PART 12 - REMEDYING INDIVIDUAL CASES

Before examining the various steps which HFC has already taken, and those which it has committed itself to taking, to compensate borrowers for HFC's past actions, it is necessary to refer to what are known as civil penalty provisions of the Credit Act.

Section 36 and the Fourth Schedule have the effect of regulating the amounts that may be included in the amount financed under a regulated loan contract. The inclusion in the amount financed of an amount of a kind not permitted or of an excessive amount may attract the operation of section 42 of the Act. In that event, the debtor is not liable for any of the credit charge provided for under the contract.

Many of the errors and breaches committed by HFC were of a nature which may have attracted the operation of section 42. To the extent that such is the case, HFC has no entitlement to any credit charge.

However, section 85 of the Credit Act permits a lender to apply to the Credit Division of the Small Claims Tribunal ("the Tribunal") for an order re-entitling the lender to the whole or part of credit charge so lost, as the Tribunal may see fit. Section 86 enables an order to be made in respect of a number of contracts which are affected by the same type of error or breach.

HFC's difficulties with the civil penalty provisions may not end with the contracts in which the breaches or errors first occurred. Many of those contracts were refinanced, sometimes more than once, before HFC was aware of the possible loss of credit charges. In each such

case, the amount financed may be regarded as having been overstated, simply because in calculating the net balance due under the original contract it was assumed that the credit charges had accrued as provided for in the terms of the contract. It is considered that in this way section 42 may apply also to the refinancing contracts. The term "infected contracts" is used to describe these contracts.

HFC has refunded to all affected borrowers that it has been able to locate -

1. Excessive interest charged on early loan terminations - the Rule of 78 problem - (most refunded March, 1988).

2. Excessive vehicle security registration fees (refunded April, 1988).

3. Valuation fees improperly charged (refunded November, 1988).

4. Title searching fees improperly charged (refunded November, 1988).

5. Stamp duties where improperly charged (most refunded April and November, 1988).

6. Certain of the close out fees improperly charged (refunds of the "section 73" cases made May, 1988).

HFC has undertaken to make refunds to all affected borrowers of -

7. Excessive interest charged in further "Rule of 78" cases that have been identified since the refunding program of March 1988 was completed.

8. The balance of the close-out fee cases.

9. Excessive insurance premiums charged.

10. Amounts of credit insurance originally under rebated.

The Authority sees no reason to doubt that if in the course of further searches the Applicant discovers other cases of a kind already listed, refunds will be made in those cases.

HFC considers that affected borrowers ought also to be paid interest. Where the unauthorised or excessive charge or the inadequate rebate was made at the termination of a contract, as is the case with close-out fees and incorrect insurance rebates, HFC has undertaken to pay interest calculated at the rate of 18%, compounding monthly. Where the unauthorised fee or charge was made at the commencement of a contract, HFC proposes to pay interest at the same rate as that provided under the contract. But it is in connection with the latter fees or charges that the civil penalty provisions of the Credit Act become relevant.

HFC does not concede that, as a matter of law, it has forfeited its right to credit charges under the affected contracts, but clearly there

is a possibility that ultimately that issue might be decided against it in respect of some or all of the various classes of errors.

The extent of the potential civil penalty problem with HFC's regulated contracts is immense. There are in excess of 15,000 individual errors. The number of contracts directly affected by those errors is somewhat less, as some contracts have more than one type of error, but there are, in addition, the refinancing contracts which may also be held to suffer from the infected contract problem.

HFC has made applications to the Tribunal under section 85/86 in respect of all contracts, including infected contracts, in which it appears that it may be at risk of being held to have lost its entitlement to credit charges.

HFC has decided to await the outcome of the Tribunal's decisions on its section 85/86 applications before paying interest to borrowers whose contracts are included in those applications. However, it has committed itself to paying interest at the contract rate or at 18% compounded monthly (whichever is appropriate) in those cases where the particular errors are ultimately held not to have resulted in loss of credit charges. The Authority considers that, in the circumstances, this is a fair and logical approach to take.

There is no doubt that the Applicant has undertaken difficult, expensive and time consuming searches of its records in order to assemble the information required to make the refunds already made and to prepare for the making of refunds which have yet to be made, but it is also true that to a very considerable extent those searches had a

dual purpose in that they were also necessary to provide the information required to enable HFC's section 85/86 applications to be prepared.

