

Prohibition On Contracting Out Of The Building And Construction Industry Security Of Payment Act 1999 (NSW)

PROHIBITION ON CONTRACTING OUT OF THE *BUILDING AND CONSTRUCTION INDUSTRY SECURITY OF PAYMENT ACT 1999 (NSW)* [1]

Robert McDougall

This paper will focus on the extent to which s 34 of the *Building and Construction Industry Security of Payment Act 1999* ("the Act") affects the primacy of parties' bargains. I said in *Minister for Commerce v Contrax Plumbing* that the Act generally strikes a balance between freedom of contract on the one hand and protection of the statutory right to a progress payment on the other. [3] However, the operation of the amended s 34 has "swung the balance somewhat away from freedom of contract, and somewhat towards strengthening the rights given by the Act." [4] It is with this understanding of the section that I consider the validity of certain provisions in building and construction contracts. In this paper I set out the reasoning behind my "broad" interpretation of s 34, and consider the application of s 34 to contractual clauses which may be said to conflict with the section.

Introduction to s 34

Section 34 aims to prevent circumvention of the Act. Currently, it reads as follows:

"34 No contracting out

(1) The provisions of this Act have effect despite any provision to the contrary in any contract.

(2) A provision of any agreement (whether in writing or not):

(a) under which the operation of this Act is, or is purported to be, excluded, modified or restricted (or that has the effect of excluding, modifying or restricting the operation of this Act).

or

(b) that may reasonably be construed as an attempt to deter a person from taking action under this Act,

is void."

It is important to note that subs (1), the words "or is purported to be" in subs 2(a) and the whole of subs 2(b) were added as part of the amendments made by the *Building and Construction Industry Security of Payment Amendment Act 2002*. Those amendments were intended to, and do, strengthen the rights given by the Act. While s 34 always prohibited contracting out, the amendments explicitly widen its breadth and extend its reach and impact. Not only does the amended section avoid provisions that exclude, modify or restrict the Act, it also renders void any provision which *purports* to do so, as well as any provision that *may reasonably be construed* as an attempt to deter a person from taking action under the Act.

The balance of contractual freedom and established rights

I acknowledge that various sections of the Act itself, several cases interpreting the Act, and some extrinsic legislative material focus on contractual freedom. They may even be thought to suggest that the contractual regime reigns supreme. Certainly many submissions based on certification clauses, and their alleged impact on the adjudicator's ability independently to value a progress payment, do so: see e.g. submissions in *Abacus Funds Management Ltd v Davenport & Ors*, *Leighton Contractors Pty Limited v Campbelltown Catholic Club*, *TransGrid v Walter Construction Group Ltd* and *TransGrid v Siemens*. [5]

Part 2 of the Act (Rights to progress payments) is replete with references to contractual terms. While s 8(1) grants the right to a progress payment from each reference date, the reference date is primarily defined in s 8(2) as the "date determined by or in accordance with the terms of the contract."

Likewise, s 9 (Amount of Progress payment), s 10 (Valuation of construction work and related goods and services), and s 11 (Due date for payment) all provide for matters to be determined “in accordance with the terms of the contract” unless the contract is lacking an express provision. Part 2 of the Act, considered alone, suggests that individuals can bargain for any contractual regime they see fit, and that the provisions of the Act will only operate as a default mechanism. Consequently, Austin J remarked in *Jemzone v Trytan* that “the Act ... generally leaves it to the construction contract to define the rights of the parties but makes ‘default provisions’ to fill in the contractual gaps”. [6]

Some case law has also focused on the primacy of the parties’ contractual bargain. The Act was described in *TransGrid v Siemens & Anor* as a “dual railroad track system,” [7] whereby the contract runs parallel to the Act, implying perhaps that the two should not interact or interfere with one another. Macready AsJ explained in *Beckhaus v Brewarrina Council* that:

“the framework of the Act is to create a statutory system *alongside* a contractual regime. It [the Act] does not purport to create a statutory liability by altering the parties’ contractual regime. There is only a limited modification in s 12 of some of the contractual provisions.” [8]

His Honour seems to suggest that the only explicit contractual provisions affected by the Act are those limited circumstances where the contract provides for pay-if-paid and pay-when-paid clauses. According to this rationale, the legislature should have explicitly prohibited any contractual provisions it found inequitable or unfair as it prohibited the pay-if/when-paid clauses.

