

**1. DEFINITIONS**

**AUD** means Australian dollar.

**Commissioning** means when the goods are assembled and operating under normal conditions. For used goods, commissioning means assembly only.

**Consequential Loss** means any consequential, indirect, exemplary or punitive loss or damage and direct or indirect loss of actual or anticipated profits or revenues, loss by reason of shutdown or non-operation, increased cost of borrowing capital or financing, or loss of use, or productivity, whether caused by or contributed to by a breach of contract or statute, breach of warranty (express or implied), tort, strict liability or any other cause whatsoever.

**Contract** means these terms and conditions and the documents expressly incorporated herein.

**Delivery** means when the Goods leave the Seller's premises or as otherwise agreed in writing.

**EUR** or **EURO** means European currency.

**Equipment** means those Goods which comprise mobile equipment and /or vehicles or attachments as described in the quotation, sale invoice or agreement.

**Exchange** (or **Exchanged**) means the exchange of the Purchaser's own Part for a Part supplied by the Seller.

**Goods** or **Services** (or both) collectively and severally means the goods, Parts, Equipment (new or used) or Services relating to the Contract or expressed in the quotation and excludes all things not expressly specified in writing by the Seller.

**GST** means as defined in the *A New Tax System (Goods and Services Tax) Act 1999* and has the same meaning when used herein.

**Intellectual property** or **IP** means all industrial and intellectual property rights whether protectable by statute, common law or equity including without limitation, all copyright in the goods and all materials provided in connection with the goods, rights in relation to inventions (including all patents and patent applications), trade secrets and know-how, design rights (registrable or not), trade mark rights (registered or not), circuit layout design rights and excluding non-assignable moral rights.

**JPY** means Japanese Yen.

**Komatsu** means Komatsu Australia Pty Ltd ABN 71 143 476 626 or any of its Related Bodies Corporate.

**Part/s** means goods other than Equipment.

**Party** means either the Purchaser or Seller.

**Parties** means both the Purchaser and Seller.

**Price** means the total monetary amount for the sale of the Goods or Services (excl GST).

**Purchaser** means the entity purchasing the Goods and/or Services or as otherwise described in the quotation, final sale invoice or agreement.

**Purchaser Nominated Items** means any fire suppression, tyres, wheel rims, accident avoidance/detection, mine management, access and/or egress systems, automatic grease systems or any other items nominated by the Purchaser that are not supplied as OEM standard or part of the OEM specification.

**Related Body Corporate** has the same meaning as in the *Corporations Act 2001* as amended.

**Seller** means Komatsu Australia Pty Limited ABN 71 143 476 626.

**Services** mean any service pursuant to a quotation, sale invoice or agreement including Commissioning.

**USD** means United States dollar.

**2. APPLICATION OF CONDITIONS****Conditions of sale**

2.1 The Goods and/or Services are supplied, traded-in or Exchanged solely on the basis of these terms and conditions.

2.2 By issuing a purchase order, invoice or similar document to the Seller, the Purchaser unconditionally accepts to be bound by this Contract in its entirety and without alteration. The Purchaser unconditionally agrees that any terms attached to such purchase order, invoice or otherwise are null and void and the Seller is entitled to ignore such terms.

**Orders**

2.3 Submission by the Purchaser of a purchase order for the Goods and/or Services is deemed to be an offer to purchase the Goods and/or Services (**offer**) subject to this Contract. The Seller may accept or reject such offer in its sole discretion.

2.4 An offer to purchase Goods and/or Services (except Parts) is only deemed accepted by the Seller when it is acknowledged by the Seller in writing.

2.5 An offer to purchase Parts can be accepted by the Seller either orally or in writing or by the Seller's Delivery of the Parts.

### **3. PRICE**

3.1 Unless otherwise stated, Price quoted excludes GST, Delivery costs and any other matter or thing not expressly specified in writing by the Seller.

3.2 Unless otherwise stated, Price quoted is valid for 30 calendar days from the date of quotation after which time it will lapse.

3.3 The Seller may at any time require the Purchaser to provide security against default by way of a cash deposit or unconditional bank guarantee, such security to be released within 7 days of payment of all monies due.

#### **Price variation due to currency fluctuations**

3.4.1. The Price may include an imported content of Goods in the relevant foreign currency being USD/JPY/EUR equivalent to AUD and is based on an indicative currency exchange rate of AUD1.00 = USD/JPY/EUR.

