



Australian Government

Department of Defence

ASDEFCON INSURANCE HANDBOOK

V2.0

Defence Scope

This publication is a companion to the ASDEFCON suite of tendering and contracting templates and provides guidance to Defence staff on the use of the ASDEFCON insurance clause.

Authority

Procurement handbooks do not create new mandatory procurement policy. All Defence mandatory procurement policy is contained in either the Defence Procurement Policy Manual or Departmental Procurement Policy Instructions. Within Capability Acquisition and Sustainment Group (CASG), additional mandatory procurement policy is contained in either Defence Materiel Instructions (Procurement) or Defence Materiel Handbooks (Procurement).

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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This publication should be attributed as the *ASDEFCON Insurance Handbook V2.0*.

Use of the Coat of Arms

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Feedback

All feedback on this publication and suggestions for improvement should be sent to: ACIP.ManagementTeam@defence.gov.au

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FOREWORD AND INTRODUCTION

This handbook has been prepared to assist drafters in the use of the ASDEFCON insurance clause.

This handbook is to be used by drafters in conjunction with all other applicable guidance, policies and procedures for procurements.

Drafters are encouraged to refer to the Insurance Case Studies which may provide further guidance on the use of the ASDEFCON insurance clause. The Insurance Case Studies are available online at <http://intranet.defence.gov.au/dmoweb/sites/PP/comweb.asp?page=116599&Title=ACIP%20Initiative>.

Part A of this handbook sets out important background information regarding Defence's approach to insurance requirements in contracts.

Part B introduces the ASDEFCON insurance clause, providing guidance on which formulation of the clause is to be used and the types of insurances contemplated by the clause.

Part C of this handbook steps through each of the key elements of the ASDEFCON insurance clause and includes guidance on the use of options provided for by the clause.

Part D provides a brief overview of the Approved Contractor Insurance Program (**ACIP**) Initiative and how it relates to the ASDEFCON insurance clause.

Part E of this handbook notes further areas of consideration for drafters, including providing guidance on the review of insurances proposed by contractors in purported compliance with the ASDEFCON insurance clause.

Annexure A provides a glossary of terms used in this handbook, as well as a number of insurance terms commonly used.

Annexure B provides a short list of acronyms.

Annexure C provides a checklist to assist drafters in their selection of which insurances and which options of the ASDEFCON insurance clause to require.

Annexure D provides a table which sets out the clause numbering used in the various short form versions of the ASDEFCON insurance clause which correspond to those in the long form versions which are referred to in this Handbook.

Drafters should review and consider the content of this handbook carefully.

If drafters have any questions or comments regarding this handbook or the use of the ASDEFCON insurance clause, please contact the ACIP Management Team at ACIP.ManagementTeam@defence.go.au.

PART A – BACKGROUND

Why does Defence require contractors to have insurance?

1. There are two main purposes for requiring a contractor to effect and maintain insurance:
 - (a) The first is to ensure that the allocation of risk under the contract is effective. If the contractor incurs a liability to Defence or to a third party, insurance can reduce the risk that the contractor will not have the financial resources available to meet that liability. In particular, where a contractor cannot meet a liability it incurs to a third party arising out of its performance of a Defence contract, the Commonwealth may also be liable to the third party and may become the unintentional indemnifier of the contractor for that liability.
 - (b) The second is to ensure that the contractor will be able to fund its own losses and liabilities and still be able to perform its obligations under the contract. The importance of this purpose will vary depending on the ease with which the contractor can be replaced and the length of the contract. For example, it may be important to Defence that the contractor remains in business in order to complete its obligations under the contract and to supply ongoing maintenance and support for an extended period.
2. In the considering these objectives it is relevant to think about the financial capacity of the contractor in the absence of insurance. For example, if Defence is dealing with a large, financially secure entity, it may be acceptable for the contractor to wholly or partly rely on self-insurance, either by retaining and managing the risk internally or, by transferring it to a Captive Insurer – see paragraphs 4 and 5 of Part E for more information. However, even if the contractor is financially strong, insurance may still be desirable in order to reduce the potential for disputes and to facilitate payment in the event of a claim by Defence or a third party on the contractor. Having an Insurer involved can also provide an additional incentive for good risk management practices by the contractor.
3. Where the contractor is financially weak or its ongoing financial capacity is questionable, or where the potential losses and liabilities which may arise in the course of performing the contract may exceed the contractor's ability to self-fund those losses or liabilities, insurance becomes very important as it provides security that the contractor will be able to fund its own losses and meet its liabilities to Defence and third parties, and continue to perform the contract. Where a contractor is unable to obtain insurance for a commercially insurable risk, this could be the result of the contractor's past claims experience and this may require further investigation to determine if this represents a risk to Defence.

Uninsured risks and prudent risk management

4. Whatever insurance is required of the contractor or held by Defence there will nevertheless be uninsured risks under any contract which must be allocated by the contract terms and managed, to the extent possible and appropriate, by other risk management techniques. For example, a contractor cannot insure against its own wilful or reckless acts and may not be able to insure liabilities which it assumes by contract (for example, by way of an indemnity).
5. Even those risks which are insured should be the subject of further risk management as insured events are generally undesirable and often cannot be fully compensated by money alone (for example, employee injury). A poor claims history will also affect the availability and cost of insurance in future years. In addition, insurance companies sometimes require the insured to undertake certain risk management activities as a condition of the policy, and failure to do this may jeopardise the ability to claim on the policy.

Defence's own insurance cover

6. Most governments have self-insurance schemes of one type or another (for example, most Australian states and territories have a Treasury Managed Fund which self-insures the risks of the state or territory).
7. Defence self-insures many risks through the Commonwealth's self-managed insurance schemes known as Comcover (general insurance) and Comcare (workers' compensation insurances). In the case of Defence, these schemes are self-insurance as Defence, Comcover and Comcare are all part of the Commonwealth and so there is no transfer of risk from one legal entity to another. Accordingly, it is not truly insurance. However, for convenience we will refer to the cover provided by these schemes as insurance.
8. These schemes insure Defence's own losses and liabilities and the losses and liabilities of its officers, employees and, in some cases, others such as volunteers.
9. Defence's rights to indemnity under the schemes are subject to limits, exclusions, conditions and high Deductibles. In the event that Defence's losses or liabilities are insured by the schemes, the Commonwealth generally expects to have the right to pursue any third party (including contractors) responsible for the loss or liability indemnified. This is called the Insurer's right of subrogation.
10. Comcover expects Defence to act prudently in entering into agreements with contractors and to require, as a general rule, that contractors provide indemnities (backed where appropriate by insurances) in respect of losses or liabilities incurred by Defence as a result of the contractor's own acts or omissions or the acts or omissions of those for whom the contractor is responsible.
11. Unless extended by specific agreement, Comcover does not insure Defence for risks assumed by Defence in a business agreement for the supply of goods or services between Defence and another party where Defence would not be liable for those risks at common law (commonly referred to as contractually assumed risk) (see, for example, General Exclusion 3 and foot note 24 of the Comcover policy). Contractually assumed risks can arise as a result of indemnities or liability caps. Comcover treats liability caps and indemnities as being the same. If there is a need for an extension of the Comcover policy to provide cover for risks that Defence has assumed by contract, drafters must contact the Defence Insurance Office for further information on how to make an application to Comcover for an extension of cover. This application should be made before the contract is finally agreed. It should not be assumed that such an extension will be granted.¹

What insurances should be required from contractors?

12. The answer to this question will depend on an analysis of the LRA for a particular contract, a determination of which of the risks are to be borne by the contractor and a consideration of which of these risks are capable of being insured. The last two of these considerations inform each other. Of those risks which can be insured, a decision must be then made as to which, and how much, of these risks should be insured by the contractor. Appropriate advice should be sought in relation to any contract involving significant risks to be insured.
13. Accordingly, every contract must be individually considered. For this reason the ASDEFCON templates give guidance to drafters with respect to what insurances should be requested from contractors, but are not prescriptive.
14. In considering which risks remain the responsibility of the contractor, consider the whole of the contract including indemnities, liability caps and general allocation of risk provisions. Be very careful about moving risks from one party to another by contract. Most commercial insurance policies will not cover the insureds for contractually assumed risks. It will not

¹ DPPM, Chapter 3.15, paragraphs 39-47.

always be possible to have insurances extended to cover such risks and, where it is possible, this may involve additional premium costs. Where Defence requires a contractor to take on risks that the contractor would not otherwise have at common law (for example, by requiring the contractor to adhere to a higher standard of care than usual or to be liable for losses caused by third parties for whom it is not otherwise responsible) then the contractor is accepting a contractually assumed risk. As a result, the contractor may be exposed to an uninsured contingent liability. This may be commercially unacceptable to the contractor. In this context it is relevant to consider if the Commonwealth is already insured for such risks under Comcover or Comcare. If so, it may not be necessary for the contractor to also insure against the same risk. For example, a risk that Commonwealth property will be damaged by an act of God such as hail will usually be insured by Comcover, so requiring the contractor to also insure this risk may be unnecessary.

15. The contractor should not be required to insure against all risks which it has accepted by contract, for example, under an indemnity. It is not possible to insure all risks because all insurances will be subject to exclusions and limitations.² For example, in the case of an indemnity against loss of or damage to Commonwealth property, the contractor will not be able to insure its own intentional destruction of such property. Defence must be specific and realistic with respect to the risks to be insured by the contractor. Appropriate advice should be sought in relation to any contract involving significant insurance provisions.

Changes to the scope or risk profile of the contract

16. If the scope of the contract, the risk profile or the allocation of the risks between the contracting parties changes, insurance requirements must be reviewed and, where appropriate, amended to reflect such changes.

Project-specific insurances

17. In some circumstances, it will be appropriate to require project-specific insurances to be effected by contractors. This means that the contractor must effect an insurance policy for risks arising from the contract alone rather than rely on general insurances which may also cover other activities of the contractor and possibly also other insureds (for example, related bodies corporate). This will usually result in higher insurance costs, but can be desirable where, for example:
 - the risks under a contract are unique;
 - various unrelated parties are to be insured under the one insurance policy;
 - the policy is to be placed for an extended period (for example, a period of construction); or
 - the type of insurance has an Aggregate Limit of Indemnity for all claims. An Aggregate Limit of Indemnity could be exhausted by claims unrelated to the contract. Project-specific insurance ensures that there is a pool of insurance dedicated to claims arising from the performance of the contract.
18. Where project-specific insurances are appropriate, tailored amendments will need to be made to the ASDEFCON insurance clause. Drafters should seek advice from the ACIP Management Team where project-specific insurances are being contemplated by Defence as appropriate to require in a contract.
19. For some projects, the Commonwealth may elect to effect and maintain a "principal" placed project-specific policy. In those circumstances, the Commonwealth will have control over the placement of the policy. The Commonwealth will be required to provide the Insurers with

² However, note that the term 'all risks' has a particular meaning in relation to property insurance – see paragraph 43 in Part C.

underwriting information, including details of the risk, the insureds' claims history and other information about the contract. Most of this information will be within the knowledge of the contractor. It will therefore be necessary to contractually oblige the contractor to provide underwriting information as required by the Insurers. Tailored amendments will therefore need to be made to the ASDEFCON insurance clause. Drafters should seek advice from the ACIP Management Team where the Commonwealth is considering placement of a principal placed project-specific policy.