In *TransGrid v Siemens* Macready AsJ once again commented on the freedom of parties to determine how progress payments are to be paid under a construction contract. He stated:

“In adopting their contract regime parties are, of course, free to adopt any particular mechanism for determination of progress payments. The range and variety of such mechanisms is quite substantial. To quote an example referred to in oral argument, the parties would be quite free to make provision for progress payments which make a progress payment equal to a certain proportion of funds expended in the previous month by the builder...All of these approaches are quite open to parties and are governed by the different principles of law that a court will apply depending upon the particular agreement adopted....The parties are thus free to choose a form of contract with widely differing legal results. This is a point I will return to later. There is nothing in the simple words of s 9 (a) which differentiates between the many and varied results that might be achieved as a result of the parties’ contract. The section simply directs one to the contract result.” [9]

Barrett J also acknowledged the supremacy of the contract in *Quasar Constructions v Demtech Pty Ltd*, when he focused on Parliament’s intention that the statutory progress payment scheme should “underwrite” rather than override any contractual regime. [10] His Honour’s conclusion was summarised as being that “the existence of contractual provisions in the ‘ordinary sense’ will suffice to oust the operation of the Act in this respect.” [11]

The focus on contractual freedom is also apparent in extrinsic legislative materials. For example, the Minister for Public Works and Services emphasised in his second reading speech that “In forming their contract, the parties are free to agree upon the intervals for making payment claims, times for making payment and how such payments are valued ...”. Similarly, this freedom was underscored in a debate on 15 September 1999. One member stated that the Bill sought to redress the power relationship, but he went on to say:

“Therefore this bill has not intervened in the operations of the marketplace. There is nothing in this bill to indicate that there must be a certain type of contract. The contract is negotiated entirely, as it was in the past...It allows the subcontractor to have the power to effectively enforce an existing contract. That is what the bill provides ... The bill does not override payment provisions provided by a construction contract.”

I agree that the Act often “operates to supplement rather than to displace contractual entitlements”, [12] but it is also clear, in my view, that contractual provisions cannot diminish rights or entitlements provided for in the Act. [13] Consequently, the Act, especially through s 34, is more than just a supplement to, or a mechanism designed to reinforce, contractual terms.

The operation of s 34

The reasoning behind the broad interpretation of s 34 is best explained by reference to my judgment in *Minister v Contrax*. I there analysed whether contractual provisions relied upon by the plaintiff were void by reason of the operation of s 34 of the Act. According to cls 42.1 and 42.2 of the relevant contract, Contrax was not entitled to a progress payment, because it was only permitted the appropriate fraction of the contract price and the full contract price had already been paid. Contrax could only have a contractual right to further progress payments if it sought to vary the contract price by following the process described in cl 46 of the contract. That process included submissions to the Superintendent's representative, submissions to the Superintendent, expert determination, and ultimately arbitration. In total, the time required to satisfy the conditions precedent before a progress claim could be obtained stretched beyond the relevant reference date by 200 days, or more than six months. Consequently, I held that both cl 42.1 and cl 42.2 contravened s 34, because they would exclude, modify or restrict the operation of the Act. They would do so because, if enforced, they would defer significantly the entitlement given by s 8(1) [14] of the Act to be paid from a reference date for construction work carried out prior to that reference date. [15]

My analysis in *Minister v Contrax* illustrated the fact that s 34 will operate in all circumstances where contractual clauses attempt to eradicate or limit the rights given under the Act. As a result, the section is likely to alter the effect of numerous contractual provisions.

On appeal, Hodgson JA declined to express a final view as to the invalidating effect of s 34, because he found that the adjudicator's determination would remain valid regardless of s 34's impact. However, he noted that it was "strongly arguable that s 34 does have that effect on either or both of the two grounds". [16] The first ground was that cl 42 would be void under s 34, if it were interpreted to preclude the payment of progress payments calculated in accordance with the terms of the contract. [17]

The simplest way to propound the second ground is to set out paras [53] and [54] of his Honour's reasons:

"[53] Second, although "progress payment" is defined in s 4 of the Act to mean "a payment to which a person is entitled under s 8", and although s 4 does not contain a qualification by reference to context, nevertheless in my opinion it is plain that, in some places in the Act, the expression "progress payment" is used in a way that includes a more generalised meaning. For example, s 3(2) cannot mean that the means by which the Act ensures that a person is entitled to receive "a payment to which a person is entitled under s 8" is by granting a statutory entitlement to such a payment, regardless of whether the relevant construction contract makes provision for "payments to which a person is entitled under s 8". Plainly, in s 3(2), progress payment is meant in a more general sense; and the same must be true of its use in s 3(1). Similarly, where s 8(2)(a) refers to the date determined under the contract as the date on which a claim for a progress payment may be made, this provision was not meant to be ineffectual unless the contract provision relates to payments to which a person is entitled under s 8: again, in my opinion, plainly a more general sense of the phrase is intended to be included: cf. *Quasar* at [21]. And in my opinion, the more general sense is also intended in s 8(1), because otherwise s 8(1) would be circular and vacuous.

[54] On that basis, in my opinion a provision of a contract as to the determination of reference dates, or as to the calculation of the amount of progress payments, could be such as to restrict the operation of the Act within the meaning of s 34, even though the Act in s 8(2)(a) and s 9(a) expressly defers to such provisions. For example, if a contract provided for yearly reference dates, or provided that progress payments should be calculated on the basis of 1% of the value of work done, in my opinion such provisions could be so inimical to s 3(1), s 3(2) and s 8(1) as to be avoided by s 34. If, contrary to the first ground, cl 46 is a provision as to calculation, the relevant parts of cl 42 could still be seen as restricting the operation of the Act. In my opinion, it is preferable not to finally determine this question in a case where it is not necessary to do so."

