

5.4 FAILURE TO MAKE ANY REBATE OF INSURANCE ON EARLY TERMINATION

In Part 5.1 an explanation is given of the provisions of the Credit Act and Regulations which require a rebate to be allowed or given upon the cancellation of a credit insurance policy which occurs simultaneously with the early discharge of a loan contract.

HFC informed the Authority that between 28 February 1985 and 31 December 1988 there were 682 cases in which no insurance rebate was paid upon the early termination of a loan. In particular, there were 245 cases in 1986 and 202 in 1987, with a marked decline becoming evident in the last quarter of 1987 and fewer cases still in 1988. It appears that not all of the 682 cases were attributable to a single cause.

Non-recognition cases

Mr. Shaw told the Authority that occasionally when a payment was made (which may have represented one or more instalments) which resulted in a loan being fully repaid before the date scheduled for the final instalment, the staff accepting the payment did not realise that the loan had been fully repaid earlier than scheduled. As a consequence no attempt was made to calculate and make the requisite statutory rebates of credit charge or insurance premium.

While these instances may be said to reflect adversely on HFC's efficiency, it is clear that they were entirely unintentional. It is also relevant that HFC has introduced further procedures to minimise future non-recognition cases by requiring staff to use the LA100 automated rebate verification system whenever the repayment of a loan

is completed, even if it appears that the last payment is being made on the scheduled date.

It is of interest to attempt to ascertain how many of the 682 cases of failure to rebate were attributable to the "non-recognition" cause. No investigations were carried out by HFC which enable the number of non-recognition cases to be determined accurately.

It is, however, possible to make some broad estimates. The Applicant has asserted (Final submission para 29.5) and the Authority agrees that all failures to rebate which occurred after the introduction on 1 September, 1988 of the LA100 system, should be assumed to have been non-recognition cases.

There is no reason to suspect that the incidence of non-recognition cases was significantly higher before 1 September, 1988 than it was after that date. Indeed, the evidence of Mr. Shaw is that the phenomenon of the non-recognition case was discovered by HFC only in late 1988 or early 1989, which would suggest that the incidence of the cases was not significantly higher before September 1988.

There were 10 cases of failure to rebate in the four months from 1 September to 31 December, 1988, all of which are assumed to have been non-recognition cases. That is the equivalent of 30 cases per year.

There were 245 failures to rebate in 1986 and 202 in 1987. It thus seems highly probable that the majority of the failures in those two years were not attributable to the non-recognition cause.

Failure to rebate - factors other than the non-recognition cause

Evidence was received as to other factors which might account for the substantial number of cases of failure to rebate that were not non-recognition cases -

- (a) the first manual provided to HFC staff to assist them in complying with the Credit Act, directed that when calculating the net balance due under a loan contract "If an insurance rebate is requested this is also to be deducted" (A156, Vol 2 Tab 1, para. 28);

- (b) the detailed Heritage Insurance Manuals referred to earlier in this Part were already on issue at HFC branches when the Credit Act came into operation. It appears that in March 1985 replacement pages dealing with rebates on early terminations of loans were issued for the manual covering credit life and credit accident and sickness insurance sold in connection with personal loans.

The instructions as set out in those replacement pages read as follows: -

"i) PB/Made Again Accounts

When an account is finalised before the expiry date and another loan is immediately taken out, the loan is classed as a PB/Made Again Account. In these situations a premium rebate, calculated as shown on the next page is made.

"ii) Premature Payouts

When a loan is paid out by the borrower or competitor before the expiry date of the loan, it is classed as a Premature Payout. Company Policy is to make every attempt to convince the customer to allow the policy to continue to run. This means that even though the account is settled the benefits under the policy will continue until the original termination date. (In the event of a claim, all claim payments in these cases will be made direct to the claimant). If the customer requests cancellation of the insurance policy at the time of the premature payout, a premium rebate, calculated as shown on the next page is to be made by the branch without reference to Head Office".

(AC156, Vol 8, Tab 36, page 18).

These instructions remained unaltered until the manual was replaced at the end of 1988.

It is clear that these instructions, which quite plainly fail to direct that rebates are to be made in all cases, were issued, or at least re-issued, in March 1985 after Heritage had examined the new requirements of the Credit Act concerning rebates, since page 20 of the same manual, also re-issued in March, 1985, correctly directed staff not to make deductions in the nature of administration fees when calculating insurance rebates in States and Territories where the Credit Act was in force;

(c) two former branch managers, Messrs. Downs and Maloney, both of whom were employed from prior to 1985 until some time in 1986, told the Authority that where a loan was discharged prematurely and not refinanced, the insured borrower was not given a rebate of insurance premiums unless he or she sought it. The evidence of Downs went further and said that this practice was carried out in accordance with the instructions of his District Manager (3600). It was also stated that some borrowers who did not ask for and did not receive a rebate at the time of discharging loans subsequently returned to claim a rebate as a result of having been informed by another lender of their right to a rebate;

(d) on 7 November, 1988, during the course of the evidence of the Managing Director, Mr. Wilson, the Applicant tendered a document said to be a copy of an instruction issued to all branches and bearing the date 25 October 1985. The document had not been previously discovered and it was explained by Counsel for the applicant that the document had only just come to light;

The text of the document (A159) was as follows -

"HFC Financial Services Limited (HFC)

(Incorporated in New South Wales)

c.c OPERATING EXECUTIVES

Memo to: ALL BRANCH MANAGERS

From: D. R. WILSON

Subject: CREDIT INSURANCE REBATES EFFECTIVE IMMEDIATELY

Date : 25 October 1985

1. Effectively immediately credit insurance premiums are to be rebated automatically on all loans finalising prematurely. The rule of 78th method continues as the method of rebate.

i.e. PB plus premature." ;

(e) the first instruction in an HFC manual to the effect that rebates of insurances must be made on all occasions was contained in a manual issued around June 1986. Paragraph 9 of that manual was in the following terms -

"The calculation of net balance due as required by the Act is as follows. (see example 3).

