

ROYAL AUSTRALIAN NAVY

NAVY HEADQUARTERS



DEPARTMENT OF DEFENCE CANBERRA ACT 2600

DGNBM/OUT/2007/

Mr E. Graham
Chairman
HMAS SYDNEY Search Pty Ltd
L3/267 St George Terrace
Perth WA 6000

October 2007

Dear Mr Graham,

FUNDING AGREEMENT IN RELATION TO THE SEARCH FOR HMAS SYDNEY(II)

I am pleased to advise you that I am able to offer you funding as described in the Funding Agreement attached to this letter, subject to the Funding Agreement being entered into by both parties.

The funding must be used for the Activity as described in the Funding Agreement and is subject to your compliance with all of the requirements of the Funding Agreement.

If you wish to accept this offer of funding please sign and date both copies of the attached Funding Agreement and return them to me within 20 business days from the date of this letter, after which the offer lapses. The Funding Agreement will commence only once the Commonwealth has signed and dated both copies of the Funding Agreement. One copy will then be returned to you for your records. The date of execution of the Funding Agreement will be the date that the Commonwealth signs both copies of the Funding Agreement.

Please contact Commander Fiona McNaught on 02 6265 5059 if you have any questions.

Yours sincerely

WAYNE QUINNELL
A/Director General Navy Business Management

THIS FUNDING AGREEMENT is made between:

HMAS SYDNEY Search Pty Ltd as the trustee for THE FINDING SYDNEY FOUNDATION (ABN: 22 671 041 152) of L3/267 St George Terrace, Perth WA 6000 (“the Organisation”)

AND

THE COMMONWEALTH OF AUSTRALIA as represented by and acting through the Department of Defence (“the Commonwealth”).

THE PARTIES AGREE:

1. INTERPRETATION

1.1 In this Funding Agreement, unless the contrary intention appears:

‘**ABN**’ has the same meaning as it has in section 41 of the *A New Tax System (Australian Business Number) Act 1999* (Cth);

‘**Activity**’ means the search to attempt to locate and identify the wrecks or wreckage fields of HSK *Kormoran* and HMAS *Sydney* (II);

‘**Activity material**’ means all material:

- (i) brought into existence for the purpose of performing the Activity;
- (ii) incorporated in, supplied or required to be supplied along with the material referred to in paragraph (i); or
- (iii) copied or derived from material referred to in paragraphs (i) or (ii);

‘**Activity Period**’ means the period provided for in Table 1 during which the Activity must be completed;

‘**Adjustment Note**’ has the meaning given in section 195-1 of the GST Act;

‘**Approved Auditor**’ means a person who is:

- (a) registered as a company auditor under the *Corporations Act 2001*, or a member of the Institute of Chartered Accountants in Australia, or of CPA Australia or the National Institute of Accountants; and
- (b) not a principal, member, shareholder, officer or employee of the Organisation or of a related body corporate as defined in section 9 of the *Corporations Act 2001* or the Organisation’s Qualified Accountant;

‘**Asset**’ means any item of tangible property purchased, leased, created or otherwise brought into existence wholly or in part with the use of the Funds that has a value when acquired of \$5,000 or more (including GST) but does not include Activity material;

‘**Auditor-General**’ means the office established under the *Auditor-General Act 1997* (Cth) and includes any other entity that may, from time to time, perform the functions of that office;

‘**Australian Accounting Standards**’ refers to the standards of that name maintained by the Australian Accounting Standards Board created by section 226 of the *Australian Securities and Investments Commission Act 2001* (Cth);

‘Australian Auditing Standards’ refers to the standards of that name maintained by the Australian Auditing and Assurance Standards Board created by section 227A of the *Australian Securities and Investments Commission Act 2001* (Cth);

‘Australian Government Material’ means any material provided by the Commonwealth to the Organisation for the purposes of this Funding Agreement or which is copied or derived from material so provided, except for Activity material;

‘Business Day’ in relation to the doing of any action in a place means any day other than a Saturday, Sunday, or public holiday in that place;

‘Budget’ means the budget, if any, for the expenditure of the Funds on the Activity that is included in or with this Funding Agreement;

‘Commonwealth’ includes other Commonwealth department or agency and its delegates, officers, employees and agents that is, from time to time, responsible for the administration of this Funding Agreement;

‘Commonwealth purpose’ means any purpose within the power of the Commonwealth with respect to the defence of the Commonwealth and includes purposes that are necessary or incidental to that purpose.