Towards the end of the hearing HFC announced that it was proposing to take further steps in an effort to compensate borrowers affected by its past actions. It proposes the following -

1. HFC will review -

   (a) each of the files involved in the section 85/86 applications;

   (b) all regulated contract files now held in the Central Collections Office and all files referred there in the future from branches; and

   (c) all existing and former loan contracts whenever the borrower obtains further credit or the terms of the loan with the borrower are varied,

   for the purpose of determining whether there were any other errors made by HFC. Any further errors so detected will be dealt with either in a similar manner to that adopted for breaches that have already been detected or by HFC abandoning any claim to credit charges and refunding the whole of such charges, as HFC may elect.

2. HFC will advertise in relation to a large number of potential mistakes so that customers who were affected will have an opportunity to approach HFC and be compensated. This proposal recognises that there may have been errors in contracts that are not detectable by examinations that HFC can make of its own records, such as errors or omissions that occurred only in borrowers' copies of contracts.

In addition to those measures which are intended to apply to a variety of types of errors, HFC has specific proposals for the following -

1. HFC will advertise for loan contracts in which no percentage rate was included. In such cases HFC will either make application under section 85 or 86 of the Credit Act or, alternatively, refund the credit charge.

2. HFC will undertake the searches and further work necessary to identify -

   (a) secured loan contracts where the interest rate exceeded 30%; and

   (b) secured loans where the interest rate, though expressed at below 30%, would increase to beyond 30% if recalculated on the basis that any unauthorised or excess fee or charge, such as stamp duty, valuation fees or security registration fees, were regarded as interest.

In cases where the rate was expressed to be in excess of 30% (and in the recalculated cases, depending upon what legal view ultimately prevails) HFC will take appropriate action such as notifying the borrower that the property is not secured, refunding costs or fees that were related to the security and giving appropriate notice and advice to the debtor if repossession has taken place.

3. HFC will advertise for instances in which legal fees, collection expenses or valuation fees may have been improperly charged.

4. HFC will conduct searches to identify any cases in which repossessions were effected under expired Bills of Sale or loan contracts where HFC had no security. In any cases detected, HFC will notify the debtors that the goods were repossessed improperly and that the debtors have a possible right to compensation and will suggest that the debtors obtain legal advice.

5. HFC will search its records in the Central Collections Office for voluntary surrenders where no security was held.

6. HFC will advertise for cases where repossessions or voluntary surrenders took place under unsecured contracts.

7. HFC will advertise for the cases where debtors made payments to it after becoming bankrupt and any amounts found to have been so paid will be paid to the Trustee in Bankruptcy or other appropriate Authority.

8. HFC will, by advertisement, invite any borrower who made a claim under a credit insurance policy but was rejected or who believed that he or she had a claim but was discouraged from making it, to resubmit or submit any such claim.

HFC aims by doing this to identify any cases where claims were wrongly rejected, including cases where an insured was wrongly deterred from claiming, but this process will also identify cases where HFC was aware of disqualifying pre-existing conditions when the insurance was sold. In the last mentioned cases it proposes to refund the premiums, together with all the credit charges arising therefrom under the loan contracts

[The Authority has some reservations about the adequacy of that last measure. HFC has argued in other contexts that its branch staff acted as the agents of Heritage. It is implicit in these cases that HFC staff were aware of the disqualifying conditions but nonetheless proceeded to sell the insurance. As a matter of fairness, if not law, Heritage should bear the risk that its agents knowingly accepted.]

9. HFC will advertise for cases in which borrowers were charged default fees or late fees where the payments were not in fact made late to HFC. There was evidence during the hearing of instances in which delays occurred in the transmission and crediting of payments made to a HFC branch other than the branch at which the borrower's account was maintained. HFC would refund any late fees wrongly collected with interest.

10. HFC proposes to obtain legal advice on whether it is bound to refund fees collected under revolving credit contracts on account of dishonoured cheques.

Remedies for borrowers who were told or led to believe that insurance was a condition of obtaining credit

There remains the matter of compensating consumers who purchased Heritage insurance because either -

(i) HFC had told the consumers directly that taking insurance was a condition of a loan being granted; or

(ii) although the consumers were not told directly that taking insurance was a condition of a loan being granted, they nonetheless believed that to be so as a direct consequence of the loan repayment instalments having been overquoted and the insurance having been included in the loan contract documents for their signature, without there first having been any discussion about insurance.

The position which HFC has adopted is that it will investigate any complaint made to it that insurance was made a condition of the granting of credit contrary to section 127 of the Credit Act. Where HFC is satisfied that such has occurred, it will refund to the affected borrower the insurance premium and the credit charges involved.

