

**National Interest Analysis [2021] ATNIA 19**

**with attachment on consultation**

**Framework Agreement between the Organisation for Joint Armament Cooperation  
(Organisation Conjointe de Coopération en Matière d'Armement (OCCAR)) and  
the Government of Australia for the participation of Australia in OCCAR-managed  
Programmes**

(Perth and Bonn on 5 February 2021)

**[2021] ATNIF 24**

## NATIONAL INTEREST ANALYSIS: CATEGORY 1 TREATY

### **Framework Agreement between the Organisation for Joint Armament Cooperation (Organisation Conjointe de Coopération en Matière d'Armement (OCCAR)) and the Government of Australia for the participation of Australia in OCCAR-managed Programmes**

(Perth and Bonn on 5 February 2021)

[2021] ATNIA 19

[2021] ATNIF 24

#### **Nature and timing of proposed treaty action**

1. The proposed treaty action is the entry into force of the *Framework Agreement between the Organisation for Joint Armament Cooperation (Organisation Conjointe de Coopération en Matière d'Armement (OCCAR)) and the Government of Australia for the participation of Australia in OCCAR-managed Programmes* (the Agreement).
2. For the Agreement to enter into force, the Parties must notify each other of the completion of their necessary domestic requirements through an exchange of notes. The Agreement would enter into force on the date of signature of the last note (Article 20.1). Australia intends to send its note as soon as practicable following the completion of domestic requirements.

#### **Overview and national interest summary**

3. The purpose of the Agreement is to establish a legally binding framework to enable Australia's formal participation in OCCAR-managed Programmes, as a non-Member State. OCCAR is an inter-governmental organisation based in Europe that manages defence equipment procurement and sustainment programmes for the benefit of OCCAR Member States (France, Germany, Italy, the United Kingdom, Belgium and Spain) and non-Member States participating in OCCAR-managed Programmes (currently including Finland, Sweden, Turkey, Lithuania and the Netherlands).
4. OCCAR currently manages an annual €4000 million operating budget portfolio for defence equipment programmes. Australia has been seeking to participate formally in OCCAR-managed Programmes for nearly a decade, building on its observer status in several Programmes. Australia is interested in participating in the OCCAR Light Weight Torpedo Programme, and is exploring the benefits of participation in the OCCAR Tiger Helicopter and Boxer Multi Role Armoured Vehicle Programmes. A number of other OCCAR-managed Programmes are also relevant to Defence's current and potential future capability.
5. The Agreement contributes to Australia's national interest by facilitating Australian access to the full benefits of formal participation in OCCAR-managed Programmes, including in terms of cost efficiencies, programme risk reduction, scheduling,

promotion of global competition among suppliers, and opportunities for Australian defence industry. When participating in selected Programmes, Australia would be included in OCCAR's suite of collaborative contracting arrangements with European equipment manufacturers and supply chains, allowing access to significant cost and scheduling benefits. In particular, formal participation in OCCAR-managed Programmes creates acquisition and sustainment opportunities in respect of a range of European platforms that potentially present viable alternatives for Australian Defence Force capability requirements.

### **Reasons for Australia to take the proposed treaty action**

6. The Agreement would enable relevant Australian defence capability programmes to participate in OCCAR-managed Programmes. This would bring the following benefits:
  - (a) cost savings from the economies of scale generated by collaboration in the acquisition and support of defence equipment;
  - (b) reduced sustainment cost and increased assurance of Australian capabilities through early access to global technology;
  - (c) opportunity for Australian defence industry participation in OCCAR-managed Programmes under workshare arrangements;
  - (d) strengthened global competition among suppliers at prime and sub-contractor levels to drive efficiencies;
  - (e) shared risk in the development of future capability across Programme Participating States;
  - (f) early influence on future European defence-related development programmes to support Australian requirements, leading to a positive impact on scheduling and subsequent implementation of our unique needs;
  - (g) increased overall interoperability of Australian capabilities with allied defence forces around the world; and
  - (h) reduced risk of Australian capabilities becoming an 'orphan' capability in the global environment.

