily taken advantage of by persons close to them. That there are elder protection laws and mandatory reporting of abuse in some jurisdictions[137] highlight the real danger of elder abuse. Some have also suggested that elders who are in the baby-boomer bracket are particularly susceptible because of the amount of wealth they are likely to have.[138]

80 In *Hsu Ann Mei Amy v Oversea-Chinese Banking Corp Ltd*,[139] the Court of Appeal considered the issue of elder financial abuse and set out certain guidelines which indicate red flags of elder financial abuse. These include where an elderly person: (a) is accompanied by a family member or other person who seems to coerce them into making transactions; (b) is not allowed to speak for himself or herself, or where the party accompanying the elderly person does all the talking; (c) is physically absent when the instructions are given to the bank; (d) does not appear to benefit from such transactions even though there are significant withdrawals or transfers suddenly made by or on behalf of the elderly person; (e) is not able to understand or aware of recently completed transactions; and (f) is not able to understand what the documents he or she has signed mean. The Court of Appeal explained that the existence of one or more red flags may be sufficient to put a bank on notice of potential financial abuse of the elderly customer. It would serve a financial institution well to observe these guidelines in the sale of equity release products given that in most cases the real property involved is the elder's main repository of wealth.

### *E. Dispute resolution forums*

81 Disputes arising from equity release products are not likely to be different from mortgage disputes, the most common and drastic

Influence" (2000–2001) 2 *Elder's Advisor* 49; Andrew Fischer, "Elder Abuse: A Private Problem that Requires Private Solutions" (2012) 8 *Journal of Health and Biomedical Law* 81; Fiona Burns, "Elders and Undue Influence *Inter Vivos*: Lessons from the United Kingdom?" (2003) 24 *Adelaide Law Review* 37; Lorna Fox O'Mahony & James Devenney, "Undue Influence, the Elderly and Equity Release Schemes" (2006) 5 Elder L Rev 1; and Rochford Gibson, "Emerging Consumer Credit Issues for Older Australians" (2008) 12(1) *University of Western Sydney Law Review* 73.

137 For instance, the state of California has enacted the Elder Abuse and Dependent Adult Civil Protection Act and in Canada, the State of British Columbia has in place the Adult Guardianship Act.

138 Shelby A D Moore & Jeanette Schaefer, "Remembering the Forgotten Ones: Protecting the Elderly from Financial Abuse" (2004) 41 *San Diego Law Review* 505; 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).

139 [2011] 2 SLR 178.

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action being a home repossession. Having alternative dispute resolution ("ADR") channels may assure elders of a low cost and potentially less adversarial alternative. In this regard, the ADR schemes in Australia and the UK for financial products provide a welcome function in reducing litigation costs.

82 As mentioned above, the NCCPA is the Australian 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 mandatory internal and external dispute resolution processes. Under the NCCPA, Australian financial services licensees, unlicenced product issuers and secondary sellers are required to have ASIC-approved forms of dispute resolution processes.[140] This typically includes an internal dispute resolution ("IDR") process, and membership to an external dispute resolution ("EDR") scheme.[141] Licensees are required to inform customers of their right to bring an unsuccessful internal dispute resolution complaint to an external dispute resolution process.[142]

83 IDR mechanisms which are set up by financial institutions are supervised and approved by ASIC. IDR procedures are said to allow an organisation to resolve complaints quickly and directly, and allow the organisation to identify and address recurring or systemic problems and permit them to provide solutions to problems rather than have remedies imposed on them by external parties.[143] Any "dispute" (under the NCCPA) raised by the consumer must receive a "final response" from the organisation within 45 days. This comprises of the final outcome of their complaint and notice given to the consumer that they may take their complaint or dispute to EDR.[144] As regards EDR, the two main ASIC-approved schemes are the Financial Ombudsman Service[145] and

140 Specifically, dispute resolution mechanisms are made mandatory for: (a) Australian financial services licensees vide ss 912A(1)(g) and 912A(2) of the Corporations Act 2001; (b) an unlicenced product issuer or secondary seller vide s 1017G of the Corporations Act 2001; and (c) a credit licensee vide s 47 of the National Consumer Credit Protection Act 2009.

141 Australian Securities and Investments Commission reg 139.

142 Australian Securities and Investments Commission reg 139.6 and reg 139.9.

143 Australian Securities and Investments Commission reg 165.71.

144 Australian Securities and Investments Commission reg 165.91.

145 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"); and the Insurance Brokers Disputes Limited ("IBDL"). In the Australian Securities and Investments Commission's Regulation Impact Statement titled "Dispute Resolution Requirements for Consumer Credit and Margin Lending" (May 2010) at para 28, it reports that the FOS provides dispute resolution services for close to 90% of all Australian financial services complaints: <http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/RIS-dispute-resolution-

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Credit Ombudsman Service.[146] Both services consolidate previously disparate groups of ombudsman services under their respective umbrellas. Under the relevant Corporation and National Credit Regulations,[147] ASIC acts as the body approving and overseeing all EDR processes for organisations, to ensure that such processes remain accessible, independent, fair and effective. All EDR schemes must be free of charge to the complainant to provide accessibility.[148]

