

ASDEFCON Technical Data and Intellectual Property Commercial Handbook

Authority

This Handbook does not create new mandatory procurement policy. All Defence mandatory procurement policy is contained in the Defence Procurement Policy Manual or other Defence policy documents. This Handbook is intended as a guide only. The ASDEFCON templates set out detailed provisions relating to Technical Data, Software and Intellectual Property and this Handbook is not a substitute for reading and understanding those provisions and the specific contracts relating to each project.

Monitor and Review

The content of this Handbook will be reviewed whenever relevant sections of any of the identified references are updated or amended.

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Table of Contents

Chapter 1	6
Introduction	6
Background	6
Purpose and use of this document	6
Nature of IP in Defence contracts.....	7
Chapter 2	8
TD, Software and IP under Defence Contracts	8
What is Technical Data?.....	8
What is Software?	8
Importance of TD and Software.....	8
Relationship between IP rights and TD/Software	9
Chapter 3	11
Key Concepts	11
TD and Software categories.....	11
Ownership vs licensing of IP	11
Delivery of TD and Software.....	12
Licences and Sublicences	13
Defence Purpose.....	13
Use.....	13
Commercial TD and Commercial Software	14
Role and structure of the TDSR Schedule.....	15
Chapter 4	16
Ownership	16
Pre-existing IP	16
Contractor ownership of new IP	16
Commonwealth TD and Software.....	16
GFM	16
Chapter 5	18
TD and Software	18
Overview	18
Commonwealth right to Use the TD or Software	18
Sublicensing to Commonwealth Service Providers	19
Sublicensing TD and Software to "any person"	20
Chapter 6	21
Highly Sensitive TD and Software	21
Overview	21
Licence Structure	21
Restrictions on rights to Use and Sublicence	21
What type of TD or Software is Highly Sensitive?	21

Chapter 7	23
Commercial TD and Software	23
Overview	23
Licence Structure	23
Licence on "best commercial terms"	23
Key Commercial Items	23
Chapter 8	25
Commonwealth TD and Software	25
Overview	25
Licence Structure	25
Licence to Commonwealth TD and Commonwealth Software	25
Restrictions on Commonwealth TD and Commonwealth Software	25
Identifying Commonwealth TD and Commonwealth Software	26
Chapter 9	27
GFM Licence	27
Overview	27
Licence Structure	27
Licence to GFM	27
Restrictions on GFM	27
Sublicensing of IP in GFM	27
Export Approvals	28
Chapter 10	29
Contract Material	29
Overview	29
Licence Structure	29
Commonwealth's right to Use the Contract Material	29
Sublicensing to Commonwealth Service Providers	29
Sublicensing Contract Material to any other person	30
Restrictions on Contract Material	30
Chapter 11	31
Other ASDEFCON Provisions	31
Sublicensing Conditions	31
No Commercialisation	31
Approved Subcontractor IP Deeds	32
Failure to obtain IP rights	32
Delivery obligations	33
Electronic Delivery of TD, Software or Contract Material	33
Markings	33
Patents, Registrable Designs and Circuit Layouts	34
Escrow	34
Export Approvals	34

Chapter 12	35
Confidential Information	35
Protection of Confidential Information	35
Interaction with IP regime	35
Other permitted disclosures	35
Chapter 13	37
ASDEFCON Support	37
Introduction	37
Key Sustainment Differences	38
GFM Attachments	39
Products Being Supported - Attachment S	39
Restrictions on Products Being Supported and GFM Licences	39
Commercial Licences for Maintenance	40
Survey & Quote Orders	40
Warranties	41
Use with other templates	42
Chapter 14	43
Other ASDEFCON templates	43
Introduction	43
Template Selection and Tailoring	43
Overview	43
High Level Templates	44
Mid-Level Templates	45
Low Level Templates	46
Chapter 15	48
ASDEFCON Transition Arrangements	48
Introduction	48
Transition options	Error! Bookmark not defined.
Additional transitional issues	50

Chapter 1

Introduction

Background

1. Defence established the Defence and Industry Intellectual Property Working Group (**DIIPWG**) to undertake a review of the way in which Intellectual Property (**IP**) rights are treated and managed under the ASDEFCON suite of contracting templates. The objectives of this review is to:
 - a. balance the IP interests of Defence and Industry;
 - b. better reflect the importance of Technical Data (TD) and Software and their relationship with IP, particularly so that items of TD and Software can be used as intended;
 - c. reflect an efficient and commercially realistic treatment of TD, Software and IP issues;
 - d. streamline the negotiation of IP, TD and Software provisions by promoting an understanding of the relative requirements of Defence and Industry; and
 - e. improve the IP and TD management practices of both Defence and Industry, including IP and TD markings.
2. The review has resulted in substantial changes to the IP regime in the ASDEFCON contracting suite and other Defence technical guidance.

Purpose and use of this document

3. This Handbook outlines the approach to IP ownership and licensing under contracts (**Contracts**) for the acquisition of Defence capability (**Capability**) based on the ASDEFCON (Strategic Materiel) template. It explains the rationale of the approach to the IP in TD and Software supplied under the Contract and how the clauses are intended to operate.
4. As the ASDEFCON (Support) template is used in a different context than the ASDEFCON (Strategic Materiel) template, additional guidance on the use of ASDEFCON (Support) has been included at Chapter 13.
5. While the mid and low level ASDEFCON templates generally adopt the approach to IP ownership and licensing included in the ASDEFCON (Strategic Materiel) and ASDEFCON (Support) templates, that approach has been simplified or amended to reflect the less complex procurements, where these low level templates are used. See further Chapter 14.
6. This Handbook is intended to be used by Defence staff in preparing and negotiating Defence contracts, as well as providing guidance to Industry personnel in understanding Defence's approach to TD and Software when tendering and contracting.
7. This Handbook is not intended to be used to identify the TD or Software that is to be provided to Defence or how it is to be managed. These matters are to be determined by project and technical staff in accordance with published technical guidance and engineering documentation¹.

¹ For example, DMI(ENG) 12-2-003 – Acquisition and Management of Technical Data, DMH(ENG) 12-2-003 – Technical Data Management Handbook, DMSP-1QMS(ENG) 12-2-004 – Acquiring Technical Data and DMSP-1QMS(ENG) 12-2-007 – Technical Data Management.

Nature of IP in Defence contracts

Intellectual Property or IP refers to legal rights that protect original ideas in the industrial, scientific, literary and artistic fields. These rights include copyright and rights relating to circuit layouts, patents, registrable designs and trademarks. The most important right held by owners of intellectual property is the right to decide who can use the original idea and on what terms.

8. The main source of IP rights in Defence contracts is Copyright. Copyright is the exclusive right to reproduce or copy an original work in a material form, to publish the work and to communicate the work to the public. Copyright will generally exist in relation to documentation and computer programs provided to Defence under a Contract. Accordingly, the focus of the IP clauses is on the three main types of Copyright works – TD, Software and Contract Material.
9. There are a range of other types of IP that may arise in the context of a Contract, including Moral Rights, Circuit layouts, Patents and Registered Designs. The IP clauses in the Contract also include licences and warranties relating to these forms of IP.

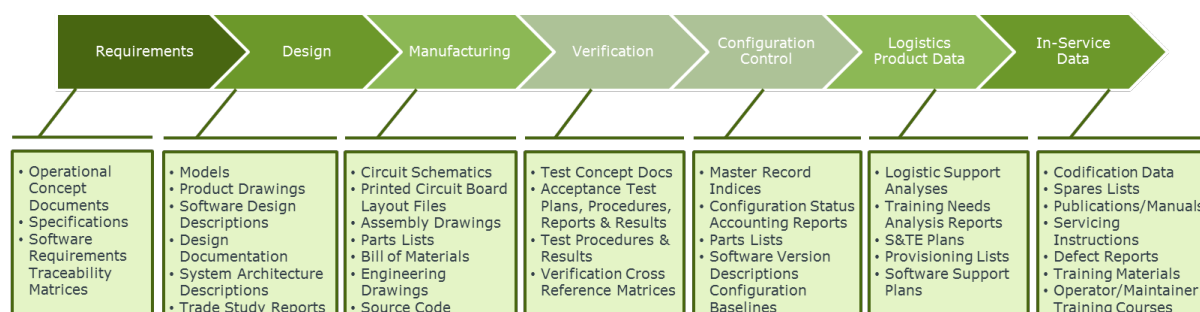
Chapter 2

TD, Software and IP under Defence Contracts

What is Technical Data?

TD is technical or scientific data, know-how or information, reduced to a material form (whether stored electronically or otherwise) in relation to the Materiel System. TD includes calculations, data, databases, designs, design documentation, drawings, guides, handbooks, instructions, manuals, models, plans, reports, simulations, sketches, specifications, standards, training materials, test results.

1. TD also includes Source Code. Source Code is the expression of Software in human readable form (i.e. typed code) which is necessary to understand, maintain, modify and enhance that Software.
2. TD includes information that describes the performance, functional and physical attributes of the relevant Capability as well as information required for its operation and support.



3. TD does not include financial, contract management and administrative data (e.g. contract master schedules, project management plans, risk management plans, contract status reports and meeting agendas/minutes). This material is classified as Contract Material under the Contract.

What is Software?

Software is computer code that instructs a computer to bring about a certain result or perform tasks. Software includes computer programming languages that control a computer or its peripheral devices, and also firmware and installed applications.

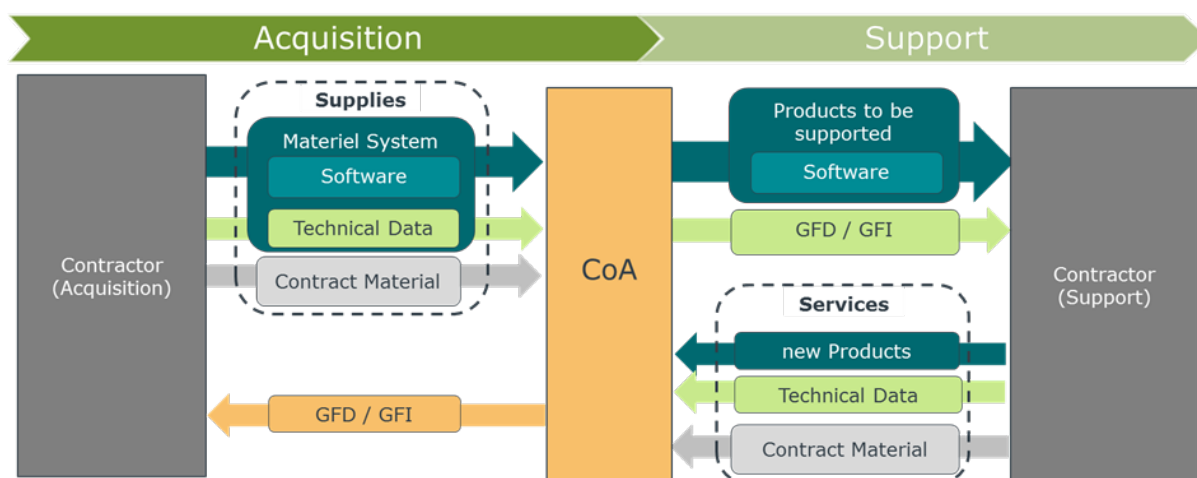
4. The definition of Software does not include software documentation or Source Code. These are both TD for the purpose of the Contract. Note, that in the ASDEFCON (Support) template, Software includes Software Updates, however Software Design Data is included in the definition of TD.
5. The Software included in Supplies provided to the Commonwealth under a Contract may not always be obvious. Software may be included as firmware embedded in a piece of equipment, such as a military radio or aviation guidance system. Software may also be included in the Support System (e.g. in satellite monitoring and control equipment or test equipment to calibrate maintenance tools).

Importance of TD and Software

6. The IP provisions in the Contract recognise the fundamental importance of TD and Software as "enablers" of capability outcomes. The focus is on the TD and Software required to achieve capability outcomes and the IP rights for that TD and Software. This approach is similar to the

approach adopted by the US Department of Defense under the US Defense Federal Acquisition Regulation.

7. The TD and Software related to a Capability procured under a Contract is crucial to ensuring that the Commonwealth obtains the most effective and efficient use of the Capability. For example, TD and Software for the Capability (i.e. operator manuals, maintenance manuals and product specifications) enable the Commonwealth and its contractors to use and repair that product in the field, at sea or in the air. Other TD and Software may be used to record and understand the performance of the Capability, with such performance information critical to ensuring that the Capability can be used effectively and safely.
8. The Contract recognises the flow of TD and Software from a range of Defence contractors, including as part of the acquisition and support phases of a project. The Contract allows for different items (provided by different contractors and with different IP rights) being combined in a single item.