His Honour thus drew a distinction between sections of the Act in which the words "progress

payment” were to be interpreted according to their statutory definition (“a payment to which a person is entitled under section 8”), and sections in which they were to be interpreted more widely. [18]

His Honour’s alternative analysis recognises both the dual system which undoubtedly exists as a result of the operation of the Act and, in at least some areas, the primacy of the contractual system. Nonetheless, that analysis would suggest that the effect of s 34, in an appropriate case, might be to undercut the apparent primacy of the contractual system. The question is whether the operation of the relevant contractual provision “could ... be seen as restricting the operation of the Act”: clearly, as his Honour suggested, something dependent on a case by case analysis and not to be undertaken in a vacuum.

Bryson JA did not join in Hodgson JA’s observation that the effect of s 34 was to invalidate portions of cl 42, because he considered that “demonstration of the manner in which provisions of the contract excluded modified or restricted the operation of the Act, or otherwise fell within s 34(2), was not appropriately specific.” [19]

In response to the suggested lack of specificity, I offer the following calculations regarding the greatest length of time a claimant would be required to wait under the Act before lodging an adjudication application or having an adjudication amount determined.

According to the Act, once a claimant serves a payment claim the respondent has a maximum of 10 business days to provide a payment schedule. [20] If the respondent does not provide a payment schedule or pay any money by the due date, it becomes liable to pay the claimed amount. [21] The claimant may immediately notify the respondent of its intention to adjudicate and the respondent has 5 business days to provide a payment schedule. [22] Therefore, where a payment schedule is provided, a claimant may wait a maximum 15 business days before lodging an adjudication application. In the second scenario the respondent provides a payment schedule, but the amount indicated in the payment schedule is less than the claimed amount in the payment claim. [23] Under these circumstances the claimant may make the adjudication application as soon as the inadequate payment schedule is received. [24] In the third scenario, the respondent provides a payment schedule but fails to pay the whole or any part of the scheduled amount to the claimant by the due date. [25] Once the due date has passed the claimant may immediately lodge its adjudication application. [26] Despite the variable due date for payment in the third scenario, the claimant is able to lodge its application as soon as it realises that the payment has not been made.

Once the adjudicator accepts the application for adjudication and notifies the parties of that acceptance, the adjudicator has 10 business days to determine the adjudication. [27] This time may be extended when the respondent has provided a payment schedule, because the respondent has 5 business days after receiving a copy of the application or 2 business days after receiving notice of an adjudicator’s acceptance (whichever period is later) to lodge an adjudication response. [28] Accounting for this variance, the Act contemplates a period of about 10 to 15 business days (after an adjudicator has notified the parties of his acceptance) before an “adjudicated amount” is determined. In para [99] of *Energetech Australia v Sides Engineering*, [29] Campbell J also calculated the extremely tight time limits imposed by the Act.

These calculations show that, in general, the Act contemplates that a diligent claimant would only have to wait 15 business days before lodging an adjudication application and another 10 to 15 business days before receiving an adjudication determination. This figure of approximately 30 business days stands in stark contrast to the 200 days required for the working out of cls 42 and 46 in *Minister v Contrax*. Even allowing for weekends and public holidays, the difference is huge.

In *Minister v Contrax*, Bryson JA stated that “the avoidance provisions should be applied according to their terms and no more widely.” [30] I would not suggest otherwise; but the calculation that I have set out might fulfil his Honour’s desire for specificity as to the manner in which the contract conflicts with the Act. In any event, application of those provisions according to their terms requires a value judgment to be made as to the nature and effect of the impugned contractual provisions, and that judgment must be informed by (among other things) the stated legislative objects.

Although the Court of Appeal did not determine *Minister v Contrax* based on s 34, the observations by Hodgson JA, suggest that my approach to the application of s 34 is appropriate; and the views of Bryson JA do not require a contrary conclusion.

In addition to the *Minister v Contrax* cases, there are some extrinsic legislative materials which support an expansive, strengthened construction of s 34. The Review Discussion Paper [31] explained that s 34 was being extended by Part 2(b) to ensure that clauses which act as “a strong disincentive for a claimant proceeding with an adjudication application” are rendered void. Unfortunately, the explanatory memoranda for the principal Bill and the 2002 amendments are not as helpful, because they merely echo and summarise the section. However, the second reading speech for the 2002 amendment and the following debates suggest that the amendments were designed to make the Act more effective and strengthen it. In particular, the Minister stated that “Reports received by my department indicate that the Act is proving very successful in reforming these practices. But changes can be made to make the Act even more effective. The purpose of this bill is to enact those changes.” [32] Likewise, the Honourable Grant McBride MP explained in debate on 15 November 2002:

“Last year we delivered a discussion paper to the industry to ascertain how they thought the Act could be improved. Close to 60 submissions were received. Almost all of the responses, representing the industry association contractors, and legal and other interested parties, provided strong support for the proposed enhancements that strengthen the Act and its implementation. The strengthening of the Act will improve payment to subcontractors and deal with issues that have been raised previously.” [33]

There are no decisions, other than those in *Minister v Contrax*, where the outcome hinges at least in part on the operation of s 34. However, there are a handful of cases where the submissions contained s 34 arguments. Moreover, some decisions have considered the potential impact of the section, although by way of obiter dicta only, which did not affect the ruling. The following cases illustrate that s 34 arguments may be applied to a variety of contractual provisions. Whether these arguments will ultimately be effective remains to be seen.