3.4.2. A Purchaser must specify in its purchase order whether to fix the exchange rate for payment of any imported content of the Goods in AUD or whether to take the exchange rate risk. The Seller reserves the right not to accept a purchase order until such time as a Purchaser makes this election. If the Seller chooses to accept a purchase order in circumstances where the Purchaser has not made an election whether to fix the exchange rate for payment of any imported content of the Goods in AUD then the purchase order is accepted on the basis that the Purchaser is taking the exchange rate risk unless the Seller has advised the Purchaser, in writing, at the time of acceptance of the purchase order that the Seller will take the exchange rate risk.

3.4.3. Where a Purchaser elects to fix the exchange rate for payment of any imported content of the Goods in AUD then the Seller will issue a revised final Price in AUD and thereafter the Seller will take the exchange rate risk, provided the Goods are paid for in accordance with the terms of the sale invoice. The relevant foreign exchange rate(s) that will be used in the final Price will be the spot buying rate of the currency specified being USD/JPY/EUR minus the appropriate forward points from the date of receiving the purchase order from the Purchaser up to the agreed date of full settlement of the sale invoice. The currency will be purchased from a reputed commercial bank based in Australia with whom Komatsu holds an account.

3.4.4. Where a Purchaser elects to take the exchange rate risk any variation from the rate used in the quotation or other document issued prior to the time of the final Price, will be to the Purchaser's account.

3.4.5 Where the Price for the Goods in the Contract is specified in AUD only, the Seller reserves the right to issue a revised Price where there is a depreciation of 10% or more of the AUD against the relevant overseas currency from where the Goods are imported by the Seller, when measured against the daily foreign exchange rate available to the Seller. The Seller may issue a revised Price at any time from the date of the Contract for the purchase of the Goods to the date of actual full payment for the Goods by the Purchaser. If the Seller exercises its rights under this clause 3.4.5, it will give the Purchaser 7 days from notification of the revised Price to exercise a right to cancel the Contract for purchase of the Goods, without penalty.

#### **Rise and Fall**

3.5 For Goods classified by the Seller as mining classified Goods, the Price (being the overseas content and Australian sourced attachments, materials and services) may increase where there is an ex factory date for the Equipment after the next 1<sup>st</sup> of April from the date of the Contract for the mining classified Goods, in accordance with the Rise and Fall Mechanism for Komatsu Australia Pty Ltd – Mining (Document Number KALM-02) which is available from the Seller.

#### **Custom Import Duties**

3.6 Unless otherwise specified, the Price is exclusive of any custom import duties payable by the Seller in respect of import of the Goods by the Seller into Australia. If the Price is specified to be inclusive of any such custom import duties then if there is any change in the dutiable classification or effective rate of the applicable custom import duties the Price will be adjusted to pass through the effect of the change to the Purchaser and the Purchaser must pay the adjusted Price.

### **4. DELIVERY, PICKUP AND COMMISSIONING**

#### **When goods are to be delivered or Services performed**

If the parties agree that the Seller will provide Delivery of Goods and/or provision of Services then:

4.1 new and used Equipment Delivery, Service and pick-up dates are indicative only;

4.2 the Seller will use reasonable efforts to Deliver the Goods to the site or perform the Services as agreed with the Purchaser. If the Seller is prevented from or delayed in making Delivery of Goods or performing Services for a reason or event beyond the Seller's reasonable control, the Seller may either extend the date for a reasonable period or terminate the Contract, without liability to the Purchaser; and

4.3 the Seller is not liable, and the Purchaser releases the Seller, for any damage or loss, including Consequential Loss, to the Purchaser resulting from any delay in Delivery or Service.

## **Early Acceptance**

4.4 The Purchaser may not take possession, custody or control of Goods before Delivery unless agreed by the Seller, which agreement may be conditional and at the sole discretion of the Seller.

4.5 In the event that the Purchaser takes possession, custody or control of Goods before they are ready for Delivery, it is deemed that the Purchaser accepts the Goods on that date.

## **5. INTELLECTUAL PROPERTY**

Where IP rights are expressly granted by the Seller in writing, the following clauses are applicable to the grant of IP in the Goods:

5.1 The Seller grants the Purchaser a non-exclusive, non transferable revocable licence to use the IP provided by the Seller for the operation of the Goods (including without limitation, the collection, manipulation and reporting of data associated with the Goods) for such period as the Purchaser owns and operates the Goods.