In April, 1989 Mr. Miller announced in his second statement (A324) some further action which HFC proposed taking. Paragraph 9 of that statement was in the following terms:

"It is clear that there is some unascertained number of HFC clients who may have been sold insurance in breach of s.127 of the Credit Act. During the course of giving evidence last December I was asked what HFC intended to do about such clients. I have given a lot of thought to the problem. It is impractical, for reasons I gave in December, to write to all clients who have purchased insurance since February 28, 1985. On the other hand HFC recognises that it cannot be seen to profit from unlawful conduct. HFC has decided to commit approximately $25,000 per year for the next five years to a programme of consumer credit education either at the secondary or tertiary level. We have conducted preliminary discussions with Mr. Lyneham on the question in order to seek the Ministry's views about the most effective way in which such a sum could be spent. We intend to finalise a proposal very soon.

"HFC will continue to deal with complaints about compulsory insurance brought to its attention in the manner referred to previously."

On 14 April, 1989 Mr. Miller repeated the reasons why HFC considered it was not practical to write to all persons who had purchased insurance since February, 1985. He said:

"...Well, I think I said at that time that I believed that if you did that - I mean, the people - the customers already had the protection. The time has passed and I just think that if you just had ordinary buyer's remorse, those kind of people would pop up and I don't think it's a workable solution. I know if a

customer presents a claim we'll handle it just like we said. They get back the credit charges and they get back the refund. I'm sure that there are people out there - I know there is somebody else there that was forced insurance and I don't want to benefit from that person but I want to do what's right. But I just don't think it's a reasonable proposition to write every customer." (8962)

HFC's attitude to compensating borrowers who were adversely affected by HFC's insurance selling practices is in marked contrast with its attitude to borrowers affected by its conduct in all other areas that have been examined in this Part. Although HFC's own records would doubtless be of no assistance in detecting cases where insurance was improperly sold, HFC does not propose to write to borrowers or to advertise for borrowers who consider they believed insurance was compulsory.

The Authority does not dispute the likelihood of HFC being approached by people who purchased insurance voluntarily but could now regret that decision and if given the opportunity might wrongfully seek refunds from HFC. However, the fact remains that there is an unknown number of consumers who were directly required to take insurance in order to obtain loans and a further unknown number of consumers who were led to believe, because of HFC's selling practices, that insurance was a condition of their loans proceeding.

In essence, HFC is taking the position that because of the difficulty in distinguishing between genuine and non-genuine claims, it does not propose to take any action to inform past borrowers of their possible entitlements.

HFC says that it stands ready to compensate those who approach it and can establish that insurance was directly or indirectly made a condition of the grant of credit. It is highly probable that the only borrowers who will approach HFC will be those who will have become aware that it was unlawful for HFC to have made insurance an express or implied condition of the grant of credit. But this is precisely what HFC is not prepared to bring to the notice of borrowers and thus the position will be that HFC stands to profit from the ignorance of borrowers.

It is in that light that the Authority views HFC's undertaking to expend $25,000 a year, in consultation with an appropriate institution or public body, for the benefit of consumers generally by way of consumer education. Welcome though that initiative may be, it is difficult to accept that it will necessarily put HFC into a position whereby HFC will not have profited from unlawful insurance sales, for the extent of those sales is undetermined.

Conclusions

Except in relation to borrowers adversely affected by HFC's insurance selling practices referred to above, HFC has already gone to considerable effort and expense to remedy "losses" suffered by borrowers as a result of its breaches of the Credit Act and other

deficiencies in its conduct. It has committed itself to further action of a remedial kind. With one rather minor exception concerning persons insured despite pre-existing conditions, the Authority considers that the methods being adopted and the levels or amounts of compensation paid or to be paid are just and fair in the circumstances.

It is obvious that HFC's actions in this regard must stand to its credit, since what HFC has undertaken is, in essence, aimed at re-instating borrowers to the positions in which they would have been had the breaches or other conduct not occurred.

However, in the Authority's opinion it must also be noted that with respect to most of the types of errors for which compensation is being made, it was either CCLS or some incident in these proceedings which brought the matter to light and thus lead to the remedial action. By contrast, with respect to the two major types of consumer losses which the Applicant knew about before the Objections were lodged, namely overpaid insurance premiums and underpaid insurance rebates, the Applicant did nothing of its own volition until well after the Objections had been lodged. Somewhat similarly, the Applicant did not see fit to take any action until June 1988 with respect to co-borrowers who had been signed up purely for security purposes, notwithstanding that almost two years earlier the industry association of which it was a member had brought the undesirable features of that practice to its notice.

As to the matter of compensation to borrowers who were adversely affected by HFC's insurance selling practices, the Authority considers, for the reasons already given, that the action proposed is not satisfactory