

### **THE ABIC SUITE OF BUILDING CONTRACTS —DEVELOPMENT AND PARTICULAR FEATURES**

Richard Booth

Director, Bruce Henderson Architects Pty Ltd

Victorian Representative, National Contracts Committee of the Royal Australian Institute of Architects

#### **OVERVIEW**

The Australian Building Industry Contracts (ABIC) are a development of an earlier range of standard form contracts published by the Royal Australian Institute of Architects (RAIA) known as the Construction Industry Contract (CIC) suite. The development of the CIC and ABIC suites of contracts resulted from complaints by members of the RAIA about difficulties in understanding the legal terminology that had begun to appear in common standard forms and in particular those produced by the JCC Committee and Standards Australia. This paper explains the process behind the development of the CIC and ABIC suites of contracts and the particular features that make the ABIC suite unique amongst standard form building contracts available in Australia.

#### **Background to the Development of ABIC**

The RAIA has a specialist committee, the National Contracts Committee, which meets regularly to develop, review and re-write standard form contracts and other support material that the RAIA publishes, either on its own or in conjunction with other bodies such as the Master Builders Australia (MBA), the Furniture Supply Association and the Institute of Landscape Architects. The Committee also represents the RAIA on both the JCC Committee and the OB3 Committee of Standards Australia. The National Council of the RAIA appoints members to the Committee and it reports to and takes instruction from the National Secretariat and the National Practice Committee of the RAIA. The Committee has been involved in the development, review and re-writing of standard form building contracts for over 30 years and has been given authority by National Council to bind the RAIA to any decisions it may make in negotiations with other bodies such

as Standards Australia and the MBA.

In 1995 the National Council asked the Committee to put forward a business plan covering the next three to five years setting out its programme of work over that period. At that time there were two issues the Committee felt it must address.

The first was the complaints it was receiving from members who as lay practitioners and educators were having difficulty with the complex legal language that had been creeping into standard forms produced by Government, Standards Australia, the RAIA and other parties over the preceding 10 years or so.

The second problem was the difficulties that the Committee was encountering with its negotiations over the development of new contracts and any amendments that it was attempting to have made to the existing standard forms on the market. Other parties, principally the interests representing the Contractors, were using forums such as the JCC Committee and Standards Australia drafting committees to push for better protection of their interests. This was causing unreasonable delay in reaching agreement on almost any amendments to the standard forms then in place, or new forms, and was generating contracts that tended to favour the interests of one party more than those of the other.

In addressing these issues, the Contracts Committee put together the following strategy:

1. Undertake research to identify all standard form contracts which were available and then in use.
2. Analyse all of those forms to determine the strengths and weaknesses of each.
3. Analyse the nature of project delivery in the market place and

establish if the current standard forms adequately met the needs of the industry.

To assist the Committee in this research it was felt that the opinions of its members would be invaluable and so a questionnaire was prepared and mailed to all RAI A members seeking information relating to the contract forms they regularly used. The questionnaire asked what standard form contracts individual members recommended or used and then sought their opinion on the strengths and weaknesses of those contracts. It also asked for opinion on the types of project delivery where there was inadequate coverage by current standard forms. Members were also asked to seek an evaluation of these questions from their clients. To compliment the findings from this questionnaire, certain Government departments, both state and federal, were canvassed for their opinions on the standard forms available and where they saw there could be improvement or new products made available.

The research revealed the following:

A. At that time there were 52 separate standard form building contracts available. The principal authors of those forms were Standards Australia, the MBA and the RAI A (publishing jointly and individually), the Housing Industry Association, the Commonwealth Department of Defence, and various other Government or semi-Government departments and agencies.

B. The commercial and housing markets were well covered by standard lump sum contracts for projects of almost any scale.

C. Most large value commercial and Government building projects involved the use of purpose written contracts, which in the main used one of the Standards Australia or

MBA/RAI A standard form contracts as a base.

D. State and Commonwealth Government departments, where they did not have their own standard form contract, mainly used the Standards Australia forms, usually modified, but more significantly not the latest versions of those forms but earlier versions considered to be more 'proprietor friendly'.