‘Completion Date’ means, unless a date is specified in Table 1, the day after the Organisation has done all that the Organisation is required to do under this Funding Agreement to the Commonwealth’s satisfaction;

‘Conflict’ refers to a conflict of interest, or risk of a conflict of interest, or an apparent conflict of interest, arising through the Organisation engaging in any activity or obtaining any interest that is likely to conflict with or restrict the Organisation in undertaking the Activity or using the Funding fairly and independently;

‘Existing Material’ means all material in existence prior to the execution of this Funding Agreement:

- (a) incorporated in;
- (b) supplied with, or as part of; or
- (c) required to be supplied with, or as part of, the Activity material;

‘Financial Year’ means a period from 1 July to the following 30 June occurring during the Activity period, or any part of such a period occurring at the beginning or end of the Activity period;

‘Funding’ means and is limited to the amount so specified and described in clause 3.1 of this Funding Agreement, and ‘Funds’ has an equivalent grammatical meaning.;

‘Funding Agreement’ means this agreement and any Schedules, attachments and annexures;

‘GST’ has the meaning given in section 195-1 of the GST Act;

‘GST Act’ means the *A New Tax System (Goods and Services Tax) Act 1999* (Cth);

‘Intellectual Property Rights’ includes all copyright (including rights in relation to phonograms and broadcasts), all rights in relation to inventions (including patent rights), registered and unregistered trademarks (including service marks), designs,

and all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields;

‘Material’ includes documents, equipment, software (including source code and object code), goods, information and data stored by any means including all copies and extracts of the same;

‘Organisation’ includes, where the context admits, its personnel, subcontractors and successors and members and their successors of the charitable trust known as the **‘FINDING SYDNEY FOUNDATION’**;

‘Party’ means a party to this Funding Agreement;

‘Personal Information’ has the same meaning as under the *Privacy Act 1988* (Cth), which currently is information or an opinion (including information or an opinion forming part of a database), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion;

‘Personnel’ means a Party’s officers, employees and agents;

‘Privacy Commissioner’ means the Office of the Privacy Commissioner established under the *Privacy Act 1988* (Cth) and includes any other entity that may, from time to time, perform the functions of that Office;

‘Qualified Accountant’ means a person who is a member of the Institute of Chartered Accountants in Australia, or of CPA Australia or the National Institute of Accountants;

‘Records’ includes documents, information and data stored by any means, and all copies and extracts of the same;

‘Report’ means Activity Material that is provided to the Commonwealth for reporting purposes on matters stipulated in this Funding Agreement;

‘Search Area’ means an area up to approximately 1,400 square nautical miles situated in Australian waters or waters above the continental shelf of Australia adjacent to the coast of the State of Western Australia, south west of Carnarvon in the vicinity of 26°S to 27°S and approximately between 110°E and 112°E;

‘Tax Invoice’ has the meaning given in section 195-1 of the GST Act; and

‘Taxable Supply’ has the meaning given in section 195-1 of the GST Act.

2. PROGRAM AND ACTIVITY

2.1 In conducting the Activity the Organisation must abide by the following:

- (a) the Organisation, its officers, employees, subcontractors and volunteers must show proper respect to the resting place of the officers and crew of the HMAS *Sydney* (II) and HSK *Kormoran* and any other shipwreck found during conduct of the Activity;
- (b) the Organisation must not use the term ‘war grave’ in any statement or publication relating to HMAS *Sydney* (II) and HSK *Kormoran*;

- (c) the Organisation must permit an observer nominated by the Commonwealth to observe the on-water phase of the Activity on board the vessel acquired for the purposes of the Activity. The observer's accommodation, meals, etc are to be met by the Organisation from the Funding and provided for in the Budget. The Organisation, its officers, employees, subcontractors and volunteers must give the observer full and free access to all Material as requested by the observer;
- (d) the Organisation must appoint a full time manager to conduct the Activity and be the main point of contact for the Commonwealth;
- (e) the precise location of any ship wreck or wreckage field found during conduct of the Activity and the Organisation's assessment of its identity must immediately be notified to the observer nominated by the Commonwealth referred to in clause 2.1(c);
- (f) the finding and positive identification of any ship wrecks or wreckage fields, their location and the assessment of their identity must be kept confidential by the Organisation (using its best endeavours) until approval for its release is granted by the Chief of Navy. The Organisation agrees that the Chief of Navy shall have the sole right to determine the timing and method of the first public announcement of the finding of any wrecks or wreckage fields, their location and their identity (noting that the intention is for a joint announcement involving federal and state politicians, Chief of Navy, the Organisation's Chairman). To that end, but without affecting the rights of Chief of Navy as set out above, the Commonwealth and the Organisation will develop and seek to agree on a communications strategy in relation to public announcements which they will use (if and when it has been agreed); and
- (g) the Organisation is solely responsible for, and must obtain, all statutory approvals for commencement of the Activity, including under the *Environment Protection and Biodiversity Conservation Act 1999 (Cth)*, and must provide satisfactory evidence of this to the Commonwealth.

