

*ENFORCEMENT PROCEDURES IN RESPECT
OF THE CONSUMER'S RIGHT TO FAIR,
REASONABLE AND JUST CONTRACT TERMS
UNDER THE CONSUMER PROTECTION ACT
IN COMPARATIVE PERSPECTIVE*

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I INTRODUCTION

Part G of Chapter 2 of the Consumer Protection Act¹ seeks to protect a consumer's 'right to fair, reasonable and just terms and conditions'. This part of the Consumer Protection Act has already been discussed in detail elsewhere,² and will not be set out again in full, but a summary thereof will provide a useful introduction to this article. Section 48 primarily prohibits suppliers from contracting, or offering to contract, on terms that are unfair, unreasonable or unjust.³ Section 52 regulates the 'powers of court to ensure fair, reasonable and just terms and conditions'. It therefore provides what orders a court may make in this regard and what factors must be considered when deciding whether a term or a contract is unfair. The Consumer Protection Act bolsters the general prohibition of unfair terms by also enumerating certain terms which are prohibited outright (this in s 51). These include exemption clauses in respect of gross negligence, and false acknowledgments by the consumer that no representations were made by or on behalf of the supplier.⁴ In addition, the rest of the Consumer Protection Act creates mandatory rights for the consumer (for example to quality goods) which may not be derogated from by contrary agreement between the

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¹ Act 68 of 2008.

² Tjakie Naudé 'The consumer's right to fair, reasonable and just terms under the new Consumer Protection Act in comparative perspective' (2009) 126 *SALJ* 505.

³ Section 48.

⁴ Section 51.

parties.⁵ Section 50 provides further protection to consumers faced with standard contract terms by requiring all written agreements to be in plain and understandable language.⁶ Section 49 provides that certain types of terms (notably exemption clauses) must be brought to the attention of the consumer in a conspicuous manner and form likely to attract the attention of the ordinarily alert consumer. In addition, terms concerning certain types of risks should be signed or initialed by the consumer.⁷

The purpose of this article is to investigate more closely the enforcement procedures available in respect of a consumer's right to fair contract terms. This also involves a study of other parts of the Consumer Protection Act. The overarching question that will be addressed is whether the enforcement procedures and other parts of the Consumer Protection Act relevant to unfair contract terms reflect an effective, preventative or proactive control paradigm to operate in tandem with reactive or 'ex post facto' judicial control over individual contracts. This includes an investigation of the path that a consumer complaint about an alleged unfair term must follow. Questions which arise in this regard include the following: is there an agency which is obliged to investigate such complaints and to take action against the relevant supplier if there appears to be good grounds for the complaint, without the consumer having to be involved further in any litigation against the supplier? Which of the adjudicatory bodies recognised in the Consumer Protection Act (that is, the National Consumer Tribunal, provincial consumer courts and the ordinary courts) have powers to declare contract terms unfair and to make orders against suppliers? Should other bodies be given such powers as well? Are there any preliminary procedures that must be followed before such bodies may make such orders? Is the need for some co-ordination of enforcement at national level recognised in the interest of consistency and legal certainty?

A number of legal systems recognise the need for an effective preventative or proactive control paradigm in respect of unfair terms in consumer contracts.⁸ A preventative control paradigm is crucial because control through the courts over individual contracts has several limitations in the consumer context.⁹ Not only is the cost, risk and effort of litigation normally prohibitive to consumers, but judicial control or control by special consumer

⁵ See for example ss 55–61.

⁶ Section 50.

⁷ Section 49.

⁸ For an overview, see for example Sarah Andrews *Organization for Economic Co-operation and Development Workshop on Consumer Dispute Resolution and Redress in the Global Marketplace, 19–20 April 2005, Washington DC — Background Report* available at <http://www.oecd.org/dataoecd/59/21/34699496.pdf>, accessed 18 February 2009 (hereafter the *OECD Background Report*).

⁹ These arguments have already been set out in more depth by Tjakkie Naudé 'Unfair contract terms legislation: the implications of why we need it for its formulation and application' (2006) 17 *Stell LR* 361. See also especially Ewoud Hondius *Standaardvoorwaarden* (1978) 488.

tribunals is also always reactive, occurring after the abuse has already taken place, often for a long time.¹⁰ Court action is also normally a slow process. In addition, a court decision on an individual consumer contract will normally not bind other suppliers directly, and may in any event not come to the attention of businesses using similar terms.¹¹ Many cases involving consumers would be heard in the lower courts, whose decisions are seldom reported, as is the case in South Africa. The same term declared void by a court in respect of one contract may therefore still continue to be used in other contracts. Moreover, a supplier faced with a threat of court action over an unfair term will be tempted to settle with this particular consumer by waiving the term, to allow it to continue using the term in contracts with other consumers.¹² A preventative control paradigm is even more essential in developing countries with large numbers of poor, vulnerable consumers who cannot afford to seek redress from the courts at all and who are less likely to be aware of their rights, even if more affordable processes before special tribunals are created.

It is therefore essential that unfair contract terms legislation provides for procedural enforcement mechanisms aimed at achieving preventative control which is not dependant on judicial control over a particular individual contract. In this regard, consumer organisations and administrative watchdog bodies should be given preventative powers to enforce the prohibition against unfair terms without involving any individual consumer in litigation. These could be termed actions in the collective interest as opposed to actions where a specific consumer is represented by a consumer organisation. In addition, all other provisions in unfair contract terms legislation must be geared towards a preventative control paradigm.

One could identify two levels of preventative control at the procedural level, as Ewoud Hondius, the well-known comparative scholar of unfair terms control, has done.¹³ At the first level, consumers' interests are represented by an entity which negotiates with suppliers to arrive at fair terms. Two substantive sanctions are essential at this level, namely an entitlement to a copy of terms used, and the power to obtain a declaration or undertaking by the supplier that it will stop using the term and that it will pay a penalty upon infringement.¹⁴ However, negotiations are not always the ideal way of dealing with the problem as they may be slow, expensive and painstaking. Therefore Hondius argues that a 'black list' of prohibited terms and mandatory legal provisions should be implied into all contracts to provide consumer representatives with sufficient back-up in these negotia-

¹⁰ Ibid. See also, for example, *Opinion of the Economic and Social Committee on the 'Report from the Commission on the Implementation of Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts'* OJ 2001/C 116/25 at C 116/121 at 122 (hereafter the 'EESC 2001 Opinion').

¹¹ Ibid.

¹² Naudé op cit note 9 at 380.

¹³ Ewoud Hondius *Unfair Terms in Consumer Contracts* (1987) 224.

¹⁴ Ibid at 227.

tions.¹⁵ In addition, the negotiations should also be conducted against the background of a threat of legal action before a court or neutral court-like agency, either of which may order the cessation of the use of a term.¹⁶ Hondius identifies such cease and desist orders by a court or neutral board as the second level of control.¹⁷ He states that publication of decisions and the power to prevent similar terms from being used are essential sanctions for ensuring the effectiveness of this second level of control.¹⁸ He therefore foresees not only representative or joint representative actions, where individual consumers may be represented by a consumer organisation or other enforcement body in litigation, but 'abstract', 'ex ante' or 'general use' challenges, where the public enforcement body represents the collective interest of all consumers in fair terms, without any individual consumer being named as represented in the court action, and where no harm to individual consumers need be shown.¹⁹

This kind of multi-leveled system of control, based on administrative control, voluntary agreements and judicial control, is likely to yield the best results in practice.²⁰ The South African Law Commission also recognised this in its final report on *Unreasonable Stipulations in Contracts and the Rectification of Contracts* of 1998.²¹ The Law Commission recommended that an ombuds-person be granted preventative powers to negotiate undertakings with, and (if necessary) obtain interdicts against, businesses using unfair contract terms. These provisions are similar to those found in the equivalent British legislation.

The British experience with preventative control over unfair contract terms has been lauded by the European Commission as a success story in the fight against unfair terms.²² This article will focus on that experience, and compare its enabling legislation with the Consumer Protection Act. Good practice from other countries in Europe will also be referred to, particularly Germany and the Nordic countries. After comparing the European and South African legislation, the article will make various recommendations about the formulation of the enabling legislation and for the implementation thereof. Hopefully these recommendations will also prove helpful to other countries seeking to introduce or revise unfair contract terms legislation.

The article is structured as follows. First, a brief overview with preventative control in the United Kingdom of Great Britain and Northern Ireland

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ Mario Tenreiro 'Conclusion' in European Commission *The 'Unfair Terms' Directive, Five Years On: Evaluation and Future Perspectives, Brussels Conference 1-3.7.1999* (1999) 215 at 217 (hereafter 'European Commission Brussels Conference').

²¹ South African Law Commission Project 47 (1998) *Report on Unreasonable Stipulations in Contracts and the Rectification of Contracts*.

²² Tenreiro op cit note 20 at 217.

('UK') will be provided. Thereafter, several aspects of a system of general use challenges will be considered. These are, first, which agencies are, or should be, empowered to bring general use challenges. The second question to be considered is whether a public enforcement body is, or should be, obliged to act upon a complaint by applying for an interdict if negotiations with the supplier fail. Thirdly, the powers that should be granted to an enforcement body to facilitate general use challenges will be considered, as well as the procedure that ought to be followed. Thereafter I will consider the possible court orders for which unfair terms legislation should ideally provide to facilitate preventative control. Fifthly, other parts of the legislation (in addition to the 'procedural part') which should be geared towards a preventative control paradigm will be identified. Thereafter extra-legislative strategies will be examined, especially action on sectoral level and dissemination of information. Finally, the need to provide for regional co-operation will be discussed.

II OVERVIEW OF THE EXPERIENCE WITH PREVENTATIVE CONTROL IN THE UNITED KINGDOM

The UK introduced preventative control in 1995 upon implementing the 1993 EC Directive on Unfair Terms in Consumer Contracts.²³ The Directive requires 'adequate and effective means to prevent the continued use of unfair terms in contracts concluded with consumers. . .'.²⁴ It provides that such means include

'provisions whereby persons or organizations, having a legitimate interest under national law in protecting consumers, may take action according to the national law concerned before the courts or before competent administrative bodies for a decision as to whether contractual terms drawn up for general use are unfair, so that they can apply appropriate and effective means to prevent the continued use of such terms'.²⁵

The Directive was implemented in the UK by the Unfair Terms in Consumer Contracts Regulations, 1994 ('Unfair Terms Regulations').²⁶ Long before that, the Unfair Contract Terms Act of 1977 ('UCTA') had already prohibited certain terms²⁷ and had subjected a limited class of other terms to a fairness review.²⁸ The UCTA did not, however, provide for

²³ This 'minimum harmonization directive' prescribes a minimum level of consumer protection for all countries in Europe.