In *Australian Remediation Services v Earth Tech Engineering*, [34] an application for costs, White J made some observations regarding the impact of s 34(2)(a). He reasoned that cl 18 of the construction contract there under consideration must be read in such a manner that it does not conflict with s 34. [35] Moreover, the notice may be avoided in whole or in part by s 34, because it affected the substance of the matters to be determined in arbitration and therefore the operation of the Act. [36]

In *Barclay Mowlem Construction v Tesrol Walsh Bay*, I considered a submission that the estoppel defence was prohibited by s 34, because the “agreement” said to have been formed by estoppel was void under s 34. [37] Although I declined to rule on this issue in the application for summary judgment, I observed that the “agreement” could be found void under s 34, but that the underlying representation may still survive. [38]

In *Lucas Stuart Pty Ltd v Council of the City of Sydney*, [39] the plaintiff also contended that the estoppel defence “flies in the face of s 34”, but Einstein J found it unnecessary to deal with the issue. [40]

In *Energetech Australia v Sides Engineering*, [41] the defendant argued that the contractual terms preventing it from submitting a payment claim for work carried out after practical completion was void pursuant to s 34(2). [42] In response, the plaintiff contended that s 34 did not operate in the particular instance, because the Act upholds contractual provisions which provide for agreed upon reference dates. [43]

Finally, in *TransGrid v Siemens & Anor* [44] the plaintiffs submitted in the alternative that a superintendent’s certificate that was said to fix the amount of a progress payment was void under s 34. [45] The contract contained no valid provision for the calculation of progress payments. The plaintiffs submitted that the default provisions for calculation should have been applied. [46] Macready AsJ rejected this argument, saying that s 9(b) of the Act provides that progress claims are to be valued in accordance with the terms of the contract, and here the contract provided for the determination to be made by the superintendent. [47] His Honour did not base his decision upon the operation of s 34, but rather he denied relief upon discretionary grounds. [48] Although this decision does not analyse s 34 in any depth, its dicta might be seen to limit the operation of s 34, by suggesting that contractual terms apply, regardless of their effect on the ability of the adjudicator to make a determination of the value of construction work.

On appeal, in *TransGrid v Siemens Ltd*, [49] Hodgson JA found that it was not necessary to decide the true construction of s 9(a) and the impact of s 34. [50] However, he did express the view that the progress payment should be determined by the value of the work less certain deductions rather than the amount certified by the superintendent. [51] His Honour suggested that this calculation is to be preferred, because contractual provisions, which provide for progress payments to be determined by the superintendent, may be void under s 34. [52]

There are numerous similar cases where the validity of clauses which require a superintendent’s certification are considered. Although the parties in these cases did not explicitly engage in s 34 debate, the same struggle between contractual freedom and the rights established in the Act is exhibited. For instance, in *Abacus Funds Management Ltd v Davenport & Ors* [53] the plaintiff argued that the adjudicator was bound by the superintendent’s decision, relying upon ss 9(1)(a) and 10(1), which states that the amount of a progress payment or value of construction work is to be “calculated in accordance with the terms of the contract”. [54] I held that the adjudicator was not bound by the superintendent’s decision, because ss 9(1) and 10(1) direct attention to the mechanism for calculation, and not to the individual by whom that calculation is to be made. [55]

Likewise in *TransGrid v Walter Construction Group*, [56] where it was once again argued that progress payments must be approved by the superintendent, I held that the superintendent’s decision was not determinative. I said:

“... if the legislature intended the decision of the Superintendent (or someone in the Superintendent’s contractual position) to be determinative in any case to which sections 9 (a) and 10(1a) applied, there would be no utility whatsoever in putting in place the

mechanism for adjudication. That is because, by hypothesis, the claimant would have a contractual right to the amount of the payment and the determination of the adjudicator could do no more than recognize that right. The only benefit from the adjudication process would follow from the ability to register the adjudication certificate in a Court of competent jurisdiction and thereby obtain a judgment. However, on the hypothesis under consideration, the claimant could equally well sue for the payment and recover summary judgment.” [57]

Finally, in *Leighton Contractors Pty Limited v Campbelltown Catholic Club*, [58] Einstein J concluded that provisions which required certification, “had the potential to frustrate the operation of the Act whenever the relevant construction contract requires certification of a progress claim and payment of the amount certified.” [59]

Although none of these cases analyses the impact of s 34 on certification clauses, it is certainly arguable that such clauses may exclude, restrict or modify the operation of the Act if and to the extent that they subordinate the adjudicator’s role to that of the superintendent. If the adjudicator is bound by a superintendent’s certification, the adjudication process is fruitless or futile, as suggested in *TransGrid v Walter Construction Group*, and a claimant would be reluctant to engage in it.