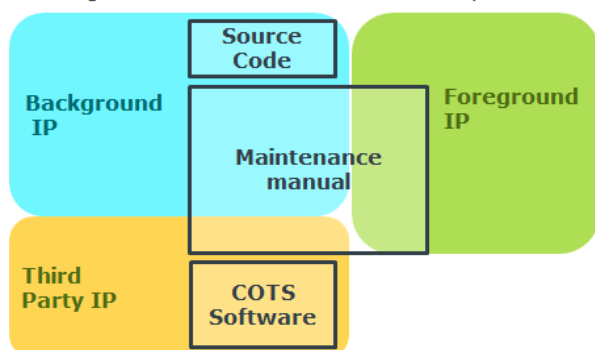
Relationship between IP rights and TD/Software

9. A critical element is the relationship between TD and Software and the associated IP rights. As noted above, TD and Software are key enablers of capability outcomes. An IP right, on the other hand, is the legal "permission" to use the relevant TD or Software to achieve those capability outcomes.
10. Defence contracts have often focused on the IP rights required by the Commonwealth, using the categories of Foreground IP, Background IP and Third Party IP. This IP-centric approach results in:
 - a. the Commonwealth seeking IP rights for a broader category of TD and Software than necessary;
 - b. the obligation to deliver TD being driven by what is required for the Commonwealth's IP rights rather than what is required for capability purposes;
 - c. unnecessary Commonwealth ownership of valuable IP to avoid "gaps";
 - d. a mix of IP rights in individual items of TD or Software; and
 - e. extensive negotiations on IP rights with often insufficient clarity around what IP, and for what purposes the IP, is being sought by Defence.
11. Under the new approach, the Contract is focussed on the usable items of TD and Software delivered under the Contract with the IP rights being defined by reference to that TD and Software. The aim is to minimise the mixture of IP rights within individual items of TD and

Software and to avoid seeking IP rights that the Commonwealth does not actually need to achieve capability outcomes.

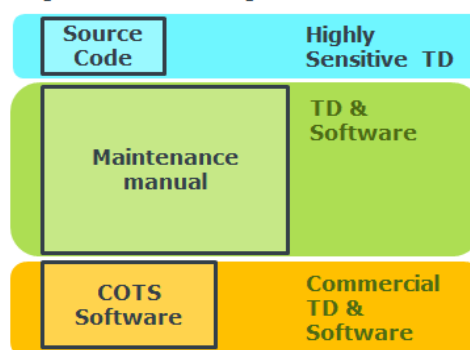
Former IP-centric Approach

Rights based on broad IP-based concepts



New TD/Software Approach

Rights based on categories of TD or Software



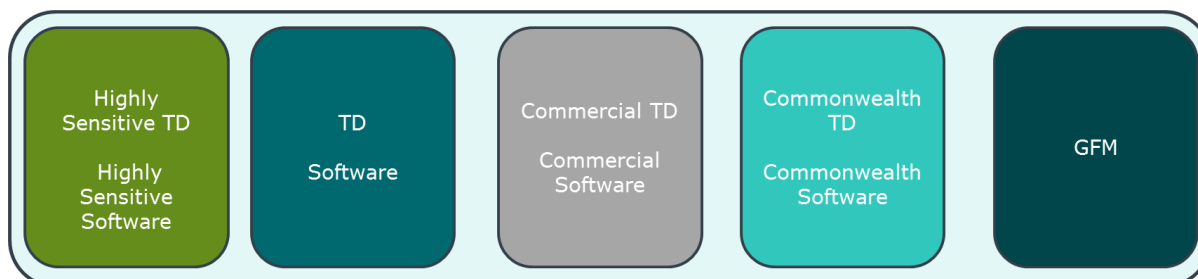
12. This approach enables the Contractor, and its Subcontractors, to consider on a "per item" basis (rather than using abstract IP concepts) whether to:
- a. restrict the Commonwealth from using an item of TD or Software in a way that might raise concerns for the owner of the IP; or
 - b. offer to supply the relevant IP rights to the Commonwealth to enable the use of the TD and Software for the particular activity (and include a price for doing so in its tender).

Chapter 3

Key Concepts

TD and Software categories

1. The Contract refers to a number of different categories of TD and Software.



2. These mutually exclusive categories were developed to assist the Commonwealth and Contractors to determine the licensing approach that is most suitable to a particular item of TD or Software.

Highly Sensitive TD and Software	Existing TD or Software brought to a Contract by the Contractor (or Approved Subcontractor) where disclosure of this to third parties would have a major adverse effect on the Contractor (or Approved Subcontractor) and its commercial position in the market.
Commercial TD and Software	TD and Software relating to "Commercial-Off-The-Shelf (COTS)" or "Military-Off-The-Shelf (MOTS)" items. These are known as Commercial Items. This category includes free and open source software.
Commonwealth TD and Software	TD or Software in which the Commonwealth requires IP ownership. As described in Chapter 8, this category will only be used where there are compelling reasons (e.g. national security reasons) and the grant of a licence to the Commonwealth is insufficient to advance or protect these interests.
Government Furnished Material	TD and Software provided as part of Government Furnished Material (GFM). This may include TD relating to equipment being installed on a Mission System, or Software procured by the Commonwealth under Foreign Military Sales or under a separate Defence contract.
TD and Software	Any TD and Software delivered under the Contract that does not fit within one of the categories listed above. It is likely that the majority of TD and Software delivered under a Contract will fall within this category.

3. Categorising TD and Software in this way enables different ownership and rights to be applied to each category. The categories are mutually exclusive: each item of TD and Software should fall within only one category, because the category will determine the ownership and rights that apply to the IP in the item.
4. The Contract also includes a category of material called **Contract Material** which has different licensing rights. This category does not cover TD and Software. This category is further described at Chapter 10 below.

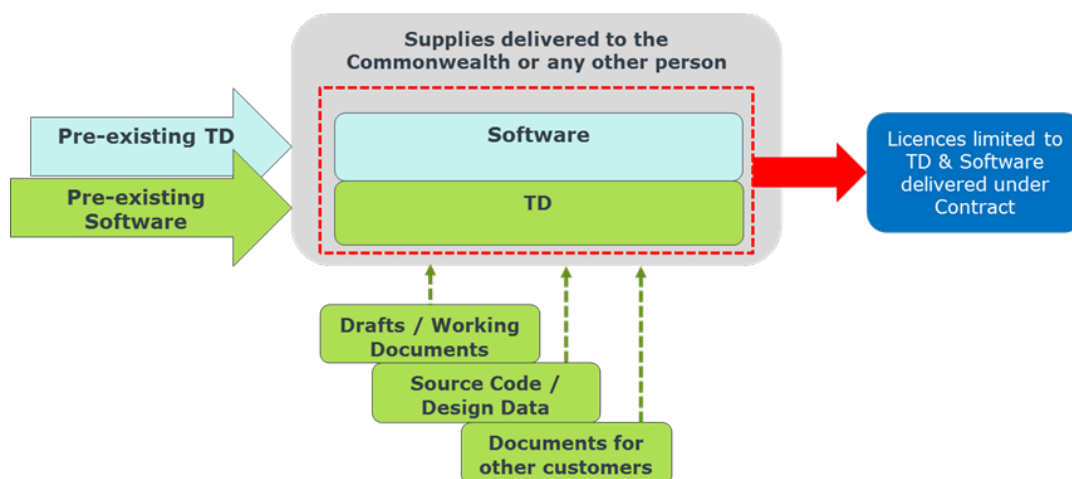
Ownership vs licensing of IP

5. The Contract does not seek to change the ownership of any existing IP.

6. In relation to new IP (i.e. IP created under the Contract or a Subcontract), the default position is that the Contractor (rather than the Commonwealth) will be the owner. The Contract adopts this approach because the Contractor will generally be in the best position to obtain the commercial benefits of exploitation of the IP.
7. However, if the Commonwealth requires ownership of IP in specific items of TD or Software, those items should be identified as **Commonwealth TD** or **Commonwealth Software**. Items should only be categorised as Commonwealth TD or Software if a licence of the TD or Software granted to the Commonwealth would be insufficient to protect the Commonwealth's interests. For example, IP ownership may be required if:
 - a. Defence's **strategic interests** will be better served. For example, where Commonwealth ownership of IP is needed to enable the development of a strategic Australian Industry Capability;
 - b. for **national security reasons** the Commonwealth needs to control the use or disclosure of the TD and Software; or
 - c. the new IP builds upon **existing IP owned by the Commonwealth** or a Commonwealth Contractor.

Delivery of TD and Software

8. The IP provisions in the Contract are focussed on the TD and Software required to be delivered under the Contract. This includes TD and Software required to achieve the relevant Specifications or required under the Statement of Work or the Contract Data Requirements List.



9. Importantly, the IP provisions do not generally apply to various other documents used or created by the Contractor or Subcontractors that are not Contract deliverables. For example, the IP provisions do not require rights in relation to working documents and drafts created by the Contractor or a Subcontractor in the background which are not delivered or required to be delivered under the Contract.
10. However, there is an exception to this rule in relation to new IP created in relation to GFM and Commonwealth TD/Software. This new IP will usually vest in the Commonwealth in accordance with clause 5.1.3, whether or not there is a delivery requirement under the Contract. Nevertheless, where the IP ownership vests in the Contractor, the Commonwealth's licence to use is limited to items which are delivered or required to be delivered. Further guidance regarding delivery is at Chapter 11 paragraphs 11-13 below.

Licences and Sublicences

11. Under the Contract, the Contractor must grant to the Commonwealth (or ensure that the Commonwealth is granted) "Licences" of TD, Software and Contract Material. Licence is a defined term.

A **Licence** granted by the Contractor:

- is worldwide and perpetual;
- does not require the Commonwealth to pay any additional payment (e.g. Royalty);
- cannot be revoked by the Contractor or the Contractor's successors; and
- does not permit the Commonwealth to exploit the IP in TD, Software or Contract Material to earn royalties or profits.

12. A Licence permits the Commonwealth to grant Sublicences, subject to particular conditions (see Chapter 11 paragraph 1 below). There may also be additional restrictions on the ability of the Commonwealth to grant Sublicences in respect of certain items of TD and Software as further described in Chapters 5 and 6 below.
13. In some cases, the IP provisions do not use the defined terms "Licence" and "Sublicence". For example, the Contractor is not required to obtain a "Licence" in the context of Commercial TD or Commercial Software as this is usually not viable. In these cases, the IP provisions use the terms "licence" and "sublicence" which have their ordinary meaning.

Defence Purpose

14. The concept of a "Defence Purpose" is central to the Commonwealth's rights under the Contract.

A **Defence Purpose** is a purpose related to the defence and defence interests of Australia, the national security of Australia, the provision by Defence of aid or assistance (in respect of an emergency or disaster) or peacekeeping or peace enforcement activities.

15. Defence Purposes is intended to have a broad meaning to cover the activities that Defence undertakes as part of its role and functions.

Use

16. The Licences set out in the IP provisions give the Commonwealth (and its sublicensees) the right to "Use" the relevant TD, Software and Contract Material.

Use **means** to:

- use, reproduce, adapt and modify the TD, Software or Contract Material in accordance with the licence; and
- disclose, transmit and communicate the TD, Software or Contract Material:
 - to the licensee's employees, officers and agents; and
 - to a sublicensee under a sublicense granted in accordance with the licence.

17. The definition of Use reflects the terminology in IP legislation or terms commonly used in the context of IP. The following table sets out some examples of the types of activities that are covered by the definition of Use.

Use	To use, understand, apply, or run the TD, Software or Contract Material.
Reproduce	To make a copy of the TD, Software or Contract Material, including an electronic, photographic or handwritten copy or partial copy.
Adapt	To adapt the form or medium of the TD, Software or Contract Material. For example, from a manual to a video demonstration.
Modify	To modify the arrangement, content, configuration, performance or functionality of the TD, Software or Contract Material.

Disclose	To provide access to the TD, Software or Contract Material, including by revealing or permitting the viewing of it.
Transmit	To send to another person the TD, Software or Contract Material, including by unguided or guided electromagnetic energy or by post.
Communicate	To discuss, describe or announce the TD, Software or Contract Material.

Commercial TD and Commercial Software

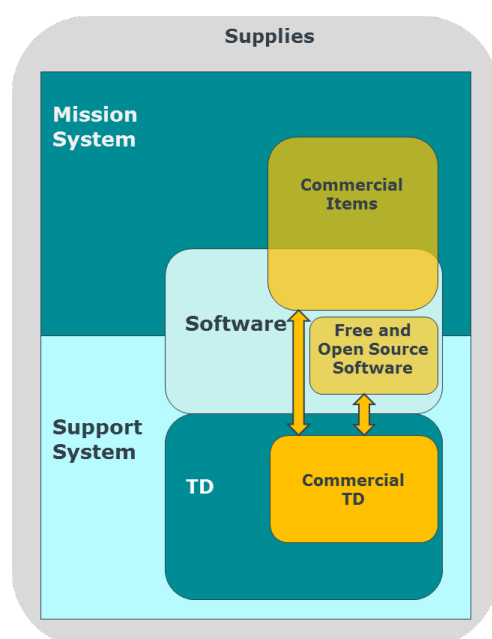
18. As noted above, the Contract includes provisions which apply to Commercial TD and Commercial Software. Commercial TD and Commercial Software are defined by reference to "Commercial Items".

A **Commercial Item** is an item that is able to be used for its intended purpose, without requiring any significant changes to be made to the item by the Contractor or a Subcontractor to use it for that purpose, and the item is available in the market on standard commercial terms.

19. Commercial Items are essentially "off the shelf" items (i.e. COTS products available to the general public or MOTS products commonly provided on an "as is" basis). Some examples of Commercial Items are contained in the table below.

COTS	Small scale generators Engines Commercial system or database software (e.g. Windows, Oracle)
MOTS	Ruggedized laptops Militarised commercial radios

20. These items do not need to be modified or only need minor modification or reconfiguration (e.g. complex enterprise resource planning software will often require a degree of configuration to reflect each user's unique business requirements).



Commercial Software is Software that is a Commercial Item, or any Software that is supplied under the standard commercial terms applicable to a Commercial Item.

