SUPREME COURT OF QUEENSLAND

CITATION:	*State of Queensland v Ward & Anor* [2002] QSC 171
PARTIES:	**STATE OF QUEENSLAND** (Plaintiff) v **TIMOTHY JOHN WARD** (First Defendant) **SHARK FINANCIAL SERVICES PTY LTD** **(ACN 083 322 132)** (Second Defendant)
FILE NO/S:	5515A of 1999
DIVISION:	Trial Division
PROCEEDING:	Trial
DELIVERED ON:	14 June 2002
HEARING DATE:	29, 30 April, 1, 2, 3 May 2002
JUDGE:	Ambrose J
ORDER:	**Prohibition order made, civil penalties imposed.**
CATCHWORDS:	CONSUMER CREDIT – *Consumer Credit Code* – claim for prohibition order against lender – where lender used threats and intimidation for purposes of ensuring payment – whether actions of lender "unjust conduct" – claim by Crown for civil penalties against lender under Division 1 of Part 6 of Code – whether loans come within ambit of *Consumer Credit Code* – whether loans for business or investment purposes Whether Government Consumer Agency may obtain on behalf of borrower under Division 2 of Part 6 of Code relief – which borrower may obtain personally under Division 1 of Part 6 of Code COSTS – Indemnity costs – against defendant – where unsustainable defence – where claim pursued in public interest – whether costs should be awarded on indemnity basis *Consumer Credit (Queensland) Act* 1994 (Qld), s 14(1), s 17(a), s 18(b), s 21(1)(a), s 23(1), s 23(1)(a), s 23(4), s 23(5), s 25, s 26(2) *Consumer Credit (Queensland) Code* (Qld), Part 5, Div 1, Part 6, Div 1, Div 2, s 6, s 6(1), s 6(1)(a), s 6(1)(b), s 7(1), s 11, s 11(1), s 11(2), s 12(1), s 14(1)(a), s 14(2)(b), s 15, s 15(B), s 15(B)(a), s 15(C), s 15(D), s 15(E), s 15(G), s 15(H), s 15(I), s 15(J), s 18A, s 21, s 21(1), s 21(1)(c), s 100(1), s 100(1)(a)(i), s 101, s 102, s 102(2), s 102(4), s 102(4)(c), s

102(4)(i), s 103, s 103(1)(a), s 103(2), s 104, s 104(1), s 104(2), s 105, s 105(1), s 107, s 107(1), s 107(2), s 107(3), s 107(4), s 108(1), s 108(2), s 109, s 114, s 114(1), s 183(1)
Consumer Credit Regulation 1995 (Qld), Sch 2, Form 2, cl 22, cl 23, cl 24, cl 25
Criminal Code (Qld), s 415(1)(b), s 415(4)
Crown Proceedings Act 1980 (Qld)
Drugs Misuses Act 1986 (Qld), s 5
Evidence Act 1977 (Qld), s 92

Australian Federation of Consumer Organisations v Tobacco Institute of Australia Ltd (1991) 100 ALR 568, considered
Baltic Shipping v Dillon [1991] NSWLR 22, considered
Briginshaw v Briginshaw (1938) 60 CLR 336, applied
Edwards v The Queen (1993) 178 CLR 193, considered
Leigh v Russell [1961] WAR 103, considered
TPC v Stihl Chainsaws (Aust) Pty Ltd (1978) 80 TPR 40-091, considered

COUNSEL: W Sofronoff QC with P Flanagan for the plaintiff
R V Hanson QC for the defendants

SOLICITORS: C W Lohe, Crown Solicitor for the plaintiff
Price and Roobottom for the defendants

[1] **AMBROSE J:** This is a claim by the State of Queensland ("Queensland") brought pursuant to the *Crown Proceedings Act* 1980 on behalf of the Chief Executive of the Government Consumer Agency pursuant to the *Consumer Credit (Queensland) Act* 1994 ("the Act") and the *Consumer Credit (Queensland) Code* ("the Code"), an appendix to that Act. The Act and the Code became operative on 1 November 1996.

[2] The first defendant at material times subsequent to 8 July 1998 was the sole shareholder and director of the second defendant, which was incorporated on that day. Subsequent to its incorporation the second defendant carried on the business of "credit provider" within the meaning of s 6 of the Code.

[3] I am satisfied that prior to the incorporation of the second defendant, the first defendant had provided credit of the sort to which, upon commencement of operation of the Act and Code on 1 November 1996, that Act and Code applied. I reject the contentions of the defendants that they lent money only for business and investment purposes with the consequence that the Act and Code did not apply to those loan transactions. I will deal with this issue in more detail under the heading "Jurisdiction".

[4] With respect therefore to loan transactions subsequent to 1 November 1996 and prior to 8 July 1998 the first defendant was subject to the constraints of the Act and Code.

[5] Subsequent to 8 July 1998 both the first defendant and the second defendant were subject to those statutory constraints - *vide* s 183(1) of the Code.

[6] The first defendant gave evidence that while living in New Zealand as a youth and supporting himself by playing pool for money he became known by his associates and those with whom he played pool as "Shark". He explained that when he migrated to Australia he kept that name and indeed when he commenced to lend money, and before he incorporated his company in 1998 as his money lending business expanded, he used the business name of "Shark Financial Services". In the circumstances it is convenient to refer to both defendants as "Shark" albeit that prior to incorporation of the second defendant on 8 July 1998 the loan transactions coming within the purview of the Act and Code were conducted by the first defendant personally without any involvement of his later incorporated company.

[7] In the course of the trial, activities on the part of Shark were established which Queensland contends should lead to orders being made against them for civil penalties, compensation, and an order prohibiting them from providing credit to other persons. Those activities were asserted to justify a description of both defendants as "Loansharks".

JURISDICTION

[8] The real factual issue in this case was whether the various loan contracts considered in respect of which there were clear contraventions of the Code were in fact within the ambit of the Act and Code. It was the contention of Shark that all loans made subsequent to the provisions of the Act and Code becoming operative were made for "business or investment purposes" and not "predominantly for personal domestic or household purposes". It was hardly contested – indeed on the evidence it could hardly be contested – that essential to his/its loan shark activities was his/its involvement in "unfair conduct" within s 17(a) of the Act. Again it could not be contested that having regard to the terms of the recorded loan agreements there had been a contravention of "key requirements" of the Code.

[9] The matter raised by Shark in an endeavour to avoid the legal consequences of these clearly established matters under the Act and Code was the contention that all relevant loans were made for the purposes of business and investment and for no other purpose.

[10] Considered in the light of the content of the various "files" kept by Shark with respect to loans made, the particulars recorded in my view were more consistent with loans having been made for personal use than they were for loans being made for the purposes of business or investment. The only evidence really given to support Shark's contention was that given by Shark himself.

[11] In determining this factual issue which goes to the very jurisdiction of this Court to make orders sought by Queensland, the standard of proof is on the balance of probabilities keeping in mind the serious nature of the allegations and the consequence for Shark if proved. I apply the test in *Briginshaw v Briginshaw* (1938) 60 CLR 336 in determining issues of fact in this case.

[12] Having listened carefully to the evidence given by Shark to the effect that all loans were made for business purposes and having rejected that evidence as false, I take the view that it was really within only Shark's personal knowledge and that of borrowers from him/it whether those loans were made for business or investment purposes. It was only the acceptance of his evidence as to whether he knew or had reason to believe this when the various declarations to that effect were executed at

his insistence by borrowers (as recorded in tape recorded conversations in his business premises) which could take the loans outside the ambit of the Act and Code. He declined to call a single borrower to support his evidence and explained that in his opinion there was no onus on him/it to do so.

[13] Stated shortly, where declarations were signed (to the extent that they were) the loan transactions were either within the ambit of the Act and Code or they were outside that ambit.

[14] I reject out of hand the evidence given by Shark in this respect and refer to the observations in *Edwards v The Queen* (1993) 178 CLR 193 at p 209 per Deane, Dawson and Gaudron JJ:

> "When the telling of a lie by an accused amounts to an implied admission, the prosecution may rely upon it as independent evidence to "convert what would otherwise have been insufficient into sufficient evidence of guilt" …
> But not every lie told by an accused provides evidence probative of guilt. It is only if the accused is telling a lie because he perceives that the truth is inconsistent with his innocence that the telling of the lie may constitute evidence against him. In other words, in telling the lie the accused must be acting as if he were guilty. It must be a lie which an innocent person would not tell. That is why the lie must be deliberate. Telling an untruth inadvertently cannot be indicative of guilt. And the lie must relate to a material issue because the telling of it must be explicable only on the basis that the truth would implicate the accused in the offence with which he is charged."

[15] In *Leigh v Russell* [1961] WAR 103 the Full Court of Western Australia held that where only one of two alternative states of fact must be true and the other must be false disbelief of evidence which affirms the truth of one state of fact does support the evidence of the existence of the other state of fact. At 109, D'Arcy J in the course of his judgment, with which the other members of the Full Court concurred, observed –

> "The dictum, which relates to the fallacy of relying on disbelief in the testimony of a witness as providing positive support for the proposition that the contrary of such testimony is true, clearly has no application where the testimony affirms the truth of one of two alternative states of fact, one of which must be true and the other must be false, and where consequently disbelief in the evidence that one of the states of fact exists of necessity supports the existence of the other as a matter of logical inference."

[16] Before embarking upon a consideration of Queensland's application for imposition of civil penalties compensation and an order for prohibition against Shark under the provisions of the Act and Code to which I have referred I will observe merely that, to no small extent the time spent and legal costs incurred in Queensland's pursuit of the relief it seeks against Shark is attributable to the significant constraints upon the application of the Code to credit providers found in s 6(1) of it.

[17] Section 6(1) of the Code provides –

> "This code applies to the provision of credit (and to the credit contract and related matters) if when the credit contract is entered

into or (in the case of pre contractual obligations) is proposed to be entered into –

(a) the debtor is a natural person ordinarily resident in this jurisdiction or a strata corporation formed in this jurisdiction; and

(b) the credit is provided or intended to be provided wholly or predominantly for personal, domestic or household purposes; and

(c) a charge is or may be made for providing the credit; and

(d) the credit provider provides the credit in the course of a business of providing credit or as part of or incidentally to any other business of the credit provider".

