

28 January 2021

Committee Secretary
Senate Economics Legislation Committee
Department of the Senate
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Committee Secretary,

SUBMISSION

NATIONAL CONSUMER CREDIT PROTECTION AMENDMENT (SUPPORTING ECONOMIC RECOVERY) BILL 2020

The Indigenous Consumer Assistance Network welcomes the opportunity to provide a submission to the Senate Economics Legislation Committee's Inquiry into the *National Consumer Credit Protection Amendment (Supporting Economic Recovery) Bill 2020* ("the Bill").

About the Indigenous Consumer Assistance Network

The Indigenous Consumer Assistance Network Ltd (ICAN) provides consumer education, advocacy and financial counselling services to Indigenous consumers across North and Far North Queensland, with a vision of "Empowering Indigenous Consumers".

Indigenous peoples living in regional and remote communities often experience heightened consumer disadvantage. Structural barriers and an uncompetitive marketplace in remote and regional communities create conditions in which consumer and financial exploitation occur. In line with its vision to empower Indigenous consumers, ICAN provides Indigenous consumers with assistance to alleviate consumer detriment, education to make informed consumer choices and consumer advocacy services to highlight and tackle consumer disadvantage experienced by Indigenous peoples. In its ten years of service delivery, ICAN has assisted individual people with numerous responsible lending disputes, as well as uncovering significant systemic breaches of the responsible lending laws impacting on the communities we work with. These systemic breaches resulted in the Australian Securities and Investment Commission (ASIC) taking enforcement action¹. In *ASIC v Channic*,² the Federal Court found that the responsible lending laws had been breached. It made orders which included remedies for the individual borrowers involved.

¹ See for instance: <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2017-releases/17-361mr-asic-cancels-cairns-car-dealers-credit-licence/>

² *Australian Securities & Investment Commission v Channic Pty Ltd (No.4)* [2016] FCA 1174

Our Submission

We hold critical concerns about this Bill. It is our strong submission that the Bill, in its entirety, **not pass Parliament**. It will remove fundamental consumer protections that Australian families, and in particular the communities we serve, **cannot afford to lose**. It is laws, not standards, that we need to ensure banks and other lenders engage in safe lending.

We understand that there are two parts to the Bill – one being the proposal to remove responsible lending obligations for all consumer loans (except loans under \$2,000 and consumer leases) (Schedule 1 of the Bill) and the other being the reforms in relation to the Small Amount Credit and consumer lease provisions (Schedule 2 – 6 of the Bill). To be clear, we reject both parts of the Bill.

Further comments in support of our submission follow.

Schedule 1 – Dismantling Safe Lending in Australia

The Responsible Lending laws are a cornerstone protection within the financial services system in Australia. They articulate the principle that all Australians assume exists when a lender engages in lending: the principle that the lender will assess the borrower's ability to repay the loan. People assume this, because they assume it is in the best interests of the lender to do this. It is, after all, the lender's money.

The people we see every day through our financial counselling service take responsibility for the financial position they are in and the debts they take on. People do not set out to get into unaffordable debt. They seek loan options that they believe will be affordable and will help them obtain or sustain financial stability. In doing so, they seek guidance from lenders. This is because not only do they believe it is in the lender's interests to assess their ability to repay, but the lender is also best placed to do this since it is in the business of lending. It is the lender that has all the information available about the lending process; the financial and housing markets; causes of default; and what all of the information in a person's bank statement says about their financial position.

However, it is not necessarily in the best interests of the lender to lend responsibly. There is a perverse incentive in the form of default fees and interest that mean the people who are facing financial hardship and are unlikely to be able to make their repayments on time can be the most profitable for lenders.

Dismantling the ability of individuals to take legal action against banks and other lenders

While maintaining a principled approach to lending, the current law seeks to counter the profit incentives that exist within unsuitable loans by imposing civil and criminal penalties for breaches of the responsible lending laws. The penalty regime is a fundamental protection within the current laws. It seeks to ensure that lenders comply with community expectations of good lending standards. It also provides a critically important legal mechanism by which individual borrowers can hold lenders to account and seek redress for the harm caused when lenders fail to meet good lending standards. In particular, section 178 of the *National Consumer Credit Protection Act* allows an individual to seek redress where there has been a breach of a civil penalty provision. In doing so, individuals currently have the right and ability to obtain the documents relied upon by the lender as part of the credit assessment of the borrower that they do under the responsible lending laws. These documents provide the evidence an individual and/or their advocates need to evidence a breach of the law. These assessment documents are ones that any borrower would expect a lender to create, hold and provide to the borrower when requested. Once again, these provisions are simply in keeping with community expectations that individuals have the right and ability to take legal action in court against a bank or other lender when it does the wrong thing. If the Bill passes, this fundamental right of individuals in the context of the responsible lending regime will be effectively removed for loans of more than \$2,000.