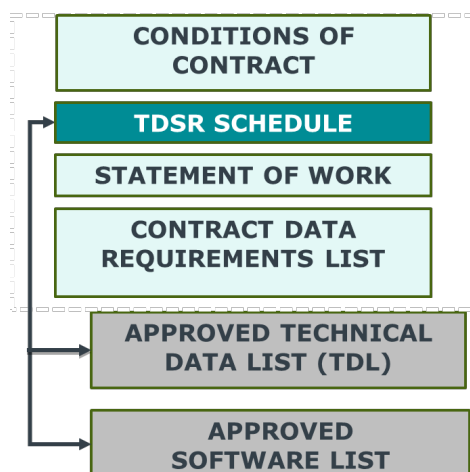
21. This could include, for example, a Microsoft Office product or firmware embedded in a piece of industrial test equipment. The definition of Commercial Software captures all Free and Open Source Software (being software distributed on a free to use basis without payment of a royalty or other fee).

Commercial TD is TD that is a Commercial Item, or that is supplied under standard commercial terms applicable to a Commercial Item or Commercial Software.

22. Commercial TD could include the operating manual for a microwave or a laptop, or a book of specialised diagrams or calibration guides for use in undertaking scientific measurements or engineering assessments.

Role and structure of the TDSR Schedule

23. The provisions relating to IP ownership and licensing for TD, Software and Contract Material are set out in the Conditions of Contract. These provisions can be modified by the parties through the TD and Software Rights (**TDSR**) Schedule (Attachment G to the Contract). The TDSR Schedule is able to identify additional restrictions which can override some of the Commonwealth's rights granted under the Conditions of Contract.



24. The TDSR Schedule is not an exhaustive list of all TD or Software to be provided under the Contract or a Subcontract. The Approved TD List (forming part of the Master TD Index) and the Approved Software List will list all relevant TD and Software. The TDSR Schedule will only list specific TD or Software where a restriction applies to the Commonwealth's rights under the Conditions of Contract.
25. Tenderers will be required to provide a draft TDSR Schedule as part of their tenders to enable the Commonwealth to understand the restrictions required by the tenderer in any resultant Contract. For a Contract involving the provision of “developmental” Supplies, the TDSR Schedule will need to be periodically updated as all relevant information may not be known at the time of contract signature. However, for all Contracts, it is important that the TDSR Schedule is regularly reviewed so it is kept up to date and contains an accurate and complete description of all restrictions on the Commonwealth's rights to Use and Sublicense TD, Software and Contract Material delivered under the Contract.

Chapter 4

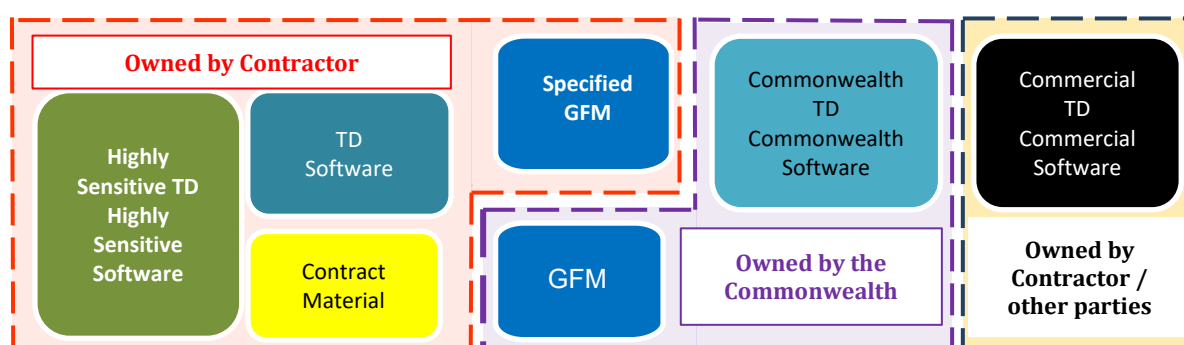
Ownership

Pre-existing IP

1. The Contract does not change the ownership of pre-existing IP (or IP created outside the Contract and the Subcontracts). Ownership of IP in TD and not created under the terms of the Contract is not affected by the Contract, although a Licence to such material is still required.

Contractor ownership of new IP

2. As noted in Chapter 3 paragraphs 5 - 7 above, the default position is that the Contractor (or its nominee) will own the IP in the TD, Software and Contract Material created under the Contract or a Subcontract, subject to the exceptions listed below.



3. This does not mean that the Contractor will own IP in material created by the Commonwealth such as internal Commonwealth research or assessments. This material is not created under the Contract unless there is an obligation on the Commonwealth to produce such material.

Commonwealth TD and Software

4. As noted in Chapter 3 paragraphs 5 - 7 above, the Commonwealth may, where there are compelling reasons to do so, elect to own (or elect its nominee to own – e.g. another Commonwealth Contractor) IP created under the Contract or Subcontract in specified items of TD or Software. In these cases, the relevant TD or Software would need to be categorised as Commonwealth TD or Commonwealth Software in the TDSR Schedule.
5. In most cases the IP in Commonwealth TD or Commonwealth Software will be IP developed under the Contract. However, if these items also contain pre-existing IP (or IP created outside the Contract), the Contract will not change the ownership of the IP. This IP will be covered by the Licence granted (or procured) by the Contractor in respect of all other TD or Software delivered under the Contract (see Chapter 5 below).

GFM

6. Any new IP created under the Contract or a Subcontract in respect of GFM will be generally be owned by the Commonwealth (or its nominee). This is because the Commonwealth or another Commonwealth Contractor is likely to own the pre-existing IP in the GFM and therefore should own any new IP that is derived from, supplements or improves the GFM. In addition, if the Commonwealth does not own the IP in the GFM, the Commonwealth may be obliged to assign ownership in any improvements or enhancements to the GFM back to the original IP owner.
7. However, the parties may agree that new IP created in respect of the GFM will be owned by the Contractor (rather than the Commonwealth) by specifying this in Attachment E to the Contract. This option might be appropriate where:

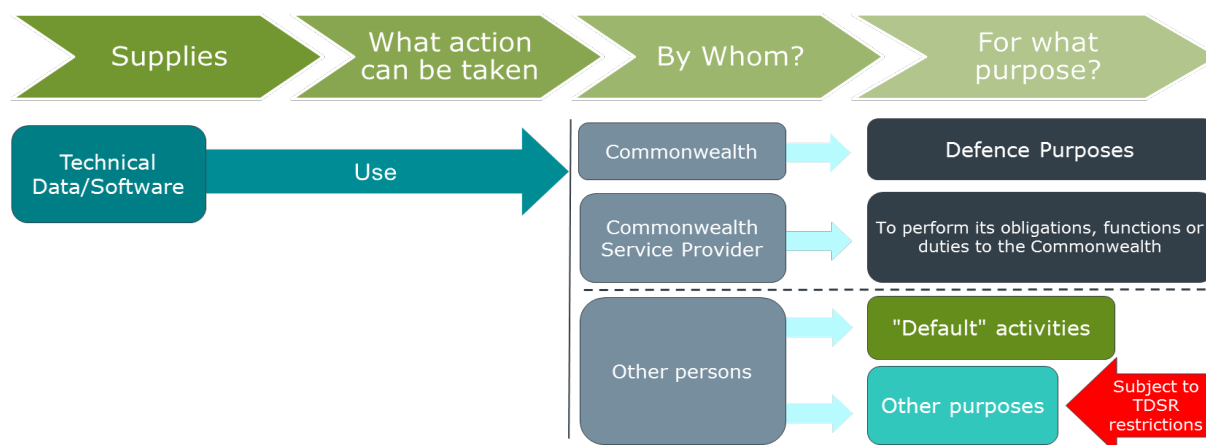
- a. the Contractor owns part of the IP in the GFM from an earlier contract; or
 - b. where the Contractor is in the best position to exploit or further develop the new IP.
8. If it is agreed that the Contractor will own any new IP in GFM, this IP will be licensed to the Commonwealth under the general Licence to be granted (or procured) by the Contractor in respect of TD or Software delivered under the Contract (see Chapter 5 below).

Chapter 5

TD and Software

Overview

1. As described at Chapter 3 paragraphs 1 -4 above, there are a number of categories of TD and Software under the Contract, namely:
 - a. Highly Sensitive TD and Highly Sensitive Software;
 - b. Commercial TD and Commercial Software;
 - c. Commonwealth TD and Commonwealth Software;
 - d. GFM; and
 - e. all other TD or Software that is delivered, or required to be delivered, under the Contract.
2. This Chapter 5 describes the licensing arrangements that apply to the last of the above mentioned categories of TD and Software. It is expected that the majority of TD and Software delivered under the Contract will be licensed to the Commonwealth on this basis.
3. The licensing arrangements applicable to the other above categories of TD and Software are dealt with in Chapters 6 – 9 of this Handbook.
4. The Contractor must grant the Licence itself or ensure the Licence is granted by the relevant owner of the IP. If the Contractor is unable to grant the Licence itself, it must procure the grant of that Licence from the relevant licensor (i.e. the Subcontractor or a previous supplier that owns the IP in the TD and Software). The following diagram sets out the structure of this licence.



Commonwealth right to Use the TD or Software

5. The Commonwealth has the right to Use the TD or Software for any Defence Purpose. This right is internal to the Commonwealth and therefore cannot be made subject to any additional restrictions by the Contractor under the TDSR Schedule.
6. This right ensures that the Commonwealth (through its employees and officials) is able to make use of the Supplies and undertake Defence activities without having to pay additional licence fees or obtain additional consents, provided the Use is for Defence Purposes. However, the Commonwealth is not able to Commercialise the TD and Software (see Chapter 11 paragraphs 2 - 4 below).

7. The Commonwealth's rights to sublicense this category of TD and Software are dealt with in clause 5.3.

Sublicensing to Commonwealth Service Providers

8. The Commonwealth has a right to grant a Sublicense in respect of the TD or Software to certain "above the line" contractors referred to as Commonwealth Service Providers.

A Commonwealth Service Provider is a person engaged to perform a function, or discharge a duty, of the Commonwealth, including a person engaged to provide:

- professional, administrative, contract management or project management services to the Commonwealth;
 - technical management or assurance services, including verification and validation, safety, certification, security or capability development.
9. Defence engages these "above the line" contractors to assist Defence to perform its functions or duties. Examples include individuals engaged to perform technical, program management, commercial or administrative roles within a project or System Program Office (**SPO**), as well as larger professional service providers, such as accountancy or engineering firms providing a range of "above the line" services to Defence to support the delivery or operation of multiple projects or business units.
10. Commonwealth Service Providers essentially "stand in the shoes" of the Commonwealth and may be required to perform a wide range of activities typically performed by Commonwealth employees and officials. For this reason, it is necessary that Commonwealth Service Providers have sufficient rights to perform the services for which they have been engaged and not be subject to further restrictions in the TDSR Schedule.
11. However, given that Commonwealth Service Providers will have access to a range of commercially sensitive or Confidential Information, the Contract protects the interests of the Contractor (and Subcontractors) in a number of ways, including by ensuring that Commonwealth Service Providers:
- a. enter into confidentiality deeds before receiving any Confidential Information;
 - b. are only able to Use the TD and Software to perform their obligations, functions, or duties.
12. The parties may also agree to exclude certain persons (such as direct competitors of the Contractor) from being Commonwealth Service Providers by listing those persons as 'Excluded Parties' in the TDSR Schedule. There is otherwise nothing in the Contract which prohibits the Commonwealth from engaging a direct competitor of the Contractor in an 'above-the-line' position.
13. Given the Commonwealth's reliance on Commonwealth Service Providers, the Commonwealth will only agree to an Excluded Party where there is a strong justification provided by the Contractor. In most cases, the Excluded Parties table in the TDSR Schedule will be blank.
14. If the Commonwealth agrees to a person being designated an Excluded Party, that person is only restricted from being a Commonwealth Service Provider, and only in relation to the Contract. The Commonwealth's other sublicensing rights (such as those set out at paragraph 16 below) are unaffected. For this reason, the listing of an Excluded Party is not a substitute for the listing of restrictions in other parts of the TDSR Schedule (the primary mechanism for protecting the Contractor's IP interests).
15. The relatively narrow concept of Excluded Parties is an agreed compromise between the Commonwealth and industry on the broad licensing rights the Commonwealth has in respect of Commonwealth Service Providers.

Sublicensing TD and Software to "any person"

16. The Commonwealth may grant a Sublicence to any person (including an Excluded Party) to Use the TD or Software **for certain "default" activities**. These activities are considered integral to the Commonwealth's ability to undertake a range of routine activities with respect to the Supplies provided under the Contract and achieve the required Capability and strategic objectives of the Contract. The "default" activities are:
 - a. installing or configuring the Supplies;
 - b. physically integrating the Supplies with other systems;
 - c. operating or maintaining the Supplies;
 - d. rectifying any Defect in the Supplies where the Contractor has failed to rectify the Defect;
 - e. undertaking training in relation to the Supplies;
 - f. removing or uninstalling the Supplies;
 - g. decommissioning or destroying the Supplies; and
 - h. enabling the person to respond to requests for tender for any of the above activities.
17. Given the fundamental importance of these "default" activities, the Commonwealth's right to grant a Sublicence in relation to these cannot be made subject to any further restrictions in the TDSR Schedule.
18. The Commonwealth can also grant a Sublicence to a person to Use an item of TD or Software for any other purpose, including to modify and upgrade the Supplies. However, the Contractor may require restrictions in relation to the right to grant Sublicences for these broader purposes that fall outside the list of default activities. For example, the Contractor may restrict the Commonwealth from granting a Sublicence to a third party to use an item of TD for the purpose of manufacturing the associated equipment or product to which the TD relates. Any such restrictions would be agreed by the parties and included in the TDSR Schedule.