PART B – THE ASDEFCON INSURANCE CLAUSE

Which ASDEFCON insurance clause should be used – the short form or the long form?

1. There are two main forms of the ASDEFCON insurance clause – a short form and a long form.
2. The long form is more detailed and is tailored to suit projects with higher value and more complex risks, such as will ordinarily be the case with strategic and higher-level complex procurements. The short form, on the other hand, is shorter and is suited to projects with lower value and less complex risks.
3. The short form is suitable for use in substitution for the long form where:
 - (a) there is no requirement for any type of aviation insurance;
 - (b) there is no requirement for any type of marine insurance; and
 - (c) the highest Limit of Indemnity required for any one of the required liability insurances, contract works and transit insurances is determined to be less than A25m.
4. In all other circumstances, the long form is the appropriate clause to use.
5. References to clause numbers in this handbook are to those in the long form of the ASDEFCON insurance clause. Please see Annexure D for a table which sets out the corresponding clause numbers in the short form versions.

Named insured versus additional insured status

6. The terms named insured and additional insured do not have settled meanings in the insurance industry, particularly overseas. That is, these terms may mean different things depending on the Insurer and the specific policy at issue. As a result, there is often confusion surrounding the use of the terms. For example, a named insured often refers to the party to an insurance contract which is the insured responsible for the payment of premium and is nominated to receive all notices from the Insurer on behalf of all of the other insureds. However, this is not always the case. The term additional insured may refer to an insured who has only limited cover under the policy, or it may refer to a party with an interest in the risk insured. There are however a myriad of different uses of these and other similar terms.
7. The ASDEFCON insurance clause avoids using such potentially ambiguous terminology to ensure that the cover required is clearly specified. Whether the required cover is called by one name or another, it is irrelevant to the Commonwealth, provided the cover required by the ASDEFCON insurance clause is actually provided.

First party loss and third party liability insurances

8. There are many different types of insurance, and they can be categorised in various ways. One distinction which drafters should understand is that between:
 - (a) first party loss insurances; and
 - (b) third party liability insurances.
9. First party loss insurances provide cover for losses suffered by the insured as a consequence of an insured peril. For example, property insurance is a first party loss insurance – it covers the insured for its interest in insured property which is lost or damaged as a result of an insured peril (eg fire).
10. Third party liability insurances, on the other hand, provide cover for the liability of the insured to compensate a third party for loss or damage suffered by that third party as a result of the

acts or omissions of the insured. For example, public and products liability insurance is a third party loss insurance – it covers the insured for its liability to third parties who suffer loss or damage as a result of the insured's acts or omissions.

11. The distinction between first party loss and third party liability insurances is not always absolute, however, as a single insurance policy may contain both types of cover under different insuring clauses.
12. The insurances required by the (long form) ASDEFCON insurance clause can be generally categorised as follows:

First party loss insurances	Third party liability insurances
Property / Industrial Special Risks (clause 8.6.6)	Workers compensation (clause 8.6.3)
Transit (clause 8.6.7)	Public (and products) liability (clause 8.6.4)
Aircraft hull (clause 8.6.9)	Professional indemnity (clause 8.6.5)
Marine hull (clause 8.6.12)	Motor vehicle (clause 8.6.8)
Ship builders (hull) (clause 8.6.14)	Aviation liability (clause 8.6.10)
Contract works (clause 8.6.15)	Hangarkeepers (clause 8.6.11)
	Marine liability (clause 8.6.13)
	Ship builders (liability) and Ship repairers liability (clause 8.6.14)

Claims-made versus occurrence based insurances

13. Another distinction drawn between different types of liability insurances is in respect of the basis on which the policy is written – occurrence versus claims-made.
14. Liability insurances written on an occurrence basis cover claims arising from occurrences (as that term is defined in the policy) happening during the policy period (irrespective of when the claim is made against the insured). Liability insurances covering short(er)-tail liability risks are typically written on an occurrence basis (eg public and products liability insurance). This is because there is typically only a short delay between the date of the occurrence and the date the claim is made against the insured.
15. Liability insurance written on a claims-made basis however covers claims made during the policy period (irrespective of when the occurrence giving rise to the claim happened). Liability insurances covering long(er)-tail liability risks are typically written on a claims-made basis (eg professional indemnity insurance).
16. First party loss insurances are written on an occurrence basis.

17. The insurances required by the (long form) ASDEFCON insurance clause can be generally categorised as follows:

Occurrence basis	Claims-made basis
Workers compensation (clause 8.6.3)	Professional indemnity (clause 8.6.5)
Public (and products) liability (clause 8.6.4)	
Property / Industrial Special Risks (clause 8.6.6)	
Transit (clause 8.6.7)	
Motor vehicle (clause 8.6.8)	
Aircraft hull (clause 8.6.9)	
Aviation liability (clause 8.6.10)	
Hangarkeepers (clause 8.6.11)	
Marine hull (clause 8.6.12)	
Marine liability (clause 8.6.13)	
Ship builders and Ship repairers liability (clause 8.6.14)	
Contract works (clause 8.6.15)	

PART C – ELEMENTS OF THE ASDEFCON INSURANCE CLAUSE

Introductory provision (clause 8.6.1)

1. The ASDEFCON insurance clause commences with an obligation that the contractor effect and maintain (or cause to be effected and maintained) the insurances stipulated in the balance of the clause. This obligation recognises that contractors are often insured under insurances effected by others (for example, by a parent company).
2. Given the numerous ways in which insurance programs can be structured, particularly where the contractor's insurance program is arranged on a group basis or from overseas (such as by a contractor's foreign parent company), the ASDEFCON insurance clause provides that the contractor does not need to double insure any particular risk. That is, provided each risk required to be insured by the clause is insured, the Commonwealth is not concerned with which particular insurance policy within the contractor's insurance program provides the cover or whether one or more policies are used.
3. Further, the requirement for the contractor to effect and maintain (or cause to be effected and maintained) insurance in the ASDEFCON insurance clause does not extend to require the contractor to insure risks which the Commonwealth has expressly retained.

Subcontractors (clause 8.6.2)

4. The ASDEFCON insurance clause obliges the contractor to use its best endeavours to ensure that each of its subcontractors are insured as is appropriate given the nature of the services or work to be performed by those subcontractors.
5. The best endeavours obligation recognises that contractors cannot directly control whether or not their subcontractors (or any other third party) effect and maintain insurance.
6. The determination of the appropriate insurances to be required from any subcontractor is left to the contractor and should be informed by the insurance requirements of the ASDEFCON insurance clause that are imposed on the contractor and the work to be performed by the subcontractor. Usually the insurance requirements for a subcontractor will be a sub-set of the insurance requirements imposed on the contractor as the risks of a subcontractor are a subset of the risks of the contractor under the contract.
7. This approach provides flexibility to contractors in ensuring that their subcontractors are insured in a prudent manner which takes due account of the potentially widely varying circumstances in which (and the work for which) subcontractors are engaged by the contractor.
8. In some cases, it may be appropriate for Defence to specify minimum insurances to be maintained by the subcontractor. For example, the contractor may be a project company which itself has no or few employees, formed to allow a consortium of companies (subcontractors) to perform the contract. In many cases this will simply require the ASDEFCON insurance requirements to apply to both the contractor and the specified subcontractors. Drafters can obtain the assistance of the ACIP Management Team with drafting amendments to the ASDEFCON insurance clause to include specific insurance requirements in the subcontractors clause.

Workers compensation insurance (clause 8.6.3)

9. Workers compensation insurance (and employers liability insurance) cover an insured for its liability at common law and under statute for bodily injury, disease, illness or death of a worker engaged by the insured.

10. All Australian jurisdictions have a statutory requirement for an employer to maintain workers compensation insurance or for the employer to be a licensed and regulated self-insured or an exempt employer.
11. However requirements vary in overseas jurisdictions. Not all overseas jurisdictions require all liabilities of an employer to its workers to be insured which can lead to uninsured gaps. Also the definition of who is a worker can vary, again, potentially leading to uninsured gaps.
12. Where there is a gap between the potential liability of the employer and cover provided by the statutory workers compensation insurance, additional insurance is required to fill this gap.
13. Drafters must select one of the two options for the clause:
 - (a) Where all work pursuant to the contract is to be undertaken by workers in Australia, the first option is to be used.
 - (b) Where work pursuant to the contract will be undertaken by workers engaged by the contractor to perform work outside of Australia, the alternative two-part option is to be used. The drafting of the ASDEFCON insurance clause strives to minimise the potential for uninsured gaps by requiring both workers compensation insurance and employers liability insurance which responds to risks not covered by the relevant statutory workers compensation insurance. Also, the ASDEFCON insurance clause refers broadly to any persons engaged in the work under the contract (or their dependants) rather than by reference to a definition of worker or employee which can vary across overseas jurisdictions.
14. The requirement for vicarious liability cover for the Commonwealth is often misunderstood. Vicarious liability cover (which is sometimes also called principal's liability cover) does not insure the Commonwealth for its liability for its own acts or omissions. Rather, vicarious liability insures the Commonwealth for its vicarious liability for the acts or omissions of the contractor. In the context of workers compensation, this vicarious liability may arise in circumstances where the Commonwealth is deemed to be the employer of an individual who was injured or killed during performance by the contractor of the contract. Vicarious liability cover is only available under the statutory schemes of certain of the states and territories in Australia (currently Western Australia, Tasmania and the Northern Territory), and thus, the requirement is drafted to only apply where such cover is actually available.

Public (and products) liability insurance (clause 8.6.4)

15. Public and products liability insurance (which is sometimes referred to as general liability insurance) covers the insured for its liability for:
 - (a) loss of, damage to, or loss of use of tangible property; or
 - (b) bodily injury, disease, illness or death of any person (other than an employee of the insured),

suffered by third parties as a result of the operations or activities of the insured or the manufacture, processing, alteration, repair, installation, supply, distribution or sale of products by the insured.
16. The reference to third parties above includes any person who is not the insured making the claim. For example, the Commonwealth is a third party in this context.
17. In most cases both public liability and products liability insurance is required.
18. Products liability insurance is required where the contractor will manufacture, process, alter, repair, install, supply, distribute or sell any tangible products (as opposed to intangible products such as software) pursuant to the contract.

