

ABIC 2018 Contracts FAQs

Questions:	Answers:
When will the 2008 ABIC contracts become invalid?	<p>The 2008 contracts are still compliant and can be used for a project, for example, if your client had tendered the project on the basis of the 2008 contracts.</p> <p>The ABIC authors strongly recommend you use the new, updated 2018 contracts for your next project. There will be a short transition period this year, before the ABIC authors formally withdraw copyright and authorisation to use the 2008 contract forms. We will send out a communication on this when it happens.</p>
If a contractor insists on a 5% deposit, is it reasonable to increase cash retention to 10% for example?	This is a matter of negotiation between the parties. Note that the deposit can be any % or \$ amount the parties agree to, but must not be more than the specific limits in the Act applicable in your state or territory. See the relevant MW or SW User Guide for more information.
If the deposit is a percentage is it then adjusted with all variations to the contract price?	No, because it is a 'one-off' advance payment that is paid at the beginning of the project (see MW or SW H, clause N16 / N17). See the relevant MW or SW User Guide for more information.
At the time of certifying/assessing the deposit, does the deposit paid to the contractor attract bank fees or interest and should these be assessed in the certificate when assessing the deposit?	No, because it is an advance payment and the actual amount typically gets applied to the Contractor's preliminaries. The deposit amount is different to the cash retention security, because it doesn't get paid into a separate bank account that is held on trust in the same way.
Will there be a practice note to explain how to administer the deposit provision in the contract?	Both the MW and SW User Guide have a special section with guidance on administering the deposit provision.
If stage payments are agreed at contract time, why are other valuations needed? Could a quantity surveyor's (QS) valuation amend the contract terms unintentionally and place the owner at risk of breach?	<p>A QS can be engaged by the Owner, or the Owner's financier. Either way, a QS does <u>not</u> have a role to play under an ABIC contract, nor any contractual effect under that ABIC contract. The Owner is a party to the ABIC contract and so is contractually only required to pay the amount on the Architect's certificate (see MW, clause N7).</p> <p>If there is a Bank involved and if the Bank insists on only paying on a QS' valuation, then this is a matter between the Owner and their financier. Under</p>

	<p>ABIC, the Owner still needs to meet the dollar amount in the Architect's certificate issued under section N.</p>
<p>If the amount of staged payments is listed in the contract, can the bank still decide to change the amount?</p>	<p>The bank doesn't have power to "change" the contract. However, financiers have sometimes been problematic where they choose what (or whose) valuation of a particular stage they accept. In some cases, they might require a QS to be appointed to value the stage.</p> <p>Ultimately, under the terms of finance they have agreed with their customer (the owner), the financier may well have this right to decide to draw down on the valuation they choose. This is a matter between the Owner and their financier.</p> <p>Under an ABIC contract, however, the contractor is still entitled to be paid—and the Owner must pay what the Architect certifies under section N.</p>
<p>If the bank guarantee is due to expire and the contractor has made no intent of replacing this, can the architect withhold money from the next claim until these bank guarantees are replaced?</p>	<p>No. But note that the MW contract does allow the parties to change the type of security being given (see clause C4). We suggest that the parties ensure, from the beginning, that any expiry date on the unconditional guarantee document, allows ample time for project delays and the defects liability period, until final certificate. If not, it is good practice that the owner should not accept the document that is provided by the contractor (see MW clause C3.2)</p>
<p>Security of Payment (SoP) legislation requires respondents to claims to comply with strict timelines that could place the owner at risk, is there provision in the ABIC contracts for managing these timelines?</p>	<p>Security of Payment legislation operates outside of an ABIC contract and will in all cases, override anything a construction contract says. The ABIC authors have tried to accommodate the payment timelines in the ABIC contracts and the ABIC sub-contracts. However, all parties should be aware that the timelines in the SoP legislation will always takes precedence over the contract and that these may change over time, if the legislation is changed.</p> <p>The Owner should be made aware that SoP takes precedence and both the Contractor and the Architect should be familiar with the timelines that apply in their state/territory.</p>
<p>In regards to unfixed materials on site, is the client obliged to pay for unfixed materials when they are on site e.g. blockwork, or does the client pay once the materials are installed and form part of the building works e.g. wall constructed?</p>	<p>The Owner only pays for the <i>*contract price</i> (see MW clause N2), which is the <i>*cost of building work</i> plus GST. If materials are not fixed to the <i>*works</i>, then they are not the <i>*cost of building works</i>. Generally, the Architect should not certify materials that are not installed/fixed to the <i>*works</i>.</p>

	See also the new clarifying clause in MW G17 and SW G16.
Disputing a failure to issue, can the contractor notify after final certificate is issued?	No, unless there is a dispute already notified under section P. See MW clause N15.
If the deposit cannot be credited until the end then it acts as a security deposit, what if the builders cannot pay it back? Does the owner have to resort to the courts or tribunals?	<p>The deposit is an advance payment (pre-payment). It is not held as and it is not a security deposit.</p> <p>The deposit is assessed and credited immediately after practical completion (see MW H clause N17), which is not quite 'the end', and so it should be credited against the final stage payment or the final few progress payments (depending on whether the signed contract uses the ABIC-standard monthly progress payments or has the legislated stage payments).</p> <p>The answer also varies depending on the particular circumstances. For example, is there an <i>*insolvency event*</i>? In which case, this is much more complicated and the parties should be getting legal advice.</p>