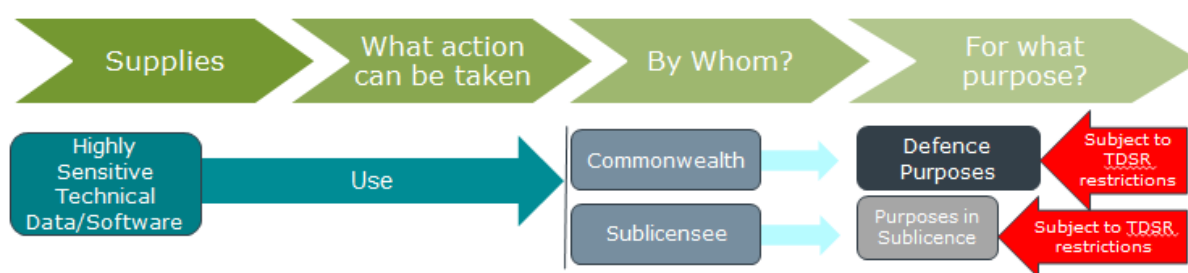
Chapter 6

Highly Sensitive TD and Software

Overview

1. As noted at Chapter 3 paragraphs 1 - 4 above, TD or Software may be categorised as Highly Sensitive TD or Highly Sensitive Software. The effect is that the Contractor may impose restrictions on the Commonwealth's right to Use and sublicense the TD or Software to other persons.
2. This category of TD and Software is only used in the ASDEFCON (Strategic Materiel) and ASDEFCON (Support) templates.

Licence Structure



Restrictions on rights to Use and Sublicence

3. As the baseline position, the Commonwealth has the right to:
 - a. Use the Highly Sensitive TD or Highly Sensitive Software for any Defence Purpose; and
 - b. grant a Sublicence to a person to Use the Highly Sensitive TD or Highly Sensitive Software.
4. However, recognising the highly valuable and sensitive nature of this category of TD and Software from the Contractor's perspective, the Commonwealth's rights in relation to Highly Sensitive TD or Software can be made subject to restrictions in the TDSR Schedule. This includes the Commonwealth's own rights to Use the TD or Software and, more importantly, the Commonwealth's right to grant a Sublicence to other persons. The parties may (in appropriate circumstances) agree to restrictions on the use of Highly Sensitive TD or Software even in the context of the "default" activities referred to in Chapter 5 paragraphs 16 - 18.
5. These restrictions may include, as appropriate for the relevant Highly Sensitive TD or Software:
 - a. a narrower purpose for which TD or Software may be Used (i.e. narrower than Defence Purposes);
 - b. preventing the Commonwealth from granting a sublicense to specific entities (or individuals); or
 - c. requiring the Commonwealth to provide the Contractor with details of disclosures.

What type of TD or Software is Highly Sensitive?

6. As noted above, the Contractor can impose restrictions on the Commonwealth's own Use of the Highly Sensitive TD or Software and the Commonwealth's right to grant a Sublicence, including in relation to the "default" activities.

7. In most Contracts only a very small amount of TD or Software will qualify as Highly Sensitive TD or Software. Much of this TD or Software is expected to relate to technologies that the Contractor (or a Related Body Corporate) has developed at its own (or a Related Body Corporate's) expense and is technology that is core to the Contractor's (or Group's) competitive edge.
8. The Commonwealth will not agree to TD or Software being included in this category without strong justification, which would need to be considered on a case by case basis. Relevant factors include:
 - a. whether the TD or Software was created under a contract with the Commonwealth or was otherwise funded by the Commonwealth; and
 - b. whether provision of the TD or Software to a third party would cause significant damage to the Contractor's (or Subcontractor's) commercial position in the market.

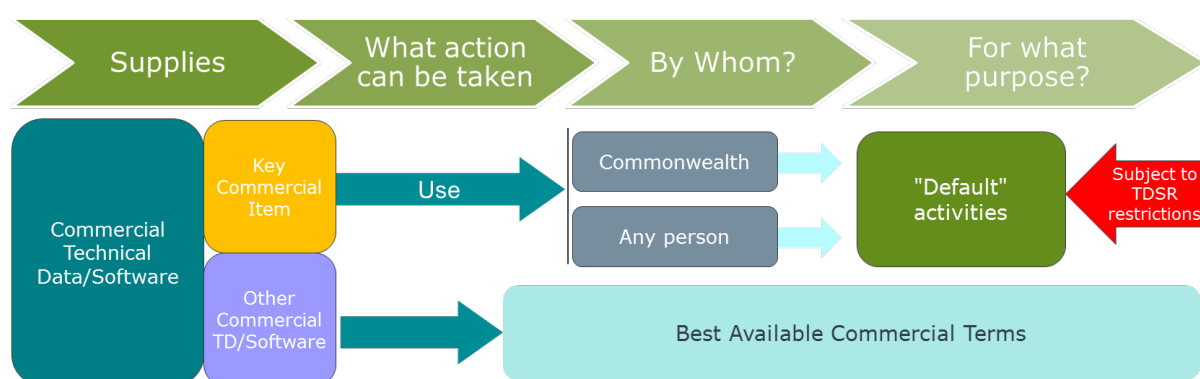
Chapter 7

Commercial TD and Software

Overview

- As noted at Chapter 3 paragraphs 1 - 4 above, Commercial TD and Software are associated with certain "off the shelf" Commercial Items. The Contract recognises that it is not feasible nor value for money for the Commonwealth to require the Contractor to obtain broad IP rights from suppliers of Commercial Items. The Contractor (and Subcontractors) will have limited (if any) commercial leverage to negotiate IP licences with these suppliers. As such, the obligations of the Contractor in relation to IP in the Commercial TD or Commercial Software are more limited than for other types of TD or Software.

Licence Structure



Licence on "best commercial terms"

- The IP provisions require the Contractor to obtain licences on the "best commercial terms" available to the Contractor for the majority of Commercial TD and Software provided under the Contract. The Contractor should review the commercial licence terms for any Commercial Item to be supplied under a Contract to ensure they are the best terms available to the Contractor from the market. The Contractor also needs to ensure that the terms relating to Commercial TD and Software will not impact on the capability (i.e. by preventing the capability from being used and supported as intended). The Contractor is not required to specify these best available commercial terms in the TDSR Schedule.

Key Commercial Items

- The IP provisions recognise that for some Commercial Items (known as "Key Commercial Items") an IP licence on the "best commercial terms" may not be sufficient to enable the Commonwealth to use and support the Capability. As such, for "Key Commercial Items" a different licence regime applies.
- The Key Commercial Item concept is only used in the ASDEFCON (Strategic Materiel), ASDEFCON (Complex Materiel Volume 2) ASDEFCON (Support) templates.

A Key Commercial Item includes a Commercial Item where the IP in the related TD or Software is owned by the Contractor, its Related Bodies Corporate or an Approved Subcontractor. There may be other Commercial Items to be delivered under the Contract that the Commonwealth requires to be categorised as Key Commercial Items.

- The Contractor and its Related Bodies Corporate and Approved Subcontractors are in a better position to provide the Commonwealth with a broader set of rights to the IP in Commercial TD

or Commercial Software than the standard commercial terms offered by other commercial suppliers.

6. The Contract outlines a "baseline" for licences relating to Key Commercial Items, being that the Commonwealth has the right to use the relevant TD or Software for the "default" purposes referred to in Chapter 5 paragraphs 16 - 18 above. However, the parties can agree to further restrictions on these "default rights" by including such restrictions in the TDSR Schedule.
7. The Contractor is also required to ensure that there are no fees or royalties payable for licences of Commercial TD and Commercial Software (without the Commonwealth's written consent), in addition to the agreed Contract Price. For example, any ongoing "per annum" licence fee for the use of Commercial Software that is not factored into the Contract Price must be agreed by the Commonwealth.

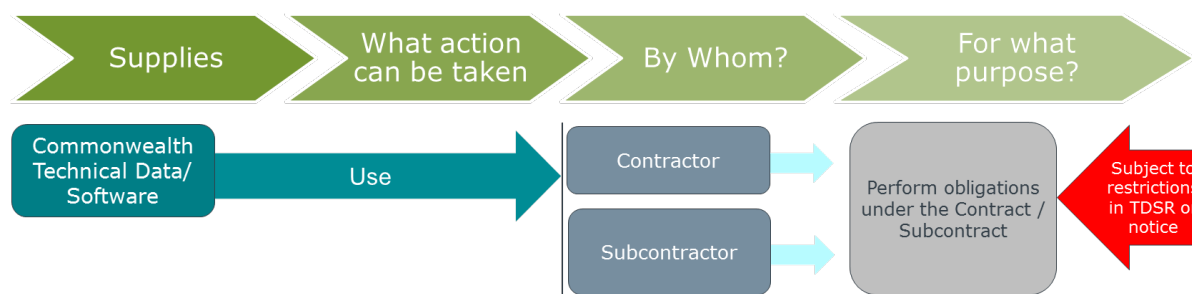
Chapter 8

Commonwealth TD and Software

Overview

1. As noted at Chapter 3 paragraphs 17 - 21 above, the Commonwealth may require ownership of IP in certain TD or Software, in which case that TD or Software will be categorised as Commonwealth TD and Software in the TDSR Schedule. Commonwealth TD and Commonwealth Software includes any developments, modifications or improvements made to the Commonwealth TD or Commonwealth Software.
2. In order to enable the Contractor (and its Subcontractors) to use the Commonwealth TD or Software, the IP provisions include a licence granted by the Commonwealth in favour of the Contractor.
3. This category of TD or Software is only used in the ASDEFCON (Strategic Materiel), ASDEFCON (Complex Materiel Volume 2) ASDEFCON (Support) templates.

Licence Structure



Licence to Commonwealth TD and Commonwealth Software

4. The Commonwealth grants a limited royalty-free licence of Commonwealth TD and Software to the Contractor. The limited licence enables the Contractor to Use the Commonwealth TD and Commonwealth Software to perform its obligations under the Contract. For example, the Contractor may create training materials to be owned by the Commonwealth as Commonwealth TD, but the Contractor is also required to use those materials to provide a range of "train the trainer" courses.
5. The licence also permits the Contractor to sublicense the Commonwealth TD and Commonwealth Software to a Subcontractor to perform the Subcontract. For example, in the training situation described above, the Contractor may have created the training materials and engaged the Subcontractor to provide part of the training.

Restrictions on Commonwealth TD and Commonwealth Software

6. The licence of Commonwealth TD and Commonwealth Software is subject to any restrictions imposed by the Commonwealth. These restrictions may be included in the TDSR Schedule or may be notified to the Contractor by the Commonwealth. For example, if the Commonwealth has determined that it should own IP in certain Commonwealth TD or Commonwealth Software for national security reasons, the Commonwealth may include a restriction in the TDSR Schedule that prevents the Contractor from sublicensing the Commonwealth TD or Commonwealth Software to a particular foreign entity.

Identifying Commonwealth TD and Commonwealth Software

7. While it is expected that all (or at least most) IP in Commonwealth TD and Software will be created under the Contract, Commonwealth TD and Software may include some pre-existing IP or IP created outside the Contract. If so, the Contractor is required to provide a Licence of this IP on the terms set out in Chapter 5, above.
8. If any Commonwealth TD or Commonwealth Software contains pre-existing IP (or non-contract IP), the Commonwealth will generally not agree to restrictions being included in the TDSR Schedule. This is because such restrictions would impact on the use of the Commonwealth TD and Software and potentially undermine the national security or other reason that was the basis for seeking Commonwealth ownership of the IP. However, if pre-existing material (or non-contract IP) included in Commonwealth TD or Software is properly categorised as Highly Sensitive TD or Software, the parties would need to negotiate and agree changes to deal with this situation.

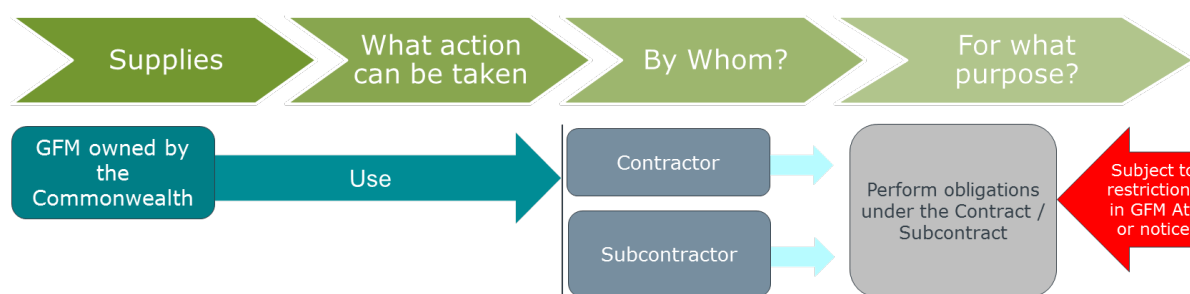
Chapter 9

GFM Licence

Overview

1. The Commonwealth often provides TD and Software to assist the Contractor or Subcontractors to perform obligations under the Contract or a Subcontract. This TD forms part of Government Furnished Data (GFD) or Government Furnished Information (GFI), and Software is provided as part of Government Furnished Equipment (GFE). Collectively, these are known as Government Furnished Material (GFM).
2. The TD or Software provided as GFM may take various forms and be provided directly by the Commonwealth under the Contract (e.g. login guides for remote access) or by other Commonwealth Contractors pursuant to their contracts with the Commonwealth (e.g. maintenance manuals for equipment manufactured by the other Commonwealth Contractor).