E. The majority of the contracts on the market were poorly constructed and difficult for lay superintendents to understand and administer. Many used legal terminology and drafting styles that were difficult to comprehend by non-lawyers, the notable exception being the recently released Department of Defence Contracts which were the only examples of the use of plain English in standard forms at that time.

F. Many, if not most of the contracts published by one of the parties to the agreement (i.e. not jointly developed by interested groups), allocated risk in a manner that did not match the recommendations of the report produced by the joint working party of the National Public Works Committee (NPWC) and the NBCC titled *'No Dispute—Strategies for improvement in the Australian building and construction industry'*. That report produced a model for risk allocation between the parties which has been accepted by all industry sectors as the method by which all construction contracts should allocate risk.

G. The development of standard forms by expert committees such as Standards Australia was producing documents that were less than equitable in their allocation of risk. It was recognised that this inequity had not been evident in such contracts before the early 1990's but was a recent development. Inequity, together with other pressures within the

industry, were causing building owners to either turn away from using the current standard forms, or to extensively modify them to re-distribute risk.

H. Because of the variety of available standard form contracts, members of the RAI A were increasingly uncertain as to which form should be applied to particular contracts and were using forms that were inappropriate for particular instances. This confusion was compounded by the development of legislation by various State and Territory governments proscribing certain additional specific requirements for contracts covering residential construction. Members had been caught out using standard forms that did not comply with that legislation.

I. As a consequence of the large number of available contracts and the difficulty in understanding the terminology in them, there were a number of RAI A members who were deliberately opting out of the role of superintendent on projects and either handing the responsibility to project managers or recommending that their client use a contract not requiring the use of a superintendent.

To further back up this research there were the findings of the Trade Practices Commission, which in 1993 had issued a report on its investigations into the problems of contracting in the home building industry. In that report the Commission identified a number of areas of concern, of which the main ones were:

- Construction contracts being produced which both consumers and builders simply could not understand and which were biased in favour of the builder;
- Significant construction delays and substantial increases in price during the life of contracts;
- Failure of existing dispute resolution mechanisms to provide

inexpensive, fair and quick resolution of disputes;

- The construction process being subject to inadequate insurance cover and security for performance;
- Overall poor performance and poor reputation of many of the regulatory agencies.

The report noted that confusion about contract terms was a major source of disputes. It criticised the set-out and language used in contracts. The report recommended the elimination, as far as possible, of 'legalese' and technical terms and where that was not possible, explanation of such terms in the body of the contract itself and in supporting material. Ideally that material would include a checklist for users to sign in confirmation that they had read and understood the documents.

### **The Policy**

As a result of this research, the RAIA developed a policy for future work of the National Contracts Committee.

As a result of dissatisfaction with the current standard forms by members of the RAIA, a new suite of contracts would be developed which would be easier to understand and administer. These standard forms would be developed so that they could be used throughout all Australian states and territories and, if possible, would be structured so that they met the requirements of each of the various state based statutes relating to residential construction.

Notwithstanding the decision to develop these new standard forms, the RAIA would remain committed to taking part in development of the standard form contracts published by Standards Australia and would continue to publish and support the JCC suite of contracts and the other contracts that it jointly published with the MBA. If the development of the new standard forms by the

RAIA proved to be successful, then it would seek to have those standard forms adopted as replacements for the contracts it jointly published with the MBA and the Property Council of Australia including the JCC suite of contracts and SBW-2.

These new contracts, and all future contracts developed by the RAIA, were to be written in plain English and gender-neutral language. The contracts would minimise the use of legal terminology, using only those terms that as a result of their widespread common usage had become well known and understood. Where those terms were used, the text of the document would seek to define and, if necessary, qualify the terms where they were used within the document so that lay practitioners would be better able to understand their intent both from that definition and from the context in which they were used.

The new contracts, and all future contracts would adopt the principles described in the Commonwealth Government's 1992 paper entitled '*No Dispute*' and the 1993 Trade Practices Commission report on construction contracts.