²⁴ Article 7 of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, *Official Journal* L 95 at 29–34. See now art 38 of the Proposal for a Directive on Consumer Rights COM (2008) 614 final.

²⁵ *Ibid.*

²⁶ In force from July 1995.

²⁷ Such as exemption clauses in respect of bodily injury or death caused by negligence (see s 2(1)).

²⁸ Particularly exemption clauses and clauses allowing a party to perform in a manner substantially different from that which the other party is entitled to expect (see s 3).

preventative control through empowering an administrative regulator or consumer organisations to bring abstract, general use challenges to standard terms — that is, applications for injunctions (interdicts) against businesses ordering them to stop using a term or terms — without involving any individual consumer in the litigation. By contrast, the Unfair Terms Regulations oblige the Office of Fair Trading ('OFT') to consider all complaints, except if they are frivolous or vexatious, or if a qualifying body has notified the OFT that it agrees to consider the complaint.²⁹ The OFT may then apply for an injunction against any person apparently using or recommending the use of an unfair term drawn up for general use in consumer contracts.³⁰ If it decides not to, it must give reasons for its decision.³¹ In this regard, undertakings given to it as to the continued use of a term would be relevant.³² This effectively means that it is obliged either to obtain an undertaking or to apply for an injunction unless the complaint is frivolous or vexatious or a qualifying body has agreed to consider the complaint. These powers and duties are now set out in the amended Unfair Terms Regulations of 1999.³³

When the OFT commenced its work in this field, it was surprised at how many unfair terms were to be found in consumer contracts, including terms which were prohibited outright under the UCTA for more than a decade.³⁴ However, ever since the OFT started exercising its preventative powers, much progress has been made in the eradication of unfair contract terms,³⁵ which emphasises the necessity for a preventative control paradigm. Sir John Vickers, erstwhile Chairman of the OFT, reported in 2005 that in nearly a 1000 cases, over 6000 contract terms had been deleted or amended following OFT action.³⁶ The OFT has relied primarily on negotiations with, and informal undertakings from, businesses and has rarely had to make use of its powers to bring injunction applications.³⁷

²⁹ Regulation 10(1). These qualifying bodies include the Financial Services Authority, as well as water, gas and railway authorities.

³⁰ Regulation 12(1).

³¹ Regulation 10(2).

³² Regulation 10(3).

³³ Regulations 10 to 16 read with Schedule 1 of the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999 No 2083.

³⁴ OFT Bulletin 2 p 5. See also Robert Bradgate 'Experience in the UK' in European Commission *Brussels Conference* 35 at 50; Standing Committee of Officials on Consumer Affairs — Unfair Contract Terms Working Party *Unfair Contract Terms — A Discussion Paper* (2004) at 44.

³⁵ See Bradgate op cit note 34 for statistics up to the end of 1998. See generally, Susan Bright 'Winning the battle against unfair contract terms' 2000 (20) *Legal Studies* 331–52.

³⁶ John Vickers 'Contracts and European Consumer Law: an OFT Perspective' in Stefan Vogenauer & Stephen Weatherill (eds) *The Harmonisation of European Contract Law: Implications for European Private Laws, Business and Legal Practice* (2006) 171 at 175.

³⁷ UK DTI Consumer & Competition Policy Directorate *Commission Review of Council Directive 93/13/EEC on Unfair Terms in Consumer Contracts (Consultation Paper)* (2000) (hereafter 'UK DTI Consultation Paper') para 66.

Whenever the OFT receives a complaint about a particular term it not only considers that term, but also questions every other term in the contract that it thinks may potentially be unfair.³⁸ Apart from taking such preventative action against individual businesses, the OFT takes action on sectoral level by investigating contract terms across whole sectors of industry, negotiating fairer terms within those sectors, as well as issuing guidance notices on unfair terms in particular sectors.³⁹ Such sectoral action promotes effective removal of unfair terms, and is also beneficial to businesses in those sectors.⁴⁰ It means that all similar unfair terms are removed so that no individual company can gain an unfair competitive advantage through the continued use of an unfair term. In addition, businesses are then less likely to face repeated challenges to its terms.⁴¹

III INSTITUTIONS AUTHORISED AND/OR OBLIGED TO TAKE PREVENTATIVE ACTION

(a) *Who may bring general use challenges?*

As indicated above, in the UK a national enforcement authority is the chief player in negotiating undertakings with businesses and bringing injunction proceedings where necessary. Other qualifying bodies may also consider complaints and apply for injunctions under the Regulations.⁴² These include the Financial Services Authority, and authorities over gas and water supply and railways. It is noteworthy that only one consumer organisation, namely the Consumers' Association, is mandated to apply for injunctions under the legislation.⁴³

By contrast, in other countries (eg Germany) a number of accredited consumer organisations have been at the forefront of the fight against unfair terms in consumer contracts.⁴⁴ More than seventy consumer organisations are accredited to bring interdict proceedings in respect of unfair terms under

³⁸ Ibid paras 8.5–8.8.

³⁹ Ibid. For example, the OFT approached all seven of the major mobile phone companies who thereupon agreed major improvements in their contracts in 1997, which included reductions in notice periods to a maximum period of one month (Vickers op cit note 36 at 175).

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² Schedule 1.

⁴³ Ibid.

⁴⁴ See Hans-W Micklitz 'Report on the practical implementation of Directive 93/13/EEC in the Federal Republic of Germany' in European Commission *Brussels Conference* op cit note 20 at 222. They are given the power to bring injunction proceedings under the Unterlassungsklagegesetz (§§ 1–3). See also the *Background Report to the OECD Workshop on Consumer Dispute Resolution and Redress in the Global Marketplace, 19–25 April 2005* at 30 available at <http://www.oecd.org/dataoecd/59/21/34699496.pdf>, accessed on 18 February 2009.

German law.⁴⁵ The German government assists with funding of the litigation against unfair terms, and also bears the risk of such litigation being unsuccessful.⁴⁶ Adequate subsidisation by government is clearly a prerequisite for leaving control primarily up to consumer organisations. The German legislation does empower qualifying trade or professional associations, as well as the chambers of commerce or industry, to bring interdict proceedings in respect of consumer contracts.⁴⁷ In addition, since 2006 the Federal Office of Consumer Protection and Food Safety ‘has adopted central tasks in economic consumer protection, committing itself to the enforcement of consumer protection laws within the EU as part of a network of European authorities’.⁴⁸

Ideally, a public enforcement body should be obliged — as opposed merely to being empowered — to bring general use challenges. However, this would of course be a policy decision that may be informed by budgetary constraints, particularly in developing countries such as South Africa. The OFT has described its work as ‘resource intensive’. At one stage before 2004 there were already twenty-one caseworkers working on unfair contract terms cases alone, in addition to six administrative support staff and two managers. In addition, all new cases are considered by the OFT’s lawyers before the matters go forward, which is very costly.⁴⁹

Turning to the Consumer Protection Act,⁵⁰ it is not clear which consumer organisations may apply for an interdict against a business that is using unfair terms. On the one hand, s 78 provides that *accredited* consumer protection groups may commence any act to protect the interests of a consumer individually, or of consumers collectively, in any matter or before any forum contemplated in the Consumer Protection Act. The criteria for accreditation are also set out in this section. However, s 4 creates the impression that it is not accredited consumer organizations alone that may institute action, as any ‘association acting in the interests of its members’ may approach a court, the Tribunal or the National Consumer Commission (‘NCC’) alleging that

⁴⁵ § 3(1)(1) of the *Unterlassungsklagegesetz*, read with the list of institutions provided in the European Commission’s ‘Communication concerning Article 4(3) of Directive 98/27/EC of the European Parliament and of the Council on injunctions for the protection of consumers’ interests, concerning the entities qualified to bring an action under Article 2 of this Directive’ OJ C 63, 8.3.2008, 5–43.

⁴⁶ Micklitz *op cit* note 44 at 222.

⁴⁷ §§ 3(1)(2) and (3) of the *Unterlassungsklagegesetz*.

⁴⁸ According to the website of this national enforcement body, the Bundesamt für Verbraucherschutz und Lebensmittelsicherheit, available at http://www.bvl.bund.de/dn_027/mn_495478/EN/Home/homepage_node.html_nnn=true, accessed on 18 February 2009.

⁴⁹ (Australian) Standing Committee of Officials of Consumer Affairs, Unfair Contract Terms Working Party *Unfair Contract Terms: a Discussion Paper* (2004) 44–5.

⁵⁰ Act 68 of 2008. The Act is to come fully into operation on 24 October 2010, although this date may be deferred for up to six months (s 122 read with item 2 of Schedule 2).

prohibited conduct has occurred, or is occurring.⁵¹ In addition, 'a person acting as a member of, or in the interest of, a group or class of affected persons' may also take such action. This is wide enough to cover non-accredited consumer organisations. However, it may be that a court would treat s 78 as *lex specialis* to s 4, so that only accredited consumer organisations would have *locus standi*. If accreditation turns out to be a speedy process, it would in any event not make much difference, as a non-accredited consumer organisation wishing to bring a general use challenge would easily be able to obtain accreditation to enable it to do so. It is submitted that only accredited consumer organisations should be allowed to bring general use challenges against unfair terms.

In any event, there are far less active consumer organisations in South Africa than in Germany, and these are unlikely to be funded to the same degree as in Germany. Better funding of litigation by consumer organisations would be ideal, but it is more likely that effective control of unfair contract terms in South Africa would depend on an active role being played by the proposed NCC and other regulators, which are public authorities.