2.2 The Activity Plan is described in the following documents as revised from time to time:

- (a) The Business Plan dated September 2007 of the Organisation which the Commonwealth acknowledges is being reviewed and updated at regular intervals (Attachment A);
- (b) The Microsoft Project document dated 9 September 2007 (which the Commonwealth acknowledges is being reviewed and updated at regular intervals), which details HMA3S Potential Search Plan Milestones (Attachment B); and
- (d) The Memorandum of Understanding between the Organisation, Blue Water Recoveries Limited and Mr David Mearns, dated 4 January 2006.

2.3 The Activity will be conducted in accordance with the Milestones in Table 1:

Table 1

Milestone	Date	Reports
Milestone 1: Grant application approved by Minister	October 2007	Navy to advise HMA3S by email
Milestone 2: Organisation signs Funding Agreement with Commonwealth	October 2007	N/A
Milestone 3: Organisation issues requests for tender	October 2007	Progress Report
Milestone 4: Contract awarded by Organisation	October 2007	Progress Report and copy of contract provided to Navy Headquarters
Milestone 5: Mobilisation underway	October to December 2007	Fortnightly Progress Reports to Navy Headquarters (dot point format by email)
Milestone 6: Organisation commences Phase 1 search, following by Phase 2 if Phase 1 successful	January 2008	Daily Progress Reports by email to Navy Headquarters through deployed Navy representative
Milestone 7 final: Activity concluded and Activity Material submitted to the Commonwealth	31 May 2008	Final Report

3. FUNDING AND PAYMENT

3.1 The total funding to be provided by the Commonwealth for the Activity and pursuant to this Funding Agreement is \$4,200,000 plus GST of \$420,000) ('Funding'). The Commonwealth has no obligation or requirement to provide any further costs, expenses or other consideration of any kind in respect of this Funding Agreement.

3.2 The Funding may only be used for any of the following major expenses:

- (a) The Vessel (including vessel hire, marine crew, fuel, oil, water, victualing communications, vessel delivery/redelivery, all relevant marine insurances, weather forecasting);

(b) Sidescan Sonar Search Contractor and Inspection contractor – for Phase 1 and Phase 2 (or one combined Phase) (equipment hire, operating crew, shipping of equipment, operating crew travel and expenses, consumables, survey report);

(c) DGPS Positioning Contractor (including equipment hire, operating crew, shipping of equipment, operating crew travel and expenses, satellite signals);

(d) BWR Search Director (professional fees for David Mearns in his project management role during preparations for the search and whilst on the survey vessel during the search, travel and expenses including return visits to Australia directly connected with conduct of the search);

(e) Ancillary Services (shipping agents, port agents, port fees, pilotage, fabrication services, craneage, communications, class surveys if required; and

(f) Audit of Vessels & Main Subcontractors (air travel and expenses for persons involved in conduct of audits).

3.3 Subject to sufficient funds being available, and compliance by the Organisation with this Funding Agreement, the Commonwealth will pay the Funds to the Organisation either by one payment or through a series of partial instalments at the discretion and written request of the Organisation, subject to:

(a) the Organisation's compliance with the reporting requirements falling up to and on the date the payment is due in accordance with the Activity Plan;

(b) the Organisation providing to the Commonwealth a correctly rendered invoice for payment which must, where the Organisation makes a Taxable Supply under this Funding Agreement, also be a Tax Invoice in accordance with subclause 5.4 and include the following information:

(i) title of the Program and description of the Activity;

(ii) the words 'Tax Invoice' prominently displayed;

(iii) date of issue

(iv) payment terms (not to be less than 14 days);

(v) name, address and ABN of the Commonwealth;

(vi) name, address and ABN of the Organisation;

(vii) a brief description of the item(s) being invoiced; and

(viii) the total amount of the payment exclusive of GST, the GST component, and the total amount of the payment including GST; and

3.4 Any payment will be made within 14 Business Days of the due date and will be paid into the account identified by the Organisation.

3.5 Without limiting the Commonwealth's rights, the Commonwealth may withhold or suspend any payment in whole or in part until the Organisation has performed, to the Commonwealth's satisfaction, all of its obligations under this Funding Agreement, provided that the Commonwealth has given the Organisation seven (7) days notice in writing to perform those obligations and the Organisation fails to perform those obligations to the Commonwealth's satisfaction.