In light of previous difficulties experienced in the development of contracts by committees comprised of members drawn from all interested parties, it was determined that development of the new contracts would adopt the following fundamental principles:

a) The contracts would initially be developed by the RAIA in isolation from other interested parties so that in the early stages the focus could be on the structure, the provisions that needed to be included and ensuring that they were as balanced as possible in their share of risk, at least in the perception of the RAIA. Following development and translation into plain English, the contracts would be offered to other interested

parties, State and Federal Governments, the MBA and the Property Council of Australia for constructive comment and opinion. The RAIA would consider those comments and amend the documents where it believed that the comment or criticism warranted amendment before the contracts were formally published.

b) The RAIA Contracts Committee would not draft the contracts, but would engage one of the major Australian legal practices to produce drafts acting upon a detailed brief prepared by the RAIA. The RAIA Contracts Committee would review the drafts as they were prepared and lend its collective experience in the use and administration of Building Contracts to the selected authors. The RAIA would sign off on and adopt responsibility of the contracts once they had been through this process. This was in response to another criticism of standard forms in the market place, particularly those written by expert committees, that the drafting process tended to 'fragment' the document by combining a number of different styles of writing reflecting the various styles of the members of the drafting committee.

c) The RAIA would hold sole copyright in the contracts produced, even when they were drafted by others and where others had provided drafting input.

### **The Development of ABIC**

The business plan for the development of the new suite of contracts and the policy that underpinned that plan was approved by the National Council of the RAIA in 1996 and formal development of the contracts commenced. The RAIA has an arrangement with a number of the major legal practices in each state whereby they provide its members with low cost access to legal opinion. This arrangement is intended for those of its members

that do not have regular access to experienced legal opinion and who might need advice that only a qualified legal practitioner might be able to give. The RAI A invited expressions of interest from those practices which had a presence in Victoria (where the contract would mainly be developed) to assist in the development of the new contracts. Philips Fox was the law firm selected to carry out the task.

The RAI A provided Philips Fox with a detailed brief which included the principles contained in the business plan. The contracts were to be basic lump sum forms with an architect as superintendent or administrator. They were to be a new approach to standard form contracting adopting industry best practice in terms of their style and in terms of the roles and requirements assigned to each of the parties and the superintendent. In particular they were to adopt the latest thinking in relation to security for performance and dispute resolution. The contract was to be well presented graphically as an aid to understanding and to reflect the design-oriented approach that would be expected of the RAI A.

Philips Fox was asked to initially produce a single standard form that would be used for medium to major works beyond the range then covered by the SBW-2 contract. This would form the basis of later contracts within the suite that would ultimately replace the SBW-2, BMW-2 and BBC-1 standard forms. That suite of contracts would later be expanded to include new versions including an Administration by Owner form and possibly Schedule of Rates and Construction Management forms.

The process adopted was for a draft form to be produced using traditional legal language so that the structure and the risk sharing could be established. When a draft with all the basic requirements had been established, then the standard

form was converted into a plain English style. The revised plain English draft so radically altered the style of the contract that it was necessary to review each clause to re-establish the intended emphasis of each of the provisions. The process of development of a draft considered to be ready for review by third parties took 18 months.

It was decided to call the new form the Construction Industry Contract and as it would be the first version it was given the designation CIC-1. Drafts of CIC-1 were sent to selected senior members of the RAI A for comment and criticism. Their views were analysed and changes made to the draft. Copies of that further draft were then sent to the Property Council of Australia, to the MBA and to both the New South Wales and Victorian Governments for comment and criticism. No response was received from the MBA, the Property Council or the New South Wales Government, but the Victorian Department of Infrastructure did respond with comment which was reviewed and further changes made to the draft document. The RAI A was disappointed, but not surprised by the lack of comment from either the MBA or the Property Council.

At that stage it was decided to publish the contract and see what response it received from the industry. The RAI A fully expected there to be an adverse reaction from some quarters but hoped that at least some of the response would be in the form of constructive comment which could be used to further review and revise CIC-1. It is now history that the MBA in particular embarked on a campaign to discredit the document with a view to having it taken off the market. However, despite all the criticism and negative comment the RAI A was able to glean some worthwhile comment and as a result made certain changes and

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published the revised version approximately 8 months after the initial version.