However, the intention seems to be that the NCC will only investigate complaints which could not be resolved through any of the other mechanisms provided for in the Act, and even then there is no obligation imposed upon it to intervene in, or directly adjudicate, any dispute between a consumer and supplier.⁵² Section 72(1)(b), read with s 72(1)(d) implies that the NCC will not investigate a complaint until the parties have unsuccessfully attempted to resolve the dispute by consent through an alternative dispute resolution agent, a provincial consumer protection authority or a consumer court.⁵³ Section 99(a) provides that the Commission is responsible for enforcing the Consumer Protection Act by promoting the informal resolution of any dispute arising in terms of the Consumer Protection Act between a consumer and a supplier, but is not expected to intervene in, or directly adjudicate, any such dispute. It therefore appears that the NCC will not necessarily play as direct a role in the eradication of unfair terms on the basis of individual complaints as the OFT. At least there is hope that, in sectors regulated by a statutory authority, including ombuds, action would be

⁵¹ Section 4(1)(e).

⁵² Section 99.

⁵³ Section 72(1)(b) provides that upon initiating or receiving a complaint, the NCC may refer the complaint to an alternative dispute resolution agent, a provincial consumer protection authority or a consumer court for the purposes of assisting the parties to resolve the dispute, unless the parties have previously and unsuccessfully attempted to resolve the dispute in that manner. The other possibility listed in section 72(1)(c) is for the NCC to refer the complaint to another regulatory authority with jurisdiction over the matter. Only 'in any other case' *may* the NCC direct an inspector to investigate the complaint as quickly as practicable (s 72(1)(d)). It obviously will not do so if it is clear that the complaint is frivolous or vexatious or does not allege facts which, if true, would constitute grounds for a remedy under the Act, or if the relevant limitation periods under s 116 had elapsed (s 72(1)(a)).

taken against suppliers who offer to contract on unfair terms. The legislation should be rewritten specifically to empower such regulatory authorities and ombuds to bring general use challenges in the form of interdict applications against suppliers using unfair terms.

The Consumer Protection Act does provide that the provincial consumer protection authorities have jurisdiction to 'issue compliance notices in terms of the Consumer Protection Act on behalf of the NCC to any person carrying on business exclusively within its province',⁵⁴ to refer a dispute between parties resident and/or carrying on business exclusively within that province to the relevant provincial consumer court, and to 'request the Commission to initiate a complaint in respect of any apparent prohibited conduct or offence in terms of this Act'.⁵⁵ Perhaps the last-mentioned power means that the NCC will effectively be forced to intervene where a business which does not carry on business exclusively within a province, and which is not regulated by a sectoral regulatory authority, is involved.

It is clearly advantageous to bestow ultimate responsibility to exercise preventative powers over unfair contract terms on one national body, as opposed to allowing each provincial authority the freedom to act as it sees fit. Consistent and predictable enforcement policy would be especially important for suppliers who operate in more than one province, but would be advantageous for smaller suppliers as well. More consistency and legal certainty is likely to result if a central body like the OFT, or NCC, is mandated to control unfair contract terms (unless a national sectoral regulator gives notice that it will deal with a matter). Second prize would be to grant the provincial consumer protection departments the jurisdiction to bring preventative challenges to unfair contract terms, but to co-ordinate enforcement as far as possible. Attempts could be made to agree on consistent policy on types of contract terms, and that the NCC or other central sectoral regulator would deal with suppliers operating in more than one province. Information gathering by the NCC from the provinces should result in a centralised register of voluntary undertakings, as well as the centralised dissemination of information to the public, via the NCC's website, for example, which will make it easier for suppliers to know what is expected of them. Consumers should still have the right to approach the NCC as the national regulator should the industry regulator fail to act in response to a complaint.

Although technically s 72 of the Consumer Protection Act also applies to complaints initiated by the NCC, and not only to complaints received from consumers, it is likely that the NCC and courts will interpret the legislation to mean that, when acting on its own initiative, the NCC itself need not first follow the route of alternative dispute resolution through the other bodies mentioned, before it may act on the matter.

⁵⁴ Section 84(a) [sic].

⁵⁵ Section 84(c) and (d).

(b) Which courts or tribunals have jurisdiction to decide general use challenges?

In their initial briefing to Parliament, the Department of Trade and Industry ('DTI') stated that the Consumer Protection Bill gives exclusive jurisdiction to the ordinary courts over 'contractual disputes' due to a compromise reached with the Department of Justice, which was concerned that the courts' jurisdiction would be eroded by the creation of various tribunals.⁵⁶ However, the Consumer Protection Act does not unequivocally bear out this intention. It may be indirectly inferred from s 52, which is headed 'Powers of court to ensure fair and just conduct, terms and conditions' and which only bestows powers on the ordinary courts in respect of unfair contract terms. 'Court' is defined in s 1 as not including a (provincial) consumer court.⁵⁷

However, it could be argued that the interpretation that only the ordinary courts will have powers over contractual disputes conflicts with the more general provisions in s 73, according to which the NCC may refer a finding by it that a person has engaged in prohibited conduct to the relevant provincial consumer court or the National Consumer Tribunal. One possible interpretation that has been mooted informally in response to this argument is that use of a contract term only becomes 'prohibited conduct' once a court has declared it to be unfair. On this interpretation, the NCC, provincial consumer courts or the Tribunal will only have jurisdiction to act against a supplier who has used a particular term after such a term has been declared unfair by an ordinary court. Again, this interpretation is not clearly borne out by the Act. On a plain reading of s 48, the use of unfair terms is 'prohibited' by s 48.⁵⁸

⁵⁶ A minute of this briefing is available at <http://www.pmg.org.za/report/20080507-consumer-protection-bill-workshop-day-2>. The minute states that '[i]t was decided that the National Consumer Tribunal would be able to deal with most consumer issues, but would refer contractual disputes to the courts. The problem was however that courts were difficult for consumers to access. Thus the Tribunal had the power to order compensation for the consumer. Where the consumer approached the Ombudsman, the latter could enter a consent order, which can be taken to the Tribunal or court to be entered as an order (which could include damages). This shortened the process considerably, since a Tribunal order enjoyed the same status as an order of the court.' Unfortunately the minute does not provide a word-for-word transcript of what was said in the briefing on the compromise with the Department of Justice, as the author can attest.

⁵⁷ It was submitted to the DTI and Parliament that this issue should be resolved by unequivocal wording in the Act itself, but no action was taken in response to this submission (see <http://www.pmg.org.za/files/docs/080826proftjakiesub.doc> para 14, accessed on 27 October 2008).

⁵⁸ A pamphlet on the Consumer Protection Act, distributed by the DTI, confusingly states in its commentary on the consumer's right to fair, just and reasonable terms that '[i]f consumers are not satisfied with the outcomes of the National Consumer Tribunal's investigation into alleged unconscionable, unjust or unfair conduct on the part of the suppliers, they may approach the Court for its further consideration of these matters'. (The DTI *Consumer Protection Act — I Know My Rights. Do You Know Yours?* (undated pamphlet) at 22).

The confusion about whether the ordinary courts alone will have jurisdiction is complicated further by the fact that provincial consumer protection legislation (which will operate concurrently with the Consumer Protection Act) grants provincial consumer courts jurisdiction over disputes about 'unfair business practices', which are widely defined. Thus, for example, the Gauteng Consumer Affairs (Unfair Business Practices) Act⁵⁹ gives the provincial consumer court wide jurisdiction to decide disputes about 'unfair business practices'.⁶⁰ These are defined widely as 'any business practice which, directly or indirectly, has or is likely to have the effect of unfairly affecting any consumer'.⁶¹ This could clearly include the use of unfair contract terms. As there is concurrent jurisdiction for the national and provincial governments over consumer issues, there is a strong argument to be made that ss 52, 70 and 72 of the Consumer Protection Act could not possibly deprive provincial consumer courts of their jurisdiction over contractual disputes, unless provinces can be persuaded to amend their legislation in this regard. The DTI may perhaps merely have intended to limit the National Consumer Tribunal's jurisdiction, and not those of the provincial consumer courts.⁶² There is indeed a strong argument to be made that the provincial consumer courts will have jurisdiction over unfair contract terms, which is bestowed upon them by their own legislation. Although s 52 of the Consumer Protection Act does not refer to their powers to make orders on unfair terms, they could still use the lists of relevant factors and of possible court orders in this section to guide them in exercising their wide powers under the provincial legislation.

To add to the confusion, s 69 appears to deny the consumer the choice to approach an ordinary court directly with a complaint about a contract term. Section 69(d) provides that the consumer may only approach a court with jurisdiction over the matter if all other remedies available to that person in terms of national legislation have been exhausted. This paragraph in s 69 appears after the reference to the consumer's right to use the other possible dispute resolution mechanisms of s 69(a) to (c), such as ombuds, the provincial consumer courts and the NCC. To be fair, it is likely that the dispute would be resolved by such alternative dispute resolution mechanisms. However, it is questionable whether consumers should be denied the alternative option of approaching the ordinary courts directly when dealing with a particularly intractable supplier, especially when the dispute about the alleged unfair term forms part of a claim for damages. Even if the provincial consumer courts may decide disputes on unfair contract terms, it may be more convenient for a consumer to approach a small claims court in his or her own district.

⁵⁹ Act 7 of 1996.

⁶⁰ Section 22.

⁶¹ Section 1.

⁶² See the minutes of the DTI briefing to Parliament set out in note 56 above, which only refer to the Tribunal not having jurisdiction to hear such disputes.

Although this is not entirely clear, the path of a complaint therefore appears to be that the consumer must first approach a sectoral regulator or ombud, if there is one. If there is not, the consumer must first approach a provincial consumer court, alternative dispute resolution agent or provincial consumer authority in order to try to reach consensus with the supplier, and only once that is successful will the NCC be empowered (but not obliged) to investigate the complaint, and will the consumer be entitled to approach the ordinary courts. Because the ordinary courts may arguably have sole jurisdiction to make orders on unfair contract terms, it is possible that if the NCC becomes involved, it may not refer the matter back to the consumer court or the Tribunal as provided for more generally in s 73. If this is the intention, the legislation should be amended to make this clear.