19. The long and short form acquisition contracts include an option for only products liability insurance (and not public liability insurance). Drafters should only use this clause where the contractor will only supply goods pursuant to the contract without any training or other ancillary services. For example, the contractor may be providing supplies such as uniforms, munitions or other supplies.
20. The short form services contract only requires public liability insurance. This is appropriate because the contractor will not manufacture, process, alter, repair, install, supply, distribute or sell any tangible products pursuant to the contract. For example, the contractor may be providing audit services only. Like public and products liability insurance, public liability insurance covers the insured for its liability for bodily injury or property damage suffered by a third party. However, there is no cover for claims for bodily injury or property damage which arise in respect of products.
21. Drafters must select an option in respect of the territorial limit of the policy:
 - (a) The Australia only territorial limit option should be used where the works under the contract will occur only in Australia and acquired items will not be used outside Australia.
 - (b) The worldwide territorial limit option should be used where the works under the contract will occur in whole or part outside of Australia or acquired items may be used outside of Australia.
22. In some cases where the worldwide limit option is selected, it may be appropriate to exclude certain irrelevant territories such as North America which can be difficult to insure by contractors who have policies issued in Australia. See paragraphs 16 to 21 of Part E for more information on territorial limits.
23. The Limit of Indemnity for public and products liability insurance is typically as follows:
 - (a) For public liability claims, the Limit of Indemnity applies per occurrence (although some policies, particularly foreign policies also impose an Aggregate for all occurrences in any one policy period).
 - (b) For products liability claims, the Limit of Indemnity applies per occurrence and is subject to an Aggregate for all occurrences in any one policy period. Usually this limit is the same as the limit per occurrence for public liability claims.
24. Drafters should note that the Limit of Indemnity per occurrence usually applies to all liabilities arising from a series of related occurrences. Whether a particular set of circumstances constitutes a series of related occurrences is always a question of fact (ie it will depend on the specific facts of a particular case) and may differ depending on the wording of each particular policy. A series of related occurrences could include where a number of individuals suffer an illness or bodily injury as a result of consuming contaminated products produced in a single batch. Another example could be a series of thefts by embezzlement committed by one individual over a period of time.
25. Both clause options require the insurance to cover the liability of one insured to another insured. For example, the liability of one worker to another worker in respect of property damage is covered. Another example would be that the liability of an agent to the contractor is covered.
26. Both clause options require vicarious liability cover for the Commonwealth, which, as noted above, is often misunderstood. Vicarious liability cover does not insure the Commonwealth for its liability for its own acts or omissions. Rather, vicarious liability insures the Commonwealth for its vicarious liability for the acts or omissions of the contractor or other insureds. Defence relies on the Comcover policy for insurance for its own acts or omissions.

27. The clause requires this insurance to be written on an occurrence basis. As discussed above, this means that it will cover claims arising from occurrences (as that term is defined in the policy) happening during the policy period (irrespective of when the claim is made). This insurance can however be written on a claims-made basis. Although this is not common in Australia, it is common for policies written in certain other countries. Claims-made insurance covers claims made during the policy period (irrespective of when the occurrence happened).³ If the public (and products) liability insurance policy is written on a claims-made basis, it must be current at the time the claim is made against the contractor and accordingly the policy must be maintained for a period after the end of the contract. It is therefore preferable for the policy to be written on an occurrence basis.
28. Public and products liability insurance policies exclude risks covered by more specific insurances (eg professional indemnity risks; workers compensation risks; motor vehicle / aviation / marine liability risks). They will also, in general, exclude cover for the following:
- (a) construction risks;
 - (b) pollution risks (except for sudden and accidental pollution events, however only limited cover for such events may apply);
 - (c) software and other IT-related risks (where there is no resultant tangible property damage);
 - (d) asbestos-related risks;
 - (e) nuclear risks; and
 - (f) war and terrorism⁴ risks.
29. The clause requires the public (and products) liability insurance to include cover for damage to property in the insured's care, custody or control, albeit subject to a Sub-Limit, which drafters must specify. As there is sometimes an exclusion for this risk in public (and products) liability insurance policies, and obtaining cover may increase the premium for the policy, drafters should consider whether or not the cover is appropriate to require for a given contract. For example, if in a contract the contractor will not have any GFF, GFE or any other Commonwealth property in its care, custody or control, then the requirement (which appears in brackets) can be deleted. If the cover is required, it is often subject to a Sub-Limit and so, consideration must be given to the Maximum Probable Loss of such property in any one occurrence (ie as a result of one event, at one site) as this will inform what is an acceptable Sub-Limit.

Professional indemnity insurance (clause 8.6.5)

30. Professional indemnity (or errors and omissions or civil liability) insurance covers the insured for its liability for economic loss suffered by third parties⁵ as a result of the negligent performance of professional services by the insured. There is no requirement for the occurrence to involve bodily injury or property damage in order to trigger the policy to respond. In other words, this policy will respond to a claim for pure economic loss such as costs thrown away by relying on incorrect advice. It will also cover the insured's liability to a third party for personal injury or death or loss of or damage to property arising from the insured's negligent performance of professional services.

³ Subject to any applicable retroactive date. See paragraph 38 of this Part C for an explanation of retroactive dates.

⁴ However, the *Terrorism Insurance Act 2003* (Cth) renders inoperative terrorism exclusions in certain insurance contracts governed by Australian law in respect of certain terrorism events occurring in Australia.

⁵ As noted at paragraph 16 of this Part C, a third party means any person who is not the insured making the claim (for example, the Commonwealth).

31. Professional indemnity insurance does not cover the costs incurred by the insured to redo or correct its own poorly performed services (for example, providing a corrected advice or design). It will cover the insured where the insured is liable to compensate a third party who obtains the corrected design or advice from another third party.
32. The scope of cover provided by professional indemnity insurance is limited by the definition or description of professional services in the policy. The clause requires that the professional indemnity insurance covers all of the professional services to be provided by the contractor pursuant to the contract.
33. Professional indemnity insurance is not generally available for aviation risks. However, some cover can be obtained under an aviation liability policy (which is similar to public and products liability insurance but for aviation risks) by requiring the aviation liability policy to not exclude liabilities arising from a breach of professional duty by the insured. Cover obtained this way is not as wide as under a professional indemnity policy as the aviation liability policy will require bodily injury or death or loss of or damage to property in order to respond. The ASDEFCON insurance clause requires that the aviation liability policy not exclude cover for liabilities arising from a breach of professional duty by the insured.
34. Professional indemnity insurance policy Limits of Indemnity usually apply to each claim or series of related claims. There is usually also an Aggregate Limit of Indemnity for all claims during the policy period. This Aggregate Limit of Indemnity is usually the same as the per claim Limit of Indemnity. The ASDEFCON insurance clause provides that the policy must have one automatic right of reinstatement of the Limit of Indemnity in the event that the original Limit of Indemnity is exhausted. Note the requirement for an automatic right of reinstatement is not generally available in respect of other (non-professional indemnity) types of insurance and is therefore only included in this part sub-clause.
35. The clause provides a list of optional cover extensions, which may or may not be appropriate given the nature of the services to be provided by the contractor pursuant to the contract. These have been specifically listed separately as they are ordinarily only provided by professional indemnity insurance when specifically noted in the policy:
 - (a) software and IT risks (clause 8.6.5.b);
 - (b) unintentional breaches of intellectual property rights (clause 8.6.5.c); and
 - (c) unintentional breaches of trade practices laws (clause 8.6.5.d).
36. Drafters should only include those cover extensions which are appropriate for the services to be provided by the contractor. For example the optional cover extension for:
 - (a) software and IT risks would be relevant in a contract which includes the provision of software or IT services by the contractor. (Where this extension is required, the clause should also require that the policy have worldwide territorial and jurisdictional limits as software or IT events could occur anywhere in the ether – see paragraphs 16 to 22 of Part E for more information on territorial and jurisdictional limits);
 - (b) unintentional breaches of intellectual property rights would be relevant if the contractor is providing design services (for example, in relation to a product or process), but not if the contractor is providing transport services. (Where this extension is required, the clause should also require that the policy have worldwide territorial and jurisdictional limits as allegations of breaches of intellectual property rights can happen anywhere in the world); and
 - (c) unintentional breaches of trade practices laws would be relevant where there could be allegations of misleading or deceptive conduct.
37. Professional indemnity insurance is written on a claims-made basis. This means that the policy must be current at the time a claim is first made against the insured (or circumstances

leading to a future claim first come to the insured's attention). For this reason, professional indemnity insurance must be maintained for a period of time after the completion of the professional services provided by the contractor pursuant to the contract. The clause provides for this in another section (see paragraphs 97 to 103 in this Part C).

38. Professional indemnity insurance policies are typically subject to a retroactive date. This means that the policy will not respond to claims which relate to alleged negligent acts or omissions of the insured which occur prior to the retroactive date, irrespective of the date on which the claim is actually made. The clause requires the retroactive date of the professional indemnity policy be no later than the date on which the contractor commenced work pursuant to the contract, including any preparatory work before contract execution.

Property insurance (clause 8.6.6)

39. Property insurance covers loss of or damage to tangible property owned by the insured, and/or property for which the insured is responsible to insure. Property insurance covers first party losses. This means it covers losses suffered by the insured. Property insurance is not a liability insurance (which covers the insured's liability to third parties).
40. The clause requires property insurance for:
- (a) the tangible Supplies,
 - (b) GFE, GFF and any other property of the Commonwealth in the care, custody or control of the contractor; and
 - (c) all other property, plant and equipment in the care, custody or control of the contractor material to the contractor's ability to perform its obligations under the contract.
41. Drafters must select one of the two options of the clause:
- (a) In most circumstances, the first option is to be used.
 - (b) Where the insured property is not readily replaceable, or where the loss of or damage to the insured property will significantly adversely affect the normal business operations of the contractor (and the continued operations of the contractor are of importance to Defence), the alternative option is to be used. This is because the alternative option (which is commonly known as Industrial Special Risks insurance) includes business interruption insurance which covers the increased costs of working and loss of profits, among other things, incurred by the insured in the event of property damage covered by the property insurance. Drafters must stipulate the number of weeks for which cover is required in the clause. Determining the appropriate number of weeks for a contract will depend upon the unique risk profile of that contract. Business interruption insurance is commonly arranged for a period of 26 or 52 weeks.
42. In both options, the clause requires the property insurance to cover the interests of the Commonwealth in the property insured. This is important as, depending on the policy terms and the law of the policy, the Insurer may otherwise be entitled to only cover the interest of the contractor in the property even though it has charged a premium for the full value of the property. Thus, the requirement for cover for the Commonwealth's interest in insured property ensures that the full benefit of insurance is available in the event of a loss. Where property is insured for its full replacement of reinstatement value, but the contractor's interest in such property is less than full, an Insurer may seek to reduce a claim payment to the amount of the interest of the contractor. Including cover for the Commonwealth's interest in the insured property (eg as owner) can eliminate or reduce this risk.
43. Property insurance is usually written on either a specified perils basis or on an all risks basis. When written on a specified perils basis, the property insurance will only cover loss of or

damage to the insured property which is caused by a peril specified in the policy (eg fire, flood). It will not however respond to cover loss of or damage to the insured property caused by a peril which is not specified. Conversely, a property policy written on an all risks basis covers loss of or damage to insured property caused by any peril (subject to exclusions). Most property policies today are written on an all risks basis with specified exceptions. The clause requires the property insurance be written on an all risks basis.