The campaign by the MBA to discredit CIC-1 continued after publication of the revised version, but, notwithstanding the criticism, the contract continued to be purchased and used. In the meantime the RAI A continued to develop other versions of CIC-1 and the simple and minor works versions were both published. Along with these versions, the RAI A produced and published user guides for all versions, a sub-contract agreement for use with the CIC contracts, and standard forms for administration of the contracts for use by both architect/superintendents and contractors.

In late 1999 there was a change in the relationship between the MBA and the RAI A and both parties agreed to put their differences behind them and work towards a greater spirit of co-operation. As part of the new rapport, both bodies agreed to review the CIC suite of contracts with a view to development of versions that the MBA would agree to sponsor. The new versions would then become replacements for the JCC suite, SBW-2 and the other contracts jointly sponsored and/or published by the two bodies.

The two bodies put in place a process for reviewing the CIC suite and for agreeing upon revisions that they could jointly agree to support. It was also agreed that as a result of the campaign undertaken by the MBA against CIC-1, it would be expedient if the new versions were given a different title. The agreed new title was the Australian Building Industry Contract and the shorthand name would be ABIC. To differentiate between the various forms of the contract a further designation would be added in the form of Major Works (MW), Simple Works (SW) or Basic Works (BW). Thus it was that some 12 months

after the parties formally agreed to put their differences behind them that CIC-1 was revised to satisfy the concerns of the MBA and re-published as ABIC MW-1.

The RAI A has also revised the minor works version of CIC as ABIC BW-1 and published that version. The MBA, as a matter of policy, has always declined to involve itself in the basic works version of contracts that the RAI A publishes. The RAI A has also revised and published its practice notes to members, the user guides and the standard forms for the ABIC suite of contracts. At the time of giving this presentation, ABIC SW-1 had reached its final draft and was in the process of being formally signed-off by both the MBA and the RAI A. It is expected that the Simple Works version will be formally released on 1 July 2002.

Finally it was agreed that the JCC suite would be withdrawn from the market approximately 12 months after the release of ABIC MW-1 and that SBW-2 would be withdrawn approximately 6 months after the release of the ABIC SW-1. Therefore JCC will no longer be available after the middle of 2002 and by the end of 2002 the SBW-2 and all its versions developed for residential construction will also be withdrawn.

## **THE ABIC CONTRACTS —THE ESSENTIAL DIFFERENCES**

The ABIC contracts are a suite of standard forms developed to cover all sizes and complexities of building projects being undertaken on a standard lump sum basis. There are three basic forms:

1. Australian Building Industry Contract—1 Major Works (ABIC-1MW), a standard lump sum contract including an architect as the superintendent and intended for larger and more complex projects above approximately \$3.0M. This form was published in 2001 and is

intended to replace the JCC suite of contracts.

2. Australian Building Industry Contract—Simple Works 1 (ABIC SW-1), a standard lump sum contract including an architect as the superintendent and intended for small to medium sized projects of lesser complexity with a value range between \$0.5M and \$5.0M. This form was published in mid 2002 and will eventually replace SBW-2.

3. Australian Building Industry Contract—Basic Works 1 (ABIC-BW-1), a standard lump sum contract including an architect as the superintendent and intended for small sized projects of low complexity with only a small number of trades. This form was published in late 2001 and replaces MBW-1.

All the contracts are published with a user guide to assist the parties in their understanding and administration. The MBA has indicated that it will publish companion sub-contracts for both ABIC-1 MW and ABIC SW-1.

In addition to these forms it is intended to publish two further versions in the next 12 to 18 months. These are:

- A. Australian Building Industry Contract Simple Works—1 Administration by the Owner. This is the ABIC SW-1 form revised to provide for the owner to act as the superintendent in lieu of the architect. This contract will provide for an expedited form of expert determination of issues that could give rise to disputes in view of the fact that the superintendent is one of the parties to the agreement.

- B. Australian Building Industry Contract—1 Demolition Contract. A revised form of ABIC BW-1 written specifically for a single trade and particular to demolition works.

The main differences between other generally available standard forms and the ABIC are:

- The contracts all meet the requirements of State and Territory Government legislation on residential or housing projects.
- Each section of the contract deals with only one aspect of the project.
- Each clause deals with only one issue.
- The structure of the contract follows the building process.
- Clauses are arranged sequentially.
- Time limits are set on the notification of claims for cost or time.
- The contracts are written in plain English.
- Risk is shared equitably between the parties.