The question arises whether there are any persuasive grounds for granting the ordinary courts sole jurisdiction over disputes about alleged unfair terms. The ordinary courts are subject to the system of precedent, and the decisions of the higher courts are reported, which bodes better for legal certainty. However, most consumer matters would be heard in the lower courts, the decisions of which are not reported. Very few consumers could afford to take disputes to the High Court, particularly as small sums are usually at stake. Moreover, if the provincial consumer courts have concurrent jurisdiction, the possibility decreases that suppliers who lost in a lower court could get rid of a consumer by commencing a prohibitively expensive appeal to the High Court, or even pursue the matter all the way up to the Supreme Court of Appeal. In addition, the decisions of the Tribunal are reported on its website.⁶³ A second conceivable argument in favour of sole jurisdiction for the ordinary courts is that magistrates and judges all have legal training, and so understand contract law better than the non-lawyers who might serve on the specialised consumer tribunals. In particular, it can be argued that lawyers are better able to understand the rich legal context of the provisions on contractual fairness in the Consumer Protection Act, including the relevance of constitutional rights and common law standards such as good faith and the desirability of balancing these with the ideal of legal certainty. However, the chairpersons of the provincial courts must usually be experienced lawyers anyway.⁶⁴ In the UK, only the ordinary courts have the power to adjudicate the fairness of contract terms. However, this is balanced by the active role played by the OFT in enforcing the prohibition of unfair contract terms. The OFT's active engagement in negotiation with suppliers against the backdrop of possible injunction applications, coupled with other strategies aimed at preventative control,⁶⁵ make it largely unnecessary for individual consumers to pursue challenges against unfair terms themselves. Much of the action

⁶³ Available at <http://www.thenct.org.za/judgments>, accessed on 22 May 2010.

⁶⁴ See, for example, s 14(2) of the Gauteng Consumer Affairs (Unfair Business Practices) Act 7 of 1996.

⁶⁵ Such as dissemination of information on enforcement, discussed below.

takes place outside of the courts anyway.⁶⁶ The wisdom of granting sole jurisdiction to the ordinary courts in a poorer, developing country like South Africa can only be gauged once it is clear how well-resourced and proactive the governmental enforcement bodies will be in taking preventative action against unfair contract terms. If much will still depend on court action taken by individual consumers and consumer organisations, a choice between approaching the ordinary courts and the other specialised consumer tribunals will be more beneficial to consumers.

On the other hand, if the ordinary courts should have sole jurisdiction to pronounce contract terms unfair, it becomes especially important that the NCC be given the power (and ideally also the obligation) to apply for an interdict against any person appearing to it to be using or recommending use of an unfair term; provided that if the NCC decides not to apply for an interdict, it should furnish reasons to the complainant for such decision. These may include a voluntary undertaking given by the supplier, or a decision that a sectoral or provincial authority would prefer to take the matter over. The South African Law Commission recommended that such a power and obligation be bestowed on a special ombud in its proposed 'Bill on the Control of Unreasonableness, Unconscionableness or Oppressiveness in Contracts or Terms' of 1998,⁶⁷ in line with the legislation in the UK.

IV PRESCRIBED POWERS AND PROCEDURES FOR GENERAL USE CHALLENGES

(a) Powers to obtain documents and information

It is obviously necessary that enforcement bodies are given powers to obtain documents and to obtain information about the use or recommendation for use of a document to facilitate general use challenges. So, for example, the OFT and all the qualifying bodies in the UK are granted these powers.⁶⁸ The Consumer Protection Act does not set out powers which are aimed specifically at the problem of unfair contract terms. Instead, more general provisions elsewhere in the Consumer Protection Act bestow powers and responsibilities on the NCC in respect of any complaint initiated by consumers, or which is initiated by the NCC on its own motion.⁶⁹ Part B of Chapter 3 sets out the rules governing investigations by the NCC. In this regard, the NCC is given sufficient powers to obtain documents and information in support of any investigation into a complaint initiated or received by it.⁷⁰ Courts may also issue warrants to enter and search premises on application.⁷¹

⁶⁶ Bright *op cit* note 35.

⁶⁷ Section 6(2)(d).

⁶⁸ Regulation 13.

⁶⁹ As allowed by s 71.

⁷⁰ Section 102 read with s 72.

⁷¹ Sections 103–105.

Accredited consumer organisations are not given the same powers to obtain documents and information to establish whether a supplier is engaging in prohibited conduct. The Unfair Contract Terms Bill drafted by the Law Commissions in the UK also grants such powers only to regulators who are 'public authorities', and therefore not to private organisations which may be designated as regulators under the legislation.⁷² There does not seem to be any good reason why accredited consumer organisations should not have the right to obtain copies of a supplier's standard terms. This would be particularly useful in South Africa if the NCC is not going to play as active a role as the OFT does in dealing with consumer complaints.⁷³

(b) Register of undertakings by suppliers

As mentioned above, the UK Unfair Terms in Consumer Contracts Regulations ('UTCCR') provide for the possibility that undertakings may be made by businesses in respect of the use of contract terms. There is no provision that these undertakings must be elevated to court orders: they may be informal. The Consumer Protection Act provides that an agreement between the NCC and a relevant supplier may be confirmed as a consent order by a court or Tribunal.⁷⁴ In this regard, the Consumer Protection Act should also have provided for a Register of Undertakings, which need not take the form of court orders. The latter are expensive and cumbersome to obtain, whereas an undertaking would in any event be enforced by a court upon breach thereof. The UK UTCCR do not provide for undertakings to be made orders of court. Instead, the OFT must simply keep a record of all undertakings in respect of unfair terms and must publish these in such form and manner as it considers appropriate.⁷⁵ The OFT must then inform any person on request whether a particular term to which the Regulations apply has been the subject of an undertaking given to the OFT or notified to it by a qualifying body (regulator), and must give that person details of the undertaking as well as of amendments made to the term in question.⁷⁶ The South African Law Commission's Bill of 1998 also did not provide for undertakings to be elevated to court orders, but implied simply that the proposed ombudsperson would keep a register of any undertakings.⁷⁷

⁷² Paragraph 7 read with para 10(3) of Schedule 1 to the Unfair Contract Terms Bill proposed by the Law Commission of England and Wales and the Scottish Law Commission *Unfair Terms in Contracts — Report on a Reference under Section 3(1)(e) of the Law Commissions Act 1965* (Law Com No 292, Scot Law Com No 199) (2005). The Bill does provide that the Secretary of State may by order designate a consumer organisation which is not a public authority as a regulator with powers to bring general use challenges under the legislation, but such regulators are not given the power to obtain copies of documents and so forth.

⁷³ See the text at note 52 et seq above.

⁷⁴ Section 74.

⁷⁵ Paragraph 10(3) read with para 15. The OFT publishes such undertakings on its website.

⁷⁶ Regulation 15(2).

⁷⁷ Section 6(2).

Unfortunately, the Consumer Protection Act also does not provide for a duty on the NCC to make the details of undertakings available on request, as the UK legislation does.

The Law Commissions of England, Wales and Scotland have retained these features of the Unfair Terms Regulations in their proposed Unfair Contract Terms Bill of 2005 (with some changes to the details thereof).⁷⁸

(c) *Procedure for enforcement*

The OFT exercises its statutory powers primarily through negotiation, persuasion and consensus; its primary aim is to seek informal undertakings.⁷⁹ It only uses the threat of litigation as a last resort to demand undertakings to amend contract terms. Only in a few cases has it been necessary for it to demand such formal undertakings.⁸⁰ Often it does not insist on complete removal of a term, but aids the business in drafting a more acceptable substitute. This approach demonstrates to businesses that the OFT takes the legitimate interests of business into account, so that if the OFT decides that a term is unfair, this is likely to be the result of a balanced, well-reasoned decision, and is one which a court is likely to confirm.⁸¹

Whereas the UK legislation provides for enforcement by way of injunction if consensus cannot be reached, the South African legislation provides that where the NCC is convinced that prohibited conduct occurred, it may issue a compliance notice.⁸² It has already been noted above that there is some uncertainty as to whether any body except the ordinary courts may decide whether a term is unfair, meaning that use thereof would constitute 'prohibited conduct'. At the very least, the NCC should be able to issue a compliance notice in respect of terms already declared substantively unfair by a court by reference to the supplier's interests and the terms' effect on typical consumers dealing with that supplier. Conceivably, a court may be prepared to pronounce a term unfair in an entire trade sector, or per se, despite the focus on the position of a particular, individual consumer in the list of factors which courts 'must' consider to decide on unfairness, set out in s 52.⁸³ If courts are prepared to go this far, this would enable the NCC to issue compliance notices in respect of any use contrary to such ruling. According to s 100(4)(a) the onus would then be on the respondent supplier to apply to

⁷⁸ Op cit note 72.

⁷⁹ Bradgate op cit note 34 at 47.

⁸⁰ Cf ibid.

⁸¹ For a rare example of a case where a court did not agree with the OFT's decision that it had jurisdiction to challenge particular terms, see *Office of Fair Trading v Abbey National plc & others* [2009] UKSC 6, [2009] EWCA 116. The court held that the terms in question related to the price, were thus 'core terms' and therefore exempted from control under the Unfair Terms in Consumer Contracts Regulations, 1999.

⁸² Section 100.

⁸³ On whether it would be desirable to make such a finding in the absence of representation by other suppliers in the particular matter, see text at notes 96 to 101 below.

the Tribunal to have the notice set aside or, if that is unsuccessful, to take the Tribunal's decision not to do so on review to a court. Again, it should be noted that the confusion as to whether only the ordinary courts could declare a term unfair before use thereof could be regarded as 'prohibited conduct', should be cleared up by way of clear drafting as soon as possible. If a person fails to comply with a compliance notice, the NCC may either apply to the Tribunal for the imposition of an administrative fine⁸⁴ or refer the matter to the National Prosecuting Authority for prosecution as an offence.⁸⁵

There are no specific provisions in the Act on the procedure to be followed when an accredited consumer organisation institutes a general use challenge against a business. In this regard, it is recommended that unfair terms legislation ought to provide that a consumer organisation may not institute interdict proceedings against a supplier until it has given the supplier reasonable notice of its intention to institute such action. This gives the supplier the opportunity to cease the conduct complained of voluntarily, in order to avoid litigation. German consumer organisations must first try to reach a 'stop-use' agreement with a supplier before injunction proceedings may be brought.⁸⁶ If an agreement is signed within a specified period, there are no cost implications for the business.