### **Obligations**

#### *Purpose and Definitions*

7. The purpose of the Agreement is to provide the legal framework for the participation and integration of Australia in OCCAR-managed Programmes (Articles 1.1 and 2.1), across all life-cycle phases of selected defence equipment (Article 2.2). The Agreement contains a list of defined terms, noting many terms are defined in the OCCAR Rules (see further paragraph 11 below).

#### *Scope*

8. The provisions of the Agreement apply to all activities for the integration and participation of Australia in OCCAR-managed Programmes (Article 2.1). It extends to all activities including those undertaken for the benefit of all States participating

in a Programme (Common Elements) and those undertaken solely for Australia's benefit (Non-Common Elements) (Article 2.2).

9. Article 2.3 reflects the undertaking of all OCCAR Member and non-Member States participating in an OCCAR-managed Programme not to require the automatic allocation to their domestic industry of a share of the work in strict proportion to their financial contribution to the relevant Programme. Rather, OCCAR operates on the basis of a global balance of work allocated among States across all Programmes in which they are participating. Australian industry would have the opportunity to participate in workshare arrangements as determined on a Programme-by-Programme basis taking into account Australian industry capability.

#### *General Provisions*

10. Article 3 deals with undertakings that all States participating in OCCAR-managed Programmes are required to make in respect of their participation.
11. OCCAR-managed Programmes in which Australia participates would be managed by OCCAR in accordance with the OCCAR Rules (Article 3.1). The OCCAR Rules means the *Convention on the Establishment of the Organisation for Joint Armament Cooperation 2001* (OCCAR Convention), the *OCCAR Security Agreement 2005* and OCCAR Management Procedures, including all principles, strategies and policies (Article 3.2). The version of the OCCAR Rules in force at the time of usage would apply, and would be accessible to Australia (Article 3.2).
12. Representatives of Australia would be required to participate in the relevant Programme Boards and Committees that manage each Programme. Australian representatives would be notified to OCCAR in writing, and would have authority to decide on all matters within the responsibility of the relevant Board or Committee (Article 3.1).
13. In accordance with Annex I of the OCCAR Convention (Article 3.3), the Parliament's approval would be sought to amend the *International Organisations (Privileges and Immunities) Act 1963* in order to allow the granting of privileges and immunities to OCCAR and its staff. Privileges and immunities are necessary for OCCAR and its staff to perform their functions and would be similar to those granted to other international organisations (and their staff) which operate in Australia. Privileges and immunities for OCCAR and its staff do not need to be in place prior to the entry into force of the Agreement.
14. Pending the amendments, restrictions would be placed on OCCAR's activities in Australia and limitations would be placed on the appointment of Australian prime contractors and the recruitment of Australian nationals as OCCAR staff members (Article 3.3). Even after the amendments, it is not expected that OCCAR will undertake significant activities in Australia, and accordingly the operation of the privileges and immunities would be limited.
15. Australia's participation in OCCAR-managed Programmes would be subject to the provisions for arbitration contained in Annex II to the OCCAR Convention (Article 3.4). This is a legally binding dispute resolution process between the Participating States and OCCAR, which includes reference of disputes to an Arbitral Tribunal with power to make binding awards.

16. Article 3.5 provides that the Agreement is an agreement between OCCAR and Australia pursuant to Article 37 of the OCCAR Convention, concerning cooperative activities for the integration and participation of Australia in OCCAR-managed Programmes.
17. Articles 3.5 and 3.6 specify the Parties' respective representatives for the purposes of implementing the Agreement. The Australian Representative or authorised delegate shall be responsible for the effective implementation of the Agreement. Australia shall promptly advise OCCAR of any change of the Australian Representative (Article 3.5).

#### *Implementation*

18. Article 4 of the Agreement addresses the requirements for Australia to be integrated into OCCAR-managed Programmes.
19. Australia's participation in an OCCAR-managed Programme would commence with the signing of an Implementing Arrangement (Article 4.1). The Implementing Arrangement would detail the commitments of the Participating States, and the scope, objectives, and management of the relevant OCCAR-managed Programme. The Implementing Arrangement would also address financing including cost-share and workshare among the Participating States (Article 4.2).
20. Article 4.3 provides that Australia would become legally bound under the OCCAR Rules to the relevant OCCAR-managed Programme (including regarding financial commitments and budget), and would enjoy the rights arising from participation in the relevant Programme, once the Implementing Arrangement is signed. However, Article 4.4 provides that an Implementing Arrangement is not itself to be considered a treaty within the meaning of the Vienna Convention on the Law of Treaties 1969.