Licence Structure



Licence to GFM

3. The Commonwealth grants (or must procure the grant of) a limited licence to the Contractor for IP in GFM sufficient for the Contractor to perform the Contract. The limited licence enables Contractor to Use the TD and Software in the GFM to perform its obligations under the Contract. For example, the Contractor may be provided with an operator's manual produced by an original equipment manufacturer so the Contractor can design a training course in using the equipment.

Restrictions on GFM

4. The licence of GFM is subject to any restrictions imposed by the Commonwealth as set out in Attachment E to the Contract or as notified to the Contractor in writing. This may include a "pass through" of restrictions that the Commonwealth is subject to under its arrangements with the owner of IP in the GFM. For example, the Commonwealth may have agreed with the IP owner that the Commonwealth (or its contractors) will not give the material to certain parties (e.g. prohibited competitors) or will not use the TD or Software in the GFM to manufacture an item of GFE.

Sublicensing of IP in GFM

5. Subject to any restrictions in the licence granted by the Commonwealth, the Contractor may sublicense the IP in GFM to enable a Subcontractor to perform its obligations under a Subcontract. The sublicense will need to comply with sublicensing requirements equivalent to those which govern the Commonwealth's ability to sublicense (see Chapter 11 paragraph 1 below).

Export Approvals

6. The Commonwealth is responsible for ensuring that any Export Approvals that apply to an item of GFM are listed in the Attachment E to the Contract. This ensures that both the Commonwealth and the Contractor are actively considering the Export Approvals and all parties are aware of relevant requirements and restrictions, such as under ITARs or under the *Customs Act 1901 (Cth)* or *Defence Trade Controls Act 2012 (Cth)*, when dealing with the provision of GFM to the Contractor under the Contract.

Chapter 10

Contract Material

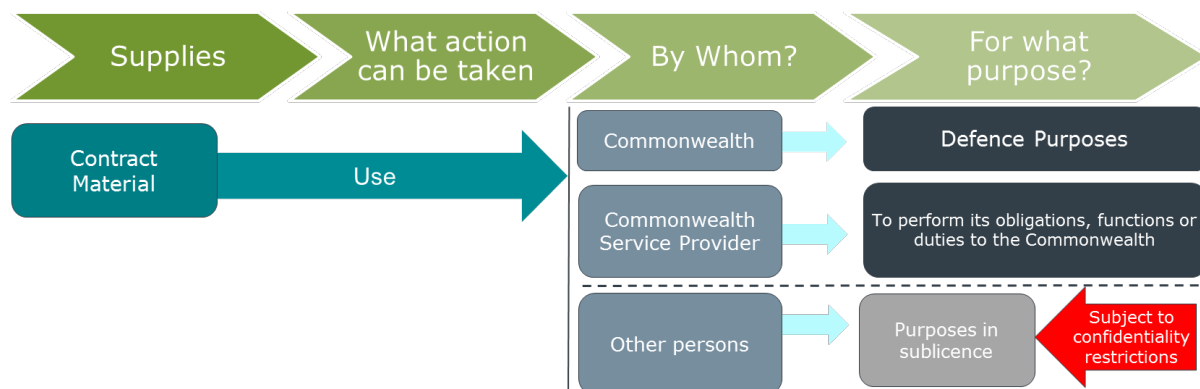
Overview

1. The Contract includes a category of Contract Material that is separately licensed from the TD and Software. It is expected that the majority of the IP in Contract Material delivered under the Contract will be owned by the Contractor.

Contract Material means information, other than TD or Software, reduced to a material form (whether stored electronically or otherwise) that is delivered or required to be delivered to the Commonwealth under the Contract (see Glossary).

2. Contract Material is essentially any information reduced to material form that is required to be delivered under the Contract that is not categorised as TD or Software. It includes a range of non-technical material (e.g. contract administration material, price and costing data, performance reporting, contract process guidance, transactional or management reporting, business rules or instructions that are required to be provided by the Contractor to the Commonwealth). If a document includes elements of technical and non-technical material, it is to be treated as an item of TD.
3. The Contractor must grant the Licence itself or ensure the Licence is granted by the relevant owner of the IP in Contract Material. If the Contractor is unable to grant the Licence itself, it must procure the grant of that Licence from the relevant licensor (i.e. the Subcontractor or a previous supplier that owns the IP in the Contract Material). The following diagram sets out the structure of this licence.

Licence Structure



Commonwealth's right to Use the Contract Material

4. The Commonwealth (through its own employees and officials) has the right to Use any Contract Material for any Defence Purpose. This ensures that the Commonwealth will not have to seek additional consents to use the Contract Material for internal Defence purposes.

Sublicensing to Commonwealth Service Providers

5. The Commonwealth may grant a Sublicence of Contract Material to entities engaged as Commonwealth Service Providers. A Commonwealth Service Provider will be able to Use the Contract Material to perform its obligations, functions or duties owed to the Commonwealth in its capacity as a Commonwealth Service Provider. However, any Confidential Information in Contract Material is subject to the same protective measures as are described in Chapter 5 paragraphs 8 - 12.

Sublicensing Contract Material to any other person

6. The Commonwealth may grant a Sublicence to any other person to Use the Contract Material for any purpose. However, this is subject to the application of the Confidential Information clauses. Any Confidential Information in Contract Material (e.g. labour rates, unit prices and other sensitive business information) cannot be disclosed except in limited circumstances (e.g. with Contractor consent).

Restrictions on Contract Material

7. The Contractor cannot impose restrictions on the Licence of IP in Contract Material under the TDSR Schedule. However, as noted in paragraph 5 above, the Commonwealth's ability to disclose Contract Material may be limited by the Confidential Information provisions of the Contract.

Chapter 11

Other ASDEFCON Provisions

Sublicensing Conditions

- The Commonwealth's right to grant a Sublicence of TD, Software or Contract Material is subject to some additional conditions as described in the table below:

CONDITION	DESCRIPTION
Sublicence must have at least the same restrictions as apply to the Commonwealth	Any restrictions applicable to the Commonwealth must, at a minimum, be "flowed" through to any Sublicensee. For example, if the Commonwealth is unable to disclose Highly Sensitive TD to a specific competitor, any Sublicence granted by the Commonwealth must also restrict disclosure to that specific competitor. To ensure no broader rights than are necessary are granted to Sublicensees, the Commonwealth will generally impose additional restrictions on Sublicensees.
Sublicence rights to be limited to what is reasonably necessary	The Commonwealth should not grant sublicence rights that are not actually required. If the Commonwealth needs to grant a Sublicence to another Commonwealth Contractor, it must limit the scope to the rights reasonably necessary to enable the Commonwealth Contractor to efficiently perform its obligations to the Commonwealth.
Sublicence must expire when no longer required	The Commonwealth should not grant perpetual Sublicences. A Sublicence to a Commonwealth Contractor should be limited to the term of the relevant Contract or should expire when no further obligations are required to be performed by the Commonwealth Contractor.
Further sublicences shall be subject to these conditions	If the Commonwealth grants a Sublicence, any further sublicence granted by the relevant Sublicensee must be similarly constrained.

No Commercialisation

- The Commonwealth (and any sublicensee) is not permitted to Commercialise the IP in any TD, Software or Contract Material licensed under the Contract.

Commercialise means to exploit IP in TD, Contract Material or Software to earn royalties or profit.

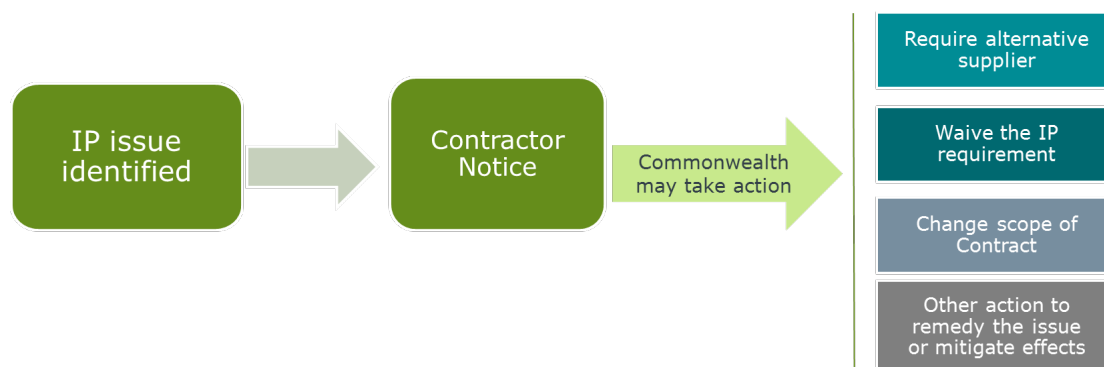
- This restriction prevents the Commonwealth and its Sublicensees from using TD, Software or Contract Material to obtain a profit or some other financial return or monetary advantage. For example, the Commonwealth cannot grant a sublicence of TD to a third party to enable the third party to compete in an international commercial or defence market (not involving the Commonwealth) against the IP owner.
- However, this restriction does not prevent a Sublicence being granted to enable the Commonwealth to obtain supplies from another person for a Defence Purpose consistent with the Commonwealth's rights granted under the Contract. For example, it is not Commercialisation for the Commonwealth to grant a Sublicence of TD or Software obtained under an acquisition contract, to a contractor to support an upgrade to the relevant Capability, or to obtain sustainment services.

Approved Subcontractor IP Deeds

5. The Contractor is required to obtain and provide to the Commonwealth an IP Deed from certain Approved Subcontractors. An IP Deed involves a direct Licence from the Approved Subcontractor to the Commonwealth. The Commonwealth can rely on the Licences granted to it under the IP Deed where the Licences granted to the Commonwealth under the Contract are unenforceable or invalid for any reason (including where the Contractor has suffered an Insolvency Event). However, the provision of an IP Deed does not replace the Contractor's obligations under the Contract to obtain Licences of Subcontractor IP and grant a sublicense to the Commonwealth.
6. The parties will need to agree which Approved Subcontractors must provide an IP Deed. In general, IP Deeds should not be required for Subcontractors providing TD or Software for routine or low value Supplies. Tenderers will identify any proposed Subcontractors that will create or own IP in significant items of TD or Software. The Approved Subcontractors that must provide IP Deeds should be agreed in contract negotiations and reflected in the Contract. Where subcontractor details are not known at contract signature, this list will need to be updated at appropriate intervals over the life of the Contract.

Failure to obtain IP rights

7. The Contract recognises that it may be difficult for Contractors to obtain IP rights for TD, Software and Contract Material. An inability or failure to obtain IP rights in accordance with the Contract is a breach. There are a range of rights that the Commonwealth may have in this situation.
8. The Contract also includes a process to assist Contractors to resolve issues in obtaining IP rights (e.g. from Subcontractors). The Contractor must notify the Commonwealth of any such issues (e.g. where the Contractor is unable to obtain an IP Deed required under the Contract).



9. If the Contractor gives notice (or if the Commonwealth considers that an IP issue has arisen), the Commonwealth may take steps to resolve the IP issue in the best overall interests of the Capability. For example, if the Contractor is having difficulty securing IP rights from a proposed Subcontractor, one solution might be for the Contractor use alternative goods or services or modify the design so that the proposed Subcontractor is not required. There may be ways to mitigate the impact of the failure to obtain the required IP rights.
10. This process does not limit the Commonwealth's other rights under the Contract or the Contractor's obligations under the Contract, unless the Commonwealth agrees to waive or modify a requirement of the Contract as a result of the IP issue. This process is designed to provide the parties with a pragmatic means for resolving unanticipated IP issues to avoid the Commonwealth having to resort to other remedies under the Contract in the interests of achieving the best overall outcomes for the Commonwealth.

Delivery obligations

11. As noted at Chapter 3 paragraphs 8 - 9, the IP rights are linked to TD, Software and Contract Material delivered under the Contract. There are a number of parts of the Contract which set out items to be delivered, including the following:
 - a. **Statement of Work (and its Annexes):** The Statement of Work (**SOW**) includes the process for delivery and the development of, and updates to, TD and Software in the form of various technical plans, reports, design documentation, assessments, lists, descriptions and other documents;
 - b. **Contract Data Requirements List (CDRL):** This brings **together** the majority of the Contractor's TD, Software and Contract Material delivery obligations. It describes the documents to be delivered, the frequency and form of delivery and the Commonwealth's obligations to review or Approve; and
 - c. **TD List and Software List:** These are **lists** developed and maintained by the Contractor in accordance with the CDRL and the SOW.
12. In most cases the Commonwealth will be the recipient of TD or Software delivered under a Contract. However, in some cases, the Commonwealth may not be the recipient of that material (e.g. where maintenance manuals are to be delivered to a sustainment contractor rather than the Commonwealth). The Commonwealth can nevertheless request a copy of any TD included on the TD and Software lists maintained by the Contractor unless there are specific restrictions agreed in the TDSR Schedule preventing re-delivery of the item for specific reasons.
13. If the Contract is terminated for default, the Contractor is required to deliver all TD and Software in its current state of development. This does not require that the Contractor meet all of its future obligations to deliver TD and Software that would have applied under the Contract had it not been terminated. It only applies to any TD and Software that has been developed at the time of termination. This ensures the Commonwealth gets the benefit of all TD and Software (including partly completed TD and Software) that it has funded under a Contract.

Electronic Delivery of TD, Software or Contract Material

14. The Contract recognises the increased use of electronic means for the transmission of information. Electronic delivery of TD, Software and Contract Material may occur in the following circumstances:
 - a. **Accessible on Contractor Systems:** The parties may agree that an item of TD, Software or Contract Material will be delivered by making that item accessible for use by the Commonwealth on an information system of the Contractor. This allows for easy updating, correction and distribution by the Contractor to its staff and subcontractors; and
 - b. **Electronic communication or transfer:** The Contract also contemplates the delivery of an item of TD, Software or Contract Material either through electronic communication (e.g. by email) or by electronic transfer into an information system nominated by the Commonwealth (e.g. uploaded into Objective).