V POSSIBLE COURT ORDERS FOR WHICH THE LEGISLATION SHOULD IDEALLY PROVIDE

Section 52 of the South African Act on the 'powers of court to ensure fair and just conduct, terms and conditions' is written only with the paradigm of an individual consumer approaching an ordinary court in mind. Thus, for example, s 52 only grants powers to courts in respect of 'a transaction or agreement between a consumer and a supplier'.⁸⁷ The drafters of this section clearly did not conceive of the possibility of general use challenges. However, as an adjunct to a main order declaring a term in an individual transaction unfair, the court may also 'make any further order the court considers just and reasonable in the circumstances, including, but not limited to, an order . . . requiring the supplier to cease any practice, or alter any practice, form or document, as required to avoid a repetition of the supplier's conduct'.⁸⁸ This allows for preventative control in respect of future contracts between the supplier and other consumers, provided that one individual consumer had approached the court in respect of his or her individual contract. However, the section should be redrafted with abstract, general use challenges in mind.

⁸⁴ To a maximum of 10 per cent of annual turnover during the preceding financial year or R1 000 000, whichever is the greater (s 112).

⁸⁵ Section 100(6) read with s 110(2).

⁸⁶ Micklitz *op cit* note 44 at 222.

⁸⁷ For more detail, see Naudé *op cit* note 2 at 526–7.

⁸⁸ Section 52(3)(b)(iii).

(a) *An order that the court order be published at the cost of the supplier*

It would also have been advisable for the legislation specifically to allow a court the discretion to declare that its order be published at the cost of the supplier. This would increase the chance of the court order having a preventative effect.⁸⁹ In Germany, consumer organisations regularly ask for orders that the outcome of the case be published at the expense of the business.⁹⁰ If the business agrees out of court to refrain from using the contentious clauses, such claim to formal publication is usually waived.⁹¹ Publication could also take the form of letters to all the supplier's existing customers. The business should also be ordered to advise the NCC and provincial consumer protection agency of the decision.⁹²

(b) *An order providing for phased-in penalties*

In addition, the legislation should also have specifically empowered the court to order payment of a penalty per prohibited clause and per violation after an initial phase-out period for implementation of the order.⁹³ In Germany, court orders usually provide for such phase-out periods, during which the supplier may still use the contract, but may not invoke the offending clause.⁹⁴ Conditional fines which become payable upon breach of a decision in preventative proceedings are also imposed in Sweden.⁹⁵ In any event, South African courts should issue such phased-in penalty orders on the basis of their wide power to make any 'just and reasonable' order.

(c) *Should orders be effective against all suppliers using similar terms?*

The question arises whether a court should be able to interdict all suppliers from using a particular term found to be unfair, including suppliers that were not before the court. In this regard, the UK Unfair Terms Regulations provide that '[a]n injunction may relate not only to use of a particular contract term drawn up for general use but to any similar term, or a term having like effect, used or recommended for use by any person'.⁹⁶ This

⁸⁹ Thus, the EC Injunctions Directive of 1998 specifically mentions this possibility (Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests, *OJ L* 166, 11.6.1998, at 51–55).

⁹⁰ Micklitz op cit note 44 at 231. This is specifically authorised by § 7 of the *Unterlassungsklagegesetz*. See also § 9.

⁹¹ *Ibid.*

⁹² See further the text at notes 152 to 153 below.

⁹³ Again, the EC Injunctions Directive specifically provides for this possibility. Typically, undertakings by suppliers to German consumer organisations empowered to bring injunction proceedings provide for penalties for each later use of a prohibited or similar term (James R Maxeiner 'Standard-terms contracting in the global electronic age: European alternatives' (2003) 28 *Yale Journal of International Law* 58).

⁹⁴ Micklitz op cit note 44 at 231.

⁹⁵ Peter Dyer 'Implementation of Directive 93/13/EEC in Sweden' in European Commission *Brussels Conference* op cit note 20 at 263.

⁹⁶ Regulation 12(4).

implies that a UK court may order all businesses to stop using a particular term, even if such businesses were not before the court as respondents, and therefore did not have the opportunity to make submissions to the court. Hugh Beale has also argued that orders that terms are unfair should ideally not only be effective against individual businesses, but should also bind any trade association using the term, and preferably other sellers or suppliers who do so as well.⁹⁷ The European Economic and Social Committee has recommended that courts 'should define the conditions in which a legal decision regarding a type of term that has been ruled unfair by courts can be made binding on all identical contracts proposed by the same party and, with necessary procedural guarantees, by other sellers or suppliers in the same sector, or any party to a contract'.⁹⁸ On the other hand, the Unfair Contract Terms Bill proposed by the Law Commissions of England, Wales and Scotland does not replicate the provision in the UTCCR providing for an order binding all other suppliers. Instead, it provides that the court may grant an injunction or interdict on such conditions, and *against such of the respondents*, as it thinks appropriate.⁹⁹ This implies that the interdict may only apply against respondents which were before the court, and not to all users of a particular term. It is submitted that this is the correct approach. Obviously a court order pronouncing a term substantively unfair would have substantial weight in cases involving other businesses, and abstract control of unfair terms through interdicts would almost necessarily concentrate on the substantive fairness of a term.¹⁰⁰ However, other businesses should not be directly bound by such an order and automatically be subject to the penalties for non-compliance; they did not have the chance to make submissions to the court and, moreover, may not be aware of the interdict.¹⁰¹ Enforcement bodies bringing general use challenges should rather seek to involve trade associations and/or major suppliers in a particular sector in general use challenges to increase the effectiveness of such challenges.

The South African legislation apparently only foresees orders on unfair terms being effective against the supplier involved in the court action given that the relevant part of the Consumer Protection Act is written with the paradigm of an individual consumer challenging a term in its contract with a particular, individual supplier in mind.¹⁰² The legislation should rather be geared towards abstract, general use challenges, and then the NCC should as

⁹⁷ Hugh Beale 'Legislative control of fairness: The Directive on Unfair Terms in Consumer Contracts' in Jack Beatson and Daniel Friedmann (eds) *Good Faith and Fault in Contract Law* (1995) 231 at 256–9.

⁹⁸ EESC 2001 Opinion op cit note 10 at 123.

⁹⁹ Section 5(1). Hugh Beale was a Law Commissioner at the time of drafting of this Bill, and it may be that he changed his mind about this aspect in the interim (cf text at note 97 above).

¹⁰⁰ Cf Beale op cit note 97 at 256.

¹⁰¹ See also UK DTI Consultation Paper op cit note 37 at paras 7.8 and 7.11.

¹⁰² See ss 52 and 76.

far as possible seek to involve all suppliers in a particular trade sector, inter alia through involving any trade association in negotiations and court challenges.

Courts should, however, always make their order to prohibit the further use of a term in general terms to prevent evasion of their order through the use of slightly different wording in the drafting of the term.¹⁰³ Therefore all terms with the same object and effect should also be prohibited, regardless of their specific wording. Court orders should be clear on what is acceptable and what is not.¹⁰⁴ Ideally, new wording should be proposed for a problematic clause, for example replacing a wide exemption clause with a clause which merely points out the dangers of an activity to consumers and states that, except for loss caused by the supplier's negligence, the consumer undertakes the activity at its own risk.¹⁰⁵ This will help to ensure that unfair terms are substituted by acceptable terms.

(d) A power to grant monetary relief in general use challenges?

A further question relating to a court's powers in general use challenges is whether the court may only grant an interdict or injunction, or may award monetary relief as well. It appears that in a number of countries, consumer organisations may only seek 'conduct remedies', most commonly interdicts or injunctions to prohibit or compel certain action by the supplier.¹⁰⁶ However, in other countries, monetary relief may be sought as well. Similarly, in some countries, government consumer protection agencies have some form of authority to claim monetary compensation on behalf of consumers.¹⁰⁷ However, most countries seem to allow monetary claims by government agencies only in respect of actual damage suffered by individual consumers.¹⁰⁸

Section 52 of the Consumer Protection Act specifically foresees that a court may order compensation for losses or expenses relating to the transaction or agreement, or the proceedings of the court.¹⁰⁹ As already noted, this section, which forms part of the provisions on unfair contract terms, is written with only the paradigm of reactive challenges involving individual consumers in mind. It clearly relates only to actual loss suffered by individual consumers. However, in another part of the legislation, courts are granted the general, additional power to 'award damages against a supplier for collective injury to all or a class of consumers generally, to be paid on any terms or conditions that the court considers just and equitable and suitable to

¹⁰³ Beale op cit note 97 at 256–7.

¹⁰⁴ Ibid.

¹⁰⁵ See European Commission *Report from the Commission on the Implementation of Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts* COM (2000) 248 final (hereafter the *Report from the Commission*) at 17.

¹⁰⁶ *OECD Background Report* op cit note 8 at 31.

¹⁰⁷ *OECD Background Report* op cit note 8 at 33.

¹⁰⁸ *OECD Background Report* op cit note 8 at 33–4.

¹⁰⁹ Section 52(3)(b)(ii).

achieve the purposes of this Act'.¹¹⁰ Applied to unfair contract terms, this wide-ranging and vaguely articulated power may perhaps be interpreted to allow an award of punitive damages in general use challenges where no individual consumer is involved. Interpreted this widely, such an award of damages for 'collective injury to all consumers' may therefore not be subject to the ordinary requirements for proof of damages, and would be a first for South Africa, which hitherto has not allowed orders for punitive damages. This mechanism may probably be useful to help finance action taken against unfair terms by consumer organisations.

(e) Challenges against terms which are legally ineffective

Enforcement bodies should also be allowed to bring abstract, general use challenges against terms which are ineffective because they are not incorporated into the contract, for example, due to the common law rules on 'surprising terms' or because they are prohibited outright by legislation or under the common law rules on illegality.¹¹¹ Consumers will not know that terms are void for these reasons, and are likely to consider themselves bound.

