

DEFENCE LIABILITY PRINCIPLES

Defence, in consultation with Defence industry, has developed the following set of liability principles which underpin the liability-related provisions in the draft contracts in ASDEFCON templates. These principles should also guide any negotiations on the liability provisions in any Defence ASDEFCON-based contract.

1. Law and policy	The allocation of liabilities as between the parties to a Contract will be consistent with, and give effect to, applicable Commonwealth law and policy.
2. Allocation of risk	The Contract will generally allocate risks to the party best placed to manage the risks.
3. Liability to be borne by party at "fault"	<p>Liability should be borne by the party at "fault". In general, the liability of the Contractor will be reduced to the extent that the Contractor demonstrates that the loss or damage is caused by:</p> <ul style="list-style-type: none"> • the Default of the Commonwealth, Commonwealth Contractors or Commonwealth Officers; • the breach of a general law duty or an applicable law by an Unrelated Party; or • an Excepted Risk that is not caused by and could not reasonably have been prevented or anticipated by the party. <p>However, in relation to Unrelated Parties and Excepted Risks, Principles 8 and 11 below are exceptions to this overarching approach.</p>
4. No exclusion of general law	The Contract will generally preserve the parties' general law and statutory rights in respect of liabilities relating to the Contract (except to the extent expressly limited or excluded by the terms of the Contract).
5. Effect of Acceptance Milestones	The achievement of an Acceptance or Final Acceptance Milestone does not, of itself, limit the Commonwealth's rights under the Contract. However, the Commonwealth's rights to claim for Defect rectification will be limited under Principle 6 (during a Defect Rectification Period) and under Principle 15 (if a liability cap applies).
6. Defects in design, materials and workmanship	The Contractor will be required to remedy Defects in design, materials or workmanship in the Supplies notified to the Contractor within the Defect Rectification Period. The Commonwealth is not required to establish Contractor Default. The Commonwealth will be responsible for Defects identified after the Defect Rectification Periods (unless there is some other breach by the Contractor – for example, a breach of fitness for purpose obligation).
7. Standards of work and fitness for purpose	<p>The Contractor will be required to ensure that:</p> <ul style="list-style-type: none"> • the Supplies conform to the requirements of the Contract; • the work is carried out in accordance with the standards specified in the Contract and all applicable laws (and in accordance with good industry practice); and • the Supplies are fit for the purposes provided for in the Contract.
8. Commonwealth Property controlled by the Contractor	<p>The Contractor will be liable to compensate the Commonwealth for loss of or damage to:</p> <ul style="list-style-type: none"> • Commonwealth Property while it is on Contractor premises;

	<ul style="list-style-type: none"> • Government Furnished Facilities (GFF) where the Contractor or Contractor Personnel is responsible for physical access control; or • Commonwealth Property being transported by or on behalf of the Contractor or Contractor Personnel. <p>This does not require the Commonwealth to establish Contractor Default.</p> <p>Principle 8 is an exception to Principle 3 above (that liability is to be borne by the party at "fault"). However, in this circumstance the Contractor is best placed to manage and control the risks.</p>
9. Commonwealth Property <u>not</u> controlled by the Contractor	The Contractor will be liable to compensate the Commonwealth for loss of or damage to Commonwealth Property arising from a Contractor Default.
10. Excepted Risks	<p>The Contractor's liability will, in general, be reduced to the extent that the relevant loss, damage, injury or death was contributed to by the following events or circumstances which are not caused by and could not reasonably have been prevented or anticipated by the Contractor or Contractor Personnel:</p> <ul style="list-style-type: none"> • acts of God, including natural disasters; • war, invasion, acts of foreign enemies, hostilities between nations, terrorist acts, civil insurrection or militarily usurped power; • confiscation by governments or public authorities; or • ionising radiation, contamination by radioactivity from nuclear fuel or waste, or combustion of nuclear fuels.
11. Contractor's employees and officers	<p>The Contractor will be liable for any Loss that the Commonwealth suffers because of personal injury to or death of the Contractor's employees and officers occurring in connection with the Contract. The liability will apply whether or not the Contractor or Contractor Personnel are at fault.</p> <p>Principle 11 is an exception to Principle 3 above (that liability is to be borne by the party at "fault"). However, in this circumstance the Contractor is best placed to manage and control the risks.</p>
12. Third party Claims	<p>The Contractor will be liable for any Loss that the Commonwealth suffers as a result of third party Claims arising from a Contractor Default in connection with the Contract. This includes Claims in respect of:</p> <ul style="list-style-type: none"> • the death of or personal injury to any person (other than Contractor personnel); • loss of or damage to property of the third party; • infringement of the third party's intellectual property rights or moral rights; • a breach of duty of confidence owed to the third party; or • other loss or damage suffered by the third party as a result of the Default.
13. Liquidated damages	The Contract may include provisions under which the Commonwealth will have a right to recover liquidated damages for delay in providing Supplies under the Contract. Where a Contract includes liquidated damages for delay, this is the Commonwealth's sole monetary remedy in relation to the delay. If liquidated damages are not included in a Contract, the Commonwealth could rely on its right to general law damages.
14. Commonwealth indemnities	The Contract will not, except in exceptional circumstances, provide for an indemnity from the Commonwealth in favour of the Contractor.