4. MANAGEMENT OF FUNDING

- 4.1 The Organisation must carry out the Activity within the Activity Period and in accordance with this Funding Agreement diligently, effectively and to a high professional standard. The Organisation must obtain the Commonwealth's prior written consent before the nature, scope or period of the Activity may be varied, such consent not to be unreasonably withheld.
- 4.2 The Funding must be spent by the Organisation only for the Activity and only in accordance with this Funding Agreement.
- 4.3 The Organisation must identify the receipt and expenditure of the Funds separately within the Organisation's accounts and records so that at all times the Funds are identifiable and ascertainable.
- 4.4 The Organisation must ensure that the Funds are held in an account in the Organisation's name, and which the Organisation solely controls, with an authorised deposit-taking institution authorised under the *Banking Act 1959* (Cth) to carry on banking business in Australia. The Organisation must provide the Commonwealth with written details sufficient to identify this account prior to receipt of any Funds.
- 4.5 The Organisation must keep financial accounts and records relating to the Activity and the receipt and expenditure of the Funding so as to enable the Organisation to comply with the Organisation's obligations under clause 5.
- 4.6 If, at any time during the term of this Funding Agreement, there remains an amount of Funding in the account referred to in clause 4.4 that has not been spent or legally committed for expenditure in accordance with this Funding Agreement or not acquitted to the satisfaction of the Commonwealth, that amount must be refunded by the Organisation to the Commonwealth within:
- (a) 20 business days of a written notice from the Commonwealth requiring the refund; or
 - (b) or as otherwise directed in writing by the Commonwealth.
- 4.7 The Organisation must advise the Commonwealth of any financial support or assistance (other than the Funding) it receives in respect of the Activity (whether from an Australian Government department or another person).
- 4.8 The Organisation must provide to the Commonwealth a monthly report of commitment and expenditure against the Funds.

5. TAXES, DUTIES AND GOVERNMENT CHARGES

- 5.1 Subject to this clause 5, all taxes, duties and government charges imposed or levied in Australia or overseas in connection with this Funding Agreement must be borne by the Organisation.
- 5.2 The Organisation warrants that it has an ABN that it has correctly quoted to the Commonwealth. The Organisation must notify the Commonwealth in writing of any change to the Organisation's ABN or GST registration immediately after it is notified of any change.

- 5.3 The Funds paid by the Commonwealth under this Funding Agreement include GST for services provided by the Organisation to the Commonwealth, if and to the extent to which they are taxable supplies as defined in the GST Act.
- 5.4 The Organisation must give the Commonwealth a tax invoice, in accordance with the GST Act, in relation to any taxable supply made by the Organisation to the Commonwealth in connection with this Funding Agreement, prior to payment of Funds by the Commonwealth that relate to the taxable supply, and is solely responsible, in accordance with the GST Act, for passing on and accounting for the GST component of all Funds paid to it by the Commonwealth.
- 5.5 No party may claim from the other an amount for which the first party may claim an input tax credit.
- 5.6 Any refund under clause 4.6 must be inclusive of GST and must be accompanied by any adjustment note required under the GST Act relating to taxable supplies for which the Organisation previously issued the Commonwealth a tax invoice.

6. REPORTS

6.1 Within 60 Business Days after:

- (a) the expiry of the Activity Period, the completion of the Activity, or any termination of this Funding Agreement, whichever is the earlier;

the Organisation must provide the Commonwealth with:

- (b) financial statements of income and expenditure in respect of the Funding, and the other contributions (if any) (exclusive of GST) (separately and in the context of the Organisation's overall financial position), which must include a definitive statement as to whether:

- (i) the financial information for the Activity represents the financial transactions fairly and is based on proper accounts and records; and
- (ii) the Funding was spent for the Activity and in accordance with the Funding Agreement;

- (c) a statement of financial position (assets and liabilities by class), which must include, under assets, the balance of the Organisation's account referred to in clause 4.4.

6.2 Information required to be provided under clause 6.1 must be accompanied by a certificate that:

- (a) all Funding received was spent for the purpose of the Activity and in accordance with this Funding Agreement and that the Organisation has complied with this Funding Agreement;
- (b) any salaries and allowances paid to persons involved in the Activity are in accordance with any applicable award or agreement in force under any relevant law on industrial or workplace relations;
- (c) unless the Activity Period has expired or this Funding Agreement has been terminated, the unspent portion of the funds (if any) are available for use within the next reporting period; and