(f) An accelerated procedure with interim effect

Because court action opposed by the supplier may be slow, an accelerated procedure with interim effect should be considered, to ensure the rapid removal of unfair terms.¹¹²

VI PREVENTATIVE CONTROL THROUGH OTHER PARTS OF THE LEGISLATION

All other parts of unfair terms legislation (as opposed to the 'procedural parts') should also be geared towards a preventative control paradigm.

(a) Lists of prohibited terms and presumptively unfair terms ('black' and 'grey' lists)

The most important mechanisms for effective preventative control in this regard are lists of terms that are prohibited outright or presumed to be unfair until the supplier persuades the court otherwise. Thus, for example, the UK Unfair Terms in Consumer Contracts Regulations replicates the grey list of the EC Directive on Unfair Terms in Consumer Contracts. Countries like Germany, the Netherlands and Portugal have more extensive black and grey lists than are required by the Directive.

The advantages of such 'black' and 'grey' lists have been fully discussed

¹¹⁰ Section 76(1)(c).

¹¹¹ Cf Law Commission of England and Wales & Scottish Law Commission 'Unfair contract terms — A joint consultation paper' (Law Com Consultation Paper No 166, Scot Law Com Discussion Paper No 119) 66–7.

¹¹² Jean Calais-Auloy 'Clearing of the market: the mechanism for controlling unfair terms (Article 7)' in European Commission *Brussels Conference* op cit note 20 at 179.

elsewhere.¹¹³ To mention only a few of these again, lists increase the chance of the legislation having a fast, real and proactive effect as businesses are more likely to remove unfair terms on their own accord if they are given more detailed guidance as to which terms will always (or usually) be unfair, than if they are merely told in vague terms to remove ‘unfair terms’. Less conscientious businesses are also more likely to settle out of court by removing or ceasing to rely upon a term if consumers or watchdog bodies confront them with a black or grey list which includes the term, than merely with the general prohibition against ‘unfair terms’. Lists hence strengthen the hands of consumers and consumer watchdog bodies when negotiating with businesses to remove unfair terms, which is essential in view of the prohibitive costs, risk and effort of litigation for consumers. It is therefore no wonder that black and/or grey lists are included in many laws across the world, and that international experts on unfair terms control regard them as important in the fight against unfair terms.¹¹⁴

Unfortunately, this international experience with lists was not taken into account when the Consumer Protection Act was initially drafted. Section 51 does contain a relatively short list of prohibited terms, but there is no grey list in the text of the legislation. This means that many of the problematic terms commonly blacklisted or greylisted in other countries’ legislation are not named in the Consumer Protection Act.

As already noted, during the public hearings on the Consumer Protection Bill, the Portfolio Committee on Trade and Industry insisted that a grey list be inserted in the regulations.¹¹⁵ In response, officials of the DTI undertook that this would be done. Accordingly, a specific enabling provision was inserted in the Consumer Protection Act itself, namely section 120(1)(d), which allows the Minister to ‘make regulations relating to unfair, unreasonable or unjust contract terms’. It remains to be seen whether the DTI would keep their promise to Parliament in this regard.

The South African grey list could be drafted as follows:¹¹⁶

Regulation [. . .]: Non-exhaustive, indicative list of contract terms which are presumed not to be fair and reasonable

(1) A term of a consumer contract between a supplier acting wholly or mainly for purposes related to his business or profession and an individual consumer who entered into it for purposes wholly or mainly unrelated to his or her business or profession is presumed to be unfair if it —

- (a) has the object or effect of a term listed in paragraph 4, and
- (b) does not come within an exception mentioned in paragraph 5.

¹¹³ See Tjakie Naudé ‘The use of black and grey lists in unfair contract terms legislation in comparative perspective’ (2007) 124 *SALJ* 128 and the authorities cited in that article.

¹¹⁴ For details see Naudé *ibid* at 128 and the authorities cited there.

¹¹⁵ Naudé *op cit* note 2 at 521.

¹¹⁶ For more detailed motivation and discussion of the wording and individual items in the list, see Naudé *op cit* note 113.

(2) A term of any other contract between a supplier acting wholly or mainly for purposes related to his business or profession and a consumer is presumed to be unfair if —

- (a) the supplier put the term forward during the negotiation of the contract with the consumer as one of its written standard terms of business, and
- (b) the substance of the term was not, as a result of negotiation, changed in favour of the consumer, and
- (c) the term has the object or effect of a term listed in paragraph 4, and
- (d) it does not come within an exception mentioned in paragraph 5.¹¹⁷

(3) (a) The list in paragraph 4 is indicative only, so that a term listed therein may be fair in view of the particular circumstances of the case.

(b) The list in paragraph 4 is non-exhaustive, so that other terms may also be unfair under section 48 of the Act.

(c) Terms which come within an exception mentioned in paragraph 5 are still subject to the general provisions on fair and reasonable terms in sections 48 to 52 of the Act.

(d) These regulations do not derogate from the provisions elsewhere in the Act or other law on terms which are prohibited outright.

(4) A term of a consumer contract covered by paragraphs 1 and 2 is presumed to be unfair if it has the object and effect of —

(a) excluding or limiting the liability of the supplier for death or personal injury caused to the consumer through an act or omission of that supplier;

(b) excluding or restricting the legal rights or remedies of the consumer against the supplier or another party in the event of total or partial non-performance or inadequate performance by the supplier of any of the contractual obligations, including the rights of the consumer of setting off a debt owed to the supplier against any claim which the consumer may have against the supplier;

(c) limiting the supplier's obligation to respect commitments undertaken by his agents or making his commitments subject to compliance with a particular condition which depends exclusively on the supplier;

(d) excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by the Act or other legal provisions;¹¹⁸

(e) restricting the evidence available to the consumer or imposing on him or

¹¹⁷ The combined effect of regs 1 and 2 is to cover (i) all terms (including alleged negotiated terms) in contracts between a supplier who is a business, and true consumers; that is, individuals acting for purposes not connected with their businesses, as well as (ii) non-negotiated terms put forward by suppliers who are businesses when dealing with the businesses protected by the Consumer Protection Act (sole traders and small juristic persons). The list should not apply directly to all terms used by suppliers who are not businesses (e.g. non-profit organisations and schools) and to negotiated terms in business-to-business contracts. Courts which consider contracts or terms covered by the Consumer Protection Act, but not by this list, could still refer to the list as motivation for finding a term unfair, but the list should not be binding on them.

¹¹⁸ See in this regard also item (s) below which is implicit in item (d), but it may be useful to spell it out.

- her a burden of proof which, according to the applicable law, should lie with the supplier;
- (f) giving the supplier the right to determine whether the goods or services supplied are in conformity with the contract or giving the trader the exclusive right to interpret any term of the contract;
 - (g) allowing the supplier to retain a payment by the consumer where the latter fails to conclude or perform the contract, without giving the consumer the right to be compensated in the same amount if the trader fails to conclude or perform the contract;
 - (h) requiring any consumer who fails to fulfil his obligation to pay damages which significantly exceed the harm suffered by the supplier;¹¹⁹
 - (i) allowing the supplier to terminate the contract at will where the same right is not granted to the consumer;
 - (j) enabling the supplier to terminate an open-ended contract without reasonable notice except where the consumer has committed a serious breach of contract;
 - (k) allowing the supplier to increase the price agreed with the consumer when the contract was concluded without giving the consumer the right to terminate the contract;
 - (l) obliging the consumer to fulfil all his or her obligations where the supplier has failed to fulfil all its obligations;
 - (m) giving the supplier the possibility of transferring its obligations under the contract to the detriment of the consumer, without the consumer's agreement;
 - (n) restricting the consumer's right to re-sell the goods by limiting the transferability of any commercial guarantee provided by the supplier;
 - (o) enabling the supplier to unilaterally alter the terms of the contract including the characteristics of the product or service;
 - (p) unilaterally amending contract terms communicated to the consumer in a durable medium through on-line contract terms which have not been agreed by the consumer.
 - (q) permitting the supplier, but not the consumer, to avoid or limit performance of the contract;
 - (r) permitting the supplier, but not the consumer, to renew or not renew the contract;
 - (s) limiting the supplier's vicarious liability for its agents;
 - (t) a term whereby the business, upon termination of the contract by either party, can demand unreasonably high remuneration for the use of a thing or right, or for performance made, or can demand unreasonably high reimbursement of expenditure;

¹¹⁹ Contractual penalties are currently controlled under the Conventional Penalties Act 15 of 1962, which grants courts an equitable discretion to reduce the amount payable. However, this is insufficient protection in consumer contracts. Such clauses which would likely be adapted by a court should be greylisted from the start, to persuade businesses not to include it in the first place. The Conventional Penalties Act is also not as accessible to consumers (and those dealing with them) as the Consumer Protection Act. See also the qualification in paragraph 5 below as to penalties specifically allowed by the Act.

- (u) imposing on the consumer, without good reason, immediate payment of an excessive part of the price prior to performance of the contract;
- (v) a term excluding or restricting the consumer's right to rely on the statutory defence of prescription;
- (w) imposing a limitation period that is shorter than otherwise applicable under the common law or legislation for legal steps to be taken by the consumer (including for the making of a written demand and the institution of legal proceedings);¹²⁰
- (x) modifying the normal rules regarding the distribution of risk to the detriment of the consumer;¹²¹
- (y) allowing the supplier an unreasonably long time to perform;
- (z) a term by which the consumer indemnifies the supplier against liability incurred by it to third parties;
 - (aa) providing that the consumer shall be deemed to have made or not made a statement or acknowledgment to his or her detriment, unless (i) a suitable period of time is granted to him or her for the making of an express declaration thereon, and (ii) at the commencement of the period the business is to draw the attention of the consumer to the meaning that will be attached to his or her conduct;
 - (bb) providing that a statement made by the supplier which is of particular interest to the consumer shall be deemed to have reached the consumer, unless such statement has been sent by prepaid registered post to the chosen address of the consumer;
 - (cc) entitling the supplier to claim legal or other costs on a higher scale than usual, where there is not also a term entitling the consumer to claim such costs on the same scale;
 - (dd) providing that a law or laws other than that of South Africa should apply to a consumer contract concluded and implemented in South Africa, where the consumer was residing in South Africa at the time the contract was concluded.
- (5) (a) Paragraph 4(i) shall not apply to terms by which a supplier of financial service reserves the right to terminate unilaterally an open-ended contract without notice, provided that the supplier is required to inform the consumer thereof immediately.
- (b) Paragraph 4(k) shall not apply to
 - (i) transactions in transferable securities, financial instruments and other products or services where the price is linked to fluctuations in a stock exchange quotation or index or a financial market rate that the trader does not control;
 - (ii) contracts for the purchase or sale of foreign currency, traveller's

¹²⁰ This is implicitly part of item (d).