The Bill removes civil penalties for unsuitable lending and instead provides that civil penalties be imposed where lenders have engaged in 'repeated' or systemic breaches of the standards set by the Australian Prudential Regulatory Authority (APRA) (for lending by banks) and the Ministerial Standards (for non-bank lending). The intention is clearly to remove rights regarding civil penalty provisions from the hands of individual consumers as it will be all but impossible for an individual to first, identify that the unsuitable loan that they obtained is indicative of broader systemic or repeated practices by the lender and second, prove this. The significant barriers to individuals taking action against the lender which are inherent within the operation of the Bill are increased when you consider that individuals will be denied access to the very documents that evidence a breach of the standards referred to in the Bill. These are the 'systems, policies and process' documents upon which the lender makes decisions to lend. In the experience of consumer advocates, individual borrowers are consistently denied access to the 'systems, policies and process' documents upon which lenders have made the decision to lend on the basis that these are commercially sensitive and therefore 'commercial in confidence'.

It is worth noting that the process of complaining about unsuitable loans is already difficult for many of the people we assist. In our experience, it is difficult to get lenders to undertake a meaningful investigation into the alleged wrongdoing as part of the Internal Dispute Resolution process. Lenders will often deny liability because they know that the onus is on the complainant to demonstrate a breach of the laws and many people will not take their complaint any further. Even if they do and they are successful (which is in no way guaranteed), they are still required under the current laws, to repay the benefit that they received under the loan.

While the Explanatory Memorandum to the Bill ("the EM") refers to the continued ability of individuals to lodge complaints with the Australian Financial Complaints Authority (AFCA), the basis upon which they will be able to seek compensation is entirely unclear under the Bill. Moreover, individuals and their advocates will be unable to obtain the 'system, policy and process' documents that they need to make an informed decision about whether or not they have grounds to complain. The power imbalance that already exists between banks and individuals, highlighted throughout the Royal Commission into Financial Services will considerably worsen. For the people we assist, this power imbalance will be insurmountable.

Every day our team of financial counsellors rely on the tools that the current law provides to help people enforce their rights and renegotiate unaffordable debt arrangements within the parameters of the current law. The challenges faced by our clients and the importance of the responsible lending tools are highlighted throughout the case studies provided below. The Bill removes the essential tools that we use to assist people and in doing so, it will significantly cripple our ability to assist people experiencing financial hardship as a result of loans they should never have been given.

Marie's Story

When Marie (not her real name) came to ICAN she was living with her then partner and 4 children in a rental property in the Atherton Tablelands. They were behind in rent payments and had been referred to our service by a housing support worker. Marie had numerous debts, including a personal loan with one of the Big Four Banks with \$13,000 outstanding – almost all of this was made up of fees and interest charges as she had repaid almost all of the principal amount borrowed. By the time Marie accessed our services, she was very stressed. Her then partner and 4 children were about to be evicted from their home due to unpaid rent. They were struggling to afford essential living expenses and she was making very minimum repayments to this loan which were not even covering the monthly interest charge, therefore putting her further and further into debt.

As a result of obtaining the credit assessment and other documents used by the bank in relation to Marie's loan application our financial counsellor learned that the Bank had initially lent her \$7,150.00 in May 2011. It then refinanced this loan in March 2014 for \$7650.00 with additional funds lent to pay for used car

repairs. This was despite the fact that at the time, Marie was unemployed and supporting two children. In September 2015, the bank lent her a third personal loan of \$21,650.00 to refinance the remaining amount on the second loan and to purchase a second-hand car. On top of the interest, fees and charges, Marie was paying for loan protection insurance. At the time of the third loan, Marie was still unemployed and supporting two children. The first and second loans were clearly unaffordable.