A reference to the net balance due to a credit provider at a particular time means:

(a) in relation to a regulated loan contract, the sum of:

- (i) the amount financed;
- (ii) the accrued credit charged;
- (iii) any deferral charges owing;
- (iv) any default charges owing; and
- (v) any enforcement expenses,

less

- (i) any payments received from the debtor, plus
- (ii) any statutory rebate of insurance charges."

(A156, Vol2, Tab 2, para 9)

The relevant part of the Example 3 referred to was in the following terms -

"less

(f) the amount of statutory rebate (if any) of insurance premiums as calculated on cancellation certificates";

(f) the next manual which stayed on issue until approximately October 1987 instructed -

"The debtor is entitled under the Act to discharge the loan contract by paying or tendering to HFC the net balance due to him at the time of payment or tender.

For the purposes of the Act the net balance due is the sum of:

- (a) The amount financed.
- (b) The accrued credit charge.
- (c) The deferral charges (if any).
- (d) The default charge (if any).
- (e) The enforcement expenses (if any).

Less any payments received by HFC in relation to the contract and (where the relevant insurance and maintenance contracts are discharged) the amounts of statutory rebates (if any) of amount of insurance charges and maintenance charges." (A156, Vol 2, Tab 3, para G1.1);

- (g) in October 1987 a further manual prepared by Mr. McRae, the then Corporate Solicitor, was issued containing an instruction identical to that in the previous manual.

(A156. Vol 2, Tab 4)

From the above it appears -

- (i) between 28 February 1985 and 25 October 1985 all written instructions issued by HFC and Heritage were to the effect that where loans were paid out early and not refinanced, rebates of insurance were to be made if requested;
- (ii) between 25 October 1985 and June 1986 only the Wilson memorandum directed that rebates were to be made in all circumstances - all other instructions remained as in (i);
- (iii) from June 1986 onwards all HFC written instructions were to rebate in all circumstances but the Heritage instructions to rebate if requested remained in force.

In the light of the above, how can the substantial number of failures to rebate (excluding non-recognition cases) which occurred in 1986 and 1987 be explained? The evidence suggests the following -

- (a) Mr. Wilson's memorandum may not have been effectively distributed or if distributed was not generally complied with. It is relevant that the memorandum was not

promulgated as, nor was it followed up by, amendments to those parts of the relevant HFC and Heritage manuals which it should have overruled.

- (b) The HFC manuals issued on or after June 1986 gave no guidance as to how the insurance rebates were to be calculated. The Wilson memorandum stated cryptically "The Rule of 78th method continues as the method of rebate". To ascertain the correct method from an examination of the legislation is not an easy task because of the complexity and unhelpful location of some of the relevant provisions; it also requires access to the Regulations and there is no evidence that the Regulations were made available to HFC staff. HFC staff would therefore have required other guidance in the method of calculating the insurance rebates.

It is clear from Mr. Hood's evidence that HFC staff were to use the Heritage manuals for detailed guidance on all matters relating to insurance. Indeed, the first HFC manual which instructed rebates to be made, ie. the manual of June 1986, included an example which referred to the amount of statutory rebate of insurance premiums as calculated on cancellation certificates. The instructions on the preparation of insurance cancellation certificates are, of course, to be found in the Heritage manuals.

The real significance of this is that while the Heritage manuals did set out the correct method of calculating insurance rebates in readily understandable terms, the same

manuals also continued to indicate that if the loans being terminated were not being refinanced, then the rebates were to be made if requested.

Clearly, in those circumstances the staff were confronted with conflicting instructions. Faced with such a conflict some staff might naturally opt to take the easiest course and make no rebate. Other more diligent staff might carefully consider which of the two instructions should be followed.

In those circumstances the evidence of Mr. Downs that his District Manager determined that rebates not be given unless requested becomes particularly relevant. But even if the Branch Managers did not consult their District Managers and sought to arrive at the correct answer solely from the written instructions, it would be natural for them to follow the Heritage manuals. It is the Heritage manuals which are clearly the prime source of instruction to HFC staff on all insurance matters and those manuals contain detailed procedures with worked examples on almost every function that HFC branch staff were required to perform on a regular basis in connection with insurance matters.

Conclusions on failures to rebate insurance

1. The Authority does not regard the failures to rebate that were attributable to the "non-recognition" cause as being of a serious nature as those failures were relatively few in number and unintentional.

2. The Authority does, however, regard the failures to rebate which arose from the practice of not rebating unless requested as far more serious.

It has not been suggested that the issuing by HFC or Heritage of directions to make rebates if requested was accidental or arose from a misconception of the effect of the relevant provisions of the Credit Act. Indeed the evidence is otherwise for it is clear that Heritage adverted to the requirements of the Credit Act when in March 1985 it directed that administration fees were not to be charged in calculating insurance rebates for States and Territories where the Credit Act applied.

The instructions to rebate if or when requested amounted to deliberate denial of borrowers' legal entitlements and to conduct of a dishonest and unfair nature.