¹²¹ Section 19 of the Consumer Protection Act provides that risk passes upon delivery of the goods sold to the consumer, unless specifically agreed otherwise. However, not all contract terms on risk are covered by this provision. For example, some South African contracts provide that a consumer who hands in goods for repair or refill (e.g. a gas bottle) carries the risk of accidental damage or destruction of the goods. Risk should run with physical control.

- cheques or international money orders denominated in foreign currency;
- (iii) price-indexation clauses, where lawful, provided that the method by which prices vary is explicitly described.
- (c) Paragraph 4(o) shall not apply to
 - (i) terms under which a supplier of financial services reserves the right to alter the rate of interest payable by the consumer or due to the latter, or the amount of other charges for financial services without notice where there is a valid reason, provided that the supplier is required to inform the consumer thereof at the earliest opportunity and that the latter is free to dissolve the contract immediately;
 - (ii) transactions in transferable securities, financial instruments and other products or services where the price is linked to fluctuations in a stock exchange quotation or index or a financial market rate that the trader does not control;
 - (iii) contracts for the purchase or sale of foreign currency, traveller's cheques or international money orders denominated in foreign currency;
 - (iv) terms under which the supplier reserves the right to alter unilaterally the conditions of an open-ended contract, provided that he is required to inform the consumer with reasonable notice and that the consumer is free to terminate the contract.
- (d) Paragraphs 4(h) and 4(t) do not apply to any penalty, fee or compensation which the supplier is entitled to charge under the provisions of this Act or any other law.'

The terms in this grey list are not currently set out in logical order, but to reflect their origin. Items 4(a) to (p) are found in the black and grey lists of the proposed new EC Consumer Rights Directive.¹²² Thereafter, three items from recent Australian legislation not covered by the proposed Directive's list are included in items (q) to (s).¹²³ Finally some other items from other sources are set out in items (t) to the end (such as from the German legislation).¹²⁴

(b) The role of a requirement of plain and understandable language

The explicit requirement in the Consumer Protection Act that contracts must be written in plain and understandable language may also promote preventative control.¹²⁵ Those rare consumers who do have the time to read standard terms, bargain and shop around for better terms would be empowered by this requirement, and are likely to bargain more successfully to the

¹²² Op cit note 24. The Directive's item on automatic renewal of a fixed term contract is not replicated as our Consumer Protection Act regulates that in section 14.

¹²³ Item 4 of Schedule 1 to the Trade Practices Amendment (Australian Consumer Law) Bill, 2009.

¹²⁴ See further Naudé op cit note 113.

¹²⁵ Section 22 of the Consumer Protection Act, read with ss 49(3), 50 and 52(2)(g). See also reg 7(1) of the UK Unfair Terms Regulations and s 14 of the UK Law Commissions' proposed Unfair Contract Terms Bill.

ultimate advantage of less careful consumers.¹²⁶ Such measures may also persuade businesses to use fairer terms, given that consumers (and the businesses themselves) may be more likely to read and understand the standard terms than before.¹²⁷ If terms are written in simple language instead of in incomprehensible, complex legalese, a small business may perhaps realise that the contract drafted by its lawyers or copied from elsewhere exceeds its requirements, and that it does not wish to be associated with a particular unfair term.¹²⁸

Enforcement bodies should also take action against obscure terms, as is done by the OFT.¹²⁹

(c) *Provisions on interpretation*

It is also necessary to qualify any provision on strict interpretation in order to provide for general use challenges. It is recognised in Europe that strict interpretation is not favourable to consumers in general use challenges.¹³⁰ In such proceedings, it is more beneficial to consumers if any normal meaning which could possibly be placed on a term be taken into account in the decision about whether a particular clause is unfair. If a term is so widely drafted that it could be used to the detriment of the consumer, it should be open to challenge despite protestations from the business that it is always interpreted in a narrower sense and is therefore not unfairly used in practice.¹³¹ For this reason the EC Unfair Terms Directive provides that where there is doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail, but that this rule on interpretation shall not apply in the context of the procedures laid down in art 7(2), which effectively provides for general use challenges.¹³² This was implemented in the UK through reg 7 of the UTCCR, which similarly provides that if there is doubt about the meaning of a written term, the interpretation which is most favourable to the consumer shall prevail, but that this rule shall not apply in proceedings brought by the OFT and other qualifying bodies under their powers to bring general use challenges under reg 12.

By contrast, the Consumer Protection Act simply provides in s 4(4) that '[t]o the extent consistent with advancing the purposes and policies of this Act, the Tribunal or court must interpret any standard form, contract or other document prepared or published by or on behalf of a supplier, or required by this Act to be produced by a supplier, to the benefit of the

¹²⁶ As already argued by Naudé *op cit* note 9 at 371.

¹²⁷ *Ibid.*

¹²⁸ *Ibid.*

¹²⁹ See UK DTI Consultation Paper *op cit* note 37 at paras 8.5–8.8.

¹³⁰ See text at note 132 below.

¹³¹ OFT Bulletin 3 at 7. But see the contrary view proposed for Australia by the Productivity Commission (Australian Productivity Commission *Review of Australia's Consumer Policy Framework: Productivity Commission Inquiry Report* vol 2 at 156 *et seq.*)

¹³² Article 5. See also art 36 of the proposed EC Directive on Consumer Rights *op cit* note 24.

consumer so that any ambiguity that allows for more than one reasonable interpretation of a part of such a document is resolved to the benefit of the consumer.’ The failure to realise the need for wider interpretation in general use challenges is another example of the legislation not being geared towards this type of litigation.

(d) *An explicit power to raise the issue of unfairness mero motu*

As I have already argued elsewhere, unfair terms legislation should ideally provide specifically that a court may raise the issue of unfairness of a term on its own initiative.¹³³ Although the South African legislation is silent on this point, it is likely that South African courts will in any event raise the issue of unfairness of its own initiative given the principle that courts may decide issues overlooked by the parties if the interest of justice requires this.¹³⁴ A court should obviously not simply decide the issue of unfairness without raising it in time for the parties to present argument thereon.

VII INDUSTRY-WIDE AGREED CONTRACT FORMS AND CODES OF CONDUCT

One extra-legislative strategy to achieve proactive control is for enforcement bodies to negotiate industry-wide standard contract forms. It has been said that in the Nordic countries, the most important function of the consumer ombudsperson is not to act as a plaintiff in injunction cases, but to negotiate the development of industry-wide contract forms with business organisations.¹³⁵ This has resulted in fair standard contract forms for several types of consumer contracts.¹³⁶ In Sweden, the majority of standard form contracts used in the consumer market by major companies and organisations are the result of such negotiations.¹³⁷ Trade organisations are subject to an independent statutory obligation to ensure that contract forms recommended for use by their members do not lead to unfairness towards consumers, and the ombudsman may bring injunction proceedings against trade organisations in this regard.¹³⁸ Non-compliance may be sanctioned with a fine.¹³⁹ These

¹³³ Naudé op cit note 2 at 536. See, for example, s 21 of the Unfair Contract Terms Bill proposed by the UK Law Commissions of England, Wales and Scotland (op cit note 72). See also the dispute on this issue decided by the European Court of Justice in *Océano Grupo Editorial SA v Roció Murciano Quintero*; *Salvat Editores SA v José M. Sánchez Alcón Prades*, *José Luis Copano Badillo*, *Mohammed Berroane and Emilio Viñas Feliú*, ECJ judgment of 27/6/2000, Joined Cases C-240/98 to C-244/98, [2000] ECR I-4941. This expensive litigation could have been avoided if courts were explicitly granted such a power.

¹³⁴ See e.g. *Southern Africa Enterprise Development Fund Inc v Industrial Credit Corporation Africa Ltd* 2008 (6) SA 468 (W).

¹³⁵ Thomas Wilhelmson ‘The Unfair Contract Terms Directive and the Nordic Contract Model’ in European Commission *Brussels Conference* op cit note 20 at 27. See also Dyer op cit note 95 at 263.

¹³⁶ *Ibid.*

¹³⁷ Dyer op cit note 95 at 263

¹³⁸ *Ibid.*

measures have caused the number of cases on unfair terms to decrease significantly.¹⁴⁰ In the UK, the OFT has at times also approached all major players in a particular market sector and negotiated improvements in all of their contracts.¹⁴¹ This is important work where there is no overarching business organisation to negotiate with in a particular sector.

A similar strategy is to develop industry-wide codes of conduct which lay down mandatory contract terms and, perhaps, prohibit particular unfair terms as well. The OFT's Consumer Codes Approval Scheme seeks to promote voluntary consumer codes of practice that set high standards of customer service. The OFT Approved Code logo therefore aims to help consumers identify better businesses. The OFT insists that it 'will only approve and promote codes that are shown to safeguard and promote consumers' interests beyond the basic requirements of the law'.¹⁴² Because the Codes provide fair mandatory terms for contracts with members of the particular trade body, the problem of unfair terms is less likely to occur. Some of the Codes also specifically articulate that members may not include terms which contravene the Unfair Terms in Consumer Contracts Regulations.

By contrast to these voluntary consumer codes, the South African Law Commission recommended that the proposed ombudsperson be given the power to recommend codes of conduct that would be binding on all businesses in a particular trade sector after consultation with members of that sector and upon approval of the relevant code by the Minister.¹⁴³ Adherence to such codes would therefore be compulsory for all businesses in a particular sector. The Law Commission's Bill also provides for powers of enforcement of such codes.¹⁴⁴

The Consumer Protection Act also provides for industry codes of conduct which may be prescribed by the Minister by regulation.¹⁴⁵ The intention therefore seems to be that such codes would be binding on all suppliers in the sector, so that adherence thereto is not voluntary. Thus s 82(8) provides that '[a] supplier must not, in the ordinary course of business, contravene an applicable industry code'. This obligation is accordingly not limited to suppliers who had agreed to abide by a code. The compulsory nature of such codes also appears from the fact that consultations with persons conducting business within the relevant industry and publication of the proposed code for public comment must precede the recommendation of a code by the NCC to the Minister.¹⁴⁶

¹³⁹ Ibid.