44. The clause requires cover for the full reinstatement or replacement value of the property insured. This is particularly important where the property insurance contains an Average or Co-insurance clause (which permits the Insurer to reduce a claim payment to the proportional extent to which the property was underinsured). It is not desirable or appropriate to require property insurance to the value of the contract or any other arbitrary amount.
45. Property of the Commonwealth is generally insured by Comcover against the risks of loss or damage. However, where property of the Commonwealth is in the care, custody or control of the contractor, the risk of loss of or damage to such property is more appropriately covered under the contractor's insurances as the contractor is best able to manage the risk. This can be done under the contractor's public (and products) liability insurance (discussed above) or by the contractor's property insurance. The clause recognises that insurance cover may be provided under either of the contractor's insurances.
46. To accommodate circumstances where it would not be appropriate to require the contractor to insure all of the property listed in the clause, the clause contemplates the following circumstances:
 - (a) where the Commonwealth has retained the risk of loss of or damage to property of the Commonwealth, in which case the contractor need not insure such property,⁶ and
 - (b) where GFF constitutes only a part of a building or facility, in which case, the contractor need only insure the Licensed Fittings.

Transit insurance (clause 8.6.7)

47. Transit insurance is a first party loss insurance which covers property of the insured (or property for which the insured is responsible to insure) which is lost or damaged during transit. Transit insurance will also cover the risks of loss of or damage to property occurring whilst in temporary storage during transits.
48. Property insurance typically excludes transit risks and therefore transit insurance is a separate requirement. However, the contractor may satisfy this requirement by its property insurance if that insurance includes cover for transits of property and that cover is wide enough to include all transits required to be insured (for example, consideration should be given as to whether transits will be by land, air or sea and, whether they be domestic transits only or also international).
49. The clause provides that the transit insurance must be for no less than the full reinstatement or replacement value of the property insured, plus freight and insurance on an indemnity basis. This ensures that incidental expenses associated with property lost or damaged in transit are covered by the transit insurance. It is therefore not appropriate to require transit insurance cover for 110% of the value of the property in transit.
50. Drafters should include this requirement where relevant property will be transited during or for the purpose of the performance of work by the contractor. The risk of loss or damage to high value or dangerous property of the Commonwealth may however be best retained by or transferred to the Commonwealth as insurance may be commercially prohibitive in cost or simply unavailable.

⁶ This is encapsulated in clause 8.6.1b.

51. For the same reasons as set out in paragraph 42 of this Part C, the clause requires that the Commonwealth be an insured for its interest in the property to be transited.

Motor vehicle insurance (clause 8.6.8)

52. Motor vehicle liability insurance covers the insured for its liability for:
- (a) loss of or damage to tangible property; or
 - (b) bodily injury, disease, illness or death of any person (other than an employee of the insured),
- suffered by third parties⁷ as a result of the insured's use or ownership of registered and unregistered motor vehicles.
53. In Australia, this cover is provided by a combination of two policy types: compulsory third party insurance (**CTP**) and motor vehicle liability insurance.
54. CTP insurance is statutorily required and covers the insured for its liability for bodily injury suffered by third parties as a result of the insured's use or ownership of registered motor vehicles.
55. Motor vehicle insurance covers the insured for its liability for property damage suffered by third parties as a result of the insured's use or ownership of registered motor vehicles, as well as for the insured's liability for bodily injury or property damage suffered by third parties as a result of the insured's use or ownership of unregistered motor vehicles.
56. In other countries however, the insurance required by the ASDEFCON insurance clause may be provided by a different combination of policy(ies).
57. Motor vehicle insurance can also cover the vehicle itself against the risk of loss or damage. This type of cover is not required by the standard ASDEFCON insurance clauses because it is a decision appropriately left to the contractor.

Aircraft hull insurance (clause 8.6.9)

58. Aircraft hull insurance is a specialised type of property insurance which covers the loss of or damage to the hull of an aircraft which is owned by the insured (or for which the insured is responsible to insure) while the aircraft is on the ground or in flight.
59. If the Commonwealth contractually retains the risk of loss or damage to the aircraft hull then it is not appropriate to require the contractor to effect and maintain aircraft hull insurance. However, see paragraph 69 of this Part C.
60. The Commonwealth does not ordinarily insure the hull of its own aircraft.
61. Whenever aviation hull insurance is required, drafters should seek advice and assistance from the ACIP Management Team.

Aviation (and aviation products) liability insurance (clause 8.6.10)

62. Aviation (and aviation products) liability insurance is a specialised form of liability insurance which covers the insured for its liability for:
- (a) loss of, damage to, or loss of use of tangible property; or
 - (b) bodily injury, disease, illness or death of any person (other than an employee of the insured),

⁷ As noted at paragraph 16 of this Part C, a third party means any person who is not the insured making the claim (for example, the Commonwealth).

suffered by third parties⁸ (including passengers) as a result of the insured's use or ownership of an aircraft or the insured's supply of aircraft or aviation products. It can also cover such liabilities where they arise from the repair or maintenance of aircraft.

63. The clause also requires that the aviation (and aviation products) liability insurance extend to cover the Commonwealth's vicarious liability for the acts or omissions of the other insureds.
64. Public (and products) liability insurance will not normally cover aviation (and aviation products) liability risks. Hence, separate insurance is required.
65. See paragraph 33 in this Part C for a discussion of the availability of professional indemnity insurance for aviation risks.
66. The clause includes a number of cover extensions which may or may not be appropriate depending upon the nature of the services to be provided and work done by the contractor.
67. Whenever aviation (and aviation products) liability insurance is required, drafters should seek advice and assistance from the ACIP Management Team.

Hangarkeepers liability insurance (clause 8.6.11)

68. Hangarkeepers liability insurance is a specialised form of liability insurance which covers the insured for its liability for:
 - (a) loss of or damage to tangible property; or
 - (b) bodily injury, disease, illness or death of any person (other than an employee of the insured);suffered by third parties⁹ as a result of the insured's occupation, use or ownership of any hangar, runways or related infrastructure and facilities.
69. For example, if a Defence aircraft is lost or damaged whilst the contractor is storing or working on the aircraft in the contractor's hangar, then the hangarkeepers liability insurance will cover the contractor's liability to Defence for the lost or damaged aircraft.
70. Whenever hangarkeepers liability insurance is required, drafters should seek advice and assistance from the ACIP Management Team.

Marine hull insurance (clause 8.6.12)

71. Marine hull insurance is a specialised type of property insurance which covers the loss of or damage to the hull of a marine vessel which is owned by the insured (or for which the insured is responsible to insure).
72. If the Commonwealth contractually retains the risk of loss or damage to the vessel hull then it is not appropriate to require the contractor to effect and maintain marine hull insurance.
73. The Commonwealth does not ordinarily insure the hull of its own marine vessels.
74. Whenever marine hull insurance is required, drafters should seek advice and assistance from the ACIP Management Team.

⁸ As noted at paragraph 16 of this Part C, a third party means any person who is not the insured making the claim (for example, the Commonwealth).

⁹ As noted at paragraph 16 of this Part C, a third party means any person who is not the insured making the claim (for example, the Commonwealth).

Marine liability insurance (clause 8.6.13)

75. Marine liability (which is sometimes called protection and indemnity) insurance is a specialised form of liability insurance which covers the insured for its liability for:
- (a) loss of, damage to, or loss of use of tangible property; or
 - (b) bodily injury, disease, illness or death of any person (other than an employee of the insured),
- suffered by third parties¹⁰ (including passengers) as a result of the insured's use or ownership of a marine vessel.
76. The clause also requires that the marine liability insurance extend to cover the Commonwealth's vicarious liability for the acts or omissions of the other insureds.
77. Public (and products) liability insurance will not normally cover marine liability risks. Hence, separate insurance is required.
78. Whenever marine liability insurance is required, drafters should seek advice and assistance from the ACIP Management Team.

Ship builders insurance (clause 8.6.14) – only in Acquisition contracts

79. Ship builders insurance is a specialised form of insurance which provides both:
- (a) property insurance for the hull under construction (and the plant and equipment used in the construction); and
 - (b) liability insurance which covers the insured for its liability for:
 - (i) loss of or damage to tangible property; or
 - (ii) bodily injury, disease, illness or death of any person (other than an employee of the insured),suffered by third parties as a result of the insured's ship building activities.
80. The clause also requires that the ship builders insurance extend to cover the Commonwealth's vicarious liability for the acts or omissions of the other insureds.
81. Property insurance, and public (and products) liability insurance, will not normally cover ship building risks. Hence, separate insurance is required.
82. The clause includes a number of cover extensions which may or may not be appropriate depending upon the nature of the services to be provided and work done by the contractor.
83. Whenever ship builders insurance is required, drafters should seek advice and assistance from the ACIP Management Team.

Ship repairers liability insurance (clause 8.6.14) – only in Support contracts

84. Ship repairers liability insurance is a specialised form of liability insurance which covers the insured for its liability for:
- (a) loss of or damage to tangible property; or

¹⁰ As noted at paragraph 16 of this Part C, a third party means any person who is not the insured making the claim (for example, the Commonwealth).

- (b) bodily injury, disease, illness or death of any person (other than an employee of the insured),

suffered by third parties¹¹ as a result of the insured's ship repair or maintenance activities.

- 85. The clause also requires that the ship repairers liability insurance extend to cover the Commonwealth's vicarious liability for the acts or omissions of the other insureds.
- 86. Public (and products) liability insurance will not normally cover ship repair and maintenance liability risks. Hence, separate insurance is required.
- 87. The clause includes a number of cover extensions which may or may not be appropriate depending upon the nature of the services to be provided and work done by the contractor.
- 88. Whenever ship repairers liability insurance is required, drafters should seek advice and assistance from the ACIP Management Team.

Contract works insurance (clause 8.6.15)

- 89. Contract works insurance is a type of property insurance which covers the loss of or damage to property in the process of construction, plant and equipment and any other property on site. It may also cover the loss of or damage to property, plant and equipment whilst in transit to and from the site.
- 90. Property insurance will not normally cover property undergoing construction or being worked upon. Hence, separate insurance is required.
- 91. Drafters must select one of the two options for the clause:
 - (a) In most circumstances, the first option is to be used.
 - (b) Where the works and the materials forming part of the works (ie the insured property) cannot be readily replaced, or where the loss of or damage to the works will adversely affect the normal business operations of the contractor (such as by delaying the progression of the works), the alternative option that includes a requirement for cover for the financial losses of the contractor arising from the delay, such as loss of rent and increased costs of completion of the works (which is known as advanced consequential loss insurance), is to be used.
- 92. Contract works insurance is a first party loss insurance. It is important not to confuse contract works insurance with a combined insurance product commonly called contractor's all risks insurance. Contractor's all risks insurance normally includes contract works insurance and third party liability insurance (which is similar to public and products liability insurance but only covers these risks where they arise as a result of the insured's contract works activities) in a single policy. As noted at paragraph 2 of this Part C, provided each risk required to be insured by the ASDEFCON insurance clause is insured, the Commonwealth is not concerned with which particular insurance policy within the contractor's insurance program provides the cover or whether one or more policies are used. Thus, in certain circumstances, a contractor's all risks insurance policy may be suitable to satisfy the requirement for public and products liability and for contract works insurance, however, each case needs to be assessed on its particular facts.

