

BIM, **Legal &** Procurement

*L2 Professional Indemnity
Insurance*

L2

BIM IN PRACTICE



Australian
Institute of
Architects

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L2 Professional Indemnity Insurance

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INTRODUCTION

This information provides professional indemnity insurance guidance for practitioners working within a BIM environment. It is not intended to provide legal advice, but will raise issues for consideration when making decisions on how to structure commissions and Professional Service Agreements. Issues discussed relate to whether a consultant needs to advise their PI insurance provider of BIM commissions and what information should be given relating to the project. The document also considers what BIM activities or scope might take the consultant outside its PI policy provisions such as sharing data, providing services outside the specific area of expertise and offering guarantees outside of scope. Finally this information also refers to what to consider when dealing with a single project insurance policies.

DOES PI INSURANCE COVER CONSULTANTS FOR WORK USING BIM?

When an individual consultant relies on their own professional indemnity policy:

- Professional indemnity policies do not usually contain any specific exclusion clause that would exclude cover merely on the basis of using BIM.
- Although no claims which confirm this have come to light, it is likely that professional indemnity insurance would generally cover BIM, with the proviso that some BIM scenarios which would trigger common policy exclusions are noted in the section below titled “What activities risk taking consultants outside the cover of PI insurance?”, and that coverage will always depend on the individual policy terms.
- Consultants should inform their insurance broker that they are using BIM systems (eg, discipline specific-model, aggregated model, federated model). Some insurers’ proposal forms may specifically ask whether the consultant is using BIM, but if there is no specific question, consultants should make a specific notification.

When a party is not in a discipline which requires professional indemnity insurance:

- Parties without professional indemnity insurance should seek advice from an insurance broker before working on projects using BIM. For instance, the usual insurances obtained by a building contractor, such as contract works insurance, will not usually cover claims arising out of design. However, BIM work such as virtual design coordination or contribution to design intent may expose the building contractor to liability for design, so a professional indemnity policy may need to be obtained.

When a consultant relies on project specific policies:

- It is important to check the project specific policies with specialist insurance advice. For example, the policies need to: include a professional indemnity component to cover the specific design discipline, provide cover that includes the consultant’s profession; resolve the usual issues of multi-party policies such as clarifying which consultants are covered under it; and include appropriate waivers of subrogation rights.

On all BIM projects:

- Before executing the Professional Services Agreement the consultants should check that the other consultants contributing to the BIM have professional indemnity insurance to cover their own input, and consider the impact of any contractual limits of liability obtained by the other consultants. Otherwise, it may be difficult or impossible to have the other consultants contribute to any BIM related claims to which their errors have contributed. The decision to proceed or not is a commercial decision and one that needs to be carefully considered.
- Loss of documents cover should be investigated, to cover the cost of restoring documents if the BIM system should fail. Loss of documents cover may be included in the professional indemnity or general office insurance of each consultant, or the parties could investigate obtaining a project-specific loss of documents policy. It is also noted that software suppliers often rely on limitation of liability clauses and it should not be assumed that the supplier will pay for the consequences of any software failure.
- Address the question of whether any of the consultants will play the role of BIM Coordinator and, if so, whether their respective PI policies will cover that work.
- Clients should consider the inclusion of a BIM Coordinator on any mid- to large-scale project using BIM. The scope of the BIM Coordinator is to act as facilitator. The party trusted with this role does not warrant any of the work produced in a federated model, nor does it undertake any coordination resolution role. However a BIM Coordinator will be producing clash detection reports, ensuring that parameters across the federated model are correctly defined in order to produce a clash report.

WHAT ACTIVITIES RISK TAKING CONSULTANTS OUTSIDE THE COVER OF PI INSURANCE?

Agreeing to share with other parties the risks relating to the BIM

- Consultants agreeing to share liability or risk of errors in a shared BIM means that they are undertaking liability for other parties' errors as well as their own. This runs a strong risk of infringing the 'assumed liability' exclusion common in professional indemnity policies, which states that the policy does not cover liability assumed solely under a contract and which would not have applied at common law.
- Risk-sharing agreements are most likely to be found on projects being run on an IPD (Integrated Project Delivery) basis, using a federated BIM.
- The various contracts between the parties should make it clear whether there is to be formal sharing of risk. If the contracts contemplate risk sharing, there are two choices:
 1. Remove the references to risk sharing so that the consultant is only liable for their own fault, which is covered under their own professional indemnity policy; or
 2. Set up the project along the lines of an alliance and obtain a separate first-party project specific alliance policy to cover all the parties (see 'Alliance Contracting' in document '**L4 - Viable Options - Encouraging Collaboration and 'No Blame'**' document for more detail).