5.2 The IP and where applicable, all user documentation for the Goods, are the Seller's IP and the Seller retains all right, title and ownership therein.

5.3 The Purchaser may only use IP for the operation, maintenance and use of the Goods and the Seller accepts no liability whatsoever for any other use. The Purchaser must not modify the IP in any way, decompile, copy, disassemble, reverse engineer or derive software source code or otherwise do any thing which conflicts with the licensed use of the IP provided under clause 5.1.

## **6. PAYMENT**

### **Payment**

6.1 Unless otherwise agreed in writing, the Purchaser must pay the Price (together with GST and Delivery costs) without deduction or set-off when notified by the Seller in writing that the Price is due and payable but in any event, on or prior to Delivery. Time is of the essence for payment. If Delivery is delayed by the Purchaser then the Purchaser must pay the Price required by this clause when Delivery would have occurred if not for the delay by the Purchaser.

6.1A The Parties irrevocably acknowledge and agree that once Delivery has been made in accordance with this Contract, the Price becomes immediately payable by the Purchaser to the Seller as a liquidated debt and the Seller shall be entitled to commence and maintain an action against the Purchaser for the Price as a liquidated debt.

6.2 The Purchaser indemnifies the Seller for any losses, costs or fees incurred or arising in connection with recovery of any overdue payment due to the Seller.

### **Goods remain property of the Seller until payment**

6.3 The Goods remain the Seller's property until all monies owed by the Purchaser are received in clear funds by the Seller, and whilst these Goods remain the Seller's property the Purchaser must:

6.3.1 keep the Goods in its possession and control;

6.3.2 keep the Goods in good repair and condition, excluding fair wear and tear;

6.3.3 keep the Goods stored separately and marked so that the Goods are clearly and easily identifiable as the Seller's property and if requested, promptly inform the Seller of the location of the Goods; and

6.3.4 not sell, assign or lease the Goods or any interest in them, or permit any charge, pledge, lien or other encumbrance to be created in relation to them.

### **Personal Properties Securities Act 2009 (Cth) ("PPSA")**

6.4 The Purchaser acknowledges that the retention of title in clause 6.3 gives rise to a Purchase Money Security Interest under the PPSA in favour of the Seller in respect of the Goods and their proceeds.

The Purchaser undertakes to:

6.4.1 promptly do all things, execute all documents and/or provide any information which the Seller may reasonably require to enable the Seller to attach, enforce, register, protect and maintain the perfection of its first priority security interest; and

6.4.2 give the Seller not less than 14 days' prior written notice of any proposed change in its name and/or any other change to its details; and

6.4.3 immediately on request by the Seller (and at the Purchaser's expense) obtain from any third party such agreements and waivers of any Purchase Money Security Interest that any third party has in the Goods, to ensure that the retention of title in clause 6.3 provides the Seller with a first priority security interest in the Goods.

6.5 The Purchaser waives its rights to receive a copy of any verification statements under section 157 of the PPSA.

6.6 If the Purchaser defaults on payment of any monies due under this Contract, the Seller has the irrevocable right to seize the Goods without notice.

6.7 The Purchaser must give the Seller notice if another party with a security interest in the Goods seizes or otherwise deals with the Goods in a way that might impact the Seller's Purchase Money Security Interest.

6.8 To the maximum extent permitted by law, the Purchaser and the Seller agree that the following provisions of the PPSA do not apply to the enforcement by the Seller of its security interest in the Goods: sections 95, 118, 121(4), 125, 130, 132(3)(d), 132(4), 135, 142 and 143.

6.9 The Purchaser must not disclose information of the kind referred to in section 275(1) of the PPSA, unless required to do so by sections 275(7)(b) to 275(7)(e) of the PPSA. The Purchaser must not, without the Seller's consent, authorise the disclosure of information pursuant to section 275(7)(c) of the PPSA nor request the Seller to give information pursuant to section 275(7)(d) of the PPSA.

6.10 In this clause 6, "proceeds", "Purchase Money Security Interest" and "Security Interest" have the meanings given to those expressions in the PPSA.

### **Purchaser disposal of goods**

6.11 If the Purchaser disposes of any of the Goods while they remain the Seller's property, or if any of those Goods become part of another product sold by the Purchaser, the Purchaser holds the proceeds on trust for the Seller up to the amount it owes the Seller in respect of those Goods, and must immediately pay that amount to the Seller.