[18] In this case a couple of loans were made by Shark to borrowers who resided just south of the Queensland border. At the end of the day it was conceded on behalf of Queensland that the Code did not apply to Shark's loan sharking advances to those borrowers because they were not "ordinarily resident in" Queensland. To the extent that a Code in similar terms is law in New South Wales, it would not apply to money lent in Tweed Heads to borrowers residing in Queensland on the Gold Coast. It is obvious that loan sharking activities within twenty miles or so north and south of the Tweed River can easily be conducted in such a way as to circumvent constraints imposed by the two Codes operating within this area.

[19] I have looked in vain in the reading speeches for any explanation as to why non residents of Queensland who are provided with loans in Queensland have been denied the benefit of whatever protection they might be afforded under the Code, or perhaps more importantly why Queensland is unable to seek an order for prohibition of loan sharking activities to which the Act does not apply for only this reason.

[20] I also have difficulty in envisaging the circumstances in which s 109 of the Code might operate if the application of the Code is limited by the residence of the debtor under s 6(1)(a) of the Code rather than by the place where the loan is made. I have a similar difficulty in envisaging the circumstances in which s 108(1) and (2) might operate in the light of s 6(1)(a).

[21] It seems that the Queensland Code resulted from "the culmination of almost 8 years of work by Consumer Affairs Ministers and officers throughout Australia". I refer to the second reading speech of the Bill on 4 August 1994, where in outlining the intention of the draftsman of the Bill to form "the basis of consumer credit laws throughout Australia", it was stated that when adopted (with perhaps minor modifications) throughout each of the Australian States and Territories the Code would result in "a uniformity both in substance and timing".

[22] Reference to that speech also indicates that the legislative intent was that "business credit is not regulated and this stands in contrast to the existing law which attempts to regulate credit provided for the purchase of farm machinery and commercial vehicles". It was explained that to come within the constraints of the Code "the credit must be provided or intended to be provided wholly or predominately for personal domestic or household purposes".

[23] Having regard to the history of loan sharks in The United States of America in the 20th century making concerted efforts to procure borrowers engaged in business – for all the reasons and using all the strategies detailed at length in the Cornell Law Review of January 1980 to which I refer under the heading "Prohibition Order" (*vide* paragraph 76 *et seq*) it is difficult to understand the policy reason for the

imposition of the very broad legislative constraint upon the operation of the Code under s 6(1)(b).

[24] It is clear that Shark in the present case received legal advice as to the effect of the constraint under s 6(1)(b) of the Code after which he/it regarded it as providing a "loop hole" for loan shark activities to the extent that it could be pretended that they involved monies advanced to borrowers for "business or investment" purposes.

[25] Indeed it was the terms of s 11 of the Code which induced Shark to adopt a business practice of persuading some potential borrowers to sign a declaration that the money they borrowed from Shark was intended wholly or predominately for business purposes.

[26] I will set forth this curious provision in full –

> "**11.(1)** In any proceedings (whether brought under this Code or not) in which a party claims that a credit contract, mortgage or guarantee is one to which this Code applies, it is presumed to be such unless the contrary is established.
>
> **(2)** Credit is presumed conclusively for the purposes of this Code not to be provided wholly or predominately for personal, domestic or household purposes, if the debtor declares, before entering into the credit contract, that the credit is to be applied wholly or predominately for business or investment purposes (or for both purposes).
>
> **(3)** However, such a declaration is ineffective for the purposes of this section if the credit provider (or any other relevant person who obtained the declaration from the debtor) knew, or had reason to believe, at the time the declaration was made that the credit was in fact to be applied wholly or predominately for personal, domestic or household purposes. For the purposes of this subsection, a relevant person is a person associated with the credit provider or a finance broker (or a person acting for a finance broker) through whom the credit was obtained.
>
> **(4)** A declaration under this section is to be substantially in the form (if any) required by the regulations and is ineffective for the purposes of this section if it is not".

[27] In this case the effect of s 11(1) is to have each of the loan contracts presumptively come within the constraints of the Code.

[28] Section 11(2) however, requires the Court to presume conclusively that those contracts were not within the constraints of the Code if the borrower has declared in a form (to the substantial effect of one prescribed under the regulations if any) that money lent is to be applied predominately for business or investment purposes unless Shark knew or had reason to believe that the money was to be used for personal, domestic or household purposes.

[29] It is perfectly clear from the content of the many tape recorded conversations (during July, August and September 1998) and from an examination of the nature of the occupations, income sources, etc of many of the borrowers that Shark – upon legal advice – seized upon s 11 as providing him/it with a loop hole to avoid whatever constraints under the Act and Code might be imposed upon him/it should borrowers be lent money for personal, domestic or household purposes. I would not

construe "business purposes" to include "criminal business purposes" such as carrying on the business of unlawfully trafficking in a dangerous drug in contravention of s 5 of the *Drugs Misuse Act* 1986. I would categorise such a criminal business purpose as a "personal purpose" within s 6(1)(b) of the Code.

[30] To my mind it is abundantly clear from what Shark is recorded as saying to borrowers and the way he said it when discussing with them the signing of a declaration that the monies advanced (sometimes in the sum of $500 to somebody whose only income was unemployment relief or pension) that Shark made it clear to persons in desperate circumstances that he would lend them money only if they signed a declaration in a form drafted to satisfy the requirements of s 11(2) of the Code – whatever use the borrower proposed to make of the money.

[31] I observe merely that apart from the evidence given or procured from only a few of the borrowers from Shark, most of the evidence consists of documentary evidence in the possession of Shark which was seized by Police Officers in December 1998 (Ex. 1 – Vols 1 and 2).

[32] I was not referred to and have been unable to find any form of declaration contained in the regulations.

[33] However, apparently early in 1998 Shark sought legal advice and I infer he was then provided with a draft declaration of the sort contemplated by s 11(2) of the Code.

[34] The evidence demonstrates that from January 1998 Shark required many borrowers to execute such a form as a condition precedent to his handing over money they sought to borrow. I infer that one of his principal reasons for adopting this procedure was to protect himself against entrapment should some officer or inspector of the Consumer Agency purport to approach him for a loan. The form which he obtained from his legal advisers which he roneoed and used systematically in 1998 when advancing monies (although there is no direct evidence that he persuaded "drug dealers or hookers" to execute such a form) was in the following terms –

"**DECLARATION OF PURPOSES FOR WHICH CREDIT IS PROVIDED**

I/We,……
declare that the credit to be provided to me/us by the credit provider is to be applied wholly or predominantly for business or investment purposes (or for both purposes).

IMPORTANT

You should not sign this Declaration unless this loan is wholly or predominately for business or investment purposes.

By signing this declaration you may lose your protection under the *Consumer Credit Code*.

…… …… …/…/1998

Print name borrower Signature borrower Date signed"

[35] Some of the loans which have been canvassed were accompanied by a declaration executed by the borrower in the form to which I have referred. In many of them, neither Shark nor the borrower believed that the money lent was advanced for any business or investment purpose. The whole exercise in my view was merely a step taken to avoid impact of the Code upon money lent for non business/investment purposes with a wink and a nod on the part of both lender and borrower the object of the lender merely being to evade its constraints. One consequence of the loan transaction coming within those constraints of course would be to make Shark liable to be subjected to a claim for the principal relief Queensland now seeks against him/it – a prohibition order.

[36] Before descending to an examination of the evidence adduced in this case, to support the grant of substantive relief sought, it is convenient to outline the provisions of the Act and Code relevant to that relief which Queensland seeks.

[37] Under s 18(b) of the Act the Chief Executive may apply to a court for an order under s 21(1)(a) and s 23(1)(a), prohibiting Shark from providing consumer credit on the ground that he/it has repeatedly engaged in unjust conduct in the course of conducting his/its credit providing activities. Under s 23(5) both defendants may be prohibited from providing further consumer credit. Under s 25 of the Act such a prohibition order relates only to the provision of consumer credit subsequent to the making of that order.

[38] In my view the most significant relief Queensland seeks for the protection of the community against the criticised business activities of Shark, is an order prohibiting Shark from providing any further consumer credit. Under s 23(4) of the Act non compliance with such an order attracts a criminal sanction and under s 26(2) a "prohibited person" is not entitled to payment of any amount under a prohibited credit contract. Each act of non compliance with a prohibition order will constitute an offence under s 23(4). It will probably also constitute a contempt of this Court.

[39] The principal evidence on which Queensland relies to obtain a prohibition order is that contained in a number of tape recordings of threats made both expressly and impliedly to borrowers from Shark before and after default and the evidence of a number of persons that violence was applied to them as part of the ordinary business activity of Shark. That evidence must be considered in the context of the importance which all borrowers seem to have attached to payment of the weekly interest owing on the loans as it fell due. In addition, the listening device recordings of conversations in his/its business premises, between Shark and persons retained to search for and threaten and/or injure defaulting borrowers should they be deemed to be "runners", having failed to meet their obligations to pay interest on monies borrowed for a period longer than one week, establishes beyond doubt the fact that since the Act and Code became operative in November 1996 Shark has repeatedly made implied and express threats of violence to borrowers to secure payment of interest due on moneys lent at outrageous rates of interest and on occasions has used or procured other persons to use such violence.

[40] Shark relied upon the threat of physical harm to borrowers in default to ensure payment of interest and not upon any financial success or reward which might result from their use of the money lent to them. The unlikelihood of a borrower making enough income pursuing some of the lawful "business" activities which Shark

advanced in evidence as the "purpose" for which monies lent were to be used, even to pay the interest due under the loans persuades me that the whole system adopted to avoid the application of the Code under s 11(2) was a charade. The prospect of any businessman or investor however humble, engaged in lawful pursuits, borrowing money at the exorbitant rates charged by Shark is in itself so remote, in my view, as to warrant if not compel rejection of Shark's evidence as to his/its business practice.

[41] I am satisfied that this court has jurisdiction to make the orders I propose to make based upon the residence of the borrowers and the fact that the loans were not made for lawful business or investment purposes. I do not propose to make orders under Division 1 of the Code where borrowers were not ordinarily resident in Queensland when the loan was made. I have disregarded all entries in Shark's records of business (Ex 15) except those confirmed by evidence contained in material seized upon search of Shark's premises (Ex 1) and/or by oral evidence of borrowers on the basis that loans to such borrowers may have come within s 7(1) of the Code.

PROHIBITION ORDER UNDER s 23(1)(a) OF THE ACT

[42] Because, in my view, this is the most significant and important relief sought by Queensland against Shark I will deal with it first.