### **State and Territory Government legislation on residential or housing projects**

The ABIC suite of contracts have all been written so as to meet the requirements of the various State and Territory Government legislation covering residential construction and are believed to be the first such standard forms available on the market that, aside from the states of Victoria and Queensland, do not require purpose written special conditions to convert them from use on commercial projects to residential construction. For Victoria and Queensland the standard versions of the ABIC contracts require additional special conditions to comply with specific legislation related to residential construction in those states. However, these special conditions and the further attachments to the document to make them comply with legislation in those states have been developed and are available as an insert to the standard document at no extra charge.

### **Each section of the contract deals with only one aspect of the project**

As with other standard forms the contract is divided into sections but unlike most other contracts each section in an ABIC contract deals only with one aspect of the project. For example, all matters pertaining to the site are covered in Section F and in no other section and all matters pertaining to progress payment for work completed are covered in Section N and in no other section. In this way all parties are able to quickly and clearly understand their roles and responsibilities in relation to specific issues without having to search through a number of sections.

### **Each clause deals with only one issue**

In the ABIC contracts issues are defined in single or consecutive clauses to aid understanding.

For example in dealing with the issue of Latent Conditions one need only turn to section F *'The site'* and read clause F5 to understand both the meaning of the term and the action that a contractor must take should it discover a latent condition. The next clause F6 deals with the architect's responsibilities should the contractor notify him of a latent condition and the subsequent clause F7 defines the contractor's entitlement to claim additional time and/or cost for an instruction issued by the architect to resolve the discovery of the latent condition.

All claims for time and/or cost from such instructions are dealt with in Section H *'Claims to adjust the contract'*. Clauses H1 to H5 set out the procedures to be followed by the contractor and the architect. These procedures apply to all claims to adjust the contract sum as a result of any variations to the works by whatever cause.

By way of contrast, in the JCC suite of contracts, the definition of a

latent condition and the contractor's required action is in clause 3.02. This clause also indicates that a latent condition might give rise to a claim to vary the contract. The architect is required to issue an instruction. The definition of an architect's instruction and the architect's authority is covered by clauses 5.02 to 5.05. The definition of a variation is in Clause 1.02, whilst the right to issue instructions that vary the works is covered by 6.10. The procedures with regard to extensions of time are covered by clauses 9.01 to 9.07 and the procedures for adjusting the Contract Sum for instructions that vary the works are covered by clauses 10.16 to 10.18.

Clearly, the administration of JCC requires a good understanding of the terms of the contract to ensure that the contract administrator does not miss a vital ingredient in the rights and procedures that follow a claim. On the other hand with the ABIC contracts, the contract administrator can be confident that by reading the relevant section all the rights and procedures are clearly addressed and understood.

### **The structure of the contract follows the building process**

Unlike other standard forms the ABIC suite of contracts has clauses arranged in a sequence that follows the construction process.

The sections of the contract relating to basic requirements are:

**A. Overview**—the roles and obligations of the parties,

**B. Documents**—the basic documents and the effect of errors and omissions,

**C. Security**—the form of security for performance to be provided and the rights and procedures for use or release,

**D. Liability**—the liabilities of the parties to the risk of loss or damage, and

**E. Insurance**—the responsibilities of the parties to insure the works and the coverage of that insurance.

These are all logically grouped at the beginning of the contract. These clauses set out the basic entitlements of the parties under the contract and it is logical that they be clearly defined and understood before any work commences.

The following sections relate to building of the works:

**F. The site**—possession and obligations including information about the site and procedures on latent conditions and valuable finds,

**G. Building the works**—programming, sub-contracting, suspension, opening up and testing, specialist works and separate contractors,

**H. Claims to adjust the contract**—the obligations of the parties and procedures on claims for adjustment of the contract sum,

**J. Variation to the works**—instructions by the architect and others to vary the works,

**K. Adjustment of provisional and PC Sums**—procedures for expending and varying monetary allowance,

**L. Adjustment of time**—rights and procedures for making adjustments to the time to complete the works due to delay, and

**M. Completion of the works**—the procedures for establishing that the works have been completed, the rights of the parties should that be late and subsequent liability for defective work.