- (d) the financial information is presented in accordance with any other financial reporting requirements the Commonwealth may notify to the Organisation.
- 6.3 The certificate referred to in subclause 6.2 must be provided:
- (a) if the Organisation is an incorporated body, by its Chairperson, Chief Executive Officer, Chief Financial Officer or a person authorised by the Organisation to execute documents and legally bind the Organisation by their execution. Satisfactory evidence of the authorisation is to be provided to the Commonwealth before certification;
 - (b) if the Organisation is a partnership, by:
 - (i) a majority of the members; or
 - (ii) by a person or persons authorised by a majority of the members to act on behalf of the members in accordance with the Organisation's rules. Satisfactory evidence of the authorisation is to be provided to the Commonwealth before certification;
 - (c) if the Organisation is a joint venture, the Chief Executive Officer or Chief Financial Officer of each joint venturer must certify the one statement; or
 - (d) if the Organisation is an individual, by that individual.
- 6.4 The Organisation must provide progress Reports on the dates identified in Table 1 in clause 2.2 reporting progress of the Activity and expenditure of the Funding and interest (if any).
- 6.5 The Organisation must provide the final progress Report to the Commonwealth on the date specified in the Activity Plan.
- 6.6 Throughout the Activity Period, the Organisation must also provide ad-hoc reports to the Commonwealth concerning:
- (a) any significant developments concerning the Activity; and
 - (b) any significant delays or difficulties encountered in performing the Activity in accordance with this Funding Agreement.
- 6.7 Reports provided by the Organisation to the Commonwealth must also set out the details of the acquisition and disposal of any Assets and any Intellectual Property Rights created in Activity material.
- 6.8 The Organisation must keep full and accurate accounts and records of the conduct of the Activity and retain them for a period of no less than seven (7) years after the end of the Activity Period.
- 7. ACTIVITY MATERIAL**
- 7.1 The Organisation must provide to the Commonwealth, and the Western Australian Maritime Museum, the following Materials:
- (a) two (2) copies in readable digital format of the records of the sonar reconnaissance of the wrecks or wreckage field of HMAS *Sydney* (II) and HSK *Kormoran*, should they be located;

- (b) two (2) copies in hard copy printed format of the records of the sonar reconnaissance of the wrecks or wreckage field of HMAS *Sydney* (II) and HSK *Kormoran*, should they be located;
- (c) two (2) copies in digital format of any photographs and videos taken of the wrecks or wreckage field of HMAS *Sydney* (II) and HSK *Kormoran*, should they be located;
- (d) two (2) copies in digital form of representative photographs, films and videos showing the preparations for and conduct of the search, the equipment used and the people involved in the search; and

7.2 The Organisation grants to the Commonwealth a non-exclusive licence in respect of the material described in (c) and (d) above in the same terms as that provided for in clause 10 of this Funding Agreement as if that material were Activity material.

8. ACCESS TO PREMISES AND RECORDS

8.1 The Organisation must give the Commonwealth, the Auditor-General, the Privacy Commissioner and any persons authorised by the Commonwealth (referred to in this clause 8 collectively as 'those permitted') access to premises at which material, accounts and records associated with this Funding Agreement are stored, or work under the Activity is undertaken, at all reasonable times, and the right to inspect and copy material, accounts and records in the Organisation's possession or control for purposes associated with this Funding Agreement or any review of performance under this Funding Agreement.

8.2 The Organisation must provide all reasonable assistance requested by those permitted when they exercise the rights under clause 8.1.

8.3 The rights referred to in clause 8.1 are subject to:

- (a) the provision of reasonable prior notice by those permitted (except where they believe that there is an actual or apprehended breach of the law); and
- (b) the Organisation's reasonable security procedures.

8.4 The Organisation must ensure that any subcontract entered into for the purpose of this Funding Agreement contains an equivalent clause permitting those permitted to have access as specified in this clause 8.

9. CONFLICT OF INTEREST

9.1 The Organisation warrants that, at the date of this Funding Agreement, no Conflict exists or is likely to arise in the performance of its obligations under this Funding Agreement, and the Organisation must seek to ensure that no Conflict arises during the term of this Funding Agreement, but if a Conflict does arise the Organisation must:

- (a) immediately notify the Commonwealth in writing of that Conflict and of the steps the Organisation proposes to take to resolve or otherwise deal with the Conflict;
- (b) make full disclosure to the Commonwealth of all relevant information relating to the Conflict; and

- (c) take such steps as the Commonwealth may, if it chooses to, reasonably require to resolve or otherwise deal with that Conflict.

9.2 If the Organisation fails to notify the Commonwealth under this clause 9, or is unable or unwilling to resolve or deal with the Conflict as required, the Commonwealth may by notice to the Organisation terminate this Funding Agreement in which case clauses 22.2 and 22.3 will apply.

10. INTELLECTUAL PROPERTY

- 10.1 Subject to this clause 10, as between the Parties (but without affecting the position between the Organisation and a third party) Intellectual Property Rights in Activity material vest immediately in the Organisation.
- 10.2 The Organisation grants to the Commonwealth a permanent, irrevocable, free, world wide, non-exclusive licence (including a right of sub-licence) to use, reproduce, adapt and exploit the Intellectual Property Rights in Activity material and any Existing Material for any Commonwealth purpose.
- 10.3 The Organisation must ensure that any third party arrangements which it may enter into in respect of Intellectual Property Rights in the Activity material, do not prevent or impose on it or the Commonwealth, any form of restriction, or limitation (whether in the form of a right of veto or grant of approval or otherwise) on the Organisation's ability to grant a licence to the Commonwealth in accordance with clause 10.2.
- 10.4 The Organisation must provide copies of Activity material to the Commonwealth in accordance with the requirements of clause 7.

