PART 11 - MATTERS OF LESS IMPORTANCE THAN PART 5 TO PART 10 MATTERS

In Parts 5 to 10 of these Reasons the Authority has examined principally the matters that it indicated on 23 June, 1989 were of the greatest importance and relevance to the question whether a licence should be granted to the Applicant.

Those indications did not, as was then made clear, deal with the large number of matters put forward by the Applicant in its favour, particularly the way in which the Applicant has tackled the remedying of individual cases and the changes which the Applicant has made to its practices and to its management structure. These will be examined in Parts 12 and 13 of these Reasons.

There remain to be mentioned those matters raised by the Objectors or by the Authority itself which have not been dealt with in Parts 5 to 10. There is a considerable number of such matters but the Authority considers it is possible to divide the matters into four categories as follows -

(a) matters where the Applicant was not at fault in any sense;

(b) matters where the applicant believed that its conduct was lawful and where the question whether the conduct was in compliance with the Credit Act or was otherwise lawful involves a difficult question of law;

(c) matters where the Applicant's conduct was based on an erroneous but nonetheless genuinely held view of the requirements of the Credit Act or other law; and

(d) matters where the Applicant's conduct was in breach of the Credit Act or other law, but where the principal causes appear to have been ignorance of the law, mismanagement, inadequate training or supervision or like causes.

It is obvious that matters in category (a) cannot be relevant, at least in any adverse sense, to the question whether a licence should be granted.

As to category (b) and (c) matters, it seems to the Authority that where it is shown that the Applicant's conduct was based on a reasonable and genuinely held view of the applicable law, such conduct scarcely provides a basis for a view that the Applicant might not in future conduct its business honestly, efficiently or fairly, irespective of whether the Applicant's view of the law was correct.

The matters which we regard as category (a) matters are the following -

1. <u>Excessive interest rates</u> - There is no evidence to support this allegation. Indeed the evidence is that, except for its real estate loans, HFC's interest received has not, in recent times, met the cost of obtaining funds for lending together with overhead costs.

2. Collecting debts owed to BFC - The essence of the allegation by CCLS was that HFC had collected in its own right debts owed to BFC but without compliance with the provisions of the Property Law Act 1958, the Instruments Act 1958 or the Money Lenders Act 1958 relating to assignments. In our view the objection fails because HFC was acting as the agent of, or for and on behalf of, BFC and the debts which it collected belonged to BFC. HFC was not the assignee of the debts.

3. Refinancing _ CCLS attacked HFC's policy of requiring an existing borrower who is seeking further credit, to take out a new loan which both re-finances the balance due under the existing loan and provides the new credit sought. This objection can be valid only if the terms of the re-financing are unfair.

It also attacked HFC's use of the permitted "approximation methods", rather than the actuarial method, for calculating accrued credit charges on loans being refinanced.

The Credit Act protects a borrower discharging a loan prematurely by limiting the lender's entitlement to credit charge to that which has accrued up to the time of discharge and by requiring that the credit charge must be calculated in one of the ways specifically permitted by the Act. It seems to the Authority that this leaves no room for arguing that the use of any of the permitted methods can be unfair, including the use of a permitted method to calculate the net balance due

on a loan being refinanced. For this reason both objections fail.

4. <u>Section 131 of the Credit Act</u> - The Authority raised the question whether HFC's methods of dealing with, and accounting to the Heritage companies for, premiums received in HFC branches complied with section 131. The Applicant argued that so long as HFC dealt with the monies strictly in accordance with the instructions of Heritage, it could not be in breach of section 131. The Authority considers that the Applicant's argument is correct.

5. <u>Secret Commissions</u> - For this point to have any validity, it had to be established that HFC branch staff were the agents of the borrowers for the purposes of arranging insurance with the Heritage companies. In our view, the factual situation was just the reverse and the staff were the agents of the Heritage companies.

6. <u>Section 122 of the Credit Act</u> - The Authority considers that the solicitation of loans by telephone calls or letters made or sent to customers' residences does not constitute canvassing at the residences of persons within the meaning of section 122.

7. <u>Unclaimed Moneys</u> - The Authority considers that the <u>Unclaimed Moneys Act</u> 1962 does not apply to HFC which, being a recognised company, is neither a company nor a foreign company for the purposes of that Act.

Category (b) and (c) matters

As to category (b) and (c) matters, there is in the Authority's view, for the reasons given earlier, no good purpose to be served by doing more than merely specify the relevant matters.

Category (b) matters

Whether HFC's regulated loan and mortgage documents are legible and comprehensible.

Whether the form of the retail sales contract is misleading and in breach of the Credit Act.

Whether a continuing credit contract has been formed at the time that the first "purchase" of goods from a retail merchant takes place.