[43] In the shorter OED page 181 **Shark** is said to have been "applied figuratively" -

> "to persons with allusion to the predatory habits and voracity of the shark; one who enriches himself by taking advantage of the necessities of others; a rapacious usurer; an extortionate landlord or letter of lodgings etc.; a financial swindler."

[44] It is said that the use of this figurative allusion developed in the 18th Century. Perhaps it developed from the use of the verb "to shark", in the 16th and 17th Centuries to mean "to shark on or upon; to prey like a shark upon; to victimise; sponge upon; swindle; to oppress by extortion".

[45] Queensland contends that a significant number of loan transactions analysed in this case indicate an intentional non-compliance with the legislative constraints upon lending money to be found in the *Consumer Credit Code*. There are entries in diaries kept by Shark in the years 1996, 1997 and 1998 (Ex 15) indicating that only a small fraction of the recorded loans, or perhaps more accurately the recorded borrowers from Shark, have been considered in any detail in this case. The recorded loans to borrowers (many being female and identified only by their Christian names) may have been within s 7(1) of the Code.

[46] Essentially it was the case for Shark that he/it made loans only for business or investment purposes which did not come within the Act or Code.

[47] I found the first defendant a quite unpersuasive witness. In July, August, September 1998 surveillance tapes recorded conversations between Shark and various borrowers and associates in a unit in Surfers Paradise which he/it used to conduct his/its credit-providing business activates. A number of conversations were recorded which demonstrate that borrowers from Shark, at least at that stage, were required to pay weekly interest falling due on monies advanced, under threat of serious violence being accorded to them should they fail to do so, and of other

persons being members of their family being harassed with intimations of what would befall the defaulting borrowers should they remain in default.

[48] Although the recordings made of such conduct related to only 3 months of Shark's lending activities, their content indicates, to my mind, that threats of violence to borrowers in default and the conveying of such threats to persons associated with them was a regular and, indeed, essential part of the business activity of Shark subsequent to 1 November 1996 when he/it provided credit to borrowers.

[49] It seems clear that many of the borrowers were people in desperate financial straits. The monies were lent out at rates of interest between 156% per annum and 208% per annum. With late payment fees the annual rate of interest sometimes reached 360% per annum.

[50] Many of the borrowers were in very stretched financial conditions and some, at least, were borrowing money to keep themselves supplied with unlawful drugs. Some were borrowing money to finance their drug dealing activities and/or to fund their activities and/or lifestyle as prostitutes.

[51] On Queensland's case Shark instigated threats of violence to borrowers named Lincoln and Harwood, and used violence against borrowers named Gilleland and Stevens because they failed to pay interest on time.

[52] In my view both the application of violence, and the threats of violence, constitute "unjust conduct in the course of a credit business" within s 21(1)(a) of the Act. Proof of such conduct enables an order to be made against Shark pursuant to s 23(1) of the Act prohibiting him/it from providing further consumer credit if such conduct has been engaged in "repeatedly".

[53] Before dealing with each of the four cases to which I have referred involving violence and threats of violence, it is convenient to refer briefly to some tape recorded conversations in the business premises occupied by Shark indicating steps repeatedly, indeed habitually, taken by Shark to facilitate the recovery of overdue interest payments from defaulting borrowers by threats of and the application of violence to them.

[54] On 3 September 1998 a man, using the name McDennis, seeking a loan from Shark was informed *inter alia*:

> "Now mate I just have to take a quick snap of you, this just goes in your file. In the past we have had people who run away and guys I give the file to never know who they are really looking for, so this just stays in your file and I'll ask you to smile."

Shark advised another borrower:

> "… and we're gonna --- we're gonna take a photograph of you so that in case you run we can give that photograph to our boys to come and find you. Cause its hard to find someone if you don't know what they look like."

[55] Later, dealing with two borrowers male and female Shark observed:

> "Sit down. I've just got to take a photo of you both, just – it sounds funny but there has been many times when we've sent guys looking for people and they get the wrong people you know."

[56] I refer only to some of the many recorded conversations in which Shark persuaded borrowers to permit their photograph to be taken "just in case you do a runner, yeah just here, just so we can chase the money".

[57] One of the recorded telephone conversations with a borrower named "Danny" which contains *inter alia* the following threat by Shark demonstrates the nature of threats made to borrowers failing to meet their loan obligations:-

> "Danny, its Tim again. Man I hope you're not fucken me around man, cause you've been fucken me around I'll hunt you down you little cunt, rip your fucken throat out. I've just spoken to the boys where you used to live and they said you've fucked off and you owe them money. Danny I hate cunts fucken with me hey, so you pick up that fucken phone and call me, you piece of shit …".

[58] Another conversation recorded on 25 August was with a female named Jennifer. That conversation includes the following observations of Shark; what Jennifer said is not of course recorded.

> "Jennifer, I've been given a job to hunting down a man called John Jerogavich who is apparently your boy friend and apparently who is still your boy friend. Technically no, but please understand I represent a local motor cycle chapter on the Gold Coast, he took four and a half thousand dollars off one of the loan sharks that work for them and he hasn't made the payments and he's done a runner with the money. Now we are gonna take him down and we're gonna take him down hard. First of all --- you can assist me very much in finding him --- now if you can just tell just let him know that he may have fucked with a lot of people and got away with it but this time he's done the wrong thing and we'll maim him when we see him when we finally find him. If you can just pass this message to him just let him know keep playing this game keep playing his games but when we get him we'll get him good …".

[59] Later he continued:

> "Yeah, if you please could get a message to him, if you could somehow through some avenue get a message to him and just let him know that we will find him, we will find that fucker. Like that is my mission 24 hours a day my job at the moment is to find that guy, you know, and the longer it takes me to find him the worse it will be for him when I do."

[60] On 18 September 1998 in a tape recorded conversation (roll 2 exhibit 4) between Shark and Paul Lincoln (the brother of a borrower), Shark observed:

> "… no all I'm trying to do is find him, I tell you what happened he took, there's a $500 loan he took $500 loan and the payment is $20 a week. Now the payment, he was supposed to make the payment on Monday and he never fronted he never made it and then I, they give em till Friday but after that, then they're put down as a runner and then all hell breaks loose and everyone goes looking for him.

> There's a company called Sharks Financial Services it's a group of loan sharks. Yeah, no well its just loan sharks, it's just a bunch of loan sharks on the Gold Coast. Oh okay he might have gone away somewhere or something I don't know … He supplied all your details as references when he took the loan."

[61] On 11 September 1998 in the course of a discussion with a man named John, Shark observed:

> "Yeah, when will I see ya mate? I'm not having a good fucken day I don't want to be chasing you around. I'll be at the gym, pop it over to the gym mate. Thank you, bye bye. Are you there John? Listen to me man, listen. I've got four hundred clients and they're fucken drug dealers, they're fucken hookers, they're the lowest form of fucken life on this earth. Now, okay, why would a family man fuck with me? I make the drug dealers and hookers pay me before Saturday. Why do you ring me up? Why do you ring me up? Why do you ring me and tell me you're gonna pay me on Saturday?"

[62] Presumably in the course of a discussion with one of his "collectors" Shark was referring to the collection of one of his outstanding debts – presumably overdue interest. His collector observed: "run in the back door, run in the front door, rip the phones out" to which Shark replied:

> "Yeah, I think his units, see I think its upstairs units, I'm not sure. Have to find out --- He's coming down tomorrow so I'll get all the details off him. Then there we'll go up and see him first and can drive us around there and we'll just do what has to be done. I think the most important thing is that they all cop a flogging, they all feel very sorry for themselves and just things like black eyes, and things like that just to --- Yeah when they walk up the street and it's visible they've been hurt and you know like in a bad way stop their thinking 'Oh fuck you no better not fuck around with these guys' --- Yeah, Yeah, cause at the moment they're all cocky about it, you know, 'oh fuck --- getting away with it, why --- why do you pay it?"

He continued: "That bikey he wants to thrash" to which his collector replied "he's still not paying either?"

> "No, no ran away, did a runner pissed off somewhere, but I think he --- been there a couple of times and I've seen ..."

> "Not in the Club?"

Shark continued:

> "I don't know if he's in a club or not, he is – went down there and I told him next time he sees me gonna put a base ball bat over his head …"

He continued:

> "talk to me or make any payments then next time I see him I'm gonna put a base ball bat over his head and I think he must have been --- say that actually. Then he phoned up a couple of days later he said 'oh, I don't need this sort of shit mate' like he said I'll pay you out. But then he fucked off, he was knocking off Nick's --- girl."

[63] In other recorded conversations between Shark and an associate there are references made to smashing some defaulting borrowers' hands with a rolling pin. Further conversation is recorded about bashing recalcitrant borrowers "to make an example". No distinction seems to have been made between male and female borrowers with respect to the application of violence to them for not paying interest on time on the debts owed to the loan sharking group.

[64] On 10 September 1998 Shark is recorded telling a female borrower –

> "We don't give a fuck we'll bash women as well as guys you know I'm just being straight with you, I'm just telling you now it --- to me tits and a pussy don't mean fuck all …
>
> If they're if they're playing with my money I'll treat them the same way and I know the other guys are exactly the same OK ..."

[65] On Saturday morning, 19 September 1998, a conversation was recorded between Shark and a borrower named Lincoln who was behind with his interest payments; he visited Shark at his/its unit from which the loan sharking business was conducted. When Lincoln arrived Shark was alone but he told Lincoln that "these guys are comin". Lincoln is recorded as asking his father by telephone in Shark's unit for the $50 he owed Shark but was informed apparently that his father did not have that amount of cash presently available. Shark advised Lincoln that "these guys will tear your heart out mate … They'll rip your fucken heart out. If we had of done what you done to you the other day man you wouldn't see this one." He advised Lincoln in these terms:

> "Well you fucked already. Its Saturday you know the fucken rules remember what I said to ya, ya pay on Monday or Tuesday or Wednesday or Thursday/Friday, books close Friday night. Saturday, you're a runner mate, you're a runner. You've got a file everything now man, so what what's happenin you got my money, am I gonna tell the boss I get my money today."

Shark advised Lincoln:

> "You're gonna have to do this tonight mate I'm gonna tell em I'm gonna go out there and tell em the money's gonna be here tonight … they'll hunt you down man."