11. MORAL RIGHTS

- 11.1 For this purpose of this clause 11, the 'Specified Acts' means the following classes or types of acts or omissions by or on behalf of the Commonwealth:
 - (a) using, reproducing, adapting or exploiting all or any part of the Activity material, with or without attribution of authorship;
 - (b) supplementing the Activity material with any other material; and
 - (c) using the Activity material in a different context to that originally envisaged,but does not include false attribution of authorship.
- 11.2 The Organisation agrees:
 - (a) to obtain from each author of any Activity material a written consent which extends directly or indirectly to the performance of the Specified Acts by the Commonwealth or any person claiming under or through the Commonwealth (whether occurring before or after the consent is given); and
 - (b) upon request, to provide the executed original of any such consent to the Commonwealth.

12. DISCLOSURE OF INFORMATION

- 12.1 The Organisation acknowledges that the Commonwealth may be required to provide information in relation to the Funding or this Funding Agreement, as required by the operation of any law, judicial or parliamentary body or governmental agency and accordingly the Commonwealth can give no undertakings to treat any of the Organisation's information or this Funding Agreement as confidential information.
- 12.2 The Organisation is permitted to disclose Australian Government material, other than Australian Government material that the Commonwealth notifies in writing to the Organisation must not be disclosed.
- 12.3 If the Commonwealth requires the Organisation to keep any Australian Government material confidential the Commonwealth may, at its sole discretion, permit the Organisation to disclose that Australian Government material subject to compliance with any conditions on that disclosure that the Commonwealth may impose in respect of that Australian Government material.

13. PROTECTION OF PERSONAL INFORMATION

- 13.1 The Organisation agrees to:
- (a) comply, and ensure that any subcontractors (as defined in section 95B(4) of the *Privacy Act 1988*) also comply, with the Information Privacy Principles (IPPs) contained in section 14 of the *Privacy Act* and National Privacy Principles (NPPs, as defined in section 6) 7 to 10 to the extent that the content of those principles apply to the types of activities the Organisation, and any subcontractors, are undertaking under this Funding Agreement, as if the Organisation, and any subcontractors, were (in respect to the IPPs) an "agency", or (in respect to NPPs 7 to 10) an "organisation" as defined in the *Privacy Act*;
 - (b) not transfer personal information held in connection with this Funding Agreement outside Australia, or allow parties outside Australia to have access to it, without the Commonwealth's prior written approval;
 - (c) be treated as a 'contracted service provider' within the meaning of section 6 of the *Privacy Act*;
 - (d) not use or disclose personal information collected under this Funding Agreement for direct marketing; and
 - (e) disclose in writing to any person who asks the content of the provisions of this Funding Agreement (if any) which are inconsistent with an NPP or an Approved Privacy Code (as defined in section 6 of the *Privacy Act*) binding a party to this Funding Agreement.

14. INDEMNITY

- 14.1 The Organisation indemnifies (and keeps indemnified) the Commonwealth and the Commonwealth's personnel against any:
- (a) loss or liability incurred by the Commonwealth;
 - (b) loss of or damage to Commonwealth property; or

- (c) loss or expense incurred by the Commonwealth in dealing with any claim against the Commonwealth, including legal costs and expenses on a solicitor/own client basis and the cost of time spent, resources used, or disbursements paid by the Commonwealth,

arising from:

- (d) any act or omission by the Organisation, or its personnel or subcontractors in connection with this Funding Agreement, where there was fault on the part of the person whose conduct gave rise to that liability, loss, damage, or expense;
- (e) any breach by the Organisation of its obligations or warranties under this Funding Agreement;
- (f) the use of any Assets; or
- (g) the use by the Commonwealth of the Activity material or existing material, including any claims by third parties about the ownership or right to use Intellectual Property Rights in activity material or existing material.

- 14.2 For the purposes of the indemnity provided in clause 14.1, directors of the Organisation acting lawfully and in accordance with their duties will not be held personally liable by the Commonwealth
- 14.3 The Organisation's liability to indemnify the Commonwealth under this clause 14 will be reduced proportionally to the extent that any fault on the Commonwealth's part contributed to the relevant loss, damage, expense, or liability.
- 14.4 The Commonwealth's right to be indemnified under clause 14.1 is in addition to, and not exclusive of, any other right, power, or remedy provided by law, but the Commonwealth is not entitled to be compensated in excess of the amount of the relevant liability, damage, loss, or expense.
- 14.5 In this clause 14, "fault" means any negligent or unlawful act or omission or wilful misconduct.
- 14.6 The operation of this clause 14 survives the expiration or earlier termination of the term of this Funding Agreement.

