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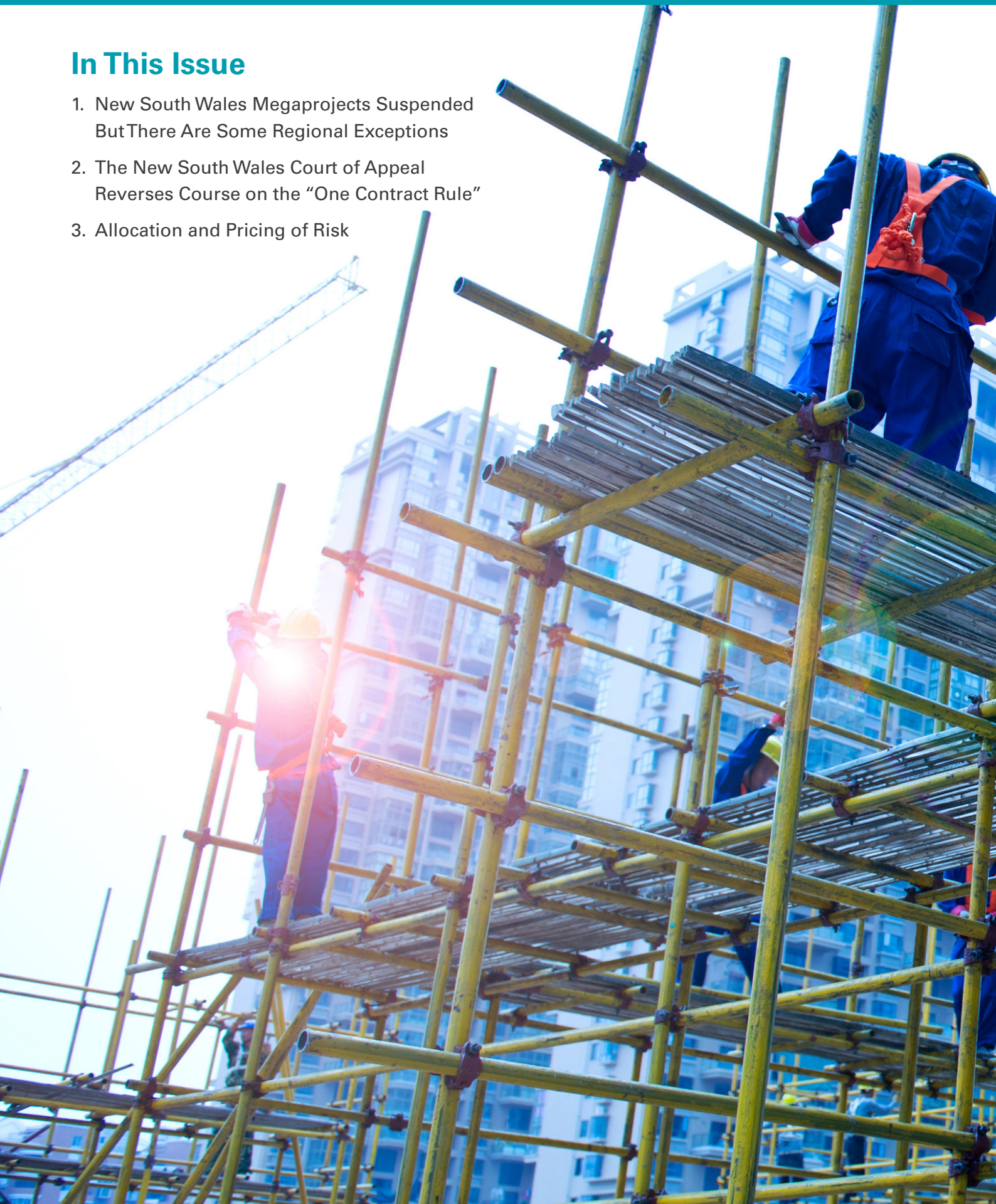

New South Wales Megaprojects Suspended But There Are Some Regional Exceptions

Authors: Brent Henderson and Hao Zhou

The state government's independent infrastructure body, Infrastructure NSW, released its report "State Infrastructure Strategy 2022-2042: Staying Ahead" (the Report) on 31 May 2022. Among other things, the Report has recommended **"the focus on megaprojects should give way to a combination of smaller and medium-sized projects,"** as they are likely to provide **"high returns and faster paybacks with less budget and delivery risks"**.

Having said that, the Report acknowledged the long-term benefit of those megaprojects but pointed out that it would be **"especially challenging to deliver additional megaprojects in a cost-efficient manner in coming years"** due to the complexity of those megaprojects and the impact of COVID-19 and other world events on the construction industry's capacity, supply chains and skills. As such, any future megaprojects will need to be delivered in a **"sensibly prioritised and sequenced manner".**

To that end, the Report has recommended the state government reconsider the timing and sequence of megaprojects that are not yet in procurement, including the Beaches Link, the Parramatta Light Rail Stage 2, the M6 Motorway Stage 2, the central tunnel for the Great Western Highway Katoomba to Lithgow upgrade and future major Sydney Metro or Rail Project (Sydney CBD to Zetland, Western Sydney International Airport to Leppington or Campbelltown), and major regional dam projects (NSW Dungowan and Wyangala).