Markings

15. As part of the Contractor's responsibility for managing IP, it will apply labels, writing or other markings to TD, Software or Contract Material. For example, a drawing may be marked with "Copyright of XYZ Pty Ltd" or "No copying without permission of XYZ Pty Ltd". The Contractor is required to ensure that any markings are accurate and properly reflect the rights of all relevant parties.

16. While such markings are important in assisting the Contractor in managing IP rights associated with TD, Software or Contract Material, these markings are not determinative of the Commonwealth's rights to use the relevant item.

Patents, Registrable Designs and Circuit Layouts

17. As noted at Chapter 1 paragraphs 6 - 7 above, the key IP that is relevant to Defence contracts is Copyright in TD, Software and Contract Material. However, for completeness, the Contract includes provisions relating to Patents, Registrable Designs or Circuit Layouts to ensure the Commonwealth obtains all relevant IP consents and authorisations in relation to the Supplies.
18. The Contractor is required to provide a warranty and to ensure that the Commonwealth is granted a licence to any Patent, Registrable Design or Circuit Layout that is necessary to use or support the Supplies for the purposes provided for in the Contract and to include any restrictions on that licence in the TDSR Schedule.

Escrow

19. There can sometimes be highly sensitive TD or Software that a Contractor (or a Subcontractor) is not willing to deliver to the Commonwealth (e.g. source code). The Commonwealth may nevertheless need to access the TD or Software in certain circumstances (e.g. where the Contractor or Subcontractor has become insolvent or is no longer carrying on business). In these cases, the relevant TD or Software can be placed into "escrow". This means it is put in the custody of an independent third party (an "Escrow Agent") who may release it to the Commonwealth if, and only if, defined "release events" occur.
20. The Contract includes optional clauses for dealing with an escrow situation. There needs to be an Escrow Agreement setting out the escrow arrangements and the Escrow Agent must meet certain requirements (for example that the escrow occurs in Australia).
21. A key issue with escrow arrangements is that the TD or Software held by the Escrow Agent can become redundant and superseded. It is also important to ensure that all security requirements are met where the TD or Software to be placed in escrow is security classified material. Accordingly, the Statement of Work contains provisions requiring the TD or Software held by the Escrow Agent to be updated.
22. The escrow clauses are only included in the ASDEFCON (Strategic Materiel) template. If escrow arrangements are required in procurements using other ASDEFCON templates, the ASDEFCON (Strategic Materiel) template clauses can be used, in conjunction with the relevant Strategic Materiel SOW clauses required to support those arrangements.

Export Approvals

23. The Contract expressly recognises that the IP regime does not interfere with the obligations of either party to comply with the terms of a binding export approval. The parties will need to comply with both the IP obligations and any requirements or restrictions relating to export approvals. That is, despite any rights under the Contract to sublicense TD or Software to another person, all relevant export approvals must be in place before any export controlled material can be transferred to the sublicensee.

Chapter 12

Confidential Information

Protection of Confidential Information

1. The Contract imposes confidentiality obligations on both parties. These obligations apply to any Confidential Information included in the TD, Software and Contract Material delivered under the Contract. For example, TD may contain the trade secrets of the Contractor or include information that is commercially sensitive from a competition perspective.
2. The Confidential Information provisions set out the primary requirements for managing Confidential Information under the Contract address the interaction of those clauses with the IP regime.

Interaction with IP regime

3. In relation to TD and Software, the Contract recognises that the parties have negotiated and agreed detailed IP provisions setting out the rights of the parties to sublicense the material to third parties. Therefore, the confidentiality provisions should not further restrict the Commonwealth's ability to provide TD and Software to third parties in accordance with the agreed licence rights. The Contractor (and Subcontractors) are able to protect their interests under the IP provisions and should not be using the confidentiality regime to undermine the utility of the Commonwealth's IP rights agreed between the parties.
4. Accordingly, where the Contractor has granted the Commonwealth a right to use and sublicense TD or Software, the Commonwealth should be able to disclose any Confidential Information of the Contractor in that TD or Software if:
 - a. the disclosure is permitted by the terms of licence granted to the Commonwealth; and
 - b. the party has complied with any other confidentiality requirements (e.g. confidentiality deeds poll have been obtained).
5. The position is different in relation to Contract Material. In general, the Commonwealth must obtain the Contractor's consent to the disclosure of Confidential Information in Contract Material (noting that the IP provisions do not allow Contractors to place restrictions on the rights granted in relation to Contract Material). However, under the Contract, the Commonwealth is able to disclose Confidential Information in Contract Material to other persons in their capacity as a Commonwealth Service Provider (provided that confidentiality deeds poll have been obtained and the person is not excluded under the TDSR Schedule). For all other third parties, the Commonwealth can generally only disclose the Confidential Information in Contract Material if the Commonwealth has obtained the Contractor's consent for the disclosure.
6. The limited circumstances in which the Commonwealth can disclose Confidential Information in Contract Material to other persons that are not Commonwealth Service Providers are described in Chapter 12 paragraphs 7 – 8, below.

Other permitted disclosures

7. The Contract allows for the disclosure of Confidential Information of a party without that party's consent in certain limited circumstances, including:
 - a. as required or authorised by law;
 - b. as necessary for the conduct of any legal proceedings arising in connection with the Contract;

- c. where the Commonwealth is the disclosing entity, to a Minister or Parliament in accordance with statutory or portfolio duties or functions, or for public accountability reasons; or
 - d. to a legal adviser, insurer, financier, auditor or accountant;
 - e. where the Contractor is the disclosing entity, to a Related Body Corporate for internal management purposes; and
 - f. to personnel of the parties (and Subcontractors in the case of the Contractor) who need to know the information to perform their duties and functions.
8. The IP provisions specifically recognise these permitted disclosures under the Contract and allow a party to sublicense the relevant IP for purposes consistent with these disclosures.

Chapter 13

ASDEFCON Support

Introduction

1. This Chapter deals specifically with the ASDEFCON (Support) V4.0 template. All clause references are to clauses in that template.
2. The guidance in the preceding chapters is focused on the ASDEFCON (Strategic Materiel) template, used for complex acquisitions. That guidance remains applicable to the ASDEFCON (Support) template, used for sustainment. However, some aspects of the Support template warrant separate discussion.
3. TD and Software are created and used in different ways in the sustainment environment. For example, TD that was created in the acquisition phase may need to be shared with sustainment Contractors, which greatly increases the amount of TD being provided by the Commonwealth to the Contractor. The key differences between the treatment of TD and Software in the sustainment and acquisition contexts are as follows:

ACQUISITION CONTEXT	SUSTAINMENT CONTEXT
TD created by the Contractor is likely to relate to design/development of materiel.	TD created by Contractor is likely to relate to repair and maintenance records. TD may include some design/development information, but this may be limited to product improvements/adjustments.
TD developed in an acquisition context is likely to have high commercial value	Maintenance records created by sustainment contractor are not likely to be valuable to contractor, but are valuable to Defence.
GFM is usually limited to a small number of items that can be obtained more easily by the Commonwealth than by the Contractor or that the Commonwealth requires the Contractor to use in the Supplies.	GFM is significant including the TD necessary to sustain the Products Being Supported.
Products are delivered under the Contract as supplies.	Products are made available by the Commonwealth to the Contractor for repair/maintenance as Products Being Supported. The Contractor will generally only provide products such as spares and replacement parts.

4. As the Commonwealth provides the Contractor with access to the platforms or systems to be sustained (i.e. Products Being Supported) and in some cases, the means by which to sustain those Products (i.e. GFM), the Commonwealth will usually be a substantial provider of IP under a sustainment contract. The IP provided by the Commonwealth may be in:
 - a. the GFM being used by the Contractor (e.g. original equipment manufacturer (OEM) maintenance manuals); or
 - b. the Products Being Supported themselves (e.g. Software or publications being maintained by the Contractor).

5. In addition, IP may be created or used in circumstances that the parties did not anticipate at the time the sustainment contract was executed. For example, if corrective maintenance requires specialised services or deliverables, then new IP could be developed under a survey & quote (S&Q) order for those specialised maintenance services.

Key Sustainment Differences

6. Key differences between the Support template and the Strategic Materiel template are:

	Strategic Material	Support
Focus of IP Rights	The Contractor's primary task is to deliver the Supplies. As such, the focus of IP rights is on the TD and Software relating to the Supplies .	<ul style="list-style-type: none"> The Contractor's primary task is to provide the Services which includes some Deliverables. Therefore, the focus of IP rights is on the TD and Software relating to the Services and the Deliverables. The reference to Deliverables is included to ensure that the Commonwealth can sublicense the IP in the Deliverables to other Commonwealth Contractors for the specified purposes. For example, the Deliverables may be a set of publications produced by the Contractor that describe the Products Being Supported. The Commonwealth may require a future Commonwealth Contractor to use or maintain those publications as a Product Being Supported under a different sustainment contract and will need the IP rights for that purpose.
Products Being Supported	While the Commonwealth may provide the Contractor with GFM, most items of TD and Software are provided by the Contractor to the Commonwealth as part of the Supplies.	<ul style="list-style-type: none"> The Commonwealth provides the Contractor with access to the materiel items that require support, being the Products Being Supported. Products Being Supported are similar to GFM, but have a different purpose (Products Being Supported are provided so they can be maintained, whereas GFM is provided to assist the Contractor to perform the Contract). Therefore, the concepts of Products Being Supported and GFM need separate identification and treatment. Similar to GFM, the default position is that the Commonwealth will retain ownership of any new IP in the Products Being Supported. This ensures that any TD delivered under the Contract in relation to a Product Being Supported can be used in the future by other Commonwealth Contractors for the purpose of working on the Product Being Supported.
Software List	The Contractor is required to develop a Software List to track and manage Software to be developed or acquired under the Contract.	<ul style="list-style-type: none"> Contractor will generally not be required to procure and deliver Software as a part of providing the Services. Consequently, the Support template does not include a Software List. If the Contractor is required to develop or procure Software or related services (e.g. Software Support Services or Systems Administration Services, etc.) drafters should seek legal and contracting advice to ensure that the Contract properly manages that procurement and the Commonwealth receives the appropriate licences to the Software.

GFM Attachments

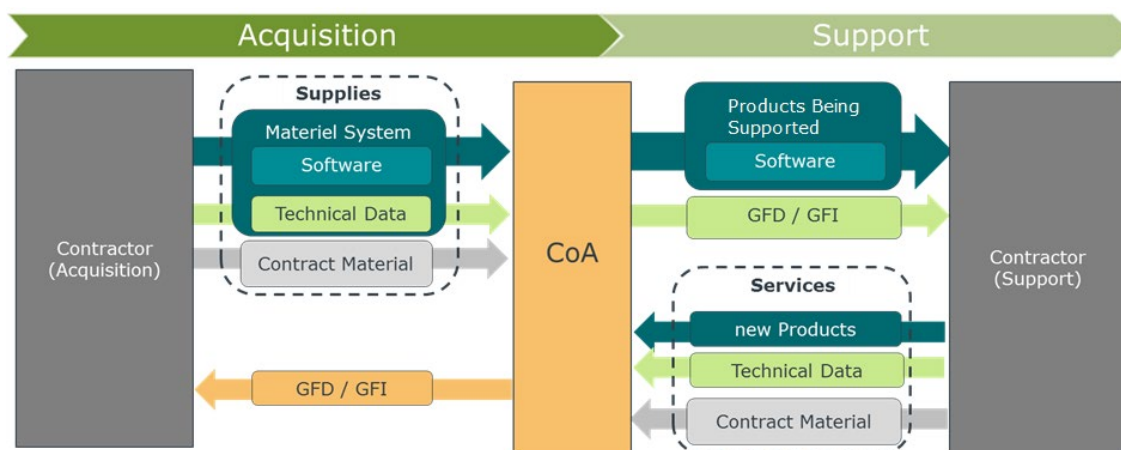
- Attachment E – GFM Schedule:** This Attachment contains restrictions on the Contractor's use of TD or Software comprised in GFM. These restrictions are substantially similar to those in the ASDEFCON (Strategic Materiel) template.

Products Being Supported - Attachment S

- The Contractor needs to be informed of any restrictions that apply to the use of IP in the Products Being Supported because the Contractor may need to exercise that IP in the course of performing maintenance. For example, the Contractor may be required to test Software included in a Product Being Supported or update publications that are part of the Products Being Supported.
- Therefore the ASDEFCON (Support) template includes **Attachment S – Products Being Supported Restrictions Schedule** which sets out any restrictions that apply to the Contractor's use of IP in the Products Being Supported. It only identifies Products Being Supported which have IP restrictions of which the Contractor needs to be advised. It does not contain a complete list of all Products Being Supported (the list of Products Being Supported is included in Annex A to the SOW).

Restrictions on Products Being Supported and GFM Licences

- As noted above, the Commonwealth may be a major provider of IP to a sustainment contractor, whether in GFM or in the Products Being Supported, to enable the provision of the Services. In many cases, the Commonwealth will itself be using the TD and Software under a licence from the acquisition contract for the GFM or Product. The Commonwealth will therefore be passing on rights to use the TD and Software to the sustainment contractor via a sublicense authorised by the relevant acquisition contract.