We negotiated with the Bank on the basis that the loans were irresponsible. Initially, they offered to reduce the debt by \$5,000. However, as this did not address the loss Marie had suffered through the responsible lending breaches, we assisted her to lodge a complaint with AFCA. As a result of Marie's responsible lending complaint with AFCA, the bank agreed to waive the balance of the debt (almost entirely made up of interest, fees and charges) and refund the \$1,935.00 in Insurance premiums.

Sarah's Story

Sarah (not her real name) is the mother of two small children. Sarah was working as a cleaner during school hours and using public transport. She was receiving part parenting benefits and Family Tax Benefits so she was able to struggle along with a modest lifestyle for her and her children. She wanted to increase her hours to try and overcome some of her financial struggles. She was told by her employer that if she didn't have to spend so much time on public transport to drop the kids to and from school and day care they could offer her extra hours.

Unable to pay for a car outright, Sara went to a broker who was recommended by a second-hand car dealer. The broker sat with her and investigated her income and expenses; obtained her bank and income statements; and pay slips to assist them in understanding her financial situation. After this assessment, the broker advised her that they didn't think the loan was affordable. Notwithstanding this, they said they would pass her information on to a lender that may get in touch with her. In fact, the lender didn't contact her during its assessment until it had approved her and was ready to give her the credit contract to sign. Sarah didn't understand what had happened but was happy that she could get the car and make more income from her work.

Unfortunately, the extra work ultimately wasn't given and Sarah continued to struggle to pay for her and her children's basic needs but now with additional car loan repayments on top. Within eighteen months Sarah had become homeless, had resorted to sleeping in her car with the children, lost her job and then her children were removed from her care. She was in a shelter and feeling like a failure when someone referred her to a financial counsellor.

Using the responsible lending laws, the Financial Counsellor was able to obtain a copy of the original credit assessment done by the broker which included the relevant verification documents that they sent to the lender before it approved the loan. This assessment explicitly identified that if Sarah were given the loan, she would be \$455 in deficit each month on the income she was then receiving and her expenses at the time of the loan. This loan assessment gave Sarah and her financial counsellor confidence to take a complaint to AFCA after both the lender and the broker refused to resolve the matter. By arguing breach of the responsible lending laws and providing this evidence in support, we were able to resolve the matter with both the broker and the credit provider on beneficial terms to Sarah. The credit provider waived the balance of the loan beyond the principal amount, which was close to what Sarah had already paid.

Sarah has now got secure housing and employment and is actively taking steps to get her children back.

Eve's story

We assisted a single mother of two young children from Yarrabah, one of which suffered autism, who was lent \$40,000 to purchase a new vehicle by a major bank. At the time, Eve (not her real name) was \$1,200 in rent arrears and had three consumer leases. The car loan repayments were \$496 per fortnight.

After entering the contract Eve immediately started to struggle with her car repayments which resulted in her getting into further debt through two pay day loans of \$1000 and \$1200 and two “top up” cash advances of \$300. The car was ultimately repossessed and subsequently sold leaving a shortfall of \$26,000. Her financial situation spiraled out of control. It pushed her into making hasty, uninformed and detrimental decisions that could have had a further significant impact on her and her family. Eve thought her only option was bankruptcy as she was so overcome with all the debt and stress. However, our financial counsellor was able to obtain copies of the loan assessment and documents which helped to identify that Eve had been lent an unaffordable loan in the first place. After negotiations with the lender initially fell through, we were able to assist her in lodging a responsible lending complaint with the Financial Ombudsman Service, resulting in the balance of the debt being waived. Eve did not need to bankrupt and was freed of the stress of such a large debt hanging over her.

Jessie’s Story

One of our financial counsellors assisted Jessie (not her real name), a mother of three children who is a survivor of family violence. Jessie was earning little more than \$30,000 per annum as a part-time community worker when she was given a car loan by a major bank totaling repayments more than \$118,000. Under the loan she was required to pay approximately \$650 per fortnight.

Based on her income alone it was clear that Jessie could never afford this loan and she quickly fell behind. She then struggled to pay basic expenses for her and her children and had to borrow money from extended family in order to get by. Jessie would have continued to struggle with this debt, getting into further and further debt had she not seen one of our financial counsellors. It was only through using the responsible lending laws that we were able to negotiate an outcome for Jessie which saw her surrendering the vehicle and getting the balance of the debt waived on the basis she should never have been lent the money in the first place.