[66] At this stage of the recorded conversation, five large men are recorded on video tape entering Shark's business premises. Shark is recorded as saying "This is some of the boys whose money you're fucken with". Then one of Shark's associates named Leavers asked Lincoln "Okay first off all I wanna know is how you're paying it" to which Shark observed: "He hasn't paid it but he's spoken to his Dad and his Dad said he'll fix it up tonight. He's given me a guarantee that money." Leavers asked "How long have you been with us" and Lincoln replied "Uh, four weeks" to which

Leavers replied "And you're fucken up already". Leavers then said to one of his companions "Come in there and look at this guy. Next time you see that face I want you to smash it, okay cause next time you see that shit face --- you'll be going in the door to smash his fucken head in."

[67] Leavers continued: "No, no. This time you had a word and nothing happened, next time we make it fucken hurt. The rules are you pay on Monday, don't pay on Monday you phone up --- you pay by Friday, this is Saturday, there is no Saturday business ...". Shark then interposed "Make sure it's in there tonight" to which Lincoln replied that he would make sure of that. Leavers then interposed "You get one chance, you only get one chance and that's it now you've just had it".

[68] After Lincoln was allowed to leave the unit, one of the associates of Leavers observed "Forgot one little detail supposed to have guns." Leavers replied that it was better not to.

[69] Shark then observed: "I really don't --- he won't have the money here tonight" and Leavers agreed merely observing "There's enough people to put a search party out".

[70] Queensland led evidence from four known borrowers to demonstrate that they had been threatened with or indeed accorded violence by Shark in the course of his/its credit-providing activities.

[71] I have already dealt with the violence threatened to Lincoln by Shark and one or more of his associates which was tape recorded. Lincoln gave evidence that in fact one of the men entering Shark's business premises took out a knife and twirled it menacingly in his hand. In fact he said that he was threatened verbally with the knife being held near his throat. No verbal threat was recorded on the listening device installed in Shark's premises. Although it is not essential to determine whether such a knife was produced by one of the "collectors" video recorded as they entered Shark's apartment just before the audio tape recorded the verbal threats made to Lincoln, I think it more than likely that one of them did produce a knife with a view to frightening Lincoln. The observation made by one of those men after Lincoln left the apartment that the threat would have been more effective perhaps had they had guns is consistent with the evidence of Lincoln that a knife was produced. The whole exercise was designed to put him in fear of serious personal injury at the hands of brutal men. The impact on Lincoln made by threats to him on that occasion in the circumstances could well explain his belief that an oral threat to use the knife was made to him, even if it was not. I accept that in all probability a knife was produced to instil fear in him as to the consequences of his non payment by that night of the interest outstanding.

[72] Interestingly on 12 October 1999 Shark was charged in the Magistrates Court at Southport with the offence of extortion (demanding money with threats of personal injury to Lincoln) pursuant to s 415(1)(b) of the *Criminal Code* (Ex 20) arising from the video-audio recorded activities in his unit where the recorded threats of violence to Lincoln were made on 19 September 1999. The proceedings were committal proceedings for an indictable offence attracting 14 years imprisonment and life imprisonment upon proof of a circumstance of aggravation under s 415(4). The police brief recorded that all collectors present at the time (including Leavers) were also charged or to be charged. None of those charges was prosecuted. For some reason, instead of completing the committal proceedings, Shark's plea of guilty to a charge of common assault was accepted, resulting in imposition of a fine. The

conviction for this offence was not recorded. From Ex 20 it appears that the charge brought against Shark resulted from investigation of the circumstances of the threat made on 19 September 1999 by members of the Crime Operations Branch of the Organised Crime Investigative Group of the Queensland Police Force. That exhibit (tendered on behalf of Shark) also records a visit by Shark and some of his collectors to Lincoln's father in their search for Lincoln.

[73] The circumstances that led to acceptance of this plea in light of the content of video and audio recordings were not investigated upon this trial. There must have been some circumstance which upon the evidence justified accepting a plea, in effect, only to a threat of physical violence ignoring the other recorded evidence of the extortionate nature of that threat. Perhaps it was that or another circumstance which persuaded the court to not even record a conviction of common assault.

[74] Another of Shark's borrowers named Gilleland was called to give evidence concerning Shark's loan sharking transactions with him. He gave evidence that after he ceased to make payments of interest, he was walking down the street one day when Shark pulled up near him on his motor cycle and assaulted him by punching him in the stomach and then threatened to do further very serious damage to him should he not recommence paying interest owed on monies advanced to him. I accept the evidence of Gilleland that he was assaulted and threatened by Shark in the course of conducting his loan sharking business, the success of which depended upon making express and/or implied threats of violence in the event that borrowers did not meet their commitments to make regular weekly payments of interest.

[75] In the circumstances I accept the assertion in the statement of David Harwood tendered pursuant to s 92 of the *Evidence Act* 1977 that Shark informed him when he advanced credit to him that if he did not make payments on time "I have collectors who are not averse to the odd knee cap".

[76] The statement of Peter Bella Stevens concerning threats of violence and violence accorded to him because he was in default in making interest payments on monies advanced by Shark is consistent with the evidence as to violence threatened to borrowers generally, and although I have some reservations about other aspects of the contents of the statement, I am satisfied on the balance of probabilities, particularly in the light of the other circumstances proved by direct evidence, that Stevens because he was a defaulting debtor probably was threatened with and accorded violence at the hands of Shark.

[77] There is an interesting historical analysis by Goldstock and Coenen of the development of loan shark operations and their connection with organised crime in the United States of America in the Cornell Law Review Vol 65 at pp 127 - 258, published in January 1980. It is a very detailed analysis of the development of loan sharking activities by crime syndicates in the United States over the 20th Century. It records the various Federal and State legislative attempts to control this activity by organised criminal groups to extract money from impoverished people whose only collateral security for a loan made at extortionate rates of interest was the personal safety of the borrower and that of his or her family members. It is pointed out that many impoverished small borrowers were unable to obtain temporary advances from reputable lenders, because of lack of any security for a loan and at p 145 it is observed that:

> "This unmet demand gave rise to a breed of creditor wholly unlike the salary lender. No longer did illicit lending wear the trappings of legality. Nor did openness and threats of mere legal sanctions characterize consumer lending. Loansharking became the province of organized crime, and fear of physical reprisals for nonpayment became its predominant feature."

At p 146 it is observed:

> "The repeal of prohibition in 1933 and the proliferation of gambling and narcotics trafficking increased the pool of capital and personnel available for carrying on the loansharking activities of organized crime. Furthermore, the Depression caused both a scarcity of capital for legal loans and a staggering demand for credit, particularly among undercapitalized small businesses."
>
> "These factors allowed organised crime to make substantial inroads into markets other than consumer credit. Most importantly, racketeer loansharks began pouring cash into legitimate businesses. The growing gambling industry also produced two significant new groups of customers: unlucky (or unskilled) bettors and bet-takers … In 1964 one state investigatory commission concluded that loansharking had become "a major and most lucrative operation of the criminal underworld." and three years later a presidential commission estimated the volume of the loanshark business to be in the "multi-billion dollar range".

[78] Interestingly, tapes in this case record discussions between Shark and a taxation investigator-auditor-advisor whose function seems to have been to secure the payment of income tax upon income earned by Shark from his/its loan sharking activities involving, *inter alia*, loans made by Shark on the Gold Coast to a firm of solicitors and to a serving police officer . It is a matter of concern that Shark, with the capacity and willingness to use violence to recover outstanding interest payments from borrowers failing to meet such payments and to assemble and mobilise groups of men of violent and merciless disposition to achieve that result, was in a position to exert influence upon members of the community so intimately involved in the administration of justice and the proper enforcement of the criminal law.

[79] At p 148 of the Cornell Law Review the essence of loan sharking activities is succinctly described:

> "On the whole, however, credentials and collateral are secondary considerations to the loanshark: he holds the physical wellbeing of the borrower and his family as security for the loan. One loanshark frankly advised a prospective customer that "[y]our body is your collateral"…
>
> In most instances, however, loansharks need rely only on threats and innuendo. Usually the lender's reputation for violence suffices to ensure prompt repayment. Alternatively, the loanshark's physique,

> weapons, or accomplices may instill the necessary fear in borrowers reluctant to repay.
>
> Threats of violence, more than beatings or murders, protect the financial interests of the loanshark; borrowers are far more likely to repay their loans if kept alive and working. Although occasional violence maintains the reputation of the loanshark and discourages default, excessive force intimidates prospective borrowers and increases the likelihood of police investigations."

[80] Shark is a man of robust physical proportions who attends a body building gymnasium regularly – as do his associates and collectors. He has tattoos on each arm. One reads "no remorse" and the other "no retreat". I am satisfied that many borrowers from him (and/or his company) would be intimated by his name and appearance and by threats he and any of his heavily built associates made in the terms and manner recorded in the tape transcripts which are Exhibit 4 and to Lincoln's father recorded in the police brief which is Ex 20.

[81] Many discussions between Shark and borrowers and between Shark and his associates in the loan shark industry on the Gold Coast have been recorded in which reference is made to Shark's "boss" and to the source of credit provided being from "bikies" in the Gold Coast area. Shark explained that these assertions were made merely to frighten prospective borrowers and those in default. Queensland did not attempt to demonstrate what the source of the money advanced by Shark to borrowers may have been or that any of the capital in Shark's loan shark business may have been directly or indirectly sourced from organised criminal activities. That was not directly relevant to the issues pleaded, although in my view it is relevant to matters to be considered under s 104(2) of the Code (see later at para [103]) However it is clear from his participation in tape recorded conversations that he received significant amounts of interest from "drug dealers and hookers" in the Gold Coast area. Undoubtedly both classes of borrower should they default in meeting promptly their obligations to Shark would be readily located by persons involved in organised criminal activity and would be loath to make official complaints should they fear being subjected to or in fact be subjected to violence as a consequence. In a conversation recorded between 8:30pm and 9:30pm on 30 August 1998 Shark is recorded as advising a borrower named Howard Matthews who was to pay interest to Shark's associate named Mark "Another thing is this money is not my money it's not Mark's money we're just pawns in a game of chess". Later on in September 1998 when discussing the loan sharking system in which he had been and was training another associate (probably Mark) Shark tells him "I'm your boss I'm not the big boss but I'm your boss".

[82] It is clear that Shark had the ability to call up "collectors" to threaten and injure "runners" who failed to meet their obligations to pay interest on loans as it fell due. It is also clear that it was Shark's practice to suspend a borrower's obligation to pay interest while he or she was serving a term of imprisonment upon conviction of some criminal offence or offences. This practice – although not investigated upon trial – does not seem to be related to or constrained by the purpose for which the money may have been advanced although one may infer it would probably be followed *inter alia* with respect to drug dealers at street level who are apprehended from time to time committing drug offences.