These are also logically grouped and follow in sequence from the handing over of the site to the contractor through to the completion of the project.

The next section, **N. Payment for the works**, deals with progressive payment for work completed and the rights and responsibilities of the

parties through this process. This also logically follows on from the previous sections dealing with the construction process.

Finally the last 4 sections are:

**P. Dispute resolution**—the processes for settling disputes between the parties,

**Q. Termination of engagement**—the rights and procedures should a party default under the contract,

**R. Miscellaneous**—general clauses related to intellectual property, transmission of documents, assignment, waivers, compliance with and applicable law etc., and

**S. Definitions**—specific definition of certain terms under the contract.

These include clauses which deal with resolution of problems and unusual circumstances as well as the clauses commonly known as boilerplate clauses dealing with matters of a general or legal nature. These are logically grouped at the end of the document as they are likely to be least referred to in the normal administration of a construction project.

### **Clauses are located sequentially**

As can be seen from the above examples, ABIC has been developed to make understanding of the various procedures that are required to be followed under the terms of the contract easier to understand and apply. Fundamental to this is the sequential ordering of sub-clauses dealing with those procedures so that actions that must follow in sequence to properly administer the contract are also sequentially arranged within the body of the contract. The RAIA has developed flow charts that describe the processes and procedures that must be applied to all separate administration issues. These flow charts were important to the

development of ABIC in that they ensured that this sequencing of actions was properly reflected in the text of the contract. The flow charts form part of the comprehensive user guides prepared and published by the RAIA for administration of ABIC contracts. Different versions have been developed to apply to each ABIC contract, be it ABIC MW-1, ABIC SW-1 or ABIC BW-1. The user guides are not sold with the contract but are available from RAIA Practice Services, 41 Exhibition Street, Melbourne and from the various RAIA state chapter offices.

### **Time limits are set on the notification of claims for cost or time**

Many disputes that arise under construction contracts can be traced back to a failure on the part of one or other of the parties to properly manage the process of variations in cost and time.

For example the contractor might not prepare its claims for extension of time until some weeks after the cause of the event that gave rise to the claim has ceased. In those instances, if the superintendent had not been warned of the possibility of a claim at the time, he or she will be placed in the difficult position of evaluating a claim for which there may no longer be any objective evidence to substantiate either the validity or the quantum of the claim. In these instances it is all too common for the superintendent to respond to the tardiness of the contractor by substantially reducing or disallowing such claims. Disputation commonly follows. This is particularly the case where a contractor becomes aware that the Date for Practical Completion will not be met. In an effort to minimise its exposure to Liquidated Damages it reviews the progress of the project and submits what it believes are legitimate claims for delay beyond its control but which it

consciously or unconsciously neglected to act upon at the time the delay occurred. These claims, made months or even years after the event, are treated with scepticism by the superintendent and are usually rejected on the basis that the evidence is suspect after such a period of time, and in any event had the delay been genuine then the claim should have been made at the time the event occurred.

A further and common example is the contractor which, in the interests of 'getting on with the job' neglects to prepare its written claims for variations to the works until the project is nearing or has reached completion. It has taken instructions from the superintendent which it believes are outside the scope of the original works and has completed that additional work without advising the owner and the superintendent of its opinion that the work varied the contract, or if it has so advised, has delayed its submission of a valuation of the cost. In this instance the owner is suddenly faced with additions in cost which he may not have been prepared to accept had he known additional cost would be involved at the time the instruction was given. As a consequence he disputes the quantum of the claim or even that the work in question was in fact outside the scope of the original contract works. Similarly, the contractor may well have responded to an instruction with a written and itemised claim at the time but the superintendent, because of other demands, has placed the claim to one side and waited until the end of the project to evaluate it. The superintendent then determines that the claims are excessive and reduces their value even though the contractor has completed the work in good faith, and in this day and age of security of payment, has already paid his subcontractors.