- There is a risk that the Commonwealth will inadvertently allow a sustainment contractor to infringe the IP of the original provider of the GFM or Product. This may arise if the Commonwealth fails to impose licensing restrictions on the sustainment contractor in accordance with the terms of the acquisition contract. If the Commonwealth allows an item of TD or Software to be used in a manner that breaches a third party's IP rights, the Commonwealth could incur liability to that third party for infringement.
- Drafters should therefore consult relevant project or engineering staff prior to developing Attachments E (GFM Schedule) and S (Products Being Supported Restrictions Schedule) to identify the likely GFM and Products Being Supported being provided by the Commonwealth and the contracts under which those items were acquired. The acquisition contracts (and in particular the acquisition TDSR Schedule) should be used to identify any restrictions on the Commonwealth's rights to further sublicense that material in a sustainment context.

13. The Commonwealth also needs to ensure that any general sublicensing rules in the acquisition contract are complied with. For example, the ASDEFCON (Strategic Materiel) template includes a Commonwealth Sublicensing framework at clause 5.9 which imposes obligations on how the Commonwealth may sublicense the acquisition TD under other contracts. Therefore, any acquisition TD, Software or Contract Material delivered to the Commonwealth (e.g. TD related to the Support System) that is licensed to a sustainment contractor, will need to be licensed in accordance with the requirements of clause 5.9 of the acquisition contract.
14. For sustainment procurements using the ASDEFCON (Support) (V4.0) template or above, the relevant GFM and Products Being Supported licensing clauses (at clause 5.6.3) have been specifically drafted to align with the sublicensing requirements in the ASDEFCON (Strategic Materiel) template (clause 5.9). For other contract arrangements, drafters should ensure that any sublicensing restrictions arising from related acquisition contracts are included in the TD and Software restrictions imposed on the sustainment contractor for the use of GFM or a Product Being Supported.

Commercial Licences for Maintenance

15. In the sustainment context, if the Contractor procures new Commercial Software, there are likely to be existing Commercial Software licences to be taken into account. Ideally, the Contractor would obtain a licence for the new items on terms which are at least as favourable as the terms that apply to existing items. However, clause 5.4 provides that, if the Commercial Item is not a Key Commercial Item, the Contractor's only obligation is to obtain the best terms commercially available, which might be narrower than terms for existing items.
16. When using the ASDEFCON (Support) template for contracts with a substantial ICT or Software maintenance aspect, drafters should consider whether:
 - a. if the Contractor will be procuring the Software, the general rights to Use Commercial TD and Commercial Software set out in clause 5.4.3 are sufficiently broad, as compared with the existing Software licences held by the Commonwealth; or
 - b. if the Commonwealth will be procuring the Software, the existing or new rights permit the maintenance of the Software to be undertaken by the Contractor.²
17. In addition, if the Commonwealth will be contracting directly with the OEM for the support of existing Commercial Software, drafters should consider whether to exclude Software provided by the OEM from the definition of a Commercial Item, even though that item would be a Key Commercial Item. This change results in the general TD and Software licensing rights in clause 5.3 applying to the Software provided by the OEM. The licence regime under clause 5.3 is a stronger position for the Commonwealth than the regime in clause 5.4, because the licence regime under clause 5.3 has been specifically drafted to ensure the Commonwealth's intended uses are all permitted.
18. This approach might be adopted on the basis that, as the original vendor of the Software, the OEM is in a better position to be able to grant the right for the full range of activities permitted under clause 5.3.3, rather than the more limited set of rights in clause 5.4.3a (Key Commercial Items).

Survey & Quote Orders

19. The IP clauses in the ASDEFCON (Support) template include a number of references to S&Q Orders for the purposes of specifying or identifying certain rights or restrictions on the Use of the TD and Software supplied under the S&Q Order.

² In any event, prior to undertaking an approach to market for Software Support Services involving maintenance, drafters should consider whether the existing Software licence permits the maintenance proposed for outsourcing.

20. S&Q Orders can be used to acquire additional TD or Software required by the Commonwealth, particularly over the longer term of some sustainment contracts. S&Q Orders can result in a substantial volume of new TD and Software. This TD and Software should be included in the Technical Data List (TDL). Relevant restrictions on the Use of that material should also be included in the TDSR Schedule.
21. Clause 3.15.5 of the ASDEFCON (Support) template provides that an S&Q Order can amend 'another attachment' of the Contract, which includes the TDSR Schedule. An S&Q Order can therefore impose restrictions on the TD and Software delivered under the S&Q Order that would not have been accepted by the Commonwealth during the negotiation stage of the Contract. Drafters should be careful to ensure that an S&Q Order is not used by the Contractor to impose inappropriate restrictions, for example, where the new TD and Software might be of a similar kind to TD and Software that falls within an existing, less limiting, restriction in the TDSR Schedule.
22. If new TD and Software procured through an S&Q Order is incorporated into an existing item, drafters should also take care to avoid differing sets of IP rights applying to the Commonwealth's Use of the consolidated item. This would arise where the S&Q Order includes restrictions on the new TD or Software that differ from the restrictions on the existing TD and Software (if any), with the result that the Commonwealth has different licences affecting use of the item. This would make it harder to manage the TD or Software when using the item and increase the risks of infringement by the Commonwealth.
23. Consequently, drafters and contract managers after contract execution, should:
- consider closely any proposed further restrictions on the Commonwealth's Use of any TD and Software delivered under an S&Q Order;
 - ensure that the S&Q Order includes any additional information required by the TD and Software clauses (i.e. relevant GFM restrictions or Export Approvals, identification of Approved Subcontractors, specification of Key Commercial Items, etc.); and
 - ensure that the routine contract management task of updating the TDSR Schedule (as per clause 5.12) and the Approved TDL includes incorporating the TD and Software delivered under any S&Q Orders. This will ensure that the TDSR Schedule operates as a complete and up-to-date list of restrictions on the Commonwealth's Use of TD and Software delivered under the Contract.

Warranties

24. The warranties in the ASDEFCON (Support) template have also been amended to reflect the focus on sustainment services rather than the satisfaction of technical specifications as per the acquisition templates.
25. The ASDEFCON (Support) TD and Software warranties address two main differences:

ASDEFCON (Strategic Material) Template	ASDEFCON (Support) Template
The Contractor warrants that the Master Technical Data Index (MTDI) and the Data Accession List (when taken together) include all of the TD used or generated in the performance of the contract.	In the ASDEFCON (Support) template this is replaced by a warranty that the TDL provided by the Contractor lists all of the TD used or required to be delivered under the Contract.

ASDEFCON (Strategic Material) Template	ASDEFCON (Support) Template
The Contractor warrants that sufficient TD or Software is provided, so as to meet the Support System Functional Baseline.	<p>In ASDEFCON (Support) the concept of Support System Functional Baseline does not exist, so the Contractor warrants that the TD or Software delivered under the Contract is complete and accurate.</p> <p>This ensures that the Contractor provides TD or Software that meets a general minimum standard, such as that the TD or Software is complete (i.e. not missing important components) and that the TD or Software is accurate (i.e. not wrong or misleading).</p>

26. As with the warranties included in the ASDEFCON (Strategic Material) template, the warranties in the ASDEFCON (Support) template should not be amended without appropriate contracting or legal advice.

Use with other templates

27. Where the Commonwealth is using the ASDEFCON (Support) template in a linked approach to market in conjunction with an acquisition template other than ASDEFCON (Strategic Material), drafters should consider removing the:

- a. Highly Sensitive TD category; or
- b. Highly Sensitive Software category,

from the ASDEFCON (Support) contract. The Highly Sensitive categories are only used in the ASDEFCON (Strategic Material) template, so if another acquisition template is used instead, removing these categories from the Support contract will help to ensure that the acquisition and support contracts have a consistent approach.

Chapter 14

Other ASDEFCON templates

Introduction

- Chapters 1 to 13 outline the approach adopted in the ASDEFCON (Strategic Materiel) and ASDEFCON (Support) templates. The other ASDEFCON templates generally adopt the same approach to IP ownership and licensing, however the IP clauses are progressively shortened as the templates become less complex and "short form" templates are adopted to address the less complex procurements for which the templates are used.
- For example, the Complex Materiel Volume 1 template is intended for the procurement of commercial or military "off the shelf" items and does not require the Commonwealth to provide any GFM to the Contractor. Accordingly, licences to TD and Software in GFM are not included.
- This Chapter sets out the main differences in the TD, Software and Contract Material clauses in each of the following templates:

HIGH LEVEL TEMPLATES	MID LEVEL TEMPLATES	LOW LEVEL TEMPLATES
<ul style="list-style-type: none"> Strategic Materiel (see Chapters 1 – 12 above) Support (see Chapter 13 above) Complex Materiel Volume 2 	<ul style="list-style-type: none"> Support Short Complex Materiel Volume 1 Standing Offer for Goods Standing Offer for Services Services 	<ul style="list-style-type: none"> Standing Offer for Goods and Maintenance Services Shortform Goods Shortform Services Form SP020 Purchase Order and Contract Form AC565 Request for Quotation

Template Selection and Tailoring

- The *ASDEFCON Contract Template Selection and Tailoring Guide* provides guidance on the selection and tailoring of the ASDEFCON templates. The principles in the guide which relate to adjusting the templates by borrowing clauses from other templates can be applied to the IP clauses. Drafters should consider the TD and Software requirements of the project and, in conjunction with legal or contracting advice, tailor the template to ensure that Defence obtains appropriate rights to the TD, Software and Contract Material.
- For example, for an acquisition that includes some GFM being provided to the Contractor and proposing to use the Complex Materiel Volume 1 template, the GFM ownership and licensing clauses from ASDEFCON (Strategic Materiel) should be included in the draft contract.

Overview

- The table below indicates which of the ASDEFCON (Strategic Materiel) IP clauses have been included in the lower level templates. The table reflects where the clause has been included in substantially the same terms, in an amended form and not at all.

TD and Software Clause from ASDEFCON (Strategic Materiel)	ASDEFCON Template											
	High-Level			Mid-Level					Low-Level			
	Strategic Materiel	Support	CM Vol 2	Support Short	CM Vol 1	Standing Offer for Goods	Services	Standing Offer for Services	Standing Offer for Goods and	Short Form Services	Short Form Goods	RFQ/SP20 Purchase Order
Ownership of IP	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✗	✗
Contract Material Licence	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
TD & Software Licence	✓	✓	✓	✓	✓	✓	✗	✗	✗	✗	✗	✗
Commercial TD & Software	✓	✓	✓	✓	✓	✓	✗	✗	✗	✗	✗	✗
No Commercialisation	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Warranties	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
TDSR or CMR Schedule	✓	✓	✓	✓	✓	✓	✓	✓	✗	✗	✗	✗
Markings	✓	✓	✓	✓	✓	✓	✗	✗	✗	✗	✗	✗
GFM Licence	✓	✓	✓	✓	✗	✗	✓	✓	✗	✗	✗	✗
Patents, Registrable Designs, Circuit Layouts	✓	✓	✓	✓	✓	✓	✗	✗	✗	✗	✗	✗
Delivery of TD & Software	✓	✓	✓	✓	✓	✓	✗	✗	✗	✗	✗	✗
Commonwealth TD & Software	✓	✓	✓	✗	✗	✗	✗	✗	✗	✗	✗	✗
Highly Sensitive TD & Software	✓	✓	✗	✗	✗	✗	✗	✗	✗	✗	✗	✗
IP Deeds	✓	✓	✓	✗	✗	✗	✗	✗	✗	✗	✗	✗
Failure to obtain IP rights	✓	✓	✓	✗	✗	✗	✗	✗	✗	✗	✗	✗
Electronic Delivery	✓	✓	✓	✗	✗	✗	✗	✗	✗	✗	✗	✗
Contractor Sublicence conditions	✓	✓	✓	✓	✗	✗	✗	✗	✗	✗	✗	✗
Commonwealth Sublicence conditions	✓	✓	✓	✗	✗	✗	✗	✗	✗	✗	✗	✗
Export Approvals	✓	✓	✓	✗	✗	✗	✗	✗	✗	✗	✗	✗
Existing IP Licences	✓	✓	✓	✓	✗	✗	✗	✗	✗	✗	✗	✗
Escrow	✓	✗	✗	✗	✗	✗	✗	✗	✗	✗	✗	✗

Key					
✓	Clause included in substantially similar terms	✓	Clause included in different terms	✗	Clause not included

High Level Templates

7. The ASDEFCON (Support) and ASDEFCON (Complex Materiel) Volume 2 templates largely adopt the TD, Software and Contract Material approaches as set out in ASDEFCON (Strategic Materiel). Some changes have been made to address the different circumstances in which each template is intended to be used.

ASDEFCON Support

8. For guidance specific to ASDEFCON Support, see Chapter 13.

ASDEFCON (Complex Materiel) Volume 2

9. The ASDEFCON (Complex Materiel) Volume 2 template adopts the majority of the IP clauses included in ASDEFCON (Strategic Materiel), with a significant exception. The ASDEFCON (Complex Materiel) Volume 2 does not include the Highly Sensitive TD or Highly Sensitive Software category or the related annex in the TDSR Schedule.
10. The category of Highly Sensitive TD or Highly Sensitive Software has not been included on the basis that the ASDEFCON (Complex Materiel) Volume 2 template generally deals with lower design and development requirements than the ASDEFCON (Strategic Materiel) template, with a high degree of integration of existing or 'off the shelf' components.
11. The Highly Sensitive TD or Highly Software category exists in ASDEFCON (Strategic Materiel) to enable the Contractor to protect their most valuable IP by imposing additional restrictions on use. Such additional protections are not warranted for the types of TD and Software expected to be delivered under ASDEFCON (Complex Materiel) Volume 2 template, such as integration or interface drawings etc.
12. If an acquisition uses the ASDEFCON (Complex Materiel) Volume 2 template, the Highly Sensitive TD or Highly Software category should be removed from the ASDEFCON (Support) template, if that template is to be used for any related support arrangements (see further Chapter 13), so that the IP regimes align across the acquisition and support stages of the project.