[83] In a conversation recorded between Shark and one of his associates on 3 September 1998 reference was made to a borrower (or perhaps a collector) named Perry who was then on either work release or parole apparently having been sentenced to imprisonment on conviction of an offence of armed robbery.

[84] In a conversation recorded between Shark and an associate (probably a "collector") on 7 September 1998 relating to collecting money owed by a borrower named Debbie Hanley reference is made to seizing her car (over which Shark held a Bill of Sale) and Shark advises "if they give you any shit we'll just grab a car load of guys from here and just come up and just destroy the whole fucken house". A short time later he spoke to a man named Warren in the following terms:-

> "Hello. Speaking. Good. Warren how are you Warren. That's Stewart's father, is that right. Gidday mate. Yeah. I sure can. Yeah no worries, look all I wanted was --- it's five hundred bucks you know. That's a --- you know, he's been away for a long time. We wiped --- when they go to prison we wipe all interest, all charges, everything. When they get out we know they're doing it tough. All we want is our principal back, you know. That's all I want. Five hundred bucks and he's clean, finished. That's the end of it Yeah. Five hundred bucks and he's out. Look he can't control --- when they run away I get pissed off. When they go to prison, they got no control over that. But when they do come out, I expect them to do the right thing, you know. Yeah. If he wants he can put it into a bank account. I can supply a bank account detail, he can put it straight into a bank account. Yeah. Yeah. Yeah. Yeah. Yeah. Yeah. Fair enough. I actually thought he might have been living out there. That's why we all turned up. Yeah well see we didn't know that. We just --- yeah the only reason that four guys turned up was because we thought he might have been living there, but you know it wouldn't have been like that if I knew he hadn't been --- well if we knew he hadn't been living there we wouldn't have gone near the place you know. But it was just a change…it was just, because he actually supplied that address as his home"

[85] I infer that Warren was the father of a borrower from Shark named Stewart recently released from prison. It is interesting to note the accommodation extended to such people by Shark. Perhaps it is consistent with Shark's ability to assemble carloads of collectors on short notice to collect interest outstanding or motor vehicles given by borrowers as security for the performance of their obligation to pay such interest.

[86] On tape 40 Vol 3 p.p. 6-7/12 Shark is recorded discussing with an associate "bashing" a female borrower in arrears with interest payments "to make an example of" her. If her mother walked over to her daughter-borrower's residence she also would be "flogged" because "she's caused a lot of problems". The mother will be told "next time we will cut you up and your daughter and your fucken son". The conversation then continued – during which it was agreed that it would be best to beat the mother because she was the one "causing the trouble and it would show that "we don't give a fuck if it's a male, female, what it is".

[87] In the article in the Cornell Law Review Vol 65 to which I have already referred it is observed at p 196

> "…loanshark victims may be unable or unwilling to testify. The very fear which must be proved often silences key witnesses and threatens to sabotage the prosecution. In either situation, proof of criminal conduct requires heavy reliance on circumstantial evidence."

[88] More than 50 pages of the article are devoted to attempts made over the 20th Century in the United States to overcome the reluctance of loan shark victims to put themselves and their families at risk by assisting law enforcement agencies to constrain loan sharking activities or by giving evidence about them in Court.

[89] In an article entitled "THE RICO CIVIL FRAUD ACTION IN CONTEXT: REFLECTIONS ON *BENNETT V BERG*" by Professor Blakey of Notre Dame Law School published in 58 Notre Dame LRev 237 in 1982 reference is made to the comprehensive analysis of the place of organised crime in loan sharking in the article by Goldstock and Coenen to which I have referred.

[90] Professor Blakey was the Chief Counsel of the Senate Sub-Committee on Criminal Laws and Procedure in the United States Senate in 1969-1970 when the *Organised Crime Control Act* of 1970 was processed. Title IX is "Racketeer Influenced and Corrupt Organisations (RICO)"; and his article contains a detailed analysis of organised criminal activity and steps taken, successfully/and unsuccessfully, to control it. Importantly for present consideration is Professor Blakey's acceptance of the reliability of the analysis of Goldstock and Coenen of difficulties in controlling contemporary loan sharking activities in the United States in 1980 as an aspect of such organised criminal activities.

[91] While the article of Goldstock and Coenen to which I have referred containing an historical analysis of loan shark operations and their effect on society in the United States provides interesting and informative background material to the development of that particular form of extortion in the United States, there is no similar historical analysis which I have been able to procure with respect to loan shark activities in Australia.

[92] There are however many aspects of Shark's activities on the Gold Coast which seem similar to and consistent with the loan shark activities in the United States described by Goldstock and Coenen in January 1980.

[93] In the course of his cross examination Shark on a number of occasions challenged Queensland to call various of the borrowers identified in his/its records and/or in the tape recorded conversations at his/its unit concerning his/its loan sharking activities. On one occasion he asked with confidence (rather than in perplexity):

> "Why are we listening to all these tapes and you don't have these people here".

[94] He later observed that he did not feel that "the onus of proof" was on him to call borrowers from him (whom he asserted on one tape included "400 drug dealers and hookers") to show that all loans made were for "business purposes" and thus not within the constraints of the Act and Code.

[95] Queensland did subpoena one alleged borrower to give evidence against Shark. However Shark drove him to Court from the Gold Coast to answer his subpoena and apparently sat with him in the witness waiting area and Counsel for Queensland,

perhaps understandably, decided not to call him. Shark made a point in evidence of commenting upon Queensland's failure to call him to support its case against Shark.

[96] I am satisfied that Shark has repeatedly engaged in unjust conduct in the conduct of his/its credit providing activities and that on this ground he/it should be prohibited from providing further consumer credit.

IMPOSITION OF CIVIL PENALTIES

[97] As well as the injunctive relief it seeks against Shark, Queensland also seeks the imposition of civil penalties for Shark's contravention of key requirements under s 102(2) of the Code and orders for restitution and/or compensation in favour of borrowers.

[98] Divisions 1 and 2 of Part 6 of the Code deal with the court's power to impose civil penalties and to make orders for restitution or compensation to persons affected by a contravention of the Code.

[99] Under Division 1 an Order may be made under s 102(2) of the Code requiring a credit provider to pay a civil penalty if that credit provider has contravened a "key requirement" of the Act.

[100] Under s 100(1) of the Code "*key requirements*" of the Code which must be contained in the written Credit Contract are defined to include *inter alia* those found in:

S 15(B) which relates to the amount of credit to be provided;

S 15(C) which requires the loan contract document to state:

(a) the annual percentage rate or rates under the contract;
(b) if there is more than one rate how each rate applies;
(c) …….

S 15(D) the method of calculation of the interest charges payable under the contract and the frequency with which interest charges are to be debited under the contract;

S 15(E) the total amount of interest charges payable under the contract if ascertainable (if the loan contract would on the assumptions under s 158 and s 160 be paid out within 7 years of the date on which credit is first provided);

S 15(G)(a) credit fees and charges, a statement of the retained credit fees and charges payable under the contract and the amount of such fee or charge for the method of calculation of that fee or charge;

(b) the amount of ascertainable fees and charges and/or the method of their calculation

S 15(H) a statement of the annual percentage rate or rates on the loan or the frequency of payment of the credit fee or charge or instalment and the means by which the debtor will be informed of the change or the new fee or charge;

S 15(I) The frequency with which statements of accounts are to be provided to the debtor;

S 15(J)(a) if the contract is one under which a default rate of interest may be charged when payments are in default – a statement to that effect and the default rate and how it is to be applied;

[101] Section 102(4) of the Code specifies matters that should be considered when considering whether a civil penalty ought be imposed under s 105 for breaches of key conditions of the Code. Those considerations are somewhat similar to those considered by Smithers J in *TPC v Stihl Chainsaws (Aust) Pty Ltd* (1978) 80 TPR 40-091 when considering the appropriate penalty to impose for breaches of s 76 of the *Trade Practices Act*.

[102] Section 102(4), requires consideration to be paid to:

"

(a) the conduct of the credit provider and the debtor before and after the credit contract was entered into;
(b) whether the contravention was deliberate or otherwise;
(c) the loss or other detriment (if any) suffered by the debtor as a result of the contravention;
(d) when the credit provider first became aware or ought reasonably to have become aware of the consequences of the contravention;
(e) any systems or procedures of the credit provider to prevent or identify contraventions;
(f) whether the contravention could have been prevented by the credit provider;
(g) any action taken by the credit provider to remedy the contravention or compensate the debtor or to prevent further contraventions;
(h) the time taken to make the application and the nature of the application;
(i) any other matter the Court considers relevant."

Although in my view the Act and Code do technically apply to a loan sharking credit provider lending money to be used to achieve personal as opposed to business or investment goals, most of their provisions have been drafted to protect borrowers where both lender and borrower assume that ultimately resort will be had to legal action in the event of disputation: *vide* Part 5 of the Code and Cll. 22 to 25 of the Information Statement which is Form 2 in the Schedule to the *Consumer Credit Regulations*, 1995. In this case however both lenders and borrowers have assumed that the ultimate sanction for the borrowers failure to make agreed payments to satisfy their obligations to the lender will be the application of physical violence to the borrower (and/or perhaps to members of his or her family).

[103] In this case in fixing the quantum of penalty to be imposed for contravention of a "key requirement" of the Code in respect of each loan made, I take into account:

(i) That Shark (as did his/its associates in loan sharking activities) lent monies to criminal classes of borrowers and to foolish and impoverished people unable to obtain loans elsewhere in relatively small sums at outrageously exorbitant rates of interest, non-payment of which on a weekly basis would attract the infliction of serious physical injury by groups of brutal and merciless people with ability to track down those seeking to hide from them;
(ii) The contraventions of the Code were deliberate;

(iii) The detriment inflicted on the borrowers by the loan sharking activity was very substantial – both financially and psychologically;

(iv) Shark was aware from the outset of the impact of the Act and Code upon his/its loan sharking activities which might be prohibited under s 21(1)(a) and s 23(1)(a) of the Act, and embarked upon a carefully planned charade designed to make use of s 11 of the Code ostensibly to evade as far as possible the application of the Act and Code to those activities; and

(v) The contraventions proved could have been avoided by Shark's strict compliance with the key requirements of the Code. However, even such compliance would not have circumvented s 21 of the Act because the basis of his/its loan sharking activity was repeated engagement in unjust conduct the effect of which of course could not be avoided by the strictest compliance with such requirements.