The cases to which I have referred suggest that s 34 might be applied to contractual provisions which affect arbitration, “agreements” formed by estoppel, clauses which provide limited progress claims and finally terms where progress payments are determined by superintendent’s certificates. In my opinion, it is likely that s 34 will be considered in more and more cases.

Other jurisdictions

While other jurisdictions have also enacted security of payment legislation for the building and construction industry or are in the process of so doing, these jurisdictions’ case law and legislative materials do not shed any light on the appropriate interpretation of the contracting out provisions. The contracting out provisions in Victoria’s *Building and Construction Industry Security of Payment Act 2002*, which commenced in January 2003, contain in s 48 the same contracting out provision as the unamended s 34 in New South Wales. In contrast, s 99 of Queensland’s *Building and Construction Industry Payments Act 2004* contains the same terms as the amended NSW s 34.

The Northern Territory has enacted the *Construction Contracts (Security of Payments) Act 2004* (NT), which took effect on 22 February. It provides a limited contracting out prohibition similar to Victoria’s s 48 and New South Wales’ unamended s 34. [60] However, unlike the NSW Act, which only expressly prohibits “pay if/when paid” provisions, the Northern Territory also prohibits “Provisions requiring payment to be made after 50 days ... after the payment is claimed.” [61] This prohibition would effectively eliminate much of the debate, whether contractual provisions that delay payment thwart the operation of the Act, and whether such clauses are invalid under the prohibition against contracting out.

Finally the “Building and Construction Industry Security of Payment Act Review Report”, published in May 2004 by the NSW Department of Commerce, comments that Western Australia has a draft Security of Payment Bill before its Parliament and the Federal Government had developed “a draft Bill as a recommendation of the Royal Commission into the Building and Construction Industry,” I have yet to be able to find this draft legislation. [62] Although these Acts and drafts are too young to provide meaningful insight into the contracting out provision at this time, they may in the future be a source of persuasive authority.

Beyond Australia, New Zealand has introduced similar legislation. Moreover, England’s Scheme for Construction Contracts (England and Wales) Regulations 1998 has been referenced by some as the impetus for the introduction of our NSW legislation in 1999. However, Macready AsJ in *TransGrid v Siemens & Anor*, found that the different English legislation was “not a proper matter to have regard to in the construction of the New South Wales Act. There was no reference to it in the second reading speeches.” [63] I have expressed a similar view. In both *Musico v Davenport* [64] and *Australian Remediation Services Pty Ltd v Earth Tech Engineering* [65] I said that the English authorities are of little assistance because “there are substantial differences between the scheme and text of the Act and the scheme and text of the legislation considered in those English and Scottish cases.” [66]

What kinds of provision might attract the operation of s 34?

Contractual provisions which delay the ability of a claimant to receive progress payments, lodge an adjudication application, or receive an adjudicated amount because of conditions precedent and conditions subsequent may in some circumstances exclude, modify or restrict the operation of the Act or deter someone from taking action under the Act.

The Act contemplates in s 8(1) that an entitlement to a progress payment arises following a reference date. Moreover an adjudicated amount, according to the calculations set out above, should be determined within a maximum period of 30 business days, assuming that the claimant acted as quickly as possible.

The case law and legislative materials suggest that the Act was intended to create rights to

prompt interim payments. The Minister in his second reading speech stated, "The main purpose of the Act is to ensure that any person who carries out construction work ... is able to promptly recover progress payments." [67] Furthermore, he commented:

"Cash flow is the lifeblood of the construction industry. Final determination of disputes is often very time consuming and costly. We are determined that, pending final determination of all disputes, contractors and subcontractors should be able to obtain a prompt interim payment on account, as always intended under the Act." [68]

In fact, the Minister suggested that the 2002 amendments were designed to enable claimants to receive payment more quickly than previously.

Case law also recognises that the legislation provides for prompt payment. In *Lucas Einstein J*, citing Hodgson JA in *Brodyn*, suggested that the legislation was designed "to provide a mechanism to ensure that disputes concerning the amount of such payments are resolved with the minimum of delay."

Taking into consideration that the Act is designed to avoid delay, one would have to consider whether the delay created by the hypothetical condition precedent or condition subsequent is so excessive as to thwart the operation of the Act, as I held was the case in *Minister v Contrax*. In that case, the delay created by cls 42.1 and 42.2 was at least part of the basis for finding those clauses void pursuant to s 34. As I have already said, satisfaction of all of the conditions precedent to a progress payment would encompass approximately 200 days. Because that delay so grossly exceeded the 30 or so business days contemplated in the Act, it clearly thwarted the entitlement to prompt payment.

Conditions precedent or subsequent which are not so excessive in their impact will need to be examined individually for their validity. For instance, a contractual provision that requires a short delay, because the claimant and the respondent must first engage in alternative dispute resolution, might not be found to dwell outside the spectrum of reasonable delay. As such a provision recognises the public policy in favour of alternative dispute resolution, [70] and if (and to the extent that) it only delays resolution of the entitlement to payment relatively briefly, it might not be held to restrict the operation of the Act, and might therefore remain valid under s 34.