The solution to these and other examples is to ensure that the parties do not delay the making and evaluation of claims that relate to varying time or cost. ABIC places time limits upon the notification of claims and the period of time by which a detailed claim must be forwarded to the superintendent for evaluation. If the contractor is delayed, it is required to notify the superintendent within 2 days of the commencement of the delay and then again, if the delay is a protracted one, within 2 days of the delay ending. If the contractor believes an instruction from the superintendent is outside the scope of the original contract and will require an adjustment to the contract value, then it must notify the superintendent within 5 days of that instruction that it intends to make a claim. In each case, the contractor, if it wishes to make a claim, must submit a detailed claim within 15 days of becoming aware of the event that gave rise to its claim. On his part, the superintendent must promptly (defined as 'as soon as practicable') evaluate the claim and issue a written decision.

The time limits for claims are deliberately consistent so that there can be no argument on the part of the contractor or the superintendent that they did not realise or understand the time limits that apply.

In this way ABIC ensures that there is good and timely management of the process of making claims to adjust the contract thereby minimising dispute in an area in which there has consistently been dispute in the past.

### **The contracts are written in plain English**

As an aid to understanding the terms of the contract by lay contractors, owners and superintendents, and in keeping with the policy of the RAIA, the ABIC contracts have been written in



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plain English and gender neutral language. This is in keeping with the recommendation of the Trade Practices Commission and with various other consumer affairs and legal bodies that standard form contracts for general use in the wider community should minimise the use of legal terminology and use only terms that as a result of their widespread common usage had become well known and understood.

Where the ABIC contracts use specific legal terms they define them within the text of the document where they occur so that they can be seen in context and thereby be better understood. With ABIC there is no need to refer to a specific section of the contract to seek the definition of a term, interrupting the reading of that portion of the document in the process. The term, its definition and the context in which it is intended to be used are all clearly set out in the one location.

### **Risk Allocation of ABIC**

The intent of all construction contracts is the definition of risk and its allocation between the parties. Ideally risk should be equitably distributed between the parties so that the party best able to manage a particular risk assumes that risk. The ABIC suite of contracts has been written with equity of risk allocation as one of its fundamental requirements. To this end it was determined that these contracts would adopt the principles described in the Commonwealth Government's 1992 paper entitled 'No Dispute' and the 1993 Trade Practices Commission report on construction contracts. Below is a list of the major risk events applicable to most construction contracts with a comparison of the risk allocation for each event as recommended in 'No Dispute' and as allocated in the ABIC contracts.

As can be seen from this analysis there is good correlation between

the 'No Dispute' model and ABIC although there are obvious departures. These departures have been highlighted in the table above and arise from the allocation of neutral risks to one or other of the parties.

The RAI, in drafting the original CIC contract, took the approach that trying to allocate neutral risk was unrealistic. In the past, and in particular with the JCC suite of contracts, neutral risks were dealt with by nominating in a schedule to the contract that each party would accept a proportion of a particular neutral risk. Commonly, the Owner, as the party issuing the tender documents, would provide a draft schedule in the tender documentation allocating all neutral risk to the Contractor. Unless the Contractor was to qualify its tender by revising the allocation of neutral risk then the Owner's allocation of that risk to the Contractor was eventually written into the contract. Most contractors would not be prepared to qualify a tender in a commercially competitive environment for fear of placing themselves in a position that was commercially disadvantageous.

The RAI considered each neutral risk and determined which of the parties it believed was in the best position to control or manage that risk. In that way it was able to re-allocate the risk to one or other of the parties and thereby ensure the most equitable allocation of risk was locked into the contract.

For example in the case of Latent Conditions it was determined that owner should seek to establish as fully as is practicable what is below the site surface prior to work commencing. ABIC requires the owner to provide any information that it has about the site to the contractor in the tender documents. If the owner decides that it will not attempt to determine the sub-soil conditions of the site prior to calling