[104] One might wonder whether the draftsman of s 102(4) ever had in contemplation a claim of this kind where the focus on the conduct of Shark is his/its resort to systematic threats and application of violence to borrowers unable or unwilling to continue to pay extortionate rates of interest on loans made on the clear understanding that their personal safety and that of their family was the only collateral security upon which ultimately Shark relied. It is with some hesitancy that in fixing the quantum of a civil penalty for breach of a key requirement of the Code, I give significant weight to the undoubtedly "unjust conduct" of Shark in the conduct of his/its loan sharking activities which justifies a prohibition order under s 23(5) of the Act, when, at the end of the day, I remain unpersuaded that Shark's unwavering compliance with all the key and non-key requirements of the Code would have made the slightest difference to the willingness of the borrowers to take the loans with the clear understanding of the painful consequences for them should they fail to meet their obligation to make timely payments of interest as it fell due.

[105] The structure of the Act and Code seems to be based on the premise that disputation between credit provider and borrower will be resolved ultimately in legal proceedings and not by maiming, stabbing, knee-capping and the infliction of other sorts of physical injury by the credit provider on the defaulting borrower.

[106] Undoubtedly Shark has repeatedly and systematically contravened key requirements of the Code. Whether such contraventions may properly be used as vehicles to impose significant civil penalties under s 102 of the Code by resort only to s 102(4)(a) and (i) for conduct specifically dealt with by s 23(5) of the Act, is a matter of some concern. Any civil penalties recovered will be held for the purposes contemplated by s 106 of the Code which hopefully will include the implementation of policies and the taking of steps designed to overcome, or at the least, control to the extent possible, extortionate loan sharking activities generally.

[107] Section 105(1) of the Code provides, *inter alia*:

> "On application being made by … the Government Consumer Agency for an order, the maximum civil penalty that may be imposed by the Court for a contravention of a key requirement relating to a contract affected by the application is an amount calculated so that the total civil penalty for all contraventions of the requirement in

Australia (as disclosed by the credit provider) does not exceed $500 000."

[108] On my analysis of the evidence in respect of 27 loans canvassed by Queensland, Shark contravened the following key requirements in respect of each loan. I am unpersuaded upon the evidence that such contraventions of the Code have been established in respect of other loans canvassed. I assess the civil penalties specified against the loans listed in respect of the breaches of key requirements which are also listed. In quantifying the penalties I give weight principally to

(a) deterrence of similar types of loan sharking activities;

(b) the serious impact upon the community of such activities which are probably linked to organised crime; and

(c) contributing to a fund under s 106 of the Code which will be available to assist in overcoming, or at least controlling extortionate loan sharking activities.

Loan	**Breach of Key Requirements**	**Penalty**
1. Stevens (1997)	No written contract as required under s 12(1) of the Code. Therefore breach of all key requirements under s 100(1)(a)(i) of the Code.	$10,000
2. Gilleland (March 1997)	No written contract as required under s 12(1) of the Code. Therefore breach of the key requirements under s 100(1)(a)(i) of the Code. If any written contracts of loan were executed they failed to comply with the key requirements s 15(B)(a), s 15(C) and s 15(D) of the Code.	$10,000
3. Beaver (September 1997)	If a written contract was executed as required under s 12(1) of the Code. There was a breach of key requirements of the Code under s 15(B)(a) (no statement of brokerage fee or advance interest deducted). Section 15(C) – no statement of annual rate of interest and s 15(D) – failure to state method of calculation of interest payable in the event of part repayment of principal.	$10,000
4. Malvenan (2 March 1998)	The written contract does not comply with:- Section 15(B)(a) of the Code – no statement of advance	$10,000

	interest deducted from the amount borrowed. No statement in the loan contract of the amount of money handed over (lent) to the borrower. Breach of s 15(C) of the Code no statement of annual percentage rate of interest payable on money lent. Breach of s 15(D) failure to state the method of calculation of interest payable in the event of part repayment of principal.	
5. Hotchin and Norbat (3 March 1998)	The written contract does not comply with:- Section 15(B)(a) of the Code – no statement of advance interest deducted from the amount borrowed. No statement in the loan contract of the amount of money handed over (lent) to the borrower. Breach of s 15(C) of the Code no statement of annual percentage rate of interest payable on money lent. Breach of s 15(D) failure to state the method of calculation of interest payable in the event of part repayment of principal.	$10,000
6. Greene (March 1998)	The written contract does not comply with s 15(B)(a), s 15(C) and s 15(D) of the Code	$10,000
7. Winton (1 April 1998)	Breach of s 15(B)(a), s 15(C) and s 15(D). No statement of advance interest deducted. No statement of annual percentage rate of interest payable. No statement of method of calculation of interest in event of part repayment of capital.	$10,000
8. Dalton (7 April 1998)	The written contract does not comply with:- Section 15(B)(a) of the Code – no statement of advance interest deducted from the amount borrowed. No statement in the loan contract of the amount of money handed over (lent) to the borrower. Breach of s 15(C) of the Code no statement of annual percentage rate of interest payable on money lent. Breach of s 15(D) failure to state the method of calculation of interest payable in the event of part repayment of principal	$10,000
9. Bentley (6 May 1998)	The written contract does not comply with:-	$10,000

	Section 15(B)(a) of the Code – no statement of advance interest deducted from the amount borrowed. No statement in the loan contract of the amount of money handed over (lent) to the borrower. Breach of s 15(C) of the Code no statement of annual percentage rate of interest payable on money lent. Breach of s 15(D) failure to state the method of calculation of interest payable in the event of part repayment of principal.	
10. Ginns (May 1998)	The written contract does not comply with:- Section 15(B)(a) of the Code – no statement of advance interest deducted from the amount borrowed. No statement in the loan contract of the amount of money handed over (lent) to the borrower. Breach of s 15(C) of the Code no statement of annual percentage rate of interest payable on money lent. Breach of s 15(D) failure to state the method of calculation of interest payable in the event of part repayment of principal.	$10,000
11. Ross and Weslin (11 May 1998)	The written contract does not comply with:- Section 15(B)(a) of the Code – no statement of advance interest deducted from the amount borrowed. No statement in the loan contract of the amount of money handed over (lent) to the borrower. Breach of s 15(C) of the Code no statement of annual percentage rate of interest payable on money lent. Breach of s 15(D) failure to state the method of calculation of interest payable in the event of part repayment of principal.	$10,000
12. Dale (21 May 1998)	The written contract does not comply with:- Section 15(B)(a) of the Code – no statement of advance interest deducted from the amount borrowed. No statement in the loan contract of the amount of money handed over (lent) to the borrower. Breach of s 15(C) of the Code no statement of annual percentage rate of interest payable on money lent. Breach of s 15(D) failure to state the method of calculation of interest payable in the event of part repayment of principal.	$10,000
13. Hoare (30 May 1998)	The written contract does not comply with:-	$10,000

	Section 15(B)(a) of the Code – no statement of advance interest deducted from the amount borrowed. No statement in the loan contract of the amount of money handed over (lent) to the borrower. Breach of s 15(C) of the Code no statement of annual percentage rate of interest payable on money lent. Breach of s 15(D) failure to state the method of calculation of interest payable in the event of part repayment of principal.	
14. Patching (November 1996)	No written contract executed as required by s 12(1) of Code therefore breach of all key requirements under s 100(1)(a)(i).	$10,000
15. Boyle and Maurice (28 July 1998)	The written contract does not comply with:- Section 15(B)(a) of the Code – no statement of advance interest deducted from the amount borrowed. No statement in the loan contract of the amount of money handed over (lent) to the borrower. Breach of s 15(C) of the Code no statement of annual percentage rate of interest payable on money lent. Breach of s 15(D) failure to state the method of calculation of interest payable in the event of part repayment of principal.	$10,000
16. Brooks and Chapman (5 August 1998)	The written contract does not comply with:- Section 15(B)(a) of the Code – no statement of advance interest deducted from the amount borrowed. No statement in the loan contract of the amount of money handed over (lent) to the borrower. Breach of s 15(C) of the Code no statement of annual percentage rate of interest payable on money lent. Breach of s 15(D) failure to state the method of calculation of interest payable in the event of part repayment of principal.	$10,000
17. Handley (10 August 1998)	Breach of same key requirements as in loan to Bentley (No. 9).	$10,000
18. Dean (25 August 1998)	The written contract does not comply with:- Section 15(B)(a) of the Code – no statement of advance interest deducted from the amount borrowed. No statement in the loan contract of the amount of money handed over (lent) to the borrower.	$10,000

	Breach of s 15(C) of the Code no statement of annual percentage rate of interest payable on money lent. Breach of s 15(D) failure to state the method of calculation of interest payable in the event of part repayment of principal.	
19. Greenham (14 October 1998)	Breach of same key requirements as in loan to Bentley (No. 9).	$10,000
20. Harding (28 January 2000)	No written contract as required by s 12(1) of the Code therefore breach of all key requirements.	$10,000
21. Harwood (22 August 2000)	No written contract as required by S 12(1) of the Code therefore breach of all key requirements	$10,000
22. Hughes (25 August 1998)	The written contract does not comply with:- Section 15(B)(a) of the Code – no statement of advance interest deducted from the amount borrowed. No statement in the loan contract of the amount of money handed over (lent) to the borrower. Breach of s 15(C) of the Code no statement of annual percentage rate of interest payable on money lent. Breach of s 15(D) failure to state the method of calculation of interest payable in the event of part repayment of principal.	$10,000
23. Lincoln (4 August 1998)	The written contract does not comply with:- Section 15(B)(a) of the Code – no statement of advance interest deducted from the amount borrowed. No statement in the loan contract of the amount of money handed over (lent) to the borrower. Breach of s 15(C) of the Code no statement of annual percentage rate of interest payable on money lent. Breach of s 15(D) failure to state the method of calculation of interest payable in the event of part repayment of principal.	$10,000
24. O'Brien (3 September 1998)	The written contract does not comply with:- Section 15(B)(a) of the Code – no statement of advance interest deducted from the amount borrowed. No statement in the loan contract of the amount of money handed over (lent) to the borrower.	$10,000

