



Hey, that's not fair! Contract renewed automatically – when did that happen?

Author // Elle Zhang

May 2018

If you are a supplier (of services or products) or just a hard working business owner, chances are, you have tried to sneak in an automatic renewal clause in your standard terms and conditions (or have, in fact, successfully “evergreen-ed” your standard form contract). Yes, we all know that as a proud business owner, of course you would like to (quietly) lock your client into another 100 years of your excellent service.

But hold on, is it legal? Is it fair?

In this article, we look at the enforceability of automatic renewal clauses, in particular, in light of the unfair contract terms regime and some recent case law in this area.

Unfair contract terms – B2B

In November 2016, Australian Consumer Law's (ACL) unfair contract regime extended the unfair contract consumer protections (previously only available to consumers) to small businesses as well. If you use standard form contracts in business-to-business transactions, then your contract would be subject to the extended unfair contract terms regime if:

- one of the parties is a small business (i.e. a business with less than 20 employees); and
- the upfront price payable is less than \$300,000 or \$1 million if the duration of the contract is more than 12 months.

It would be a practical starting point to run your standard form contract against the checklist above. If it is likely that your standard form contract may be caught by ACL's unfair contract terms regime, then potentially any “unfair” terms may be challenged by the Australian Competition and Consumer Commission (ACCC) and found to be void and unenforceable by the Federal Court.

Revision time! What would be “unfair”?

Under the relevant ACL provisions, a term in a standard form contract is unfair (and therefore void), if it:

- creates a significant imbalance in the parties' rights and obligations under the contract;
- is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the term; and
- would cause detriment to the other party if it were to be applied or relied upon.

As a guide, these are the types of “unfair” terms that have been challenged by the ACCC:

- **(unilateral variation)** terms that give one party a unilateral right to vary the terms (including payment terms or prices) of a standard form contract;
- **(termination)** terms that give one party (but not the other) a right to terminate a standard form contract;

ClarkeKann is a commercial law firm with offices in Brisbane and Sydney. Our expertise covers commercial & corporate transactions, employment & IR, financial services, litigation, risk management and insolvency, property transactions and resources projects, across a range of industries. For a full list of our legal services, please visit our website at www.clarkekann.com.au. To update your contact details or unsubscribe to any of our publications, email us at publications@clarkekann.com.au.

This bulletin is produced as general information in summary for clients and subscribers and should not be relied upon as a substitute for detailed legal advice or as a basis for formulating business or other decisions. ClarkeKann asserts copyright over the contents of this document. This bulletin is produced by ClarkeKann. It is intended to provide general information in summary form on legal topics, current at the time of publication. The contents do not constitute legal advice and should not be relied upon as such. Formal legal advice should be sought in particular matters. Liability limited by a scheme approved under professional standards legislation. [Privacy Policy](#)

- **(indemnity)** terms that require a party to grant an unlimited indemnity in favour of the other party (even if the indemnifying party did not cause the loss);
- **(exclusivity)** terms that grant exclusivity to a party despite not being necessary or reasonable for the operation of the business;
- **(Automatic renewal)** terms that allow the contract to “roll over” without providing any notice to the customer before the renewal.

Have you reviewed your standard form contracts since the introduction of the extended unfair contract regime?

We will look at the automatic renewal clauses in this article, as they have been (in different forms) successfully challenged by the ACCC and found to be unfair by the court in various recent decisions. This is one of the areas that have come under significant scrutiny and constantly been on ACCC’s “alert” radar.

Automatic Renewal Clause

A number of cases have been brought by the ACCC concerning these automatic renewal clauses. Some of the elements in a typical automatic renewal clause that have been found by the court to be unfair include:

- the limited period within which a customer can terminate or notify the other party of its intention not to renew the contract before the term of the contract is automatically renewed for a further term;
- the customer was not provided with any notice (or “alert”) in relation to the impending expiry and automatic renewal; and
- the customer has to go through lengthy or unreasonably inconvenient steps to “avoid” the automatic renewal.

In one of the recent cases, the company involved had to make its automatic renewal clause more prominent in the contract and were forced to notify customers of any pending renewal on annual subscriptions. In some other cases, it was found that a similar annual automatic renewal term was unfair and that, when combined with other unfair terms, the contracts were entirely void and unenforceable.

This particularly presents a problem for your business in relation to customers with annual or 6-month subscriptions. If you continue contracting with customers without notifying them before their subscription renews, you may run a risk of having the automatic renewal term

in these contracts deemed unfair. If a customer brought a complaint to the ACCC on this ground, it may be possible that you would be forced to amend the relevant terms in all your contracts. It would also potentially allow the court to “pick apart” your contract for any other contentious terms.

To minimise risk (and to avoid all the potential ACCC dramas!), it would be prudent to avoid having one-sided automatic renewal clauses (in particular the ones that do not allow reasonable periods of notice) in your standard form contracts; if you do wish to implement an automatic renewal structure in your contracts, then extra care should be taken and:

- ensure that the automatic renewal clause in your contract is prominent, clear and transparent for the customer;
- lengthen the notice period before the automatic renewal kicks in; don’t be stingy with the window of opportunity for your customer to opt out of the term – you should consider if this notice period is sufficient and reasonable, from your customer’s perspective;
- talk to your customers, even better, write to them, too! Send them a couple of reminder emails / notices about the upcoming contract expiry date and renewal;
- avoid charging your customers excessive penalty fees if they do terminate after an automatic renewal; and
- if doable and suitable for your business model, maximise the number of monthly (or weekly) automatic renewals for customers, as opposed to annual or long term renewals, as the periodic fees involved in shorter term are presumably a lot less and the customers are therefore taking on less risk (and leaving it less likely that the term may be considered unfair).

We are here to help! Pick up the phone and give us a call if you want to have a quick chat about your standard form contracts. We promise it will be pleasant (and we might even tell a joke or two).

For more information, please contact:



Elle Zhang //
Associate

T // 61 2 8235 1239

E // E.Zhang@clarkekann.com.au