Operating outside the insured profession

- Professional indemnity insurance covers civil liability for claims arising out of the practice of the profession specified in the policy schedule, for example, architecture. The policy may (but usually does not) seek to define that profession more specifically.
- Although there will always be differences of opinion on the boundaries of a given profession, if, for example, on a BIM project, an architect took on responsibilities that were clearly not architectural, these responsibilities would not be insured. Examples are:
 - cost estimating or construction sequencing obligations that could arise out of 4D or 5D BIMs which include cost and sequencing information
 - a consultant being required to model the design requirements of another specialist sub-consultant, where the other sub-consultant lacks the BIM ability to do their own modelling
- Some measures for managing the risk include:
 - having a clear scope of services
 - using disclaimers stating that the use of a BIM does not render the consultant liable for providing advice on any matters that would not normally be considered a usual part of the consultant's profession, such as cost estimating or construction sequencing
 - when modelling details or assumptions relating to another specialist consultant's expertise, have that other consultant approve the modelling in writing

Providing warranties, guarantees etc

- Professional indemnity insurance typically excludes cover for liability assumed under a contract that exceeds the consultant's usual common law liability. Guarantees, broad indemnities and fitness for purpose warranties are common examples of clauses which risk triggering this exclusion and rendering the consultant uninsured for the additional liability assumed under the clause.
- These kinds of obligations should be avoided in a BIM context as in any aspect of professional work. Consultants may seek the advice of their broker to ascertain the sorts of clauses likely to be excluded from their policy.
- There is a need to be cautious of a requirement to warrant the accuracy of any models provided by consultants. Sub-contractors are increasingly relying on laser based set-out on site for construction. These will be taken directly from 3D models of the project. They will be seeking warranties from the builder that any architectural and structural models are warranted as accurate. The builder will need to warrant that it is being built to a level of accuracy against the model, and in turn will require the designers to warrant the accuracy of the design model they are creating.

Specific software exclusions

- Although not commonly seen in the policies of architects and building engineers, some professional indemnity policies contain broad exclusions for claims arising out of software failures. Such exclusions may limit or exclude cover arising out of BIM use.
- Consultants should check their policy to ensure that there is no software or IT exclusion that would compromise their cover for BIM work.
- Those sharing models collaboratively need to consider software version upgrades throughout the duration of the planning process. If collaborators use different releases of their software, this can render individual parties' project files out of date. In some cases models may be unable to be upgraded to the latest release. Selected BIM authoring and coordination software works under a policy of "cliff upgrade" with no backward compatibility. The use of open standards such as IFC can avoid these issues in part as they provide interoperability without reliance on native format file models.
- As an example: A project team authored BIMs in version 2009 and agrees to provide models for the sub-contractors use. The design progresses and the sub-contractors many years later decide to document in version 2012. It is important to agree who is undertaking to upgrade the files from 2009 to 2012 and to check and rectify any errors introduced to the model as a consequence of the upgrade process.

WHAT IS THE IMPACT OF BIM RELATED CLAIMS ON A COMPANY'S PI INSURANCE?

It is in the interests of the profession as a whole and the individual consultant to minimise BIM related claims. A large number of claims, or some significant very large claims, could increase premiums for professional indemnity insurance, or see insurers attempt to limit or exclude their exposure to BIM claims.

WHAT IS HAPPENING IN OTHER PARTS OF THE WORLD WHERE THERE IS A GREATER UPTAKE OF BIM? HOW ARE THE INSURANCE COMPANIES HANDLING MATTERS THERE?

It appears that the USA is where the market-leading developments are most likely to occur. Internationally, 'integrated project insurance' (which is likely to be another name for a single project insurance policy) may be available.

SINGLE PROJECT INSURANCE

- On large projects, a single project insurance policy may be obtained to provide cover to all the main parties working on the BIM.
- However, due to the cost and complexity of the policy, and the need to involve several insurers to cover its high limit of indemnity, single project insurance tends to be feasible only on very large projects, typically for government clients.
- Insurers would charge a single (usually high) premium for a single policy which covers all parties.
- Shared liability and no blame can thus be supported by obtaining a single project insurance policy.

- However, obviously problems may occur that are not covered by insurance. And even for problems that fall within insurance cover, a single project insurance policy will have a high excess (\$1 million is typical) that the insured parties must contribute to every claim. Obtaining a single project insurance policy is not therefore a complete solution. Underlying the insurance arrangements, the parties must carefully negotiate their respective liabilities and set them out in a formal contract. Importantly, they must decide whether they are partnering, or entering into an alliance – the two have very different risk and liability implications. They must also decide and record in their formal contract how the excess on the single project insurance policy will be apportioned between them for any claims.

CONCLUSIONS

Professional indemnity policies do not usually contain any specific exclusion clause that would exclude cover merely on the basis of using BIM. However, it is advisable to notify your PI insurance provider of the specific project and your role and responsibilities in developing the model. Your insurer will be interested to know if the model is discipline specific, who will be relying on the data provided, who will own the model after your role has completed and whether other parties contributing to the model have adequate PI insurance.

As with operating in the traditional 2D environment, consultants should avoid working outside their respective area of expertise, providing guarantees for others inputs or relying solely on software outputs.

In some instances particularly with very large projects, the client elects to provide a single project insurance policy. Though the cost of single project insurance policies is high, caution and consultation with your own insurance provider are recommended.

Summary

Professional indemnity policies do not usually contain any specific exclusion clause that would exclude cover merely on the basis of using BIM:

- When a party is not in a discipline which requires professional indemnity insurance.
- When a BIM Coordinator is included on project.

What to consider before executing the Professional Services Agreement:

- Agreeing to share with other parties the risks relating to the BIM
- Operating outside the insured profession.
- Single project PI policies.
- Software exclusions in PI policies
- What is the impact of BIM related claims on a company's PI insurance?