Whether the Credit Act prohibited HFC from including in the amount financed premiums payable to Heritage Life for term life insurance.

Whether the statement concerning the payment of commission to HFC by Heritage on HFC's regulated loan contract complied with the Credit Act.

Whether BFC's Bencharge contracts are continuing credit contracts for the purposes of the Credit Act.

Whether the method used for the calculation of interest accrued under pre-Credit Act contracts is correct

Category (c) matters

Inclusion of financial institutions duty in amounts financed under regulated contracts.

Category (d) matters

Matters in category (d) are different, essentially in that they are not matters where the Applicant had examined the legal consequences of the conduct concerned and reasonably formed a view that the conduct was lawful or proper. Rather, those matters resulted from ignorance of the law, mismanagement, inadequate training or supervision and like causes. As such, those matters are potentially more relevant to the question of whether a licence should be granted, for they may be indicative of a likelihood of similar conduct in the future.

As to category (d) matters, the Authority proposes to deal with such of them in such detail only as is necessary, having regard to the nature of the task on which the Authority is engaged. It is important to bear in mind that the Authority is not engaged on a fault finding task; its task is to reach a view about the nature and quality of the Applicant's future conduct assuming that a licence were to issue.

The category (d) matters are -

1. Excessive Vehicle Security Registration Fees

From some time prior to the commencement of the Credit Act until September 1987, HFC's Victorian branch offices charged

borrowers more than the fees actually payable under the Chattel Securities Act for the registration of securities taken over motor vehicles in connection with regulated loan contracts.

The amount normally charged by HFC was $9 whereas the fee payable under that Act and, therefore, properly chargeable in the contracts was initially $6 and subsequently $6.40.

The Authority is satisfied that the overcharging was not intentional and that the overcharging by Victorian branch staff arose from a misinterpretation of an instruction given by HFC's company secretary. It is, however, to be noted that the overcharging went undetected until August or September 1987 when it was brought to HFC's notice by the Objection lodged by CCLS. It appears that there were some 1816 cases of overcharging (see AC290).

2. Close-out Fees

There are two quite separate classes of cases in which HFC wrongly imposed fees, called close-out fees, in contravention of the Credit Act upon the early termination of regulated loans.

One class of cases occurred simply because HFC was ignorant of the effect of section 73 of the Credit Act which provides that a contract which refinances a regulated loan contract is itself a regulated contract. HFC wrongly assumed that loan contracts

where the amount advanced exceeded $20,000 were not regulated and charged close-out fees on such contracts.

It appears that there were in excess of 40 cases of this type.

HFC did not become aware of the effect of section 73 until August or September 1987 when it received the CCLS Objection.

The other class is of cases where close-out fees were charged on contracts which were for amounts of less than $20,000 and for which, therefore, there was no reason for HFC staff to believe that the contracts were not regulated. There were approximately 120 cases in this class.

HFC is unable to offer any explanation for these cases, as its instructions did not direct the charging of close-out fees on regulated contracts. It is to be noted, though, that close-out fees could be charged lawfully on the early termination of contracts entered into prior to the commencement of the Credit Act. As a consequence HFC staff would undoubtedly have been properly charging close-out fees on such contracts after the Credit Act commenced and it seems to the Authority to be possible that the wrong charging of close-out fees on regulated loan contracts resulted from a failure to distinguish between pre-Credit Act contracts and regulated contracts. It is also to be noted that over the period between 28 February 1985 and 25 July, 1987 when the great bulk of these cases occurred, there were over 11,000 loan contracts finalised and from that

it appears that the incidence of this problem was comparatively minor.

3. Incorrectly charged Stamp Duty

HFC has informed the Authority that there were 1137 cases where amounts of stamp duty were wrongly charged to consumers. Most of these cases were attributable to a failure by HFC to become aware of amendments to Victorian Stamp Duty law which took effect in December 1985, by which stamp duty ceased to be payable on mortgages securing obligations under regulated loan contracts.

HFC did not become aware of the change in the dutiability of mortgages until it received the Objection from CCLS in August or September 1987, whereupon the practice ceased. It also appears that within that number of 1137 are a number of cases where stamp duty was charged on regulated loan contracts. Such contracts have not been dutiable in Victoria at any time since the coming into operation of the Credit Act.

There was also the much more serious matter of the failure by HFC to expend monies collected on the purchase of duty stamps, but that has been dealt with in Part 6.

4. Valuation Fees

From 28 February 1985 until 11 August 1987 it was not permissible to include valuation fees in the amounts financed

under regulated contracts. From 11 August 1987 onwards it has been lawful to do so.

HFC has admitted that there were 146 cases in which it wrongly included amounts of valuation fees in the amounts financed under regulated loan contracts and it is said that it does not know why these cases occurred.