Other insurances

- 93. Depending on the risk profile of the project, other types of insurances may also be required.

¹¹ As noted at paragraph 16 of this Part C, a third party means any person who is not the insured making the claim (for example, the Commonwealth).

94. For example, where the project involves chartering aircraft or marine services, charter services insurance (a combined insurance product covering loss of or damage to the hull, war risks and allied perils, hijacking, confiscation and kindred perils and passenger liabilities, among other things) may be required.
95. Other examples include where the project involves works which could result in damage to the environment, in such a case, pollution liability (also known as environmental impairment liability) insurance may be required. Or, where the project involves satellites, specific space insurances (eg pre-launch and in-orbit insurances) may be required. Such specialised insurances are not always available and may be expensive or be written on terms which significantly reduce the value of such cover.
96. Drafters are encouraged to seek assistance from the ACIP Management Team in determining whether particular project risks may require additional insurance treatment.

Periods of insurance (clause 8.6.16 and 8.6.17)

97. Insurances written on an occurrence basis respond to claims based on events or occurrences happening during the policy period and so are to be maintained for the duration of the contract and thereafter until all work pursuant to the contract is completed (including any works to be carried out after the end of the contract, for example, pursuant to defects corrections periods).
98. There are however three exceptions to this. Transit insurance, motor vehicle insurance and contract works insurance are only required for the time during which the risk insured against is actually present. Hence, the ASDEFCON insurance clause specifically stipulates the relevant time periods for these insurances.
99. Insurances written on a claims-made basis (such as professional indemnity insurance) are prudently maintained for seven (or in some cases, ten) years after work pursuant to the contract has been completed. As discussed at paragraph 37 of this Part C, claims-made policies must be current at the time a claim is first made against the insured (or circumstances leading to a future claim first come to the insured's attention) and so must be maintained for a period after the work is completed to allow for claims to be brought.
100. Clause 8.6.17 contemplates that some contractors may have cover on a claims-made basis, notwithstanding any requirements of the contract to have insurances written on an occurrence basis. For example, a contractor may have public liability insurance written on a claims-made basis even though clause 8.6.4 requires the public liability insurance to be written on an occurrence basis. In those circumstances, the contractor will be required to effect such insurances written on a claims-made basis for a period after the contract.
101. Drafters must generally select either seven or ten years as the period of time after work has been completed that the professional indemnity insurance needs to be maintained. If another time period is contemplated, for example due to a longer period of potential latent defects, drafters should refer the proposed longer requirement to the ACIP Management Team.
102. In most cases, seven years will be sufficient. However, where the risk of latent defects being discovered later exists (such as in construction contracts), the ten year period should be selected.
103. Where a contract includes provision for the supply of products, it may be appropriate to require the contractor to maintain products liability insurance for a period after completion of the contract. This is because a defect in the products may not manifest itself or be discovered during the contract period and the contractor's liability to compensate the Commonwealth for any loss in respect of such defect may not crystallise until after the contract period. For example, a defect could be discovered in the products and damage suffered 5 years after the products were supplied. The period for which the products liability cover should be maintained will usually depend on the likely life of the goods in question.

Where this will be a number of years (eg 20 years), a commercial judgement will need to be made regarding the period to be required.

Members Required in Uniform (clause 8.6.18)

104. This is an optional clause for use where a contract includes provision for Members Required in Uniform (**MRU**). Drafters will be required to select the liability insurances that are appropriate for the services that will be performed by MRU whilst under the supervision of the contractor. In most cases this should match the insurances required by the contract unless it is beyond doubt that the MRU will only perform certain tasks. For example, if in an aviation support contract the MRU will not provide any aviation related services.
105. The contractor should not be required to effect workers' compensation insurance on behalf of the MRU. Workers' compensation insurance is required by statute and can only be effected in respect of employees. The Commonwealth's own workers' compensation insurance, through Comcare, will still cover the MRU.

Terms of required insurances (clause 8.6.19)

106. The ASDEFCON insurance clause stipulates a number of terms which must be included in the required insurances (except for those insurances whose terms are dictated by statute, such as workers compensation and CTP).
107. The ASDEFCON insurance clause does not provide the Commonwealth with a blanket right to approve a contractor's Insurers or the terms of its insurances.

Approved Insurers (clause 8.6.19.a)

108. The Insurers of the required insurances must have a financial security rating of "A-" or better with Standard & Poors (or the equivalent with another recognised rating agency) at the time the insurances are effected, unless otherwise approved by the Commonwealth.
109. This requirement is intended to ensure that the Insurers of the required insurances are of such financial standing as to be able to meet their obligations to indemnify the contractor (or the Commonwealth) as an insured under the policies they issue.
110. Please see paragraphs 5 and 6 of Part E for guidance on considering Insurers which are put forward by contractors who do not have the requisite financial security rating.

Severability and non-imputation (clauses 8.6.19.b(ii), 8.6.19.b(iii) and 8.6.19.b(iv))

111. Where a policy of insurance covers more than one party, it is prudent to require that the policy include certain provisions to protect the rights of each insured.
112. Severability is one such provision. It requires that the Insurer treat each insured as though a separate policy of insurance had been issued to each (except in respect of the Limit of Indemnity, which is not increased as a result of the inclusion of a severability provision).
113. Other provisions require that the Insurer does not impute:
 - (a) the failure of one insured to comply with the terms of the insurance policy to another insured for the purposes of determining the availability of cover; and
 - (b) the knowledge of one insured to another insured for the purposes of determining the availability of cover.

Waiver of salvage rights (clause 8.6.19.b(v))

114. When an Insurer pays a claim under a property insurance policy for the replacement of damaged insured property, it usually retains the right to any salvage from the damaged property. That is, after the Insurer has fully indemnified the insured for damaged property, the

Insurer may sell any useable portions (or scrap) of the damaged property and keep the proceeds from such sale for itself.

115. Where the property covered by the insurance policy is sensitive Commonwealth property from a national security perspective, it is necessary to ensure that the Insurer agrees to forego its rights of salvage in respect of such property.
116. The ASDEFCON insurance clause provides that where the Commonwealth obtains proceeds from the salvage sale from any such property of the Commonwealth insured under the contractor's property insurance, the Insurer may deduct the actual payment of such salvage sale proceeds obtained by the Commonwealth from the amount of claim payment.

Proportionate liability (clause 8.6.19.b(vii))

117. This is an optional clause only to be used where the contract excludes proportionate liability.
118. Nine Australian jurisdictions have enacted "proportionate liability" legislation. The key feature of proportionate liability is that, where there are 2 or more defendants (ie *concurrent wrongdoers*) to a claim based on financial loss or property damage arising from negligence, a breach of a contractual duty of care or misleading conduct, the defendants are not jointly and severally liable but are liable in proportions determined by the court.
119. By contracting out of the proportionate liability regime, the contractor takes on a contractually assumed risk. As discussed in paragraph 14 of part A, most commercial insurance policies will not cover the insureds for contractually assumed risks. For this reason, it is necessary for the contract to specifically require the contractor to ensure its liability insurances (with the exception of statutory insurances) cover this contractually assumed risk.

Evidence of required insurances (clauses 8.6.20, 8.6.21 and 8.6.22)

120. The ASDEFCON insurance clause obliges the contractor to produce, on the Commonwealth's request:
 - (a) sufficiently detailed Certificates of Currency from the contractor's Insurer or Broker evidencing the required insurances;
 - (b) copies of the required insurance policies, except:
 - (i) copies of policies whose terms are dictated by statute (eg workers compensation, CTP) do not need to be provided; and
 - (ii) copies of policies which are commercially sensitive (eg professional indemnity) do not need to be provided, however the Commonwealth and/or its advisers must be given the opportunity to inspect such policies;
 - (c) any other evidence reasonably required by the Commonwealth.
121. Please see paragraphs 8 to 28 of Part E for guidance on the review of required insurances.
122. In the event that the contractor fails to comply with the requirement to produce satisfactory evidence to the Commonwealth of the currency and terms of the required insurances, the Commonwealth has the right to place the relevant required insurance(s) and the contractor must co-operate to enable the Commonwealth to do so.

Contractor's obligations in respect of required insurances (clauses 8.6.23 and 8.6.24)

123. The ASDEFCON insurance clause imposes a number of obligations on contractors in respect of the required insurances, which are drafted to ensure that the required insurances are not prejudiced or the available Limit of Indemnity impaired in a manner which adversely affects the required insurances.

124. The ASDEFCON insurance clause also obliges the contractor to do all things reasonably necessary to enable the Commonwealth (or any other person entitled to claim under a required insurance) to recover monies from the Insurer.
125. In addition, the ASDEFCON insurance clause prohibits the contractor from doing anything which may prejudice any insurance maintained by, or indemnity available to, the Commonwealth. This is conditional upon the Commonwealth providing written notice to the contractor that a relevant act or omission of the contractor would so prejudice the insurance maintained by, or indemnity available to, the Commonwealth.

Changes to the required insurances during the term of the contract (clause 8.6.25)

126. The ASDEFCON insurance clause includes a mechanism whereby the Commonwealth can:
- (a) increase or decrease the Limits of Indemnity for the required insurances; and/or
 - (b) change the types of the required insurances.
127. The Commonwealth may make such changes to the required insurances at each renewal of the relevant insurance by providing 3 months written notice to the contractor.
128. However, the Commonwealth will only exercise its right to increase the Limit of Indemnity for a required insurance or to change the types of required insurances if the Commonwealth has received a reputable Broker's (or other professional's) report which indicates that the increase is appropriate and in alignment with current market practice at the time for corporate insureds with similar risk profiles to that of the contractor.
129. The ASDEFCON insurance clause also obliges the contractor, when it is required by the Commonwealth to make a change to a required insurance, to submit a CCP to effect a corresponding change to the contract.
130. This right to increase or decrease the Limits of Indemnity or to change the types of required insurances will generally only be required for contracts of 3 years or more in duration.

Uninsurability (clauses 8.6.26 and 8.6.27)

131. In the event that a particular risk which is required to be insured under the contract becomes Uninsurable during the contract, the ASDEFCON insurance clause includes a mechanism whereby that Uninsurable risk can be managed other than by way of insurance.
132. Specifically, the ASDEFCON insurance clause provides that the following steps shall be taken in the event that a risk becomes Uninsurable:
- (a) the contractor shall promptly inform the Commonwealth of details of the Uninsurability of the risk and the steps which the contractor will take to manage the risk while it remains Uninsurable;
 - (b) the contractor and the Commonwealth shall meet to discuss and agree on how the risk will be managed while it remains Uninsurable (including, for example, that the Commonwealth may agree to provide an indemnity to the contractor); and
 - (c) if the contractor and the Commonwealth cannot agree on how the Uninsurable risk will be managed, either party may terminate the contract (except in the circumstance where the Commonwealth has offered an indemnity to the contractor on terms no less broad than the insurance held by the contractor for the risk immediately prior to it becoming Uninsurable).
133. While a risk remains Uninsurable, the ASDEFCON insurance clause obliges the contractor to monitor the availability of insurance for the risk and report to the Commonwealth details of

attempts made to obtain insurance for the risk. Further, if and when insurance becomes available for the risk, the contractor must effect such insurance.