84 In the UK, the Financial Ombudsman Service is the avenue for resolution of disputes between consumers and businesses providing financial services. The Ombudsman Service was introduced in 2000 vide the FSMA, 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".[149] Typically, before a matter is referred to the Ombudsman, it is to be dealt with by the relevant service provider. This is similar to the IDR scheme in Australia. The FCA has also made publicly available a handbook setting out detailed guidelines on internal complaint mechanisms. These guidelines include a time limit of eight weeks, by which the respondent organisation must provide the complainant with a "final response" in written form, informing the complainant as to whether it accepts the complaint and offers redress or rejects the complaint and proffers reasons for the same.[150] The complainant then has six months from the date of the final response to seek redress from the Financial Ombudsman.[151]

85 The Financial Ombudsman covers close to all financial services[152] under its broad-ranging jurisdictions. It has compulsory jurisdiction over all financial services businesses authorised or registered by the FCA. About 30,000 businesses are regulated by the FCA and may be found on its register. It also has consumer credit jurisdiction under the Consumer Credit Act 2006, which covers consumer credit

for-credit-and-margin-lending.pdf/$file/RIS-dispute-resolution-for-credit-and-margin-lending.pdf> (accessed 1 August 2014).

146 The Credit Ombudsman Service encompasses the following schemes: (a) Credit Ombudsman Service Limited; and (b) Financial Co-operative Dispute Resolution Scheme.

147 See regs 7.6.02(3)–7.6.02(4) and 7.9.77(3)–7.9.77(4) of the Corporations Regulations and regs 10(4)(a)–10(4)(c) of the National Credit Regulations.

148 Australian Securities and Investments Commission reg 139.46 and reg 139.47.

149 Financial Services and Markets Act 2000 (c 8) (UK) s 225(1).

150 Section 1.6.2 of the Financial Conduct Authority Handbook <http://media.fshandbook.info/content/full/DISP.pdf> (accessed 1 August 2014).

151 Section 1.6.2 of the Financial Conduct Authority Handbook <http://media.fshandbook.info/content/full/DISP.pdf> (accessed 1 August 2014).

152 Statement on the Roles and Responsibilities of the Financial Ombudsman Service and the Lending Standards Board dated 14 March 2012, in particular, para 1.4, <http://www.financial-ombudsman.org.uk/about/LSB-MOU-2012.pdf> (accessed 1 August 2014).

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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.[153] 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 six months' time limit for a consumer to lodge a complaint after receiving a "final response" from the service provider, he or she must do so within six years from the event which gave rise to the complaint.

86 Singapore's ADR scheme for the financial services industry stands its ground compared to its Australian and English counterparts. On 31 August 2005, 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. FIDRec is not a government body but a public company limited by guarantee, funded by the financial sector.[154] Some of its guiding principles include accessibility, fairness, independence and efficiency.[155]

87 FIDReC is empowered by MAS. MAS requires all regulated financial institutions which have dealings with retail customers to subscribe as members of FIDReC.[156] Subscription means a submission to FIDReC's jurisdiction and an agreement to be bound by the FIDReC Terms of Reference.[157] Crucially, the Terms of Reference cannot be amended without approval of MAS.[158] FIDReC is also obliged to send regular qualitative reports on the types and number of disputes brought to FIDReC. This is similar to the mandatory oversight of ASIC in Australia and compulsory jurisdiction of the Financial Ombudsman in the UK.

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153 The Ombudsman also has voluntary jurisdiction over parties outside of its compulsory and consumer credit jurisdiction which typically applies to organisations carrying on business in the European Economic Area but who may not have an office in the UK.

154 Monetary Authority of Singapore, "Policy Consultation on the Financial Industry Disputes Resolution Centre" (October 2004) at para 1. FIDRec is not entirely new. It subsumes and builds on the dispute resolution functions of the Consumer Mediation Unit and the Insurance Disputes Resolution Organisation.

155 Monetary Authority of Singapore, "Policy Consultation on the Financial Industry Disputes Resolution Centre" (October 2004) at p 3. To ensure independence and fairness, its board comprises of an independent director, three directors representing consumers, one director each representing the financial institutions, insurers and financial advisers.

156 Monetary Authority of Singapore, "Policy Consultation on the Financial Industry Disputes Resolution Centre" (October 2004) at para 12.

157 Available online at<http://www.fidrec.com.sg/website/termsref.html> (accessed 1 August 2014). Members of the Financial Industry Disputes Resolution Centre are also required to pay levies and fees to the Centre.