Another question raises the validity of provisions which bar adjudication after a certain time period has passed. In *BMD Major Projects Pty Ltd v Queensland Nickel Pty Ltd*, Adjudication Number 30034 in Queensland, cl 48 of the contract read:

"the [Respondent] shall not be liable to the Contractor in respect of any claim, demand, account, costs, expense, damage, difference, dispute, action, suit or proceedings ('claim') whatsoever, whether arising in law or in equity and whether pursuant to contract or tort or by statute unless:

- a) the Contractor gives written notice to the Company Representative not later than 14 days after the first occurrence of the events or circumstances on which the claim is based;
- b) the Contractor lodges a claim with the Company Representative within a further 14 days from the date of written notice of the claim or such further time as the Company Representative may allow, within its sole discretion, whether before or after expiry of the further 14 day period; and
- c) the claim referred to in paragraph (b) sets out:
 - i. the legal basis for each aspect of the claim;
 - ii. the facts relied upon in support of each aspect of the claim; and
 - iii. details of the quantification of sums claimed, showing the manner of their calculation, sufficient to enable a proper assessment of the claim"

The claimant had only 14 days after the event to give notice, and another 14 days to provide a second, detailed written notice, including within the legal basis for each claim. If the claimant did not engage in the cl 48 process, it was barred from serving a payment claim and participating in the adjudication process established under the Act. Not only do these conditions precedent differ greatly from the right of a claimant under the Act to serve a payment claim for at least one year once after the work is carried out, the conditions are likely to deter a person from taking any action under the Act. The timeline described in cl 48 is so abbreviated that many claimants would fail to meet the deadline to give

the initial notice. Even if they satisfied the first requirement, it is unlikely that they would be unable to provide the second detailed notice, which requires the legal basis for each claim, in the short period of 14 days. Accordingly, a clause such as cl 48 might be found to be void pursuant to s 34(2)(b).

A final question relates to the validity of clauses which provide for an adjudicator's decision to be deemed a final and binding entitlement. In my opinion this clause might be held to be void, pursuant to both s 34(2)(a) and s 34(2)(b). First, of all the clause could exclude, modify, or restrict the operation of the Act, because it explicitly conflicts with s 32. The relevant portion of s 32 of the Act specifically provides:

“32 Effect of Part on civil proceedings

(1) Subject to section 34, nothing in this Part affects any right that a party to a construction contract:

- (a) may have under the contract, or
- (b) may have under Part 2 in respect of the contract, or
- (c) may have apart from this Act in respect of anything done or omitted to be done under the contract.

(2) Nothing done under or for the purposes of the Part affects any civil proceedings arising under a construction contract, whether under this Part or otherwise, except as provided by subsection (3) ...”

In *Energetech Australia v Sides Engineering*, Campbell J stated the effect of s 32 as follows:

“Section 32 of the Act makes clear that the adjudicator's determination is an interim one, and the parties have full opportunity to litigate who owes how much to whom under the construction contract, without the decision of the adjudicator having any effect other than as required by s 32(3).” [71]

Because the Act itself and case law clearly demonstrate that an adjudicator's determination is not a final one, any provision which states otherwise may be invalid pursuant to s 34 (2)(a).

Moreover, such a clause could be interpreted as void pursuant to s 34(2)(b), because a claimant might be discouraged from engaging in the adjudication procedure for fear that the time-constrained adjudication might produce any inaccurate result without any recourse. Einstein J has recognised that the adjudication process is often inaccurate because the adjudicator can only consider a limited number of issues and because of the intense time constraints imposed. He stated in *Brodyn v Davenport* (a case which was upset on appeal, but not on this point):

“What the legislature has effectively achieved is a fast track interim progress payment adjudication vehicle. That vehicle must necessarily give rise to many adjudication determinations which will simply be incorrect. That is because the adjudicator in some instances cannot possibly, in the time available and in which the determination is to be brought down, give the type of care and attention to the dispute capable of being provided upon a full curial hearing. It is also because of the constraints imposed upon the adjudicator by section 21, and in particular by section 21(4A) denying the parties any legal representation at any conference which may be called. But primarily it is because the nature and range of issues legitimate to be raised, particularly in the case of large construction contracts, are such that it often could simply never be expected that the adjudicator would produce the correct decision. What the legislature has provided for is no more or no less than an interim quick solution to progress payment disputes which solution critically does not determine the parties rights inter se. Those rights may be determined by curial proceedings, the Court then having available to it the usual range of relief, most importantly including the right to a proprietor to claw back progress payments which it had been forced to make through the adjudication determination procedures. That clawback route expressly includes the making of restitution orders.” [72]

Likewise, in *Walter Construction Group v The Robbins Company*, I stated:

“I do not accept that the determination of the adjudicator provides any convincing indication of the amount of the plaintiff's entitlement. In particular, I do not regard the determination as providing any convincing indication that the likely amounts of

the plaintiff's claim will be much less than the sum claimed in its summons. I think that the inherent limitations in the adjudication process, and the interim nature of the procedure, mean that it could not be seen as an accurate predictor of the outcome of a fully prepared hearing." [73]

If parties were bound to the adjudicator's decision, with all the likely limitations imposed by the statutory process and time frame, parties might avoid adjudication and wait for a full court hearing.