15. INSURANCE

15.1 The Organisation shall maintain:

- (a) workers compensation insurance as required by law where the Organisation carries out Activities under this Funding Agreement; and
- (b) public liability insurance to the value of \$10 million per claim, or occurrence giving rise to a claim, in respect to Activities undertaken under this Funding Agreement, where occurrence means either a single occurrence or a series of occurrences if these are linked or occur in connection with one another from one original cause, as the case may be.

- 15.2 Whenever requested, the Organisation must provide the Commonwealth, within 10 Business Days of the request, with evidence satisfactory to the Commonwealth that the Organisation has complied with its obligation to insure.

16. ASSETS

- 16.1 Subject to this clause 16 and the terms of any relevant lease, the ownership of an Asset vests in the Organisation subject to the Organisation using the Asset for the Activity for the duration of the Activity Period
- 16.2 The Organisation is fully responsible for all Assets acquired with the Funding.
- 16.3 Any assets acquired must notified in writing to the Commonwealth.

17. COMPLIANCE WITH LAWS AND POLICIES

- 17.1 The Organisation must comply with the following laws in carrying out the Activity:
- *Equal Opportunity for Women in the Workplace Act 1999;*
 - *Racial Discrimination Act 1984;*
 - *Sex Discrimination Act 1984;*
 - *Disability Discrimination Act 1992;*
 - *Crimes Act 1914;*
 - *Criminal Code Act 1995;*
 - *Historic Shipwrecks Act 1976;*
 - *Environment Protection and Biodiversity Conservation Act 1999.*
- 17.2 The Organisation notes that under section 137.1 of the Criminal Code Act 1995 (Cth) giving false or misleading information is a serious offence.

18. NOTICES

- 18.1 A Party giving notice or notifying under this Funding Agreement must do so in writing:
- (a) directed to the recipient's address, as varied by any notice; or
 - (b) transmitted by electronic mail or facsimile ('electronically') to that address.
- 18.2 A notice given in accordance with clause 18.1 is taken to be received:
- (a) if hand delivered, on delivery;
 - (b) if sent by pre-paid post, 5 business days after the date of posting unless it has been received earlier; and
 - (c) if transmitted electronically, upon actual receipt by the addressee.
- 18.3 Commonwealth notices must be sent to the following address:

David Spouse
Director General Navy Business Management
Navy Headquarters
Department of Defence
CANBERRA ACT 2600
Tel: 02 6265 5166
Email david.spouse@defence.gov.au

18.4 Organisation's notices must be sent to the following address:

Mr E. Graham
Chairman
HMAS SYDNEY Search Pty Ltd
L3/267 St George Terrace
Perth WA 6000
Tel: 08 9261 7749
Fax: 08 9261 7700
Email: info@findingsydney.com

19. SUBCONTRACTING AND SPECIFIED PERSONNEL

- 19.1 The Organisation must not, without the Commonwealth's prior written approval, such approval not to be unreasonably withheld, subcontract the performance of any obligations under this Funding Agreement. In giving written approval, the Commonwealth may impose such terms and conditions as it thinks fit.
- 19.2 The Organisation is fully responsible for the performance of the Organisation's obligations under this Funding Agreement, even though the Organisation may have subcontracted any of them.
- 19.3 The Organisation must, in any subcontract placed with a subcontractor, reserve a right of termination to take account of the Commonwealth's right of termination under subclause 23.1(d), and the Organisation must, where appropriate, make use of that right in the event of a termination by the Commonwealth.

20. ACKNOWLEDGMENT, PUBLICITY AND DISCLAIMER

- 20.1 The Organisation agrees that it may not make any public announcement in respect of the finding of any wrecks or wreckage fields, their location and identity otherwise than in accordance with clause 2.1(f) of this Funding Agreement. The Organisation must, in any publicity in relation to the Activity, acknowledge the financial and other support the Organisation has received from the Commonwealth in the manner to be approved by the Commonwealth prior to the Organisation's use of that publicity material.
- 20.2 The Commonwealth reserves the right to publicise and report on the awarding of Funding to the Organisation. The Commonwealth may do this by including in media releases general announcements about the Funding, and in annual reports the Organisation's name, the amount of the Funds given to the Organisation and the title and a brief description of the Activity.
- 20.3 Unless otherwise approved by the Commonwealth, any Activity material published by the Organisation must contain the following disclaimer:
- "The views expressed herein are not necessarily the views of the Commonwealth, and the Commonwealth does not accept responsibility for any information or advice contained herein".

21. ASSIGNMENT AND NOVATION

21.1 The organisation must not assign, or enter into an arrangement to novate, any of its rights under this Funding Agreement without the prior written approval of the Commonwealth.