Despite the initial position that the NSW government would delay megaprojects worth up to AU$20 billion,[1] the NSW government has since decided to push ahead with the Parramatta Light Rail Stage 2 given the rapid growth in Parramatta and the western region.[2] According to the Report, the megaproject of Warragamba Dam Wall Raising will also proceed as planned due to its importance in providing flood mitigation to a large and vulnerable area of Sydney. Further exceptions could potentially be announced depending on the merits.

1 https://www.smh.com.au/politics/nsw/nsw-government-to-ignore-advice-and-push-on-with-light-rail-project-20220531-p5apwf.html
2 https://twitter.com/Dom_Perrottet/status/1531829596080877568?cxt=HHwWgMClrdq5k8IqAAAA

The New South Wales Court of Appeal Reverses Course on the "One Contract Rule"

Authors: Melissa Koo and Joseph Perkins

In the recent decision of *BSA Advanced Property Solutions (Fire) Pty Ltd v Ventia Australia Pty Ltd* [2022] NSWCA 82, the New South Wales Court of Appeal questioned the validity of the "one contract rule" under the Building and Construction Industry Security of Payment Act 1999 (NSW) (SOP Act).

The facts of this case, as well as the judgment of the New South Wales Supreme Court at first instance, are discussed in the April edition of our Construction Matters newsletter.

In allowing the appeal, the Court of Appeal found that as a matter of contract interpretation, the payment claim in dispute (being a payment claim founded upon multiple work orders) was made in respect of one construction contract. Critically, the Court of Appeal held that a provision of the contract that stated a separate agreement would come into existence each time a work order was issued was inconsistent with the balance of the contract.

While the work orders may have been an integral part of some aspects of the contractual relationship, they, like other directions to persons undertaking work for another, did not give rise to a separate contract. The simple fact that the contract stated that each work order would, in turn, result in a separate contract was insufficient to ascertain the real legal effect of the issuance of each work order.

In obiter, the Court of Appeal strongly intimated that there is no "one contract rule" and that the following three matters make it "inherently implausible" that there is any strict and precise notion of it:

1. The object of the SOP Act is to ensure that persons carrying out work obtain regular payments on account and are subject to a final reckoning. However, the expansive definition of a construction contract under the SOP Act, i.e. to include both a contract and some other arrangement, directs attention to the carrying out of the work, for reward, rather than the legal characteristics of the source of the obligation to carry out the work and a party's associated liability to make a payment.
2. The stated requirements for a valid payment claim under the SOP Act do not include the identification of the source of the obligation to carry out the work or the source of payment. Notably, the Court of Appeal has been reluctant to read the SOP Act as containing implied limitations, such as permitting the conditions of the service of a payment claim to be qualified by a contract.
3. The phrase "one contract rule" conveys a degree of precision as to its meaning, which fails to capture the expansive scope of practical commercial arrangements under which goods and services may be supplied.

The decision will likely come as a relief to parties of standing order contracts, who will no longer need to incur additional administrative costs in recovering monies owed by way of separate payment claims and adjudications.

Allocation and Pricing of Risk

Author: Donna Charlesworth

Allocation and management of risk is central to all commercial contracts and is one of the key factors in determining a successful project. Effectiveness and value for money will only be achieved where risk allocation is equitable and where the party managing the risk is the one most reasonably able to do so. The objective of risk allocation is not to transfer as much risk as possible, but to distribute risk appropriately across the parties.

It is a common starting point for contractors to consider that if they are adversely impacted by forces over which they have no control, they are entitled to an increase in rates or price. The common cry is, **"how can we be expected to carry costs over which we have no control?"** The answer to that is if the contract does not provide otherwise, the contractor does carry the cost. It is all dependent upon the allocation of risk under the contract.

As with all contracts, risk in a construction contract broadly falls into three categories:

1. Risk within the control of the principal
2. Risk within the control of the contractor
3. Neutral or outside risk over which neither party has any real control

A good contract is one that allocates risk unequivocally, appropriately and commercially. Although it may be seen by some as good contracting practice to push as much risk as possible to the other side, it can often end up being counterproductive. A competent contractor will work into its price a contingency for the risks allocated to it. Accordingly, the price or the rate may needlessly be inflated for risks that may not eventuate or that would be more appropriately dealt with if and when they arise under appropriate contract mechanisms.

As well as allocating risk appropriately, a good contract does it comprehensively and unequivocally. The category of neutral risk must be dealt with specifically. It is a formula for disaster for the parties to address allocation of risk only once the risk manifests itself.

A principal may require tenderers to identify and price risks (rather than provide a global contingency for all risks), both those allocated to the contractor and to the principal. The principal is then able to choose which risks it is prepared to pay for and the likely cost of those risks.

However, the principal will only be able to assess whether it should retain that risk if it can reasonably assess both the probability of the risk occurring and the ultimate consequence or impact on the project if the risk does materialise.

Key Contacts

Donna Charlesworth
Partner, Perth
T +61 8 9429 7465
E donna.charlesworth@squirepb.com

Cris Cureton
Partner, Sydney
T +61 2 8248 7846
E cris.cureton@squirepb.com

Brent Henderson
Partner, Sydney
T +61 2 8248 7810
E brent.henderson@squirepb.com

Melissa Koo
Partner, Perth
T +61 8 9429 7568
E melissa.koo@squirepb.com

David Starkoff
Partner, Sydney
T +61 2 8248 7833
E david.starkoff@squirepb.com

Greg Steinepreis
Partner, Perth
T +61 8 9429 7505
E greg.steinepreis@squirepb.com