Joe’s case

Joe (not his real name) is from the Torres Strait. He entered into car sale and loan contract with a major bank for a second hand 2009 Toyota Landcruiser. At the time, he had a previous car loan which he refinanced into the new loan so that the total loan amount was more than \$71,000. The loan repayments were \$1430 p/month. He was working in the mines at the time on an average monthly wage of \$5,866. However, when we obtained the loan assessment from the bank it was clear that it had failed to obtain any bank statements or documents verifying Joe’s financial situation. Furthermore, the affordability assessment done by the bank, ignored Joe’s many daily expenses, current debts and the fact he had to support 5 dependent children. While Joe was earning reasonable money, the bank completely overlooked his many financial commitments. Joe quickly fell into default and when he accessed our service the vehicle had already been surrendered, he was \$20,000 in arrears and there was an outstanding loan balance of \$45,000. As well as this he had another loan contract for a vehicle and a credit card debt.

During COVID-19, Joe lost his job and was only receiving Jobseeker payments, further entrenching his inability to deal with the debt. Due to receiving such a large amount of credit without proper assessment he was struggling to meet all the necessary expenses and had therefore turned to further credit, causing a downward spiral. After losing employment it really came to a head which is what brought him to ICAN.

Group of consumers in remote Far North Queensland Community

In 2014, we made complaint to the then Credit Industry Ombudsman on behalf of a group of 10 residents in a community in the far north of Queensland that had been lent unaffordable car loans for vehicles that were ultimately very faulty (see attached CIO case study). For this group of people, the harm was considerable. They experienced shame due to the unaffordable repayments and the need, for some, to resort to borrowing from family to meet their basic requirements. The individuals were continually harassed by the credit provider which caused further stress with some too frightened to answer their phones or open their mail. By relying on the responsible lending laws, we were able to get outcomes which saw the consumers released from the loans. This resulted in relief and the knowledge that there were consumer protections available to them even though they resided in a remote area.

We could not have achieved these outcomes for these people without relying on the responsible lending laws.

Dismantling the principle that lenders assess the ability of borrowers to repay a loan

As stated above, the current law is principles based. It relies on lenders individually determining the best way to assess a person's ability to repay a proposed loan. That the laws are flexible was confirmed in the Royal Commission into Financial Services and the recent decision of *ASIC v Westpac*, which explicitly states that lenders do not have to take a prescriptive approach to lending. Rather, they can choose and apply their own lending processes which can be scalable. All the current law requires is that, by whatever means the lender chooses, the lender make enquiries, verify that the loan is affordable and that it meets the needs (requirements and objectives) of the borrower. This obligation simply confirms what the community expects lenders should and would be doing every time they lend. However, the Bill dismantles this obligation by no longer requiring the lender to verify the information provided by the applicant borrower. In our experience, there are three significant problems with this.

First, the effect of the Bill is to place the weight of responsibility for determining if the loan is affordable on the individual instead of the bank or lender. This assumes that individuals have the financial literacy skills to undertake a realistic assessment of their financial situation. For the many people we support, this is simply not the case. Indeed, our very funding is premised on the need within the community for services like ours to play a role in improving peoples' financial literacy skills. We assist people every day who, for reasons often outside their control, are unable to understand their financial situation and are unable to make financial decisions that are in their best interests. The case of Channic clearly highlights the challenges that many of the people we assist face.³

Second, many of the unsuitable loans we see arise because the lender has chosen to ask only minimal information of the applicant borrower. For example, a loan application may only ask for the person's income and rental expenses. This information will be openly and honestly provided by the applicant but ultimately fails to provide a full picture of their financial situation. Under the Bill, the lender's obligations in this scenario will have arguably been met. And yet, for the reasons highlighted above, the borrower is now caught in an unaffordable debt for which they have no recourse against the lender.