Consequences if provision avoided

The language of s 34 is clear. A provision of an agreement falling within subs (2) is void. It is not merely void "for the purposes of this Act". It seems to me to be strongly arguable that if a provision is avoided by operation of s 34, it is void for all purposes. In other words, notwithstanding the interim nature of adjudications and other proceedings under the Act, and notwithstanding the express preservation of rights (in relation to a final hearing) effected by s 32, it may well be that a provision avoided by the operation of s 34 could not be relied upon in any such final hearing.

Indeed, it is strongly arguable that this is so even if s 34 has not been relied upon for any purpose connected with the Act (for example, in relation to an adjudication). Thus, if a principal or head contractor, in proceedings for final relief in a court or arbitral forum, were to rely by way of defence on a contractual provision of a kind caught by s 34, it may well be met by an argument that the clause in question is void by operation of s 34, notwithstanding that s 34 had not been raised or relied upon for the purposes of any progress claim or adjudication.

Very difficult and perhaps absurd consequences would arise if s 34 did not so operate. If the avoiding effect of s 34 were limited to things done under or in connection with the Act, then there could be radical inconsistencies between the interim rights established under the Act and rights established on a final hearing. Although s 32(3) recognises the possibility of, and makes allowance for the existence of, inconsistencies, I do not think that the legislature had such radical inconsistencies in mind. It is difficult to impute to the legislature the absurd intention to give an entitlement that is enforceable under the interim regime prescribed by the Act, but lost entirely in proceedings thereafter.

This analysis, if correct, suggests that parties in the position of the Minister in *Minister v Contrax* should think very carefully before inserting provisions that might fall foul of s 34 into their contracts, and that their legal advisers should specify clearly the possible consequences if they do.

Conclusion

Regardless of the Act's apparent attempts to preserve contractual freedoms, I suggest that s 34 is a bulwark against provisions attempting to eradicate or limit the rights established by the Act. The section, as amended, may be seen to have transformed the Act from a legislative scheme providing default mechanisms to one which establishes a strong entitlement to a prompt, interim progress payment.

It may be that s 34 will also have an impact on rights outside the Act, in that its avoiding effect may be permanent, and for all purposes.

End Notes

[1] A revised version of a paper delivered to the Institute of Arbitrators & Mediators Australia National Conference, Saturday 27 May 2006.

[2] A Judge of the Supreme Court of New South Wales. The views expressed in this paper are my own, not necessarily those of my colleagues or of the Court. I gratefully acknowledge the very substantial contribution of my tipstaff, Anne Egan Wagstaff, BA, summa cum laude (Providence College), JD, cum laude (University of Notre Dame), who prepared the draft on which this paper is based. Its virtues are hers; its defects are mine.

[3] *Minister for Commerce v Contrax Plumbing* [2004] NSWSC 823 at [40].

[4] *Minister for Commerce v Contrax Plumbing* [2004] NSWSC 823 at [40].

[5] *Abacus Funds Management Ltd v Davenport & Ors* [2003] NSWSC 1027, *Leighton Contractors Pty Limited v Campbelltown Catholic Club* [2003] NSWSC 1103, *TransGrid v Walter Construction Group Ltd* [2004] NSWSC 21, *TransGrid v Siemens* [2004] NSWSC 87, and *TransGrid v Siemens* [2004]

NSWCA 395.

[6] *Jemzone v Trytan* [2002] NSWSC 395 at [37].

[7] *TransGrid v Siemens & Anor* [2004] NSWSC 87 at [56]

[8] *Beckhaus v Brewarrina Council* [2002] NSWSC 960 at [60].

[9] *TransGrid v Siemens* [2004] NSWSC 87 at [31] – [34]

[10] *Quasar Constructions v Demtech Pty Ltd* [2004] NSWSC 116 at [21].

[11] McDougall, Robert, The Building and Construction Industry Security of Payment Act 1999, September 2004.

[12] *Minister for Commerce v Contrax Plumbing* [2004] NSWSC 823 at [39].

[13] *Minister for Commerce v Contrax Plumbing* [2004] NSWSC 823 at [39].

[14] Section 8(1) provides:

“(1) On and from each reference date under a construction contract, a person:
(a) who has undertaken to carry out construction work under the construction contract, or
(b) who has undertaken to supply related goods and services under the contract,
is entitled to a progress payment.”

[15] *Minister for Commerce v Contrax Plumbing* [2004] NSWSC 823 at [43].

[16] *Minister for Commerce v Contrax Plumbing* [2005] NSWCA 142 at [51].

[17] *Minister for Commerce v Contrax Plumbing* [2005] NSWCA 142 at [52]

[18] *Minister for Commerce v Contrax Plumbing* [2005] NSWCA 142 at [53]. The sections of the Act to be interpreted more widely are, or include, ss 3 (object of the Act) and 8 (right to progress payments).

[19] *Minister for Commerce v Contrax Plumbing* [2005] NSWCA 142 at [58].