22. TERMINATION

22.1 If:

- (a) the Organisation fails to fulfil, or is in breach of any of its obligations under this Funding Agreement, and does not rectify the omission or breach within 10 Business Days of receiving notice in writing from the Commonwealth to do so;
- (b) the Organisation comes under one of the forms of external administration referred to in Chapter 5 of the *Corporations Act 2001*, or an order has been made for the purpose of placing the Organisation under external administration;
- (c) the Commonwealth is satisfied that any statement made in the Organisation's application for Funding is incorrect, incomplete, false or misleading in a way which would have affected the original decision to approve the Funding; or
- (d) being an individual, the Organisation becomes bankrupt or enters into a scheme of arrangement with creditors,

then, in the case of any one or more of these events, the Commonwealth may immediately terminate this Funding Agreement by giving notice to the Organisation of the termination. The Organisation must comply with any requirements in the Commonwealth's notice of termination.

22.2 Where the Commonwealth terminates this Funding Agreement under clause 22.1 the Commonwealth:

- (a) will not be obliged to pay to the Organisation any outstanding amount of the Funds except to the extent that those monies have been legally committed for expenditure by the Organisation in accordance with this Funding Agreement and are payable by the Organisation as a current liability (written evidence of which will be required) by the date the notice of termination given under clause 22.1 is deemed to be received in accordance with clause 18; and
- (b) will be entitled to recover from the Organisation any part of the Funds which:
 - (i) has not been legally committed for expenditure by the Organisation in accordance with this Funding Agreement and payable by the Organisation as a current liability (written evidence of which will be required) by the date the notice of termination given under clause 22.1 is deemed to be received in accordance with clause 18; or
 - (ii) has not, in the Commonwealth's opinion, been spent by the Organisation in accordance with the terms and conditions of this Funding Agreement,

and all such Funds will be regarded as a debt due to the Commonwealth capable of being recovered as such in any court of competent jurisdiction.

- 22.3 Subclause 22.2 does not limit or exclude any of the Commonwealth's other rights, including the right to recover any other amounts from the Organisation on termination of this Funding Agreement.
- 22.4 Where the Commonwealth terminates this Funding Agreement under clause 22.1(d) the Organisation will be entitled to any reasonable costs incurred by the Organisation and directly attributable to the termination of this Funding Agreement subject to:
- (a) the Organisation's strict compliance with this clause 22; and
 - (b) the Organisation's substantiation of any amount claimed under this subclause 22.4.
- 22.5 Prior to the Commonwealth notifying the Organisation that the Funding has been approved by the Commonwealth, the Organisation may, by giving to the Commonwealth seven (7) days notice in writing, terminate this Funding Agreement and each Party will bear their own costs.
- 22.6 The Commonwealth will not be liable to pay compensation for loss of prospective profits for termination under this clause 22 or loss of any benefits that would have been conferred on the Organisation had the termination not occurred.

23. APPLICABLE LAW AND JURISDICTION

- 23.1 The laws of the Australian Capital Territory apply to this Funding Agreement and the courts of the Australian Capital Territory shall have non-exclusive jurisdiction in respect to any dispute under this Funding Agreement.

24. SURVIVAL

- 24.1 The operation of clauses 4, 6, 8, 10, 11, 12, 13, 14, 15, 16, 20 and 27 inclusive survive the expiration or earlier termination of this Funding Agreement.

25. WAIVER

- 25.1 If either Party does not exercise (or delays in exercising) any of its rights, that failure or delay does not operate as a waiver of those rights.

26. NEGATION OF LEGAL RELATIONSHIP OF EMPLOYMENT, PARTNERSHIP AND AGENCY

- 26.1 The Organisation (including its personnel and partners) will not, by virtue of this Funding Agreement, be or for any purpose be deemed to be the Commonwealth's legal employees, partners or agents and must not represent themselves as being the Commonwealth's personnel or partners or as otherwise able to bind or represent the Commonwealth.

27. REVIEW

- 27.1 The Organisation agrees to provide all reasonable assistance and information that the Commonwealth reasonably requires in relation to conducting a review and final evaluation of the Program.

28. ENTIRE AGREEMENT

28.1 This Funding Agreement supersedes all previous agreements in respect of its subject matter and embodies the entire agreement between the parties.

29. VARIATION

29.1 A variation of this Funding Agreement may only be in writing and must be signed by both Parties.

30. COUNTERPARTS

30.1 This Agreement may be executed in counterparts and is deemed to commence upon the date of last signature.

Executed AS AN AGREEMENT by the Parties.

SIGNED for and on behalf of the
COMMONWEALTH OF AUSTRALIA
represented by and acting through the
Department of Defence

.....
sign here
.....Date

in the presence of:

.....
print name of witness *witness sign here*

Executed by HMAS SYDNEY SEARCH
Pty Ltd ABN 22 671 041 152 as Trustee
for The Finding Sydney Foundation in
accordance with section 127(1) of the
Corporations Act 2001 (Cth)

Chairman:
Edward GrahamDate: *7/10/2007*

Director:
K BlaiseDate: *7/10/07*