EVENT	NO DISPUTE RISK/OBLIGATION ALLOCATED MODEL	ABIC RISK ALLOCATION
Programming	Contractor's Risk	Contractor's Risk
Submission of Priced Bill	Contractor's Risk	Not Applicable
Giving possession of site	Owner's Risk	Owner's Risk
Physical Conditions	Contractor's Risk	Contractor's Risk
Latent Conditions	Neutral	Owner's Risk
Defective work or materials	Contractor's Risk	Contractor's Risk
Subcontracting	Contractor's Risk	Contractor's Risk
Separate Contractors	Owner's Risk	Owner's Risk
Opening up and testing		
(a) If defective work discovered	Contractor's Risk	Contractor's Risk
(b) If defective work not discovered	Owner's Risk	Owner's Risk
Variations & Late Instructions	Owner's Risk	Owner's Risk
Contractor Efficiency	Contractor's Risk	Contractor's Risk
Time & Associated Costs		
(a) Inclement Weather	Neutral	Time given but no cost so effectively Neutral
(b) Site Industrial Action	Neutral except where caused by act or default of Contractor	Contractor's Risk
(c) Industry Industrial Action	Neutral	Owner's Risk
(d) Authority Approvals	Neutral	Owner's Risk
(e) Disputes with Neighbours	Neutral	Owner's Risk
(f) Acts or default of Architect, Consultants or Owner	Owner's Risk	Owner's Risk
Breach by Contractor	Contractor's Risk	Contractor's Risk
Breach by Owner	Owner's Risk	Owner's Risk
Force Majeure	Neutral	Contractor's Risk but insurable so effectively Neutral
Shortages		
(a) Labour	Neutral	Contractor's Risk
(b) Materials and Plant	Neutral	Contractor's Risk
(c) Finance	Owner's Risk	Owner's Risk
(d) Offshore sourced materials & plant	Neutral	Contractor's Risk
Superintendence	Contractor's Risk	Contractor's Risk
Legislative Changes after Contract Commenced	Neutral	Owner's Risk
Late Payment	Owner's Risk	Owner's Risk
Failure to Certify	Owner's Risk	Owner's Risk
Insolvency		
(a) By Owner	Owner's Risk	Owner's Risk
(b) By Contractor	Contractor's Risk	Contractor's Risk
Cost Fluctuations	Neutral	Contractor's Risk
Provisional Sums	Neutral	Owner's Risk
Contract Documentation		
(a) Discrepancies	Owner's Risk	Owner's Risk
(b) Omissions	Owner's Risk	Owner's Risk

tenders it would be inappropriate and economically inefficient to make the contractor assume the risk that the site conditions were not as assumed by the design and the tender documentation.

Similarly with time extensions and associated costs it is the owners who should manage the relationships with authorities and any adjoining neighbours and therefore bear the risk of disputes causing delay and additional cost. However, should the contractor, through its own actions, be responsible for instigating a dispute with adjoining neighbours or authorities, any claim by the contractor for an extension of time and/or costs arising out of that dispute will be invalid under ABIC and it therefore bears the risk in that situation.

In the case of industrial disputes the contractor is in control of the site and therefore better able to manage the risk of industrial action. ABIC therefore assigns that risk to the contractor. However, the contractor may not be able to control industrial action occurring as a result of actions beyond the site such as industry-wide industrial action motivated by a political campaign or an industry wide log of claims served on all employers by a particular union. In this instance, under ABIC the owner bears the risk providing the contractor has not, through its own actions, caused the dispute to widen or added to the delay.

During the period when the original CIC form was reviewed to develop the ABIC form, the MBA raised the allocation of risk for neutral events. When the RAIAs approach was fully explained the MBA agreed that allocation of neutral risk to one or other of the parties on an equitable basis should reduce disputation and was therefore appropriate.

## CONCLUSION

The ABIC Major Works and Simple Works versions are the logical successors to the standard forms previously published by the RAIAs and the MBA, the JCC suite of contracts and SBW-2. The Basic Works version is also the logical successor to MBW-2 and BBC-1. All ABIC forms are able to be used on both residential and commercial projects throughout Australia.

They are all easily read and understood by lay practitioners because of their logical structure and their use of plain English. The processes and procedures required to administer an ABIC contract are clearly set out in clauses which follow a logical sequence to further aid understanding.

They require the parties to administer all aspects of the contract including the important issues of time and additional cost in a timely manner so that disputation can be minimised.

The risk that each party must assume is well documented and each risk is appropriately allocated to the party best able to control and manage it.

The ABIC contracts are the next generation of standard forms for use in the construction industry.

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A presentation to the BDPS by Richard Booth at a discussion night held at the RACV Club on 15 May 2002.

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