134. Other forms of this regime are possible. For further guidance on alternative approaches please seek advice from the ACIP Management Team.

PART D – APPROVED CONTRACTOR INSURANCE PROGRAM INITIATIVE

The Approved Contractor Insurance Program Initiative

1. The Approved Contractor Insurance Program (**ACIP**) initiative is a joint Defence and Industry procurement reform initiative that involves a periodic centralised review by the ACIP Management Team within CASG of participating Defence companies' global / group and local insurance programs. The purpose of the review is to pre-qualify a company's insurance program (grant ACIP status), provided that General Counsel CASG is satisfied with the insurances maintained by the company.
2. Please refer to DMI(PROC) 13-0-004 *Mandatory Procurement Policy Requirements for the Approved Contractor Insurance Program Initiative* and the ACIP webpage at <http://intranet.defence.gov.au/dmoweb/sites/PP/comweb.asp?page=116599&Title=ACIP%20Initiative> for further information.

Contractor's with ACIP status (clause 8.6.28)

3. A contractor whose insurance program has been granted ACIP status by Defence is deemed compliant with, and is relieved of its obligations under the ASDEFCON insurance clause, subject to certain exceptions:
 - (a) clause 8.6.2 which obliges the contractor to use its best endeavours to ensure that its subcontractors are insured as required by the ASDEFCON insurance clause, as is appropriate (including with respect to the amount of insurance, types of insurance and period of insurance) given the nature of services or work to be performed by them, as if they were the contractor;
 - (b) clause 8.6.16 and 8.6.17 which stipulates the periods of time during which the required insurances must be maintained by the contractor;
 - (c) clause 8.6.24 which prohibits the contractor from doing anything which may prejudice any insurance maintained by, or indemnity available to, the Commonwealth;
 - (d) clause 8.6.25 which enables the Commonwealth to increase or decrease the Limits of Indemnity or change the types of insurances required by the ASDEFCON insurance clause;
 - (e) clauses 8.6.26 to 8.6.27 which detail how the parties to the contract will manage risks covered by an insurance that become Uninsurable; and
 - (f) clause 8.6.29 which enables the Commonwealth to withhold payments under the contract if the contractor fails to remedy a breach of the ASDEFCON insurance clause.
4. Further, the deemed compliance and relief from compliance with obligations under the ASDEFCON insurance clause for contractors with ACIP status only applies to the extent and for such time as the contractor holds the ACIP status.
5. In the event that a contractor's ACIP status is withdrawn by Defence, the contractor must notify the Commonwealth Representative of the withdrawal.

PART E – OTHER CONSIDERATIONS

Alliance and modified alliance contracts

1. Alliance and modified alliance contracts adopt a different risk allocation methodology which requires particular attention by drafters as traditional liability insurances will generally not effectively transfer risks to Insurers.
2. In particular, traditional professional indemnity policies generally will not operate as intended as there may be no liability of one party to another in respect of professional negligence. Specialised insurance products have been developed by Insurers to deal with alliances and modified alliances, which allow for some cover to be provided.
3. Drafters should seek advice from the ACIP Management Team when considering insurances for an alliance or modified alliance contract.

Self-insurance/ Captives/ Mutuels

4. If the contractor self-insures (ie does not insure) any of the risks required to be insured, and this is acceptable to Defence,¹² then the contract will need to reflect that the contractor is permitted to self-insure. This may require deletion of the insurance requirement altogether.
5. Some contractors insure via a Captive Insurer of the contractor. If this is acceptable, then the contract will need to be amended to reflect that the contractor is permitted to insure via a Captive. For example, the Captive will not have a financial security rating of "A-" or better with Standard & Poors (or the equivalent with another recognised rating agency) and may not be able to insure third parties (for example, the Commonwealth for its vicarious liability).
6. It should be noted that some insurances which appear to be commercial insurance may in fact be mutual arrangements. This is particularly common in aviation and marine insurances. Mutual Insurers insure the mutual members by pooling the premium contributions of members and relying, in some cases, on reinsurance. Care should be taken in agreeing to accept these insurances, particularly where the Commonwealth is paying the premium. For example, calls may be made on members of a mutual in the event of a short fall in reserves to meet anticipated claims.
7. Where a contractor proposes to self-insure, or insure via a Captive or a mutual arrangement, drafters should seek further advice from the ACIP Management Team.

Ensuring contractor compliance

8. It is important that Defence has procedures in place to check that the required insurances are effected and maintained as required by the contract.
9. Requirements that contractors provide Certificates of Currency and/or copies of policies on each renewal must be enforced and included as part of standard contract management practices by Defence.
10. If these requirements are not enforced, there is the potential that they will not be complied with and the protections which the insurance requirements of the contract are intended to afford Defence, may be wholly or partially illusory.
11. Defence should be particularly mindful of insurances written on a claims-made basis that must be maintained after the end of the contract (eg professional indemnity insurance).

¹² DPPM, Chapter 3.15, paragraph 48.

12. When reviewing Certificates of Currency and/or copies of policies, careful attention should be paid not only to the specific terms required by the contract (eg Limits of Indemnity), but reviewers should also consider, among other things:
 - (a) the levels of any Deductibles, Self-Insured Retentions or Co-insurance; and
 - (b) the exclusions.
13. Often, a Certificate of Currency issued by the contractor's Broker will contain insufficient information to satisfy the Commonwealth as to the terms of the required insurance held by the contractor. Hence, the ASDEFCON insurance clause specifically requires that Certificates of Currency be sufficiently detailed.
14. Please refer to the *Guidance Note – Insurance Certificates of Currency* available on the ACIP webpage at <http://intranet.defence.gov.au/dmoweb/sites/PP/comweb.asp?page=116599&Title=ACIP%20Initiative> for further information on certificates of currency.
15. Where the risks to be insured and/or the required insurances are complex or unique, reviewers should consider seeking assistance from the ACIP Management Team with the review of Certificates of Currency and copies of policies.

Territorial and jurisdictional limits

16. There is often misunderstanding and confusion regarding territorial and jurisdictional limits in insurance policies.
17. Territorial limits refer to the territory or geographical area in which an occurrence or event must occur in order for the policy to respond.
18. Jurisdictional limits, on the other hand, relate to the legal jurisdiction (eg courts) and/or law pursuant to which claims can be brought in order for the policy to respond. For example, many policies in Australia will not respond to claims brought in the courts of, or in any court applying the laws of, the USA or Canada (and their respective territories and protectorates).
19. The ASDEFCON insurance clause generally does not separately stipulate required geographical or jurisdictional limits (see paragraphs 21 and 22 in this Part E for exceptions). Rather, the ASDEFCON insurance clause requires that each of the insurances provide cover for the risks relevant to the project, which achieves the same result. For example, the requirement for marine liability insurance (clause 8.6.13) stipulates that the insurance cover liabilities caused by, arising out of, or in connection with, the use, operation or ownership of any vessel to be used in the performance of the work under the contract. If pursuant to a particular project a contractor was to use a vessel in inland waters of the USA the marine liability insurance for such use would be required to include both geographical limits and jurisdictional limits that included the USA. Otherwise, the insurance would not be compliant with the obligation that it cover liabilities caused by, arising out of, or in connection with, the use, operation or ownership of any vessel to be used in the performance of the work under the contract.
20. Generally, limits will be defined as one of the following:
 - (a) Australia wide;
 - (b) Worldwide excluding USA and Canada and their territories and protectorates (cover for these particular jurisdictions often further increases the premium and is not always available from all Insurers); or
 - (c) Worldwide.

21. Where a required insurance covers software or IT risks, or covers breaches of intellectual property, the geographical territory should be worldwide to avoid any dispute as to the geographical location of the occurrence (which is not necessarily easily identifiable, particularly in respect of online activities). The ASDEFCON insurance clause specifically requires this in clause 8.6.5.g.
22. The public and products liability insurance clauses include options for territorial limit. The worldwide territorial limit option should only be selected where works under the contract will be undertaken outside of Australia or where acquired items may be used outside of Australia.
23. When reviewing contractor's insurances, it is important to ensure that appropriate territorial limits and jurisdictional limits are included in the required insurances.

Limits of Indemnity

24. With respect to property insurances, the general rule is that property should be fully insured for its full reinstatement or replacement value. Where property is in transit, it is prudent to insure it for 100% of its value and for incidental costs.
25. With respect to liability insurances, Limits of Indemnity are to be set by reference to the Maximum Probable Loss derived from the LRA. The level of cover needs to consider all liabilities (to the Commonwealth and third parties) that could arise from the one occurrence or event, or series of related occurrences or events. The level of cover required also needs to take into account the costs of acquiring insurance and its availability.
26. In setting the required Limits of Indemnity for liability insurances, drafters should bear in mind that the value of the contract may bear no relation to the risks that may arise from its performance. However, the value of the contract will influence the commercial sense of requiring the contractor to incur large premium costs for high insurance levels.
27. Drafters should also consider whether the Limit of Indemnity for a required insurance is subject to an Aggregate Limit of Indemnity. This is particularly important where one Aggregate Limit of Indemnity is shared across multiple activities of the contractor. In such cases, it may be appropriate to require a higher Limit of Indemnity than would otherwise be required. The issue is however less of a concern where the policy is being effected solely for the project (ie project specific insurance).
28. The ASDEFCON insurance clause provides for Limits of Indemnity to be reviewed periodically by Defence in long term contracts (see paragraphs 126 to 130 in Part C). The ASDEFCON insurance clause does not make Limits of Indemnity subject to indexing as Limits of Indemnity are not increased or decreased incrementally.

ANNEXURE A – GLOSSARY OF TERMS

This glossary of terms includes definitions of terms which appear in this handbook as well as definitions of various other terms in common use in the insurance industry.

This glossary is not authoritative and is provided for ease of reference only. Further, it is not necessarily reflective of the precise usage of these or other similar terms in overseas jurisdictions, which can vary from Australia.

Term	Definition
ACIP Management Team	The ACIP Management Team is led by Director ASDEFCON and Contracting Initiatives and comprises nominated officers from the Directorate of ASDEFCON and Contracting Initiatives in Contracting and Legal Division, CASG.
Aggregate (or Aggregate Limit of Indemnity)	The Aggregate Limit of Indemnity in an insurance policy is the maximum amount the Insurer will pay for all claims in any one policy period, irrespective of the number of claims.
assessor (or loss adjuster or loss assessor)	A person appointed to investigate the cause and circumstances of a loss and to assess the quantum of the loss, usually appointed by the Insurer.
Average	<p>An Average clause in an insurance policy operates to reduce the amount the Insurer will pay for a claim where the property which is lost or damaged (and is the subject of the claim) was insured for less than its full replacement or reinstatement value.</p> <p>Whilst the precise operation of Average clauses varies somewhat, they typically result in a proportional reduction in a claim payment which reflects the extent to which the relevant property was under-insured.</p> <p>In effect, the Average clause penalises insured's for underinsuring their property.</p> <p>The premium for property insurance is typically calculated by applying a rate to the declared value of property to be insured. The Average clause mitigates the potential for insureds to under-declare the value of their property in order to minimise the premium payable by them.</p> <p>There are statutory provisions in the Insurance Contracts Act 1984 (Cth) which govern Average clauses in insurance policies subject to Australian law.</p>
binder	An arrangement between an Insurer and a Broker pursuant to which the Broker is authorised to accept risks on the Insurer's behalf.
Broker (or Insurance Broker)	<p>An intermediary acting on behalf of the insured in the placement and management of insurance(s).</p> <p>However, in certain circumstances, a Broker may act on behalf of the Insurer (eg pursuant to a binder).</p>
Captive	A company established to act as an Insurer of the risks of a particular contractor (and its related bodies corporate) which is itself a related body corporate of the contractor.