Third, by removing the obligation on lenders to verify the information provided by individuals, the Bill facilitates the ability of third parties to exploit people in vulnerable circumstances. The third party may be a family member; a financial service provider, such as a broker; or a supplier of goods and services such as a

³ See for instances paragraphs 1829 – 1830 in [ASIC v Channic \(No.5\)](#)

car dealer. Under the current regime, the obligation to verify information helps lenders to identify false or misleading information provided by a third party seeking to exploit the borrower. Many of the irresponsible loans that we see are arranged through brokers that are compensated through fees that produce a financial incentive to arrange more and larger loans regardless of the person's ability to repay. In our experience, some of these brokers will manipulate figures to put people into loans that they can't afford. The requirement to verify has become a critical protection for people dealing with exploitative brokers or experiencing family violence and/or elder abuse. Where lenders breach this obligation, the current operation of the responsible lending laws allows financial counsellors to get people who were taken advantage of by a third party out of loans that they should never have been given in the first place. Under the Bill, it will no longer be possible to rely on responsible lending laws to do this and we will see greater numbers of people exploited by third parties.

George's Story

George (not his real name) is from the community of Cooktown in Far North Queensland. George came down to Cairns to purchase an engagement and wedding ring for his partner and approached a local jewellery shop for assistance. Although he was working full time on a low income he still did not have enough capital to purchase the items outright and so the sales person suggested he apply for a line of credit through a large finance company. George completed the application in store with the sales representative and was later approved for the finance, returning to Cooktown with the jewellery.

George approached ICAN Financial Counsellors for support when he could no longer afford the repayments. George described not understanding how interest charges on the credit card worked and felt that he was not getting anywhere with reducing the total credit card balance. He stated he was stressed, frustrated and confused about the credit card and was choosing to make repayments by going without essential items such as groceries and medical expenses.

ICAN was able to obtain and review the loan application created by the sales representative and approved by the lender and found several concerning breaches of the responsible lending laws, including:

1. The Finance company did not obtain any payslips or bank statements in the approval process;
2. George only applied for a credit card to the value of the jewellery (\$7,316.70) but was provided, unasked, for a credit card amount of \$16,000.00 at an interest rate of 22.99%
3. His income had been significantly inflated to \$7,583.33 per month from his actual income of \$1,889.42 per month
4. The finance company assessed his cost of living expenses as only \$200 per month which was in no way reflective of his actual spending on food, clothing, health, insurance, pets, membership fees, car expenses and utility costs.
5. ICAN completed a statement of financial position with George from the time of the loan and found that he was already in financial hardship before the loan was approved with overdrawn account fees and missed payments to current financial repayment obligations.

The case of George highlights the critical importance of responsible lending laws, particularly when dealing with clients with low financial literacy who have applied for a loan through an intermediary. George had the best intentions when applying for this line of credit and the lender had an obligation to ensure the loan met his requirements and objectives and was affordable. Our financial counsellor was able to use the responsible lending laws to negotiate a full debt waiver of \$17,000 for George. Absent these laws, George would have faced a significant, long-term debt cycle and related issues including the risk of homelessness and mental health impacts.

Dismantling an economic safeguard

Through our work, we see what happens when the lenders break responsible lending laws. People lose their homes; they end up in debt spirals they can't escape; and they are unable to meet their basic housing, food and transport needs. They experience shame and embarrassment and they can be so stressed that as community lawyers and financial counsellors, we need suicide prevention training to do our job. Research done by Relationships Australia highlights that financial stress is one of the main causes of relationship breakdown⁴. An American study has found that living with significant debt can produce symptoms equivalent to post-traumatic stress⁵. And we all know that breaking this law was what caused so much pain and suffering for many of the witnesses in the Banking Royal Commission. A Royal Commission that will be rendered irrelevant if this Bill passes.

Without the current responsible lending laws, the harm we see now when they are breached will become common place. More and more people will face the loss of their homes and the debt that individuals and families face will be on a scale that our community cannot afford. Just as responsible lending laws were introduced to protect investors following the Storm Financial crisis, they were also introduced to protect consumers as a preventative measure in 2009 following the Global Financial Crisis. As we grapple with the Covid-19 crisis and the resultant economic fallout they remain critical safeguards to avoiding a debt disaster. We cannot comprehend why these laws would be removed at this time.

Schedules 2 – 6 – Failing the most vulnerable members of our community

Our agency, like all financial counselling agencies across the country, see the significant harm wrought by pay day lenders and consumer lease providers day in and day out. Harms that have been well documented through repeated attempts to highlight why the laws relating to these products must be strengthened. The review into Small Amount Credit Contracts in 2016 confirmed our concerns and the concerns of the financial counselling sector broadly. The reforms proposed in the Bill fall so far short of what was recommended in the SACC Review that we are unable to support them. Far from welcoming the proposals in the Bill regarding Small Amount Credit Contracts and consumer leases, we see these as an affront to the people who most need these laws changed.