#### *Organisation and Management*

21. OCCAR would be required to direct and manage its Programmes in accordance with the OCCAR Rules, which would be supplemented by Programme-specific provisions in the Implementing Arrangements (Article 5.1).
22. Article 5.2 requires Australia to conduct all its activities in accordance with its national laws and regulations.

#### *OCCAR-Executive Administration Reporting System*

23. The OCCAR Executive Administration (OCCAR-EA) would be required to provide Australia with reports on the progress of Programmes in which Australia is participating (Article 6.1). Reporting is required to be undertaken in accordance with the OCCAR Rules, which oblige the OCCAR-EA to provide relevant, concise, and timely information to support decision-making by (among others) Programme Boards and Committees.

### *Contractual Arrangements*

24. The OCCAR-EA would need to negotiate, award and administer Programme Contracts in the name and/or on behalf of Australia (Article 7.1). Implementing Arrangements will provide Programme-specific provisions in respect of contracting arrangements including in particular the approval level for the placement of Programme Contracts. This will include a requirement for Programme Board or Committee approvals for major contract action by the OCCAR-EA.
25. OCCAR procurement policy, as set out in the OCCAR Rules, is broadly aligned with the Commonwealth/Defence equivalent in prioritising ‘value for money’ and favouring, where practicable, open competition. Nevertheless, where permitted by the Participating States, OCCAR has the flexibility to engage in restricted or sole source procedures.
26. In negotiating contracts for and on behalf of Participating States, OCCAR-EA is guided by a set of template contract terms and conditions that address key commercial relationships with contractors. Broadly speaking, the template terms and conditions are consistent with Defence’s typical contracting arrangements. For example, they contain an express warranty provision that requires the contractor to remedy defective supplies during the stated warranty period and contain provisions to deal with contractor delay.

### *Pricing*

27. Price investigations, cost forecasting and price audits would need to be undertaken in accordance with the OCCAR Rules (Article 8.1). The OCCAR Rules permit the auditing and investigation of contractors’ price information at different stages of a contracting process by the OCCAR Programme Manager.

### *Work allocation*

28. Article 9.1 requires OCCAR-EA to monitor and record the award of work to the industry of each Participating State across OCCAR-managed Programmes. This is intended to allow the correction of workshare imbalances among Participating States arising in individual Programmes, in accordance with the OCCAR Global Balance Policy.

### *Financial Commitments and Budgets*

29. The OCCAR-EA would be required to prepare, manage and report on Administrative and Operational Budgets as required by the OCCAR Rules for each financial year (Articles 10.1 and 10.2).
30. In terms of administrative costs, Australia would be required to pay a pre-agreed contribution for OCCAR-EA Central Office activities in support of the integration of Australia into an OCCAR-managed Programme (Article 10.3). In respect of Programmes in which Australia is participating, Australia would pay its contribution to the OCCAR Administrative Budget up to a maximum calculated in accordance with the OCCAR Rules and noted in the relevant Implementing Arrangement (Article 10.4).

31. In terms of operational costs in respect of Programmes in which Australia is participating, Australia would be required to pay its contribution to Programme Operational Budgets up to a maximum calculated in accordance with the OCCAR Rules and recorded in the relevant Implementing Arrangement (Article 10.5). Article 10.6 provides for the allocation of costs for elements of the Programme common to all Participants, which will be shared as detailed in the relevant Implementing Arrangement. Article 10.7 provides for costs for elements relevant only to one Participating State, which are borne by that or those Participating State(s) that generate(s) them.

#### *Call for Funds and Payment Arrangements*

32. The OCCAR-EA would be required to call for administrative and operational funds to be paid by Australia up to the agreed amounts in EURO, unless otherwise mutually decided (Articles 11.1 and 11.2). Operational funds would be sent to a bank account established and managed by OCCAR-EA, dedicated to Australia's participation in any OCCAR-managed Programme, and the interest earned would be Australia's property (Article 11.3). Should Australia fail to pay its contribution by the date specified by OCCAR, Australia would be required to bear the costs arising (if any) (Article 11.4).