<p>15. Liability caps</p>	<p>The Contract will generally include liability caps for the following liabilities of the Contractor to the Commonwealth in connection with the Contract:</p> <ul style="list-style-type: none"> • loss of or damage to Defence Property (other than the Supplies); • liquidated damages (including the value of any agreed compensation provided in lieu of liquidated damages); and • loss of or damage to Supplies (including loss of use of Supplies) and other Losses suffered by the Commonwealth. <p>The Contract may also include a single liability cap covering all liability of the Contractor to the Commonwealth; however, the amount of the single liability cap will not be less than the aggregate of the individual liability caps.</p>
<p>16. Exclusions from liability caps</p>	<p>The liability caps under the Contract will not apply to a liability of the Contractor to the Commonwealth, under or arising out of the Contract in relation to:</p> <ul style="list-style-type: none"> • third party Claims in respect of death, personal injury or third party property; • infringement of intellectual property rights; • breach of an obligation of confidence; • death of, or injury to, a Commonwealth Officer; • loss of or damage to Commonwealth Property (other than Defence Property); • breach of the Contractor's obligations in relation to Defence security; • breach of privacy legislation; • criminal offences; • Wilful Default of the Contractor or Contractor Personnel; • repudiation due to an intentional abandonment of the Contract by the Contractor; or • restitution of amounts paid under a mistake of fact or law in relation to the Contract.
<p>17. Consequential or indirect losses</p>	<p>The Contract will not provide for a general exclusion for "consequential loss", "indirect loss" or any such similar expressions. However, the Contract will provide specific exclusions for certain heads of damage that are capable of clear definition – e.g.:</p> <ul style="list-style-type: none"> • damage to reputation or exemplary or punitive damages suffered by either party; and • diminished revenue, profits or business opportunity suffered by the Commonwealth.
<p>18. Proportionate liability</p>	<p>The Contract will, so far as the law allows, exclude the operation of the proportionate liability legislation.</p>
<p>19. Subcontractors</p>	<p>The Contractor will remain responsible for its Subcontractors and their personnel. The Contractor's liabilities under the Contract are not reduced by the acts or omissions of a Subcontractor or Subcontractor personnel.</p>

Key Liability Terms

Capitalised terms in the table above are defined terms in the ASDEFCON templates. An extract of the key definitions is included below for convenience.

Key term	Definition
Claim	means a claim, demand, suit or proceeding of any kind, including by way of court proceedings, proceedings in the nature of arbitration, mediation or other methods of dispute resolution and administrative claims and proceedings (whether or not before a tribunal).
Commonwealth Contractor	means a person (other than the Contractor or a Subcontractor) engaged by the Commonwealth to provide goods or services to the Commonwealth.
Commonwealth Default	means a Default by the Commonwealth, a Commonwealth Officer or a Commonwealth Contractor.
Commonwealth Property	means property of any kind (including GFM) owned or leased by, or in the possession of, the Commonwealth.
Contractor Default	means a Default in relation to the Contract by the Contractor or Contractor Personnel.
Default	<p>means any of the following:</p> <ul style="list-style-type: none"> a. a breach of an express or implied provision of the Contract by a party to the Contract; and b. a breach of a general law duty or an applicable law in relation to the Contract by any of the following: <ul style="list-style-type: none"> (i) the Commonwealth or Commonwealth Personnel; (ii) a Commonwealth Contractor or an employee, officer or agent of a Commonwealth Contractor; and (iii) the Contractor or Contractor Personnel. <p>A breach of a general law duty or an applicable law by Commonwealth Personnel, a Commonwealth Contractor or an employee, officer or agent of a Commonwealth Contractor is taken to be a Default by the Commonwealth.</p> <p>A breach of a general law duty or an applicable law by Contractor Personnel is taken to be a Default of the Contractor.</p>
Defect	<p>means a defect, fault (including a fault which results in a Failure), a damage or omission, whether in design, workmanship or materials, and includes a Latent Defect; and “Defective” has a corresponding meaning.</p> <p>Without limiting what “Defective” means, Supplies are Defective if:</p> <ul style="list-style-type: none"> a. they do not conform to the requirements of the Contract; b. they are not fit for purpose as described in clause 3.3 of the COC; or c. they are not in proper and effective working order. <p>A defect, fault, damage or omission in an item is not a Defect to the extent that it results from fair wear and tear.</p>
Defect Rectification Period	This is specified in the Details Schedule of the ASDEFCON templates.
Excepted Risk	<p>means an event or circumstance that is any of the following:</p> <ul style="list-style-type: none"> a. an act of God, including a natural disaster, such as a bushfire, an earthquake, a flood, a landslide or a cyclone; b. war, invasion, acts of foreign enemies, hostilities between nations, a terrorist act as defined in section 100.1 of the Criminal Code, civil insurrection or militarily usurped power;

Key term	Definition
	<ul style="list-style-type: none"> c. confiscation by governments or public authorities; and d. ionising radiation, contamination by radioactivity from nuclear fuel or waste, or combustion of nuclear fuels.
Loss	means any liability, loss (including economic loss), damage, compensation, costs and expenses.
Unrelated Party	<p>means any person other than any of the following:</p> <ul style="list-style-type: none"> a. the Commonwealth and Commonwealth Personnel; b. the Contractor and Contractor Personnel; c. a Related Body Corporate of the Contractor; and d. an employee, officer or agent of a Related Body Corporate of the Contractor.
Wilful Default	means a Default where the breach relates to an act or omission that is intended to cause harm, or otherwise involves recklessness in relation to an obligation not to cause harm.