Our reasons for this position are set out in the Submission by the Stop the Debt Trap Alliance.

Conclusion

We urge the Committee to recommend that Parliament votes against the Bill. It fundamentally fails the people we assist and the broader Australian public and will create a long-term debt disaster.

Please contact Jillian Williams at ICAN on [REDACTED] or at [REDACTED] if you have any questions about this submission.

Yours Sincerely,

⁴ Woolcott Research. (2011). *Issues and concerns for Australian relationships today*, available at < <http://www.relationships.org.au/what-we-do/research/australian-relationships-indicators/relationships-indicator-2011>>. Referred to recently by Relationships Australia in its *January 2019: Finance and Relationships* report: <https://www.relationships.org.au/what-we-do/research/online-survey/january-2019-finance-and-relationships>

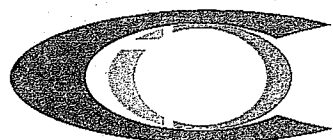
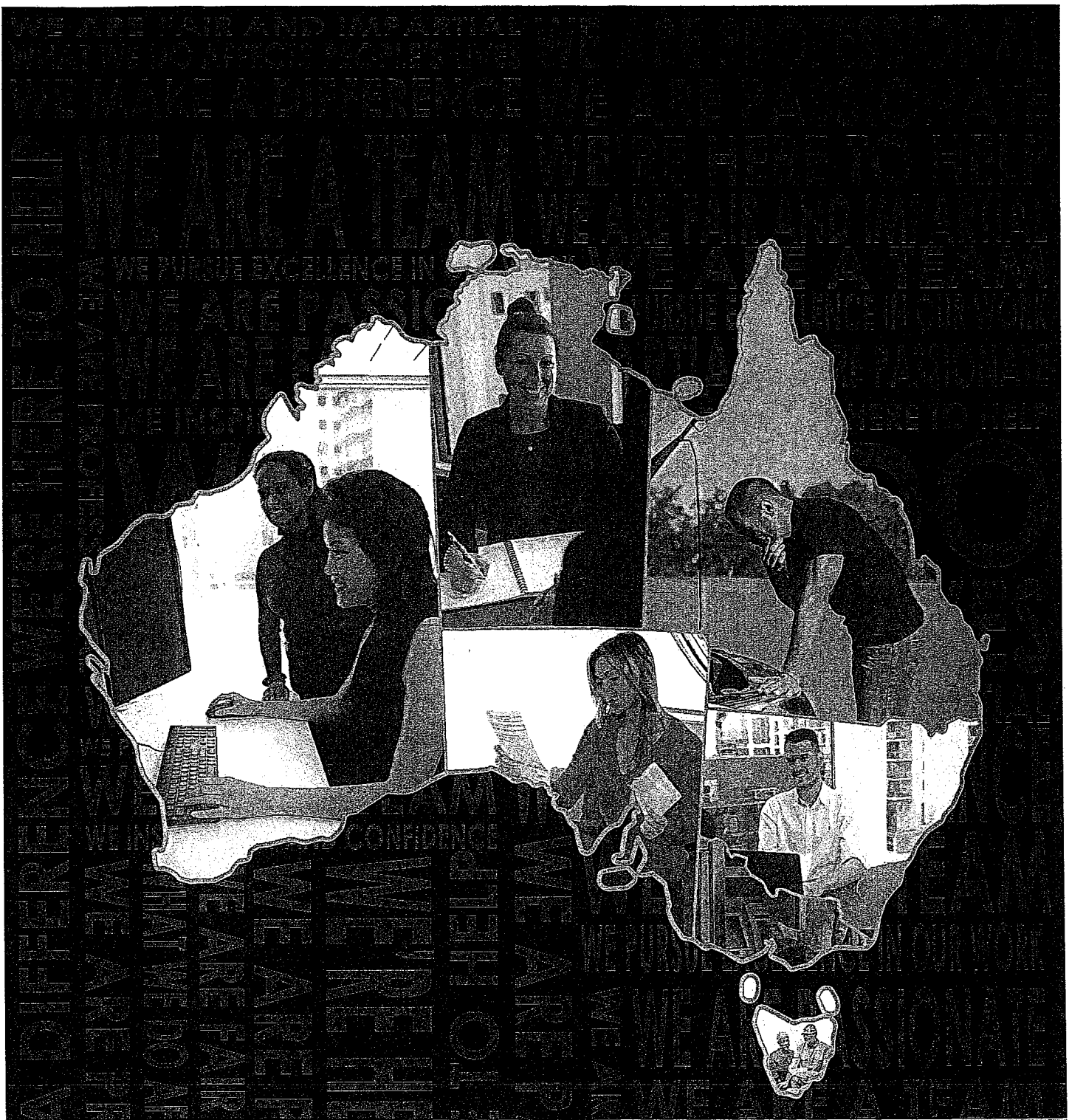
⁵ Ashford, K. (2016), available at <<https://www.forbes.com/sites/kateashford/2016/04/22/financial-stress/?sh=191c3d422753>>