	Breach of s 15(C) of the Code no statement of annual percentage rate of interest payable on money lent. Breach of s 15(D) failure to state the method of calculation of interest payable in the event of part repayment of principal.	
25. Mauiurano & Santinon (2 August 1998)	The written contract does not comply with:- Section 15(B)(a) of the Code – no statement of advance interest deducted from the amount borrowed. No statement in the loan contract of the amount of money handed over (lent) to the borrower. Breach of s 15(C) of the Code no statement of annual percentage rate of interest payable on money lent. Breach of s 15(D) failure to state the method of calculation of interest payable in the event of part repayment of principal.	$10,000
26. Sturm & Whittington (8 September 1998)	The written contract does not comply with:- Section 15(B)(a) of the Code – no statement of advance interest deducted from the amount borrowed. No statement in the loan contract of the amount of money handed over (lent) to the borrower. Breach of s 15(C) of the Code no statement of annual percentage rate of interest payable on money lent. Breach of s 15(D) failure to state the method of calculation of interest payable in the event of part repayment of principal.	$10,000
27. Toreaux (30 September 1998)	The written contract does not comply with:- Section 15(B)(a) of the Code – no statement of advance interest deducted from the amount borrowed. No statement in the loan contract of the amount of money handed over (lent) to the borrower. Breach of s 15(C) of the Code no statement of annual percentage rate of interest payable on money lent. Breach of s 15(D) failure to state the method of calculation of interest payable in the event of part repayment of principal.	$10,000
	TOTAL	**$270,000**

[109] I assess civil penalties in this sum on a construction of s 101 and s 105(1) of the Code which permits the Government Consumer Agency in essence to seek a civil penalty for "repeated unjust conduct" on the part of a credit provider under s

21(1)(a) and s 23(1) of the Act if that credit provider has also contravened key requirements of the Code. The strictest compliance with key and non-key requirements by loan sharks will of course avoid the possibility of the imposition of condign civil penalties for extortionate loan sharking activities.

ORDER FOR RESTITUTION OR COMPENSATION

[110] Division 1 of Part 6 of the Code deals with orders for "civil penalties" and for "compensation" in the event that it is shown that a credit provider has contravened "a key requirement" of the Code as defined in s 100 of it. I have already referred to s 102 of the Code and the "key requirements" enumerated in s 100(1) and s 15.

[111] Division 2 of Part 6 of the Code contains only s 114.

[112] Section 114 of Division 2 provides:-

> "**114.(1)** If a credit provider contravenes a requirement of or made under this Code (other than one for which a civil effect is specifically provided by Division 1 (*ie of Part 6*) or by any other provision of this Code), the Court may order the credit provider to make restitution or pay compensation to any person affected by the contravention and, in that event, may make any consequential order it considers appropriate in the circumstances.
>
> **(2)** An application for the exercise of the Court's powers under this section may be made by the Government Consumer Agency or by any person affected by the contravention."

[113] In my view Division 1 of Part 6 of the Act deals only with the civil effects of contraventions of the "key requirements" specified in s 100(1) of the Code.

[114] In my view the civil effects "specifically provided" by Division 1 are those mentioned in s 102(2) being a civil penalty to be "paid" by the credit provider limited in amount by section 103 if sought by a debtor or guarantor, and by s 105 if sought by either a credit provider or the Government Consumer Agency.

[115] A civil penalty ordered by the court upon application by a debtor or guarantor becomes a debt due by the credit provider to the debtor or to his/her guarantor and under s 104 may be set off against any money due to the credit provider.

[116] On the other hand any civil penalty imposed upon an application made by a credit provider or Government Consumer Agency must be paid to the Government Consumer Agency or to a fund established for the purpose of that section.

[117] Section 107 of the Code limits the amount of compensation which may be recovered by a debtor or guarantor upon application under Division 1 to the loss actually arising from the contravention of a key requirement. This limitation must be read with the limitation of their right to seek a civil penalty in the sum limited by s 103(1)(a) of the Code in an amount not exceeding the sum of all interest charges payable under the loan contract from the date it was made unless the loss actually suffered exceeds the sum of those interest charges – *vide* s 103(2).

[118] On my construction of s 114(1) found in Division 2 of Part 6 either the Government Consumer Agency or in this case, one or more of the debtors, may apply for relief

under that Division only in respect of contravention of a requirement of the Code in respect of which relief may not be sought under Division 1.

[119] On my reading of it, Division 1 makes no provision for making an Order that a credit provider make restitution to a debtor unless "restitution" under s 114(1) of the Code be construed to include within s 102(4)(c) of the Code:-

> "the loss or other detriment (if any) suffered by the debtor as a result of the contravention".

[120] With some hesitation I construe "restitution" in s 114(1) as comprehending in the circumstances of the present case, for example, the recovery of goods seized under a Bill of Sale given to Shark – such as the motor vehicles the borrowers, Beaver and Hanley used as security for repayment of the loans made to them.

[121] However it is arguable that grammatically the word may also connote an order for repayment of the amount of money paid by a debtor to Shark which exceeds the amount of money lent to that debtor; or perhaps such part of that excess as may be judged appropriate.

[122] In the shorter OED, "restitution" is defined to mean *inter alia* "the action of restoring or giving back something to its proper owner *or* making reparation to a person for loss or injury inflicted".

[123] In the same dictionary "compensation" is defined to mean "the action of compensating or a recompense for loss or damage". The verb "to compensate" is defined to mean:–

> "to counter balance, make up for, make amends for … to be an equivalent of … to make equal return to, to recompense".

[124] In my view "restitution" essentially connotes the yielding up or restoring of something improperly or unlawfully taken or retained without legal justification.

[125] In my judgment the use of the two terms, standing side by side in s 114(1), ought not be attributed to tautology on the part of the draftsman of this legislation even though, if it stood alone the term "to make restitution" might in context sometimes include "to pay compensation" or "to recompense". The payment of compensation on whatever basis must always involve the payment of money; on the other hand an order made for the restitution or return of property given, as security for repayment of a loan could never be characterised as one "requiring the payment of compensation".

[126] One question then to be determined on this issue is whether the order sought by Queensland that Shark pay the whole or at least part of the excess of payments of interest received from borrowers over the amount of money lent to them, should be characterised as an order that such money, being a "thing", be paid back to the borrowers and thus be restored or restituted to them, or whether it should be characterised as an order that Shark pay a sum of money to the borrowers to make up for or to recompense them for loss they actually suffered as a consequence of a contravention by Shark of requirements under the Act (whether key requirements or non-key requirements).

[127] To the extent that it would become necessary to make an assessment on the first characterisation the sum to be assessed would be a liquidated one and on the second it would be an unliquidated one.

[128] The policy of Division 1 of Part 6 of the Code is clearly expressed in s 107(2) which limits the amount of compensation recoverable (if any) upon application by a debtor to "the amount of the loss" resulting from the contravention. Similarly under s 103(2) of the Code the maximum civil penalty that may be imposed by a Court, upon an application by a debtor or guarantor, for contravention of a key requirement is to be the greater of "all interest charges payable from the date the contract was made" under s 103(1)(a) and/or "the amount of the loss" under s 107(2). It is unnecessary for the purposes of this application to determine whether the effect of s 107(1) and (2) and s 103(2) in any way limits the size of the civil penalty which a debtor may recover under s 103(1)(a) as intended by s 103(2).

[129] I confess to finding some difficulty in construing the limits placed upon making an order for restitution or compensation under s 114(1) in Division 2 of Part 6 which constrains the rights of all persons, including the Government Consumer Agency to seek relief under that Division. At the end of the day however, the only applicant for relief under Division 2 in this case is Queensland. No borrower has sought, either formally or informally, any relief under Part 6 of the Code. On my construction of Division 1 Part 6, it does limit the relief which may be claimed by the Government Consumer Agency, credit providers, debtors, and guarantors to the recovery of civil penalties and compensation generally; in particular a civil penalty ordered to be paid to a debtor or guarantor may properly be characterised as a payment "of a debt due" by the credit provider (under s 104(1) of the Code) such an order is limited to payment of "compensation for loss" – arising from a contravention of a "key requirement" under s 107(1).

[130] In my view the application of s 114(1) in the present case, has the result that the power of the Court under Division 2 pf Part 6 is limited to making an order for "restitution" to borrowers in the sense to which I have referred in para [116] and does not extend to making an order for payment of compensation to them.

[131] Division 1 of Part 6 (containing sections 100 to 113) in effect provides that the "civil effect" of a proven contravention of a key requirement of the Code as defined in s 100 (to include requirements contained in ss 15 and 21 of the Code) is the liability to have "a civil penalty" imposed by the Court. Section 114 in Division 2 to my mind does not permit the making of any Order against a credit provider to pay compensation to a person affected by a contravention of a key requirement defined in s 100 of the Code (in Division 1) because by its express terms, it specifically excludes such relief for contraventions of Code requirements for which a "civil effect" is provided in Division 1 which includes a civil penalty which may be imposed under s 102(2) or an order for compensation made under s 107 of the Code.

[132] In my view therefore power to make an Order upon the application of Queensland that Shark pay compensation to any of the borrowers considered in this case is limited to contraventions of requirements of the Code other than key requirements as defined in s 100(1) of the Code.

[133] Upon an application for a civil penalty by the Government Consumer Agency the legislative intent must have been to treat a breach of key requirements as in the

nature of a quasi criminal act demanding punishment to act as a deterrent to other credit providers committing similar breaches. Section 107(4) clearly distinguishes between the nature of a penalty imposed under s 105 upon application by a credit provider or the Government Consumer Agency and an order for compensation made under s 107 upon application by a debtor. On the other hand the quantum of a civil penalty recovered by a debtor under s 104(1) is probably limited by s 102(4)(c) which would probably be applied having regard to s 107 which deals with the debtors right to apply for compensation for loss "arising from the contravention of a key requirement" although the terms of s 107(3) suggest that when making an order for compensation for loss a Court would have to take into account any order for a civil penalty obtained by a debtor. In my view the better construction of ss 103 and 107 of the Code is that a debtor may not upon application under either section recover a civil penalty in a sum which exceeds the loss attributable to the breach of key requirement he establishes.

[134] However that may be, on my construction of the legislation, power to order Shark to pay compensation to borrowers in this case must be limited to those contraventions of the Code which are not defined as "key requirements" in s 100(1) of it because Division 1 of Part 6 covers the field with respect to applications for such compensation.

[135] The relief sought by Queensland for payment to borrowers of the difference between the whole of the monies repaid and the amount of the loan is really in the nature of the relief which the borrowers themselves may have sought upon application under s 103(1)(a) and perhaps s 107 of the Code to recover their loss which of course are contained in Division 1.