¹⁴⁰ Ibid.

¹⁴¹ See note 39 above.

¹⁴² See the OFT press release of 7 December 2004, 'OFT launches code approval scheme to consumers' available at <http://www.ofi.gov.uk/news/press/2004/200-04>, accessed on 13 January 2009.

¹⁴³ Section 6(2)(e) to (g).

¹⁴⁴ Section 6(2)(f) to (g).

¹⁴⁵ Section 82(2).

¹⁴⁶ Section 82(3).

Such codes of conduct should be used to prescribe fair mandatory terms for contracts concluded within the particular sector. It is to be hoped that the South African Minister will also take this opportunity to list terms which are prohibited in a particular sector. This would be especially important if no grey list is forthcoming.

Apart from these industry codes of conduct provided for in s 82 of the South African Act, s 93 also empowers the NCC to

- ‘develop, and promote the *voluntary* use of, codes of practice in respect of—
- (a) use of plain language in documents;
 - (b) a standardised or uniform means of presenting and communicating the information contemplated in sections 23 to 28 [e.g. disclosure of price and of reconditioned or gray market goods, as well as labelling and sales records requirements];
 - (c) alternative dispute resolution in terms of section 70; or
 - (d) any other matter to better achieve the purposes of this Act’ (emphasis added).

The intention seems to be that such codes would apply across all sectors, but on a voluntary basis.

VIII DISSEMINATION OF INFORMATION

To ensure proactive control, wide dissemination of information on the legislation itself, as well as on experience with enforcement through voluntary undertakings and interdicts, is also very important for preventative control. It is not enough to rely on ‘percolation from the law reports’.¹⁴⁷

The OFT publishes the relevant UK legislation, including the grey list contained therein, on its website and elsewhere.¹⁴⁸ In addition, the OFT publishes non-binding guidance notices on terms which it considers to be unfair, on the basis of its experience of negotiation with businesses and its enforcement procedures. These include ‘before and after’ examples of terms which have been rewritten by agreement with the relevant business to remove unfair elements contained therein.

The OFT first publishes a general guidance notice on unfair terms (called ‘a guidance’ or ‘guidances’), which follows the structure of the grey list in the UTCCR, and which discusses its view on each category of term in the grey list.¹⁴⁹ In addition, it publishes guidances on unfair terms in particular sectors, such as the health and fitness club, consumer entertainment and package holiday sectors. The guidances are non-binding, as only a court may declare a term to be unfair. Nevertheless the guidances carry a lot of weight in practice, so that the OFT very rarely has to institute court action to declare a term unfair. Most businesses voluntarily agree to remove or rewrite terms regarded as unfair by the OFT. In addition, the OFT has hosted conferences on the

¹⁴⁷ Beale *op cit* note 97 at 256.

¹⁴⁸ <http://www.ofi.gov.uk>.

¹⁴⁹ http://www.ofi.gov.uk/advice_and_resources/publications/guidance/unfair-terms-consumer/, accessed on 19 February 2009.

issue of unfair terms.¹⁵⁰ This type of dissemination of information is also found in other countries with effective systems of preventative control.¹⁵¹

The Consumer Protection Act does provide that the NCC is responsible 'to promote public awareness of consumer protection matters.' Section 96 provides further that this is to be done by:

- (a) implementing education and information measures to develop public awareness of the provisions of this Act; and
- (b) providing guidance to the public by —
 - (i) issuing explanatory notices outlining its procedures, or its non-binding opinion on the interpretation of any provision of this Act;
 - (ii) applying to a court for a declaratory order on the interpretation or application of any provision of this Act; or
 - (iii) publishing any orders and findings of the Tribunal or a court in respect of a breach of the Act.'

It is to be hoped that these laudable goals will in fact be implemented effectively in practice. The NCC should use the OFT guidance notices on unfair terms as models and publish similar guidance notices on their website and in the media. However, it seems unlikely that the necessary systems would be in place for the NCC to know about and publish each and every 'order and finding' of each and every court in the country (including the lower courts) in respect of any breach of the Consumer Protection Act, as is foreseen by s 96(b)(iii).

Much progress would be made in this regard if courts should use their general power to make any order it considers just and reasonable to include an order that the supplier inform the NCC, the provincial consumer protection authority and all its existing consumers of the decision.¹⁵² The supplier could also be ordered to publish the decision more widely in the media, with an obligation to furnish proof of implementation to a motion court at a later date.¹⁵³ The NCC should request all courts to make such orders.

It is also noteworthy that the South African legislation only provides for orders and findings of Tribunals and courts. The legislation does not clearly provide that the NCC must publish undertakings by businesses which have not been elevated to court orders. The OFT has such an obligation, and the NCC should follow this example.

IX REGIONAL CO-OPERATION

Where consumer transactions occur across borders in a specific region, it is advisable to provide for co-operation between enforcement bodies in the different states in order to make preventative control a reality for consumers in transactions with an international element.

¹⁵⁰ Bradgate *op cit* note 34 at 47.

¹⁵¹ On Germany's experience, see Micklitz *op cit* note 44 at 231.

¹⁵² See also text at note 92 above.

¹⁵³ See EESC 2001 Opinion *op cit* note 10 at 123.

The European Union has achieved this in respect of consumer contracts by way of the Injunctions Directive of 1998¹⁵⁴ and the Regulation on Consumer Protection Co-operation of 2004.¹⁵⁵ The Injunctions Directive, the earlier measure of the two, allows qualified bodies from one country to seek an injunction in another. It therefore aims to ensure that collective actions may be brought in the country where the business is located by an organ representing consumers' interests, which increases the potential of the order being effective. The Commission publishes a list of qualified bodies which may seek injunctions under the Directive, provided by the various member states.¹⁵⁶ Thus, for example, numerous German consumer organisations are authorised to bring injunction proceedings under the Directive. The Directive provides that member states may retain a requirement that action may only be instituted after a process of consultation with the business to seek an end to the activity.¹⁵⁷ However, if the activity continues after two weeks, the qualified body may apply for an injunction to the relevant court or administrative body with jurisdiction.¹⁵⁸ Qualified bodies may not only seek an injunction, but may also ask for measures aimed at eliminating the effects of the infringement such as publication of the court decision.¹⁵⁹ In addition, penalties may be sought in the event of failure to comply with the injunction.¹⁶⁰

The Regulation on Consumer Protection Co-operation goes further than the Directive by obliging each member state to enforce EU law in its state on behalf of all European consumers, and requires member states to designate a public enforcement authority which would be entitled to call on its counterparts in other countries for assistance in investigating possible breaches of EU Consumer Law.¹⁶¹ The Regulation provides that a requested authority may also fulfil its obligations by instructing a designated body designated as having a legitimate interest in the cessation or prohibition of the infringement to take all necessary enforcement measures available.¹⁶² However, if it fails to do so without delay, the designated public authority remains obliged to act against the infringement.¹⁶³

X CONCLUSION

A proactive approach towards the problem of unfair contract terms requires, firstly, that the unfair terms legislation itself be geared towards a preventative control paradigm. This requires that the legislation be written with both

¹⁵⁴ For a full reference to this Directive see note 89 above.

¹⁵⁵ (EC) No 2006/2004.

¹⁵⁶ As required by arts 3 and 4 of the Injunctions Directive.

¹⁵⁷ Article 5.

¹⁵⁸ *Ibid.*

¹⁵⁹ Article 2(1)(b).

¹⁶⁰ Article 2(1)(c).

¹⁶¹ Article 4.

¹⁶² Article 8(3) read with art 4(2).

¹⁶³ Article 8(3).

challenges by individuals against their own contracts, and what could be called 'general use challenges' brought by consumer watchdog bodies, in mind. In general use challenges, no individual consumer is involved in the litigation.

This article has made several recommendations for amendments to consumer protection litigation in the interests of facilitating preventative control. For example, provisions on strict interpretation should be qualified with respect to general use challenges. In addition, for example, specific provision should be made for negotiated undertakings between the relevant regulator or consumer organisations and businesses, as well as for a register of such undertakings, from which excerpts should be made available on request. Specific obligations should ideally be bestowed upon administrative watchdog bodies to deal with complaints and to bring interdict proceedings where necessary. The path of a consumer complaint should be clear and easy to understand. The confusion in the South African legislation on which courts or tribunals may be approached, and when, should be cleared up as soon as possible. Possible orders that a court may make to increase the effectiveness of an interdict against unfair terms should be listed in the legislation, including the possibility of an order that the business publish the court order in a particular manner or an order which provides for a phase-in period for compliance with the court order, after which penalties are payable per prohibited clause used per contract. As accredited consumer organisations should also have the right to bring general use challenges, the legislation should make this power subject to an obligation first to give the supplier in question an ultimatum to desist voluntarily from using a particular term or terms in order to avoid a judgment and a resultant cost order against the supplier. In addition, unfair terms legislation should include at least a 'grey list' of terms which are rebuttably presumed to be unfair, as the greater particularity which it brings makes it more likely that the legislation will have a fast and proactive effect.

Whether the legislation will have a preventative effect will obviously depend very much on the manner in which it will be implemented by the relevant authorities. In this regard, dissemination of information by the consumer watchdog body will be particularly important. Guidance notices on unfair terms should be published to guide both suppliers and consumers when seeking information on which terms are likely to be unfair. A proactive approach by regulators in the form of negotiation across a whole trade sector will also do much to prevent unfair terms in a particular sector. Agreements reached in this regard could be cemented by including them in industry codes of practice. The national consumer watchdog body should co-operate with sectoral regulators and provincial authorities to ensure that a coherent approach is taken towards the problem of unfair terms. Consumers should still, however, have the right to approach the national regulator should the industry regulator fail to act in response to a complaint.