It appears that HFC was not aware of the valuation fee problem until it received the CCLS Objection.

5. Search Fees

Although the Credit Act permits a lender to include in the amount financed reasonable amounts of fees paid to a qualified legal practitioner, it is not lawful to include in the amount financed amounts paid to firms of title searchers for searching.

It appears that there are 191 cases in which amounts for search fees were wrongly included. As was the case with respect to valuation fees, HFC does not know what the cause of the problem was and it only became aware of the problem after receiving the Objection from CCLS.

6. Calculation of net balance due

From 28 February 1987 until July 1987 HFC used the Rule of 78 to calculate the accrued credit charge for the purposes of

ascertaining the net balance due under contracts which were discharged prematurely. There were in excess of 8,000 contracts involved. There is no doubt that HFC, in common with other major lenders in the consumer sector both in Victoria and elsewhere where the uniform credit legislation is in force, thought that the approximation method prescribed in Schedule 1 of the Credit Act was a restatement of the Rule of 78.

On 26 June, 1987 the Full Court of the Supreme Court of Victoria decided otherwise.

The Authority is satisfied that HFC took all reasonable steps to cease the use of the Rule of 78 in its branches and thereafter to cause the calculations of accrued credit charges to be made according to proper formulae.

7. Section 69 Statements

HFC admits that from 28 February, 1985 to 1 September, 1988 it failed to comply with section 69 of the Credit Act which requires a credit provider who is refinancing an earlier regulated contract made by it, to give to the debtor a written statement setting out certain information which explains how the net balance due under the earlier contract has been calculated.

HFC admits that between 28 February, 1985 and December, 1985 it gave no statement at all explaining how the net balance due

under the contract being refinanced had been calculated. Between December 1985 and the middle of 1986 a document providing some of the information required to be included in a section 69 statement was given. From mid 1986 until 1 September, 1988 HFC used section 104 statements in place of section 69 statements.

In considering this matter it is to be remembered that the refinancing of loans forms a substantial part of HFC's business. It has standing instructions which require branch staff to regularly offer further credit to existing borrowers. As mentioned earlier, it is also HFC's policy not to allow a borrower to have two loans concurrently but to require any earlier loan to be refinanced whenever further credit is granted.

In light of those matters, the failure by HFC to provide information of the kind required by section 69 during 1985 was serious. Its conduct from mid 1986 onwards was certainly less serious in that the borrowers were given, in the form of section 104 statements, substantially the same information as would have been included in section 69 statements. It may well be the case that the additional information required to be included in a section 69 statement as against a section 104 statement is of doubtful use to most borrowers. Indeed it may be the case that a section 104 statement is more useful to borrowers in the sense that only from a section 104 statement can the borrower easily check that all his repayments have been duly credited. Nonetheless section 69 was not complied with.

As to the reasons why HFC failed until September 1988 to give proper section 69 statements, Mr. Wilson said he thought that a section 104 statement satisfied all the requirements of a section 69 statement. That might be thought to be a curious belief, having regard to the differences in terminology in the two relevant parts of the Act, but it appears that this belief may have been fostered or reinforced by the approval by a leading firm of solicitors of an HFC manual which suggested the use of section 104 statements for refinancing.

On balance, the Authority considers that while HFC failed for a very considerable period to comply with section 69 of the Credit Act, the seriousness of its failure is ameliorated considerably by the fact that since mid 1986, at the latest, it has provided borrowers with substantially equivalent information and thus cannot be taken to have sought to defeat the main objects of the section.

8. Other "technical" breaches

There is evidence of a range of breaches of other requirements of the Credit Act which did not result in readily measurable, if any, disadvantages to consumers. These included -

failure to provide copies of contracts prior to execution;.

failure to provide all parties to contracts with executed copies; and

failures to provide "Form 4" documents (see Maloney's evidence).

When the Credit Act came into operation on 28 February, 1985 there were many changes required to be made in the forms of documents and in the procedures to be followed prior to, at and after the execution of regulated contracts and guarantees. There were also new constraints on the fees and charges which could lawfully be included in the amount financed under contracts. The Authority considers that even numerous breaches of those provisions, particularly if the breaches occurred in the period immediately after the Credit Act came into operation, do not indicate very much about the likelihood of the credit provider complying with the law some years afterwards. What is more indicative is whether the credit provider made reasonable efforts to comply initially and, more importantly, how quickly and effectively it has attended to deficiencies as and when they become known.

Finally, there is, in the Authority's opinion, a very significant difference between all of the matters listed in category (d) and most of those that have been examined in Parts 5 to 10. While the conduct involved in the various category (d) matters was obviously less than ideal, it did not, in the Authority's view, involve dishonesty, conscious unfairness or conscious tolerance of deficiencies in management, training or supervision.