[136] The evidence discloses, and indeed Shark in effect concedes, contravention of non-key requirements of s 14(1)(a), s 14(2)(b) and s 18A of the Code.

[137] In my view the better construction of this rather difficult part of the *Consumer Credit Code* is that s 114(1) prevents a court from making an order under Division 2 with respect to compensation for contravention of key requirements of the Code which may be made under Division 1, although it does not prevent a court from making such an order with respect to contravention of non-key requirements of the Code. On the other hand it would be inconsistent with the obvious policy of Division 1 of Part 6 to make an order for compensation under Division 2 which exceeded the loss which actually resulted from contravention of the non-key requirements established.

[138] On the facts of this case in my view no loss has been established which is attributable to contravention of non-key requirements in respect of any of the loans. There is no evidence given by the only witnesses who were borrowers from Shark that they would have been dissuaded from borrowing the monies which they did from Shark had the non-key requirements been complied with. There is no suggestion from any witness or any borrower that they would have been dissuaded from borrowing from Shark at the exorbitant interest rates they agreed to pay even had relevant disclosure documents been given to them. In my view each of the borrowers was well aware that payment of the exorbitant interest rates charged by Shark for monies advanced to them was secured essentially by threats of physical violence to be meted out to them should they not pay that interest by the due date.

[139] I am quite unpersuaded in any event that compliance with either the non-key requirements or the key requirements of the Code, which have been established sufficiently on the material seized in Shark's premises and by Shark's admissions in evidence that he did not provide borrowers with the pre contractual documentation required by s 14 of the Code, would have dissuaded any of the borrowers from borrowing money from Shark or indeed would have in any way avoided or diminished financial losses they suffered as a result; in short I am unpersuaded that any contravention of the provisions of the Code established, was in any way causative of any loss or detriment to the borrowers considered in this case. Undoubtedly the loss or detriment which many did suffer resulted from their payment of exorbitant interest under threat of personal injury rather than Shark's breach or contravention of any formal requirements of the Code.

[140] With some regret, I have come to the conclusion that the material is not sufficient to permit me to make any order that the misguided borrowers in this case be paid any sum by Shark by way of compensation upon the claim by Queensland. They have refrained from taking such action themselves; it was clearly open to them to do so under s 103(1)(a) of the Code and to recover "interest payable" under the contract at least to the extent of any loss they suffered as a consequence of the breaches established; in my view it is not possible in light of the express terms of s 114(1) of the Code for Queensland to seek that relief on their behalf.

[141] The Act and Code do not constitute the Government Consumer Agency a sort of *parens patriae* of borrowers who have suffered financial loss consequent upon and attributable to breach of a key requirement of the Code (or a non-key requirement for that matter) by a lender. While such loss is a relevant consideration in imposing any civil penalty under s 102(4)(c) of the Code upon an application made under s 105 of the Code, it is clear that any penalty recovered by the Agency must be paid into the fund contemplated by s 106 of the Code. I was not referred to any section of the Act or Code which would permit any part of a civil penalty recovered from Shark in this case (which may perhaps have been recoverable by a debtor upon application under ss 103 and 104 of the Code) to be paid by Queensland to that debtor.

[142] In light of my conclusions on this issue it is unnecessary to take further submissions as to the quantum of compensation which Queensland seeks against Shark on behalf of some borrowers.

[143] **ORDERS MADE**

1. I order that Timothy John Ward and Shark Financial Services Pty Ltd from the date of this order be prohibited from providing consumer credit on the ground that they have provided consumer credit unfairly and have repeatedly engaged in unjust conduct in the course of the provision of consumer credit.
2. I declare that the first and second defendants have contravened the following specified key requirements of the *Consumer Credit Code* (Qld) with respect to the following specified credit contracts and with respect to each contravention I impose the penalty specified for those contraventions.
   (a) CREDIT CONTRACTS PROVIDED BY THE FIRST DEFENDANT PRIOR TO 8 JULY 1998 -
   THE LOAN BY THE FIRST DEFENDANT TO:
   1. Stevens (1997) Breach of all key requirements – no written contract – penalty $10,000

2. Gilliland (March 1997)
   Breach of s 21(1) of the Code and breach of all key requirements under s 100(1)(a)(i) of the Code – penalty $10,000
3. Beaver (September 1997) -
   Breach of s 12(1), s 100(1)(a)(i), s 15(B)(a) of the Code – penalty $10,000
4. Malvenan (2 March 1998)
   Breach of s 15(B)(a), s 15(C) and s 15(D) of the Code – penalty $10,000
5. Hotchin and Norbat (3 March 1998)
   Breach of s 15(B)(a), s 15(C) and s 15(D) of the Code – penalty $10,000
6. Greene (March 1998)
   Breach of s 15(B)(a), s 15(C) and s 15(D) – penalty $10,000.
7. Winton (1 April 1998)
   Breach of s 15(B)(a), s 15(C) and s 15(D) of the Code – penalty $10,000
8. Dalton (7 April 1998) –
   Breach of s 15(B)(a), s 15(C) and s 15(D) of the Code – penalty $10,000
9. Bentley (6 May 1998) –
   Breach of s 15(B)(a), s 15(C) and s 15(D) of the Code – penalty $10,000
10. Ginns (May 1998)
    Breach of s 15(B)(a), s 15(C) and s 15(D) of the Code – penalty $10,000
11. Ross and Weslin (11 May 1998)
    Breach of s 15(B)(a), s 15(C), s 15(D) of the Code – penalty $10,000
12. Dale (21 May 1998)
    Breach of s 15(B)(a), s 15(C), s 15(D) of the Code – penalty $10,000
13. Hoare (30 May 1998)
    Breach of s 15(B)(a), s 15(C) and s 15(D) of the Code – penalty $10,000
14. Patching (November 1996)
    Breach of s 12(1) of the Code and therefore breach of all key requirements under s 100(1)(a)(i) of the code – penalty $10,000

Total $140,000

(b) CREDIT CONTRACTS PROVIDED BY BOTH THE FIRST DEFENDANT AND THE SECOND DEFENDANT SUBSEQUENT TO 1 JULY 1998 -

1. Boyle and Morris (28 July 1998) -
   Breach of s 15(B)(a), s 15(C) and s 15(D) of the Code – penalty $10,000
2. Brooks and Chapman (5 August 1998)
   Breach of s 15(B)(a), 15(C) and 15(D) of the Code - penalty $10,000
3. Handley (10 August 1998)

Breach of s 15(B)(a), s 15(C) and s 15(D) – penalty $10,000

4. Dean (25 August 1998)
   Breach of s 15(B)(a), s 15(C), s 15(D) of the Code – penalty $10,000
5. Greenham (14 October 1998)
   Breach of s 15(B)(a), s 15(C) and s 15(D) of the Code
6. Harding (28 January 2000)
   No written contract therefore breach of all key requirements under s 100(1)(a)(i) – penalty $10,000
7. Harwood (22 August 2000)
   No written contract therefore breach of all key requirements under s 100(1)(a)(i) – penalty $10,000
8. Hughes (25 August 1998)
   Breach of s 15(B)(a), s 15(C) and s 15(D) of the Code – penalty $10,000
9. Lincoln (9 July 1999)
   Breach of s 15(B)(a), s 15(C) and s 15(D) – penalty $10,000
10. O'Brien (3 September 1998)
    Breach of s 15(B)(a), s 15(C) and s 15(D) of the Code – penalty $10,000
11. Mauiurano & Santinon (2 August 1998)
    Breach of s 15(B)(a), s 15(C) and s 15(D) of the Code – penalty $10,000
12. Sturm & Whittington (8 September 1998)
    Breach of s 15(B)(a), s 15(C) and s 15(D) of the Code – penalty $10,000
13. Toreaux (30 September 1998)
    Breach of s 15(B)(a), s 15(C) and s 15(D) of the Code – penalty $10,000

Total **$130,000**

[144] Although breach of the key requirements of the Code subsequent to 1 July 1998 (the date of incorporation by the first defendant of the second defendant) technically renders each defendant liable to a penalty, having regard to the fact that the second defendant upon incorporation really became the alter ego of the first defendant with respect to all breaches subsequent to 1 July 1998 I impose in respect of each contravention by both defendants specified in Order 2(b) hereof the one penalty of $10,000 and each defendant will be jointly responsible for payment of that penalty.

[145] With respect to the appropriate order for costs, in my view the defendants, properly advised, must have been well aware that upon the evidence available to Queensland their contention that their loans in issue upon this claim were substantially for business and investment purposes and so not governed by the provisions of the *Consumer Credit Act and Code* was unsustainable. I am satisfied that the evidence given by and on behalf of the defendants was in many respects false, and designed merely to avoid the impact of the Act and Code upon their loan sharking activities. The tape recorded evidence relating to the defendants' resort to a system of interest collection which relied upon threats of and application of violence to borrowers not regularly meeting their obligation to pay exorbitant rates of interest was well known to the defendants and no real attempt was made to meet it. It was this evidence which supported Queensland's claim for an order prohibiting the defendants from continuing their loan sharking activities. Queensland's claim was pursued in the

public interest to prohibit the defendant's loan sharking activities and it was vigorously contested by an unpersuasive attempt to advance and rely upon the charade adopted in 1998 to avoid the application of the Act and Code. I refer to the judgment of Morling J in *Australian Federation of Consumer Organisations v Tobacco Institute of Australia Ltd* (1991) 100 ALR 568 at 571-572 and *Baltic Shipping* v Dillon [1991] NSWLR 22 at 33, 34 and 35 per Kirby P. In my view this is a case in which it is appropriate to order costs on an indemnity basis and I propose to do so.

[146] I order that the defendants, pay to the plaintiff its costs of and incidental to its claim for a prohibition order and for an order for civil penalties in respect of contraventions of the Code subsequent to 1 July 1998 (referred to in Order 2(b)hereof) to be assessed on an indemnity basis.

[147] I make no order for costs with respect to the plaintiff's claim for relief made under Division 2 of Part 6 of the Code on behalf of the various borrowers.

[148] I order that with respect to those civil penalties recovered with respect to contraventions of the Code prior to the incorporation of the second defendant on 1 July 1998 (referred to in Order 2(a) hereof), the first defendant pay to the plaintiff its costs of and incidental to its claim to be assessed on an indemnity basis.