#### *Audits*

33. Article 12.1 requires the conduct of internal (OCCAR) and external (national) audits, in accordance with the provisions of the OCCAR Rules and any OCCAR-EA internal procedures. Australia would be granted access to necessary information and documents relating to its integration and participation in an OCCAR-managed Programme to undertake national auditing responsibilities, including reporting to Parliament (Article 12.2).

#### *Intellectual Property*

34. Article 13.1(a) imposes an obligation on OCCAR, in its negotiation and award of Programme Contracts, to secure sufficient intellectual property rights to manage the relevant Programme in accordance with the Agreement and the relevant Implementing Arrangement.
35. Article 13.1(b) imposes an obligation on OCCAR, in its negotiation and award of Programme Contracts, to secure for Australia the rights specified in the relevant OCCAR Programme Memorandum of Understanding (Programme MOU), which is negotiated among Programme Participating States prior to signing the Implementing Arrangement. This provision would ensure that Australia has sufficient rights for required uses, including authorised disclosure of information to third parties and intellectual property rights.

#### *Government Quality Assurance and Airworthiness Requirements*

36. Article 14.1 requires that Government Quality Assurance activities, Programme Qualification Management including, airworthiness requirements are undertaken in accordance with the OCCAR Rules.

### *Levies*

37. OCCAR would be required to ensure that Programme Contracts include provisions which reflect any requirement in respect of the application of levies on the sale to third parties of equipment / information developed pursuant to Programme Contracts, as detailed in the relevant OCCAR Programme MOU (Article 15.1).

### *Security of Information*

38. Australian participation in OCCAR-managed Programmes would likely entail the exchange of classified information. Article 16.1 requires that this exchange be managed in accordance with the Parties' applicable laws and/or regulations, including the OCCAR Rules, as well as the terms of the *OCCAR-Australia Security of Information Agreement* currently under negotiation.
39. Australia would be required to ensure the protection of OCCAR classified information provided to or generated by legal entities under its jurisdiction, in accordance with Australian laws and regulations (Article 16.2). OCCAR would be required to handle and protect Australian Classified Information in accordance with the procedures set out in OCCAR Management Procedures (Article 16.3).
40. If Australia shares Classified or Unclassified Sensitive Information with OCCAR, OCCAR shall not disclose, use or permit the disclosure of the information without Australia's prior written consent. Similarly, Australia would also be required not to disclose, use or permit the disclosure of Classified or Unclassified Sensitive Information that it has received from OCCAR without OCCAR's prior written consent (Article 16.4).
41. In accordance with Article 16.5, the exchange of Unclassified Information and Unclassified Sensitive Information would need to be used, handled and protected in accordance with the Parties' applicable laws and/or regulations, including the OCCAR Rules.

### *Changes in Requirement, Withdrawal and Termination of an OCCAR-managed Programme*

42. Article 17 addresses the Parties' respective obligations and the management of costs arising from a change in Australia's Programme requirements, a withdrawal by Australia from an OCCAR-managed Programme, or the termination by all Participating States of an OCCAR-managed Programme. This includes the continuation of key rights and obligations for Australia with regard to intellectual property, levies, security of information, disputes and liabilities (Article 17.6).

### *Disputes*

43. Disputes would be settled in accordance with the OCCAR Rules (Article 18.1). Any dispute between OCCAR and Australia concerning the interpretation or application of the Agreement would, if possible, need to be settled by consultation (Article 18.2). In the event that a dispute could not be resolved by consultation, it would need to be submitted to arbitration under the conditions laid down in Annex II to the OCCAR Convention, which includes reference to an Arbitral Tribunal (Article 18.3).



44. Each Programme Contract would be required to provide for conciliation and include an arbitration clause (Article 18.4). In practice, disputes with Programme contractors, including potential legal action, would be required to be managed exclusively by OCCAR-EA on behalf of the relevant Participating State(s). The OCCAR-EA is required to keep relevant Participating States informed of all developments in relation to a dispute and obtain the approval of relevant Participating States on all matters relating to a dispute including commencement, continuation, withdrawal and settlement.