Jillian Williams

Operations Manager

Indigenous Consumer Assistance Network



Credit &
Investments
Ombudsman

Annual Report on Operations 2016/17

case studies

Responsible lending

Consumers claimed that the lender provided them with an unsuitable loan

- Product/service: Car loan
- Sector type: Motor vehicle finance provider

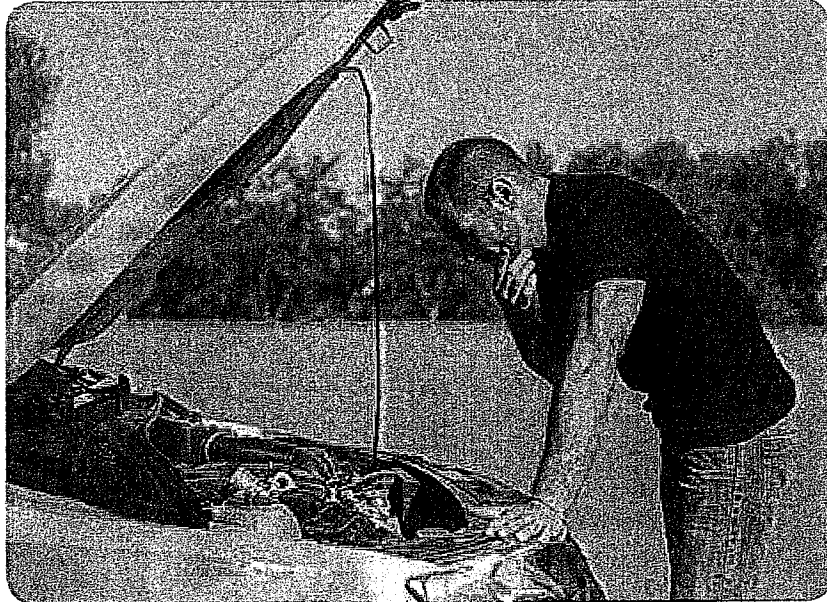
In 2014, a group of consumers living in rural Australia approached the lender for loans to buy cars.

The lender entered into verbal agreements with the group of consumers and agreed to provide each consumer with a car. In exchange, the consumers would pay a deposit and monthly instalments, ranging from \$595 per month to \$996 per month.

After driving the cars for a few weeks, most of the consumers noticed that the cars were faulty and required extensive repairs. Also, after paying the deposit, the consumers were unable to meet the monthly loan repayments.

We found that the lender had not:

- made reasonable inquiries about the consumers' financial situation:
 - the lender only relied on verbal representations made by the consumers that they were able to afford the loans, and
 - the loan applications made no reference to the consumers' living expenses,
- taken reasonable steps to verify the consumers' financial situation. In particular, the lender did not obtain any financial documents to verify the consumers' financial situation, or
- carried out an assessment of unsuitability.



We concluded that the loans provided to the group of consumers were unsuitable, as the consumers could not meet their financial obligations under the loan agreements, without experiencing substantial hardship.

We facilitated negotiations between the lender and each of the consumers and a mutually acceptable resolution was achieved. To resolve the complaints, the lender agreed to:

- waive the outstanding debt under all the loans in full,
- release the consumers from any further obligations under the loans, and
- discharge its registered interest over the cars.