

Article Information

Authors: Daniel Fitzpatrick, Robert Riddell

Service: Projects, Infrastructure & Construction

Sector: Infrastructure

One provision to void them all: The shadow life of section 34

Robert Riddell, Partner and Daniel Fitzpatrick, Special Counsel discuss the provisions in Section 34 of the Building and Construction Industry Security of Payment Act 1999.

Robert Riddell, Partner and Daniel Fitzpatrick, Special Counsel discuss the provisions in Section 34 of the *Building and Construction Industry Security of Payment Act 1999*.

Section 34 of the *Building and Construction Industry Security of Payment Act 1999 (Act)* provides:

1. The provisions of the Act have effect despite any provision to the contrary in any contract;
2. A provision of any agreement (whether in writing or not) under which the operation of the Act is, or is purported to be, excluded, modified or restricted, or which has that effect, or which may reasonably be construed as an attempt to deter use of the Act is void.

These 'no contracting out' provisions seek to ensure that the rights and benefits that the Act bestows upon those undertaking construction work or providing related goods and services are not subverted or infringed upon by the terms of the construction contract between the parties.

The scope of section 34 in the adjudication context seems well understood. Section 34 was the subject of several important judgments early in the life of the Act.^[1] It is commonly raised in answer to contract terms purporting to bind the parties to the choice of a particular authorised nominating authority, or indemnities in respect of costs if a claimant's entitlements under an adjudication determination are reversed in final civil proceedings.

What is perhaps less well understood is that section 34 can, arguably, operate as a defence in circumstances outside of the adjudication scheme and where the Act's remedies have not been invoked at all.

Take the scenario of a subcontractor in dispute with a head contractor over a claim who, without taking any action under the Act, commences proceedings in Court. The subcontractor does so without regard to the dispute resolution clause in the contract, compliance with which is expressed to be a mandatory pre-condition to any legal proceedings. As such, the subcontractor is exposed to an application by the head contractor staying the proceedings, pending completion of that dispute resolution process.

It may however be arguable that because the dispute resolution process is mandatory, it is an attempt to deter or exclude the subcontractor from commencing other legal proceedings, including taking action under the Act^[2]. As such, section 34 may save the subcontractor against the enforcement of such a process, notwithstanding that it has not invoked the Act and the parties are engaged in civil proceedings. While this operation is arguably regulatory over-reach, presenting a significant disruption to the privity around alternative dispute resolution provisions, the authors are aware that it has been raised successfully in the recent District Court interlocutory proceedings and may well be addressed soon in higher jurisdictions.

Section 34(2)(a) of the Act is deceptively broad, applying in all contexts (whether adjudication or civil proceedings or any other proceedings) and circumstances. It has the potential to make contract terms void for all purposes!

Another distinctive feature of section 34 that claimants should be alive to is that it applies to 'any agreement', ie. not just construction contracts. This has the potential to make it 'jaw-droppingly' broad in its application, the extent of which is yet to be determined. For example, arguments that a contractor cannot take action under the Act because of separate financial agreements it has entered into (an example being a factoring agreement) would seem to fall flat, as section 34

operates to make the terms of the relevant agreement void.

The key take away is that section 34 of the Act is potentially applicable to all construction related disputes, not just adjudication proceedings. It can also operate in respect of any agreement, not just construction contracts.

Watch out! Section 34 is emerging from the shadows!

[1] eg. *Minister for Commerce v Contrax Plumbing* [2004] NSWSC 823, *Trysams Pty Limited v Club Constructions (NSW) Pty Ltd* [2008] NSWSC 399

[2] According to the District Court of NSW in *Quickway Constructions Pty Limited v Electrical Energy Pty Ltd* 2017/00193185