Mid-Level Templates

13. The mid-level templates broadly adopt the same TD and Software licensing approach as the higher level templates, however, some of the sub-clauses have been simplified or in some cases, removed. These changes reflect the less complex and lower risk scenarios in which the mid-level templates will be used.
14. For example, the categories of Highly Sensitive TD and Highly Sensitive Software and Commonwealth TD and Commonwealth Software have been removed from the mid-level templates. The IP management framework included in the higher level templates (including the IP Issues, Electronic Delivery, IP Deeds, Commonwealth Sublicensing conditions and Export Approvals clauses) has also been removed.
15. These changes recognise that the mid-level templates will be used to procure more 'off the shelf' solutions, rather than involving significant Commonwealth funded design, development or assurance work.
16. However, the mid-level templates retain the same broad approach to IP taken in the respective acquisition or support higher level template, to preserve the ability for drafters to scale up the IP clause, by adopting elements from the higher level template, if appropriate.
17. The Complex Materiel Volume 1 and Standing Offer for Goods templates do not include any GFM licensing or ownership clauses, on the basis that no GFM management or delivery clauses are otherwise included in those templates.
18. The mid-level templates do not include the concept of 'Key Commercial Items'. Consequently, the definition of Commercial Item in each glossary excludes items produced by the Contractor or a Related Body Corporate of the Contractor. The licensing of these items is dealt with under the general licensing clauses.
19. This is because the mid-level templates are intended for the procurement of mostly 'off the shelf' solutions. If the Contractor was only required to provide a 'best commercial terms

available' licence for its own goods, this may not meet the Commonwealth's specialised technical or integration requirements or reflect the Commonwealth's purchasing position in the market, particularly where the Commonwealth still undertakes a degree of competition and negotiation during these mid-level procurements.

ASDEFCON (Services)

20. The ASDEFCON (Services) template uses a different approach to the categorisation of IP provided by the Contractor than the other mid-level templates. This is because of the nature of the non-material services expected to be procured using the template, for example, consultants, professional services and other contractors (Commonwealth Service Providers) providing 'in house' services to Defence. It is expected that the deliverables under ASDEFCON (Services) will mostly consist of reports or other knowledge-based products. The template therefore only uses a single category of Contract Material used in the ASDEFCON (Services) template, which includes all information required to be delivered under the contract.
21. There are also no minimum sublicensing rights of the Commonwealth in the ASDEFCON (Services) template, unlike in the other mid-level templates. As the consultants and professional services industries mainly rely upon the IP rights in their knowledge-products to obtain competitive advantage, the IP permits the Contractor to impose a broader range of restrictions on the Commonwealth's use in the Contract Material Rights (**CMR**) Schedule.
22. Drafters should ensure though that if the services being procured relate to the acquisition, support or upgrade of capability, the CMR Schedule does not include restrictions that limit the Commonwealth's right to sublicense to other Commonwealth Contractors, where this would undermine the endorsed procurement and contracting strategy for that acquisition, support or capability upgrade.
23. Any restrictions included in the CMR Schedule should be checked against the warranties provided by the Contractor in relation to the Contract Material, in particular the warranty that any restrictions will not prevent the Commonwealth from obtaining the benefit of the Services. For example, if the Commonwealth engages a consultant to prepare a report on an upgrade to an item of capability, the Commonwealth should not be restricted from giving the report to an upgrade contractor.

ASDEFCON (Standing Offer for Goods) & ASDEFCON (Standing Offer for Services)

24. The ASDEFCON (Standing Offer for Goods) and ASDEFCON (Standing Offer for Services) templates essentially reproduce the approaches to IP and TD taken in each of the ASDEFCON (Complex Materiel) Volume 1 and ASDEFCON (Services) templates respectively.
25. Each Official Order under the standing offer template deeds is a distinct contract, incorporating the terms of the relevant deed. Accordingly, the restrictions in the TDSR or CMR Schedule as relevant will apply to any new contract formed under the deed.
26. Additionally, each Official Order provides an option to update the TDSR or CMR Schedule (as relevant) with specific restrictions applicable to the IP being delivered under that particular contract. As such, the relevant deed Schedule and Official Order form will need to be read alongside each other, to understand the full set of restrictions applying to any particular contract formed under the deeds.

Low Level Templates

27. The IP/TD approach in the low-level templates reflects the reduced complexity and low risk environment in which those templates are expected to be used. Subject to the specific clauses discussed below, the low level templates rely upon the general law regarding the ownership, use and licensing of IP.

28. The low level templates use a single category of 'Contract Material' instead of referring to separate categories of TD or Software. This is consistent with the approach used in the ASDEFCON (Services) and Standing Offer for Services templates, where there is a lower expected level of technical documentation.
29. The low-level templates implement a simpler IP framework that recognises that the majority of procurements in which they will be used relate to mostly COTS products or services. As such, there are no bespoke licensing obligations specific to the Commonwealth to be met by the supplier that might require extensive negotiation or significant changes to the supplier's business model for selling the products or services.
30. Accordingly, the IP clauses in the low level templates generally only impose obligations to ensure:
 - a. the IP in the Contract Material is properly licensed to the Commonwealth for any Defence-related purpose related to the supplies or services;
 - b. the Commonwealth's use of the IP in the Contract Material will not infringe the IP or moral rights of any person; and
 - c. the Commonwealth cannot commercialise the IP in the supplies or services for a royalty or fee from a third party.
31. The general definitions of "Licence" and "Intellectual Property" are also included in the low level templates. While in most cases, these definitions will not require amendment, software suppliers may request changes to reflect the licensing arrangements particular to the software being purchased. Such changes should be carefully considered, however if the software would be Commercial Software under the higher level templates, such changes might be accepted with appropriate contracting and procurement advice and to the extent the requested changes align with the licensing approach in the higher level templates.
32. While the low level templates may be appropriate simple commercial procurements, drafters should always consider whether simple IP terms are still appropriate in the circumstances. For example, if the procurement is a simple purchase of off-the-shelf items, but they may need to be modified for integration purposes or incorporated into more complex Defence capability, or where the services may be used as a basis for more extensive studies or collaborative development by other Commonwealth Contractors then the IP clauses may need to be amended to provide the Commonwealth with adequate rights to undertake those activities.

Chapter 15

ASDEFCON Transition Arrangements

Introduction

1. In light of the revised approach to TD and Software, the Commonwealth may need to consider whether, for existing projects, to transition from the former IP-centric approach (as described in Chapter 2) to the new TD and Software approach reflected in the updated templates.
2. The benefits of adopting the revised TD and Software approach are outlined in Chapter 1. However, for existing projects, the benefits need to be weighed against the costs of shifting to the new approach. As outlined in Chapter 1, adopting the new approach requires the parties to be specific about what IP rights are granted or reserved in relation to each item of TD and Software provided under the contract.
3. The question of whether or not to transition from the old IP-centric approach to the new TD and Software approach is most likely to arise in the two following circumstances:
 - a. **New sustainment contract: Where the acquisition contract for a project uses the old IP-centric approach, but the Commonwealth intends to use the new ASDEFCON (Support) template for the initial sustainment contract.**

This is the most common circumstance in which a transition from the old IP-centric approach to the new TD and Software approach will occur. Transition arrangements will need to be considered in this situation as the old IP-centric approach may apply to items delivered under the acquisition contract, but the implementation of the TD and Software approach is considered appropriate for the sustainment phase.

To prepare the sustainment contract, the Commonwealth will need to assess any restrictions imposed under the acquisition contract on the use of TD and Software that will need to be used by the sustainment contractor. This is because TD and Software delivered under the acquisition contract will be provided to the sustainment contractor as GFM or PBS.

The Commonwealth will need to ensure that such restrictions on the TD and Software are passed on to the sustainment contractor, by setting out the restrictions in the GFM and Products lists in the sustainment contract.

Creation of the GFM list and the relevant restrictions may require some additional work on the part of the Commonwealth, as the restrictions will not have been provided under the acquisition contract in a form that can be directly used to prepare the draft sustainment contract.

However, the principle is straightforward, namely that the Commonwealth:

- can only grant to a sustainment contractor rights to use IP that it has itself acquired under the acquisition contract; and
- must ensure that the sustainment contractor abides by any restrictions that were imposed on the Commonwealth under the acquisition contract.

- b. **Amendment of an existing sustainment arrangement: Where either:**
- (a) the sustainment has been subject to a retender and there will be a new contract; or**
 - (b) there is an opportunity to vary the existing contract, potentially in conjunction with a renewal term or award term, and the parties decide to replace the old IP-centric clauses with the TD and Software clauses.**

This second transition situation may be less common, but could arise in relation to long term sustainment contracts. In these cases, there may be long term benefits in moving from the old IP-centric approach to the new TD and Software approach either at the point of retendering a sustainment contract or through an agreed variation during the term of a sustainment contract.

This may particularly be the case where the old IP-centric approach has caused uncertainty and disagreement as to what the parties' respective rights are in IP generated under the sustainment contract. Adopting the new approach to the management of TD and Software may also assist a project by providing a clearer framework for the management of IP records.

In the situation described above, any transition to the new TD and Software approach could occur by:

- applying the new TD and Software approach to all new items and to items that are updated or re-delivered over time; or
- deeming the new TD and Software approach to apply to all items of TD and Software that have previously been delivered under the old-IP centric approach.

The primary benefit of implementing such transition arrangements is that the Commonwealth can move away from maintaining two separate IP regimes under a sustainment arrangement.

The benefits of the TD and Software approach will need to be measured against the costs and complexity of making the transition and should also take into account the extent of existing IP rights.

For example, if the IP rights under the existing sustainment or acquisition contract do not limit the Commonwealth's capacity to properly sublicense the relevant IP to other Commonwealth Contractors or to modify or adapt the IP itself for other purposes, there may be little advantage in moving to the TD and Software approach.

As such, it is expected that each project would make this decision on a case-by-case basis.

Additional transitional issues to be considered

Review of existing IP terms: Flow through of Contractor restrictions

4. The Commonwealth needs to understand its IP rights to use the TD or Software delivered under earlier contracts, prior to providing that TD and Software to a new sustainment contractor as GFM or PBS.
5. While this is a standard requirement for all sustainment arrangements, due to the GFM and PBS licences that must be granted by the Commonwealth under the TD and Software approach, it will be a more complex activity when transitioning from an earlier IP-centric contract. This may particularly be the case where the appropriate records of IP ownership in individual items of TD and Software may not have been created and maintained.
6. Further, if there are bespoke clauses in the acquisition, upgrade or sustainment contracts that deal with rights to specific types of IP, a review of how that IP would be handled under the TD and Software approach should be undertaken. For example, an upgrade contract may restrict the Commonwealth from permitting Commonwealth Contractors to adapt or modify particular Background IP. This restriction would require the Commonwealth to ensure that any licensing of that IP under the GFM or PBS clauses in the new sustainment contract was appropriately restricted.
7. Also, if the Commonwealth has ownership of a particular type of Foreground IP under an earlier contract, it may be appropriate to ensure that any new TD and Software created by the new contractor is classified as Commonwealth TD or Commonwealth Software under the new contract. This will consolidate Commonwealth ownership of IP, on a system or subsystem basis, to preserve useability in the future and ensure that switching to a new approach does not erode Commonwealth rights to important IP.

Review of existing IP terms: Considering the nature of existing Commonwealth rights

8. The new TD and Software approach includes a number of restrictions on the Commonwealth's licensing and sublicensing rights. These restrictions in the template clauses reflect extensive Defence industry consultation.
9. However, it may be the case that an existing set of rights obtained by the Commonwealth under a previous IP-centric contract is less restrictive. If the contractor does not require the constraints that the new approach imposes on Commonwealth usage, the clauses should be tailored to preserve the rights that the Commonwealth enjoyed under the previous contract.
10. For example, under a previous acquisition contract the Commonwealth may have a licence to commercialise certain Foreground IP. When transitioning to the TD and Software approach, the Commonwealth may wish to ensure that such IP, when delivered as TD or Software under the new sustainment arrangement, is not subject to the 'No Commercialisation' restriction included in the ASDEFCON (Support) or (Support Short) template.
11. When conducting the IP review ahead of entering into the new contract, Defence personnel need to consider not only the restrictions in the earlier IP-centric contracts, but those included in the new TD and Software approach as well.

Transitioning Subcontractor arrangements

12. When implementing any transitional arrangement, it is necessary to assess how this might impact Subcontractor arrangements. When renewing a sustainment contract with the same contractor, there may be a number of established subcontracts in place.
13. Ideally for the Commonwealth, the contractor may be able to amend its subcontracts to ensure it is obtaining sufficient IP rights in TD and Software, to be able to grant the standard set of licensing rights that the Commonwealth requires under the new clauses.

14. However, if the Contractor is unable to amend its subcontracts, the prime contract between the contractor and the Commonwealth can still adopt the new clauses. If the contractor only has limited rights to IP and cannot grant the Commonwealth the standard rights of use, modification, etc, as set out in clause 5.3.2 of ASDEFCON (Support), then the Commonwealth can accept restrictions on those rights, including by allowing the relevant TD/Software to be classified as Highly Sensitive if necessary.
15. Some variation to the transition options discussed above may also be used to address these issues. The transition options may be adapted to only transition the contractor's own IP (and their related body corporates) to the TD and Software approach or, an alternative may be to transition only IP provided by Approved Subcontractors rather than all subcontractors.