

MinterEllison

LAWYERS

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BIM: Legal Issues and Solutions

- Contractual framework
- Liability
- Intellectual property
- Insurance
- Confidentiality



Contractual framework

- The US model
- The Australian model
 - Alliancing
 - Early Contractor Involvement (**ECI**) / Managing Contractor
 - Design and Construct (**D&C**)
- BIM Protocol
 - Management
 - Execution
 - Deliverables



Liability issues

- Risk sharing vs Collaboration
- Indemnities
 - Use of 'knock-for-knock' liability regimes where parties provide reciprocal indemnities
- Inclusion of limitation of liability clauses
- Time and cost
- Liability in a FM context



A 'no blame' approach

- Achieved through a liability exclusion clause

- (b) Each of us releases and discharges the other from liability on any legal basis for any Loss we may incur as the result of any act or omission by a Participant done or not done in connection with this Agreement, or the Project except to the extent that:
 - (i) the act or omission gives rise to a liability (under clauses 8.6(f), 23 or 28.3 of this Agreement) to indemnify another Participant; or
 - (ii) the act or omission is a Wilful Default; and
 - (iii) the Loss or liability arises out of any act or omission, done or not done in connection with this Agreement that is an Exempt Dispute.



Intellectual property issues

- Who owns the intellectual property?
 - the owner
 - third party assumes ownership of a completed model
 - each contributor retains rights over their contribution with a project specific licence
- Specific issues
 - Licences
 - Joint ownership
 - Indemnity from 3rd party infringement



Insurance issues

- The collaborative nature of BIM can complicate traditional liability based insurance arrangements
- Alternatives:
 - Retain a clear risk allocation
 - Project specific insurance
 - Self insurance
- US experience is positive – lowering the inherent risk level



Confidentiality

- An effective BIM requires each project discipline to share all design information
- Project specific confidentiality agreement



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