Term	Definition
Certificate of Currency	<p>A document evidencing the existence of an insurance policy at a particular point in time, which is typically issued by the Insurer of that policy, or by a Broker.</p> <p>The Certificate of Currency does not affect or alter the terms of the actual insurance policy in any way.</p>
claims-made basis	<p>Liability insurance written on a claims-made basis covers claims made during the policy period (irrespective of when the occurrence giving rise to the claim happened). Liability insurances covering long(er)-tail liability risks are typically written on a claims-made basis (eg professional indemnity insurance).</p> <p>Liability insurance written on a claims-made basis can be contrasted with liability insurance written on an occurrence basis.</p>
Co-insurance	<p>Co-insurance means that the insured and the Insurer together share the risk insured, at least to an extent. There are a myriad of ways Co-insurance can be used in insurance policies, but the most common provides that the insured will contribute a certain percentage to the amount of each and every loss that the Insurer pays.</p>
cover note	<p>An interim or temporary contract of insurance (or other document evidencing same) which is issued pending the issuance of the formal insurance contract document.</p>
cross liability	<p>Whilst this term can encompass a variety of nuances, a cross liability clause generally is a clause in a liability insurance policy which provides that the Insurer agrees to insure the liability of one insured to another insured under the same policy.</p>
Deductible	<p>The Deductible is the amount which the insured is required to contribute towards the payment of a loss by an Insurer.</p> <p>A Deductible is sometimes called an excess or a Self-Insured Retention. However, strictly speaking, a Self-Insured Retention operates slightly differently than a Deductible (or excess) in that a Self-Insured Retention does not form part of the Limit of Indemnity, whereas a Deductible does.</p> <p>The following example is illustrative. Assume a professional indemnity insurance policy has a Limit of Indemnity of \$1million per claim and in the aggregate per policy period, and a deductible of \$100,000 per claim. In the event of a \$1.5million claim, the insured would pay the first \$100,000 and the Insurer would pay up to the Limit of Indemnity of the policy (being \$900,000). The \$1million aggregate Limit of Indemnity has been exhausted and the remaining \$500,000 is uninsured. Now, let's assume that same professional indemnity insurance policy (with a Limit of Indemnity of \$1million per claim and in the aggregate for all claims per policy period) but is subject to a Self-Insured Retention of \$100,000. Under this policy, in the event of a \$1.5million claim, the insured would still pay the first \$100,000, but the Insurer will pay the full Limit of Indemnity (being \$1,000,000) leaving only \$400,000 uninsured.</p> <p>In any event, it is important that the terms of the actual insurance policy in question be carefully reviewed as the use of the terms Deductible, excess and Self-Insured Retention are not necessarily always indicative of their operation.</p>
duty of disclosure	<p>The <i>Insurance Contracts Act 1984</i> (Cth) imposes a statutory pre-contractual duty of disclosure on every insured. The duty requires that every insured disclose to their prospective Insurer every matter known to them which is a</p>

Term	Definition
	<p>matter relevant to the Insurer's decision to accept the risk and on what terms.</p> <p>If an insured fails to comply with the duty of disclosure, the Insurer will be entitled to certain remedies, including reducing its liability for a claim (even to nil).</p> <p>There is a similar duty owed at common law.</p>
endorsement	A term added to an insurance policy varying the standard terms. Endorsements are usually annexed or included in the policy schedule.
excess policy	An insurance policy providing cover for losses in excess of losses covered by another underlying insurance policy.
exclusion	The perils, losses, liabilities, property or circumstances for which cover is excluded by the terms of the policy.
first party loss	Insurance cover for the insured's own loss, not the insured's liability to third parties.
Institute Clauses (or AVN Clauses)	<p>A set of standard form clauses which have been developed and are commonly adopted by Insurers, particularly in the fields of marine and aviation risks.</p> <p>AVN Clauses are a set of Institute Clauses produced by the Aviation Insurance Clauses Group and are used in various forms of aviation-related insurance policies.</p>
Insurer (or Underwriter)	The party to an insurance policy to whom the risk is transferred and who has the obligation to pay claims.
Liability Risk Assessment (LRA)	<p>Liability Risk Assessment which must be undertaken by the Commonwealth in accordance with the standard Defence methodology described in the Liability Risk Management Process guide, which can be accessed at http://intranet.defence.gov.au/dmoweb/sites/PP/comweb.asp?page=74269&Title=Liability%20Risk%20Management. The Liability Risk Assessment provides the basis for determining the limitation of liability amounts and insurance requirements.</p>
Limit of Indemnity (or Limit of Liability)	The maximum amount the Insurer will pay under an insurance policy.
loss adjuster (or loss assessor)	See Assessor.
loss payee	The person specified on a first party loss insurance policy as the person to whom the proceeds of an insurance claim are to be paid.
Maximum Probable Loss (MPL)	The Maximum Probable Loss represents the financial consequence (to the Commonwealth and to any third party) of a risk event occurring after taking into account any risk treatments that mitigate consequence – it is NOT discounted by the likelihood of it occurring.
occurrence basis	Liability insurance written on an occurrence basis covers claims arising from occurrences (as that term is defined in the policy) happening during the policy period (irrespective of when the claim is made against the insured). Liability insurances covering short(er)-tail liability risks are typically written on an

Term	Definition
	<p>occurrence basis (eg public and products liability insurance). This is because there is typically only a short delay between the date of the occurrence and the date the claim is made against the insured.</p> <p>Liability insurance written on an occurrence basis can be contrasted with liability insurance written on a claims-made basis.</p> <p>First party loss policies are written on an occurrence basis.</p>
Principal's liability	See vicarious liability.
proposal	The document (and any information or other documents attached thereto) which is completed by the insured providing relevant information to the Insurer in order to apply for insurance.
reinsurance	Insurance taken out by Insurers in respect of all or part of the portfolio of risks the Insurer has insured.
renewal	The placement of a new policy of insurance in replacement for a policy which has just expired.
retroactive date	The date stipulated in a liability insurance policy written on a claims-made basis (particularly, professional indemnity insurance) as of which the acts or omission of the insured giving rise to a claim(s) will be covered by the policy. Claims which arise from acts or omissions of the insured which occurred prior to the retroactive date are not covered by the policy.
run-off cover	<p>Liability insurances written on a claims-made basis do not (with some exceptions) provide cover for claims arising after the end of the policy period. Thus, where there exists a risk that claims could arise after the end of the policy period (and the policy is not replaced) which relate to acts or omissions that occurred prior to the expiry of the policy period, run-off cover needs to be arranged to provide cover for such claims.</p> <p>The period of time for which it is prudent to maintain run-off cover varies. However, it is usually recommended that a period of 7 years be arranged in order to allow for the 6 year general limitation period for the bringing of claims plus 12 months for the serving of an originating process issued by a court.</p>
salvage	The damaged property (or amount of money representing the value of such damaged property) recovered by an Insurer after it has paid the full value of an insured's claim for such damaged property.
Self-Insured Retention (SIR)	<p>The Self-Insured Retention is the amount which the insured must bear before the Insurer's obligation to contribute to the payment of the loss arises.</p> <p>As noted above in the definition of Deductible, there is inconsistent use of the terms Deductible, excess and Self-Insured Retention. It is therefore important that the terms of the actual insurance policy in question be carefully reviewed to ascertain the actual operation.</p>
schedule (or policy schedule)	A document forming part of an insurance policy which is issued each renewal by the Insurer setting out variable information in relation to the policy including the name of the insured, period of cover, premium, Deductible, Limits of Indemnity, etc.

Term	Definition
self-insurance	Refers to the retention of a risk by a person. Self-insurance properly means that the person simply retains the risk and will fund its consequences themselves. However, sometimes it is used to mean that the entity has insured the risk with a Captive.
severability	Refers to a term in an insurance policy which provides that the policy operates as though a separate policy was issued to each individual and entity comprising the insured, except that the Limit of Indemnity is not thereby increased.
slip (or placing slip)	A document evidencing the terms of an insurance contract which has been proposed and agreed to.
Sub-Limit	A Limit of Indemnity which applies to a particular risk that is typically less than the Limit of Indemnity otherwise available for claims under an insurance policy.
subrogation	The right of an Insurer, after settling a claim or indemnifying the insured in respect of a claim, to sue in the insured's name any third party who was partly or wholly responsible for the loss, in order to make recoveries and reduce the Insurer's net loss.
Underwriter	See Insurer.
Uninsurable	For the purposes of the ASDEFCON insurance clause only, Uninsurable is defined as: <ul style="list-style-type: none"> (a) the required insurance is not available in the international insurance markets with Insurers with a financial security rating of "A-" or better by Standard & Poors (or the equivalent rating with another reputable rating agency); or (b) the premium for insuring the risk is at such a high level or terms and conditions which are such that the risk is not generally being insured against in the international insurance markets with reputable Insurers by prudent corporates with a risk profile comparable to the contractor.
vicarious liability (or principal's liability)	Refers to the liability of one person for the negligence of another person, without the first person being at fault. The most common relationships giving rise to such liability are employer and employee, principal and agent, and in limited cases, a person who engages an independent contractor and the contractor. An employer is liable for the negligent conduct of an employee committed in the course of employment – the employer is vicariously liable for the negligence of its employee.
waiver of subrogation	Refers to a provision in an insurance policy wherein the Insurer agrees not to exercise its rights of subrogation. In the absence of such a waiver, an Insurer who has paid a claim is generally entitled to step into the shoes of the insured and take any action available to the insured to recover the insured's loss against any person who caused or contributed to that loss (which the Insurer has paid to the insured pursuant to the terms of the insurance policy). Where multiple unrelated parties are insured under the same insurance policy, it is often appropriate to seek that the Insurer waive its rights of subrogation, at least in respect of the insureds under the policy.

Term**Definition**

The ASDEFCON insurance clause does not include a requirement for a waiver of subrogation in contractor's insurances because the Commonwealth is not insured under the contractor's insurances for its liability for its own acts or omissions. Accordingly, there is no direct benefit to the Commonwealth whether or not the Insurer waives its rights of subrogation in a contractor's insurance policy.