[20] s 14 (4)

[21] s 15

[22] s 17 (2)(b)

[23] s 17 (2)(b)

[24] s 17 (1)(a)(i)

[25] s 16, s 17(1)(a)(ii)

[26] s 16, s 17(1)(a)(ii)

[27] s 21 (3)

[28] s 20

[29] *Energetech Australia v Sides Engineering* [2005] NSWSC 1143.

[30] *Minister for Commerce v Contrax Plumbing* [2005] NSWCA 142 at [58].

[31] Review Discussion Paper, *Options for Enhancing the BCISOP Act*, December 2002, p 42.

[32] New South Wales Legislative Assembly, *Hansard*, 12 November 2002, p 6542.

- [33] New South Wales Legislative Assembly, *Hansard*, 15 November 2002, p 6882.
- [34] *Australian Remediation Services v Earth Tech Engineering* [2005] NSWSC 805.
- [35] *Australian Remediation Services v Earth Tech Engineering* [2005] NSWSC 805 at [12].
- [36] *Australian Remediation Services v Earth Tech Engineering* [2005] NSWSC 805 at [13] – [14].
- [37] *Barclay Mowlem Construction v Tesrol Walsh Bay* [2004] NSWSC 716 at [18].
- [38] *Barclay Mowlem Construction v Tesrol Walsh Bay* [2004] NSWSC 716 at [20].
- [39] *Lucas Stuart Pty Ltd v Council of the City of Sydney* [2005] NSWSC 840.
- [40] *Lucas Stuart Pty Ltd v Council of the City of Sydney* [2005] NSWSC 840.
- [41] *Energetech Australia v Sides Engineering* [2005] NSWSC 1143
- [42] *Energetech Australia v Sides Engineering* [2005] NSWSC 1143 at [78].
- [43] *Energetech Australia v Sides Engineering* [2005] NSWSC 1143 at [79].
- [44] *TransGrid v Siemens & Anor* [2004] NSWSC 87.
- [45] *TransGrid v Siemens & Anor* [2004] NSWSC 87 at [76] - [80].
- [46] *TransGrid v Siemens & Anor* [2004] NSWSC 87 at [76] - [80].
- [47] *TransGrid v Siemens & Anor* [2004] NSWSC 87 at [81].
- [48] *TransGrid v Siemens & Anor* [2004] NSWSC 87 at [82] - [106].
- [49] *TransGrid v Siemens Ltd* [2004] NSWCA 395 at [35].
- [50] *TransGrid v Siemens Ltd* [2004] NSWCA 395 at [35].
- [51] *TransGrid v Siemens Ltd* [2004] NSWCA 395 at [35].
- [52] *TransGrid v Siemens Ltd* [2004] NSWCA 395 at [35].
- [53] *Abacus Funds Management Ltd v Davenport & Ors* [2003] NSWSC 1027.
- [54] *Abacus Funds Management Ltd v Davenport & Ors* [2003] NSWSC 1027 at [30].
- [55] *Abacus Funds Management Ltd v Davenport & Ors* [2003] NSWSC 1027 at [33] - [38].
- [56] *TransGrid v Walter Construction Group Ltd* [2004] NSWSC 21 at [53].
- [57] *TransGrid v Walter Construction Group Ltd* [2004] NSWSC 21 at [53].
- [58] *Leighton Contractors Pty Limited v Campbelltown Catholic Club* [2003] NSWSC 1103.
- [59] *Leighton Contractors Pty Limited v Campbelltown Catholic Club* [2003] NSWSC 1103 at [73].
- [60] Construction Contracts (Security of Payments) Act 2004 (NT) s 10.
- [61] Construction Contracts (Security of Payments) Act 2004 (NT) s 13.
- [62] “Building and Construction Industry Security of Payment Act Review Report”, NSW Department of

Commerce, May 2004, p 1.

[63] *TransGrid v Siemens & Anor* [2004] NSWSC 87 at [58].

[64] *Musico v Davenport* [2003] NSWSC 977 at [41].

[65] *Australian Remediation Services Pty Ltd v Earth Tech Engineering Pty Ltd* [2005] NSWSC 362 at [10].

[66] *Musico v Davenport* [2003] NSWSC 977 at [41].

[67] New South Wales Legislative Assembly, *Hansard*, 12 November 2002, p 6542.

[68] New South Wales Legislative Assembly, *Hansard*, 12 November 2002, p 6542.

[69] *Lucas Stuart Pty Ltd v Council of the City of Sydney* [2005] NSWSC 840 at [19].

[70] That the courts should encourage, rather than impede, agreements providing for alternative dispute resolution was recognised in the judgment of Gleeson CJ (with whom Meagher and Sheller JJA agreed) in *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd* (1996) 39 NSWLR 160, 166.

[71] *Energetech Australia v Sides Engineering*, [2005] NSWSC 1143 at [101].

[72] *Brodyn Pty Ltd t/as Time Cost and Quality v Davenport* [2003] NSWSC 1019 at [14].

[73] *Walter Construction Group v Robbins Co* [2004] NSWSC 549 at [30].