158 Financial Industry Disputes Resolution Centre, Terms of Reference (ver1.6) (20 September 2012) at s 3, cl 7(3).

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88 The FIDReC process is uncomplicated and therefore suitable for retail investors. As with the IDR process in Australia, a complainant is allowed to file a FIDReC complaint after the matter has been referred to the financial institution's internal dispute resolution department without resolution, but no later than six months after the complainant has received a "final reply letter" from the financial institution.[159] The final reply letter serves the same function as the "final response" in Australia and the UK ADR regimes. It notifies the complainant of the financial institution's final position on the matter and informs the complainant that it can bring the matter to FIDReC within six months of receipt of the letter.[160]

89 Under cl 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 at $50,000, or where the financial institution agrees to the claimant's claim amount which is above $50,000. This invariably limits the number of disputes over financial products which may be brought to FIDRec. In particular, where equity release products are concerned, this limit may be too low for the elder borrower to avail himself or herself of the FIDReC regime.[161]

90 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.[162] The

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159 Financial Industry Disputes Resolution Centre, Terms of Reference (ver1.6) (20 September 2012) cl 6.

160 Financial Industry Disputes Resolution Centre, Terms of Reference (ver1.6) (20 September 2012) cl 13(2).

161 In fairness, there are arguments for limiting the number of mortgage disputes being submitted for alternative dispute resolution ("ADR"), on the grounds that ADR may be more arbitrary and it hurts the finance industry by introducing a fair amount of uncertainly in their property rights: Bransgroves Lawyers, "Why the External Dispute Resolution Regime is Hurting Capital Availability in Australia" (A White Paper presented by the mortgage lending industry to the Parliamentary Joint Committee on Corporate and Financial Services and the Senate Economics Legislation Committee, 30 April 2012) <http://www.bransgroves.com.au/documents/White_Paper.pdf> (accessed 1 August 2014). In particular, para 38 of the White Paper states:

> When property rights are known in advance it encourages the owners of money to venture capital pursuant to contracts they know the law will enforce. One of the greatest leaps of faith in a market economy is in the advancing of large sums of money against the security of real property. Simply put if lenders cannot be certain they will get their capital back, or obtain a return on their capital, they will not lend.

162 It is not a bar, however, for in-house counsel to be involved, or for the consumer to be assisted by a legally-trained friend or family member: Financial Industry

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adjudicator's decision is binding on the financial institution but not on the complainant.[163] Another helpful aspect is the use of nominees. Under the Terms of Reference, a consumer may, by way of a power of attorney, appoint a nominee to represent him or her at the relevant hearings.[164] 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.[165]

## VI. Conclusion

91 The rise in Singapore's elder population will undoubtedly affect the country's social and economic policies. One way to deal with elders' cost of living issues is to encourage the market to introduce (or reintroduce) equity release products for private property. These unique financial products are well poised to provide liquidity to the elder population who may be asset-rich but cash-poor.

92 However, elders are a vulnerable group and may face numerous difficulties in appreciating the complexity of equity release products. Crucially, Singapore may consider following Australia's lead in prescribing the scope of information to be provided to elders such as the need to provide projections and information statements. It is also crucial that the risk of negative equity be removed, or made clear to a prospective elder borrower. The Fair Dealing Guidelines serve as an encouraging marker in terms of consumer protection for financial products but can go further. Separately, Singapore's framework for mental capacity and elder abuse are nascent but appear adequate in dealing with issues raised by elders and financial products.

93 In terms of substantive protection, Singapore could consider varying the prescribed limit under the CPFTA especially in connection with financial products and services. The CPFTA was originally enacted for consumer products, and there would be scope to augment the Act to deal with specific issues posed by financial products. Should equity release products find traction, it may be worthwhile considering if the prohibition against unconscionable conduct in Australia should be introduced in Singapore. That may not be required for now since the CPFTA appears to have sufficient protection against unfair practices due

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Disputes Resolution Centre, "Dispute Resolution Processes" <https://fidrec.com.sg/website/processdisp.html> (accessed 1 August 2014).

163 Financial Industry Disputes Resolution Centre, "Frequently Asked Questions" <http://www.fidrec.com.sg/website/faq.html> (accessed 1 August 2014).

164 Financial Industry Disputes Resolution Centre, "Dispute Resolution Processes" <https://fidrec.com.sg/website/processdisp.html> (accessed 1 August 2014).

165 Financial Industry Disputes Resolution Centre, "Dispute Resolution Processes" <https://fidrec.com.sg/website/processdisp.html> (accessed 1 August 2014).

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to the special disadvantage of a class, or the unfair advantage taken by a lender. Nonetheless, Australia's NCCPA and ASIC Act 2001 remain as useful guideposts in regulating the financial products market.

94 In the wake of the 2008 financial crisis, FIDReC has proven itself to be effective and efficient by the large number of mini bond-related disputes being resolved.[166] However, 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 due to the relatively low cap on claims which can be brought to FIDReC.

95 Seen in totality, Singapore's elders are not left completely unprotected by the current legal and regulatory framework. However, more will need to be done if equity release products are to take flight as they have in Australia and the UK.

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166 Conrad Tan, "Over 1,000 Lehman-linked Disputes Solved: FIDReC" *Business Times* (1 December 2009).

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