ANNEXURE B – LIST OF ACRONYMS

Acronym	Term
ACIP	Approved Contractor Insurance Program
CASG	Capability Acquisition and Sustainment Group
CTP	compulsory third party insurance
DMI(PROC)	Defence Materiel Instruction (Procurement)
DPPM	Defence Procurement Policy Manual
LRA	Liability Risk Assessment
MRU	Members Required in Uniform
SIR	Self-Insured Retention

ANNEXURE C – INSURANCE CHECKLIST

The following checklist is intended to assist drafters in their selection of which insurances and which options of the ASDEFCON insurance clause to require.

1.	Will any workers engaged by the contractor perform work outside of Australia?	If yes:	Include the alternative option for workers compensation (clause 8.6.3)
		If no:	Include workers compensation (clause 8.6.3)

For acquisitions contracts only:

2.	Is the contract only for the supply of products, and no other services will be provided?	If yes:	Include the alternative option for products liability (clause 8.6.4) and amend clauses 8.6.6, 8.6.16.b, 8.6.19.b(v)(1) and 8.6.28.a(iii) accordingly
		If no:	Include public and products liability (clause 8.6.4) and amend clauses 8.6.6, 8.6.16.b, 8.6.19.b(v)(1) and 8.6.28.a(iii) accordingly

3.	Will the contractor be performing any professional services?	If yes:	Include professional indemnity (clause 8.6.5)	Will the contractor provide software or other IT services?	If yes:	Include paragraph b of clause 8.6.5
					If no:	Mark paragraph b of clause 8.6.5 "Not used"
				Will the contractor be providing design services (eg in relation to a product or process)?	If yes:	Include paragraph c of clause 8.6.5
					If no:	Mark paragraph c of clause 8.6.5 "Not used"
				Could the contractor's services give rise to a claim (by the Commonwealth or any other third party) for misleading and	If yes:	Include paragraph d of clause 8.6.5
					If no:	Mark paragraph d of clause 8.6.5

				deceptive conduct?		"Not used"
				Is there a risk of latent defects emerging more than 7 years after completion of the services?	If yes:	Select 10 years in clause 8.6.16.d
					If no:	Select 7 years in clause 8.6.16.d
				Could the contractor's services give rise to a claim outside Australia (where paragraphs b or c is selected, generally insurance cover for worldwide territorial and jurisdictional limits should be included)?	If yes:	Include paragraph g of clause 8.6.5
					If no:	Mark paragraph g of clause 8.6.5 "Not used"
		If no:	Mark clauses 8.6.5, 8.6.16.d and 8.6.28.a(iv) "Not used"			

4.	Will the contractor be using any of its own tangible property, or will the Commonwealth be providing the contractor with any tangible property, in the performance of the contract?	If yes:	Is the property difficult to replace? Or, will the loss of or damage to the property significantly adversely affect the normal business operations of the contractor (and the continued operations of the contractor is of importance to Defence)?	If yes:	Include the alternative option for Industrial Special Risks (clause 8.6.6) and amend clauses 8.6.16.a(ii), 8.6.19.b(v)(2) and 8.6.28.a(v) accordingly
				If no:	Include property (clause 8.6.6) and amend clauses 8.6.16a(ii), 8.6.19.b(v)(2) and 8.6.28.a(v) accordingly
		If no:	Mark clauses 8.6.6, 8.6.16.a(ii), 8.6.19.b(v)(2) and 8.6.28.a(v) as "Not used"		

5.	Will any of the products or property referred to in item 2 and 4 above be transited during performance of the contract?	If yes:	Include transit (clause 8.6.7)
		If no:	Mark clauses 8.6.7, 8.6.16e, 8.6.19.b(v)(3) and 8.6.28.a(vi) "Not used"

6.	Will the contractor be using any motor vehicles in the performance of the contract?	If yes:	Include motor vehicle (clause 8.6.8)
		If no:	Mark clauses 8.6.8, 8.6.16f and 8.6.28.a(vii) "Not used"

7.	Will the contractor be using its own aircraft in the performance of the contract?	If yes:	Include aircraft hull (clause 8.6.9)
		If no:	Mark clauses 8.6.9, 8.6.16.a(iii), 8.6.19.b(v)(4) and 8.6.28.a(viii) "Not used"

8.	Will the contractor be using, or have in its care, custody and control any aircraft, or supplying aviation products, in the performance of the contract?	If yes:	Include aviation liability (clause 8.6.10)
		If no:	Mark clauses 8.6.10, 8.6.16.c and 8.6.28.a(ix) "Not used"

9.	Will the contractor be occupying or using a hangar, runway or other related infrastructure or facilities in the performance of the contract?	If yes:	Include hangarkeepers (clause 8.6.11)
		If no:	Mark clauses 8.6.11, 8.6.16.a(iv), 8.6.19.b(v)(5) and 8.6.28.a(x) "Not used"

10.	Will the contractor be using a marine vessel which it owns (or has hired or leased) in the performance of the contract?	If yes:	Include marine hull (clause 8.6.12) and marine liability (clause 8.6.13)
		If no:	Mark clauses 8.6.12, 8.6.13, 8.6.16.a(v), 8.6.16.a(vi), 8.6.19.b(v)(6), 8.6.28.a(xi) and 8.6.28.a(xii) "Not used"

For acquisitions contracts only:

11.	Will the contractor be	If yes:	Include ship builders (clause 8.6.14)
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	undertaking any ship building activities in the performance of the contract?	If no:	Mark clauses 8.6.14, 8.6.16.a(vii), 8.6.19.b(v)(7), 8.6.28.a(xiii) "Not used"
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For maintenance contracts only:

12.	Will the contractor be undertaking any ship repair or maintenance activities in the performance of the contract?	If yes:	Include ship repairers liability (clause 8.6.14)
		If no:	Mark clauses 8.6.14, 8.6.16.a(vii), 8.6.19.b(v)(7), 8.6.28.a(xiii) "Not used"

For acquisitions contracts only:

13.	Will the contractor be undertaking any contract works (ie construction) during the performance of the contract?	If yes:	Are the works (or property forming part of the works) difficult to replace? Or, will the loss of or damage to the works significantly adversely affect the normal business operations of the contractor (and the continued operations of the contractor is of importance to Defence)?	If yes:	Include the alternative option for contract works (clause 8.6.15)
				If no:	Include contract works (clause 8.6.15)
		If no:	Mark clauses 8.6.15, 8.6.16g and 8.6.28.a(xiv) "Not used"		

14.	Do the products supplied have a life longer than the contract period?	If yes:	Include a requirement for the contractor to maintain the insurance for a period after completion of the contract in clause 8.6.16b.
		If no:	Include a requirement for products liability (or public and products liability, as the case may be) insurance to be maintained until all work under the contract is completed in clause 8.6.16b.

Note: amend all remaining square brackets “[]” to reflect the insurances and options selected.

ANNEXURE D – Long form and short form clause numbers

The following table is intended to assist drafters in the identification of clauses in the short form versions of the ASDEFCON insurance clause which correspond to those in the long form versions which are referred to in this Handbook.

Provision in ASDEFCON insurance clause	Clause # in long form (acquisition)	Clause # in long form (support)	Clause # in short form (acquisition)	Clause # in short form (services)	Clause # in short form (support)
	ASDEFCON (Strategic Materiel) and ASDEFCON (Complex Materiel) Vol 2	ASDEFCON (Support)	ASDEFCON (Complex Materiel) Vol 1 and ASDEFCON (Standing Offer for Goods)	ASDEFCON (Services) and ASDEFCON (Standing Offer for Services)	ASDEFCON (Support Short)
Introductory provision	8.6.1	8.6.1	7.4.1	6.4.1	7.1.1 preamble
Subcontractors	8.6.2	8.6.2	7.4.2	6.4.2	7.1.6
Workers compensation insurance	8.6.3	8.6.3	7.4.3	6.4.3	7.1.1.a
Public (and products) liability insurance	8.6.4	8.6.4	7.4.4	6.4.4	7.1.1.b
Professional indemnity insurance	8.6.5	8.6.5	7.4.5	6.4.5	7.1.1.c
Property insurance	8.6.6	8.6.6	7.4.6	n/a	7.1.1.d
Transit insurance	8.6.7	8.6.7	7.4.7	n/a	7.1.1.e
Motor vehicle insurance	8.6.8	8.6.8	7.4.8	n/a	7.1.1.f 7.1.1.g

Provision in ASDEFCON insurance clause	Clause # in long form (acquisition)	Clause # in long form (support)	Clause # in short form (acquisition)	Clause # in short form (services)	Clause # in short form (support)
	ASDEFCON (Strategic Materiel) and ASDEFCON (Complex Materiel) Vol 2	ASDEFCON (Support)	ASDEFCON (Complex Materiel) Vol 1 and ASDEFCON (Standing Offer for Goods)	ASDEFCON (Services) and ASDEFCON (Standing Offer for Services)	ASDEFCON (Support Short)
Aircraft hull insurance	8.6.9	8.6.9	n/a	n/a	n/a
Aviation (and aviation products) liability insurance	8.6.10	8.6.10	n/a	n/a	n/a
Hangarkeepers liability insurance	8.6.11	8.6.11	n/a	n/a	n/a
Marine hull insurance	8.6.12	8.6.12	n/a	n/a	n/a
Marine liability insurance	8.6.13	8.6.13	n/a	n/a	n/a
Ship repairers liability insurance	n/a	8.6.14	n/a	n/a	n/a
Ship builders insurance	8.6.14	n/a	n/a	n/a	n/a
Contract work insurance	8.6.15	8.6.15	7.4.9	n/a	n/a
Periods of insurance	8.6.16 8.6.17	8.6.16 8.6.17	7.4.10 7.4.11	6.4.6 6.4.7	7.1.2 7.1.3
Members Required in Uniform	n/a	8.6.18	n/a	n/a	n/a
Terms in required insurances	8.6.19	8.6.19	7.4.12	6.4.8	7.1.4
Evidence of required insurances	8.6.20	8.6.20	7.4.13	6.4.9	7.1.5

Provision in ASDEFCON insurance clause	Clause # in long form (acquisition) ASDEFCON (Strategic Materiel) and ASDEFCON (Complex Materiel) Vol 2	Clause # in long form (support) ASDEFCON (Support)	Clause # in short form (acquisition) ASDEFCON (Complex Materiel) Vol 1 and ASDEFCON (Standing Offer for Goods)	Clause # in short form (services) ASDEFCON (Services) and ASDEFCON (Standing Offer for Services)	Clause # in short form (support) ASDEFCON (Support Short)
	8.6.21 8.6.22	8.6.21 8.6.22			
Contractor's insurance obligations	8.6.23 8.6.24	8.6.23 8.6.24	7.4.14	6.4.10	7.1.7
Changes to the required insurances	8.6.25	8.6.25	n/a	n/a	n/a
Uninsurability	8.6.26 8.6.27	8.6.26 8.6.27	n/a	n/a	n/a
Contractor's with ACIP status	8.6.28	8.6.28	7.4.15	6.4.11	7.1.9
Withholding payments	8.6.29	8.6.29	7.4.16	6.4.12	7.1.10