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# OBJECTIONS TO SECURITY OF PAYMENT JURISDICTION MUST BE SERVED IN A PAYMENT SCHEDULE

**Adrian Mueller**  
Partner | Senior Lawyer  
B.Com LLB FACCAL  
[Email](#) | [LinkedIn](#)

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## OBJECTIONS TO SECURITY OF PAYMENT JURISDICTION MUST BE SERVED IN A PAYMENT SCHEDULE

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The Supreme Court found that any objection to a payment claim coming under the provisions of the *Building and Construction Industry Security of Payment Act 1999* must be put into a payment schedule under that Act and served on the party making the payment claim.

In *Nefiko Pty Ltd v Statewide Form Pty Ltd* [2014] NSWSC 442 the plaintiff received a payment claim from the defendant for money due under a construction contract. The payment claim purported to be under the *Building and Construction Industry Security of Payment Act 1999*. The plaintiff failed to serve a payment schedule on the defendant within the time limited by the Act.

The defendant then made an application for determination by an adjudicator for the claimed amount. The plaintiff sent submissions to the adjudicator saying that the Act did not apply because the contract to perform the relevant works was not between the defendant and plaintiff but rather was a contract between the defendant and Ms Cheong and that, consequently, the operation of the Act was excluded by s7(2)(b) because it was for the carrying out of residential building work on a part of the premises that Ms Cheong resided in or proposed to reside in.

The adjudicator found that he had jurisdiction and issued a certificate for an amount due to the defendant.

The plaintiff sought to quash that finding in the Supreme Court.

Section 22(2) of the Act precludes an adjudicator from considering a defence which was not raised in a payment schedule. The plaintiff submitted that section 22 could not preclude a party from making submissions concerning the adjudicator's jurisdiction where there was a threshold issue as to whether the Act applied. Justice Ball did not accept that submission. The Judge found that the plaintiff should have stated in a payment schedule that it was not a party to the construction contract and was not obliged to pay on that basis. Having failed to do so, the adjudication certificate was enforceable and the plaintiff was obliged to pay the amount in the certificate to the defendant.

### PRACTICAL IMPORTANCE

This case again highlights the need to serve a payment schedule in response to any payment claim under a construction contract where the amount is disputed for any reason.

Remember these things:

1. Treat all contracts entered into by owners corporations for work on the common property as contracts which are subject to the *Building and Construction Industry Security of Payment Act 1999*.
2. Treat any payment claim made under such contracts as being a payment claim under the Act.
3. For construction contracts entered into before 21 April 2014 the owners corporation has only 10 business days from service of the payment claim to determine whether the payment claim is disputed and to either pay it or serve a payment schedule on the claimant setting out the reasons why all or part of the claim is not being paid.



4. The owners corporation has only 10 business days from service of the payment claim to determine whether the payment claim is disputed and to either pay it or serve a payment schedule on the claimant setting out the reasons why all or part of the claim is not being paid.
5. A failure to serve a payment schedule within time will leave the owners corporation liable to pay the claim whether or not it is obliged to do so under the construction contract.

It is difficult to explain to an owners corporation that it must pay money to a contractor which is not due under the contract because the payment claim wasn't dealt with in time.

If you have any doubts about what to do with a construction contract payment claim JS Mueller & Co Lawyers will provide initial, obligation free advice.

**Adrian Mueller**

Partner I B.Com LLB FACCAL

[adrianmueller@muellers.com.au](mailto:adrianmueller@muellers.com.au)

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**About JS Mueller & Co**

JS Mueller & Co has been servicing the strata industry across metropolitan and regional NSW for almost 40 years. We are a specialist firm of strata lawyers with in depth and unmatched experience in, and comprehensive knowledge of strata law and levy collection.

02 9562 1266

[enquiries@muellers.com.au](mailto:enquiries@muellers.com.au)

[www.muellers.com.au](http://www.muellers.com.au)



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