#### *Liabilities*

45. Liabilities would need to be settled in accordance with the standard OCCAR liability regime set out in the OCCAR Rules (Article 19.1).
46. The liability regime under the OCCAR Rules provides that States participating in an OCCAR-managed Programme indemnify OCCAR from any liability arising from its activities. The regime reflects the nature of OCCAR as a non-profit organisation established for the benefit of Members and non-Member Participating States.
47. If a third party claims that damage or injury has been caused by OCCAR or its staff and OCCAR does not waive immunity, the Board of Supervisors would take all appropriate steps to deal with and, where justified, settle the claim (Article 19.2).
48. Further liability provisions would be settled on a Programme-by-Programme basis as provided in the relevant Implementing Arrangement. Liability risk assessments would be undertaken by Defence for each proposed Implementing Arrangement according to the requirements of the relevant legislative and policy framework, including the *Public Governance, Performance and Accountability Act 2013*.

#### **Implementation**

49. Australia's implementation of the Agreement will be led by the Department of Defence. The Agreement provides that the Parties will develop Implementing Arrangements signed by all States participating in the relevant OCCAR-managed Programme (Article 4.1). In addition, the States participating in a Programme enter into a Programme MOU that sets out the provisions for their participation in the OCCAR-managed Programme. As discussed at paragraph 13 above, implementation of the Agreement would also require undertaking the procedure to grant privileges and immunities to OCCAR and its staff, which would necessitate an amendment to the *International Organisations (Privileges and Immunities) Act 1963*.

#### **Costs**

50. As discussed in paragraphs 29 to 31, costs of Australian participation in OCCAR-managed Programmes would be negotiated on a Programme-by-Programme basis and would be set out in Implementing Arrangements (Article 10).

#### **Future treaty action**

51. The Parties may amend the Agreement at any time by mutual agreement in writing (Article 20.2). Any amendments would be subject to Australia's domestic treaty-

making requirements, including tabling in Parliament and consideration by JSCOT. Any amendments would enter into force on the date of signature of the last note between the Parties confirming that each Party has completed their necessary internal procedures required to bring the amendment into force, unless otherwise provided for by the Parties (Articles 20.1 and 20.2).

### **Termination**

52. The Agreement would remain in force for an initial period of ten years, and continue in force thereafter unless terminated (Article 20.3).
53. The Parties may terminate the Agreement at any time by mutual agreement in writing (Article 20.4). Either Party may also terminate the Agreement by giving the other written notice of intention to terminate, in which case it would terminate six months after receipt by the other Party of such written notice (Article 20.4). The Parties would manage the consequences of a termination on a fair and equitable basis prior to the effective date of termination and would negotiate the settlement of financial issues affected by the termination (Article 20.5). In the event that the Agreement is terminated by one Party, that Party would bear the all costs resulting from the termination, although such termination costs would not exceed the total committed financial responsibilities of the terminating Party (Article 20.6).
54. The termination of the Agreement would result in the termination of any subsequent Implementing Arrangements (Article 20.7). Obligations relating to security of information, disputes, financial commitments and budgets, and liabilities would continue to apply despite any withdrawal from or termination of the Agreement (Article 20.8).

### **Contact details:**

Rotary Aerospace and Surveillance Systems Division  
Capability Acquisition and Sustainment Group  
Department of Defence

## **ATTACHMENT ON CONSULTATION**

### **Framework Agreement between the Organisation for Joint Armament Cooperation (Organisation Conjointe de Coopération en Matière d'Armement (OCCAR)) and the Government of Australia for the participation of Australia in OCCAR-managed Programmes**

(Perth and Bonn on 5 February 2021)

**[2021] ATNIA 19**

**[2021] ATNIF 24**

#### **CONSULTATION**

1. The State and Territory Governments have been consulted through the Commonwealth-State-Territory Standing Committee on Treaties (SCOT). No requests for further information or comments on the proposed Agreement have been received to date from the State and Territory Governments. No action will be required from States or Territories to implement the proposed Agreement.
2. Defence will engage with industry and other relevant stakeholders as Australian involvement in specific OCCAR-managed Programmes is progressed, as appropriate.
3. Stakeholders relevant to the implementation of privileges and immunities for OCCAR in Australia will be consulted during the legislative process for the amendments to the IOPI Act.