### **Purchaser indemnity for breach**

6.12 The Purchaser indemnifies the Seller for any loss or damage resulting from a breach of clause 6.

### **Seller's right to repossess and suspend Delivery**

6.13 If the Purchaser fails to pay to the Seller all monies due under this Contract by the due date, the Seller has the right and irrevocable licence from the Purchaser, to at any time and without notice, via its representatives, enter and repossess the Goods. The Seller is entitled, at its absolute discretion, to keep the repossessed Goods, sell the repossessed Goods or hold the repossessed Goods in safe custody pending payment of the Price. The Seller is also entitled to suspend any other Delivery to the Purchaser without liability until any breach of this Contract is rectified by the Purchaser. In the event that the Seller repossesses the Goods, the Purchaser remains bound by its obligations to the Seller in accordance with this Contract, including its obligation to pay the Price.

6.14 The Seller is not liable for any loss, damage or liability suffered as a result of exercising its rights under condition 6.13.

6.15 The Parties irrevocably acknowledge and agree that in the event of repossession of Goods in accordance with clause 6.13, the Seller is not required to give notice in accordance with section 135 of the PPSA.

### **Finance**

6.16 The Purchaser may finance the purchase of the Goods through a separate agreement entered into between it and a finance company selected by the Purchaser (such as Komatsu Australia Corporate Finance Pty Ltd). In the event that the Purchaser elects to finance the purchase of the Goods in this manner, the Purchaser may direct the Seller to transfer title to the Goods directly to the finance company and in the event of such a direction being provided title will transfer directly to the finance company upon full payment of the Price. These terms and conditions will apply as between the Seller and the Purchaser that finances the purchase of the Goods even if the invoice records the finance company as the purchaser of the Goods.

## **7. COMMISSIONING**

### **Seller notice of Commissioning**

7.1 If Commissioning is specified by the Seller:

7.1.1 for Komatsu Equipment – the Seller will carry out Commissioning in accordance with manufacturer's documented specifications and assembly, inspection and testing criteria;

7.1.2 for Non-Komatsu Equipment - the Seller will use best endeavours to assist with Commissioning of non-Komatsu Equipment but to the extent permitted by law no liability is accepted by the Seller for such Commissioning and the Purchaser releases the Seller from any such liability howsoever caused.

7.2 The Seller is not liable for loss resulting from any delay in Commissioning and the Purchaser releases the Seller from any such liability howsoever caused.

7.3. If Commissioning is carried out other than at the Seller's premises:

7.3.1. it will only be carried out during normal business hours, where practical, and only if the Purchaser gives reasonable and safe access, space and facilities fit for the purpose of Commissioning. If the Purchaser fails to do so, the Seller may terminate the Contract;

7.3.2 the Purchaser must obtain all necessary permits, licences and approvals prior to Commissioning; and

7.3.3 the Seller is not responsible for any hazardous or toxic waste or substances (unless brought to the site by the Seller) and the Purchaser indemnifies the Seller against all costs and expenses the Seller may incur in dealing with hazardous waste or substance and all liability arising from any loss, damage or claim for personal injury or third party property howsoever caused.

## **Purchaser notice for additional Commissioning**

7.2 No notice, demand, instruction or request from the Purchaser shall oblige the Seller to provide additional Commissioning works, nor shall it delay payment of the Price once notice of Commissioning has been provided by the Seller.

## **8. RISK, INSURANCE AND DAMAGE**

### **Risk passes to Purchaser on Delivery**

8.1 Risk in the Goods passes to the Purchaser upon Delivery.

### **Purchaser must insure Goods**

8.2 The Purchaser must insure and keep the Goods insured and must note the interest of the Seller in the Goods on usual commercial terms with a reputable insurer, against all risks usually insured against for Goods of that kind for full replacement value from the time the risk in the Goods passes to the Purchaser until the time the title in the Goods passes to the Purchaser.

8.3 The Purchaser holds the proceeds of any insurance claim relating to the Goods on trust for the Seller up to the amount it owes the Seller in respect of those Goods, and must immediately pay that amount to the Seller.

### **Damage after Delivery**

8.4 The Seller is not liable for defects or damage discovered after Delivery unless:

8.4.1 The Purchaser gives written notice to the Seller and, if applicable, the Seller's carrier within 4 days after the date of Delivery;

8.4.2 The Purchaser gives the Seller reasonable opportunity to inspect the Goods in the same condition and place in which they were Delivered; and

8.4.3 The defects or damage are reasonably shown to have been pre-existing as at the date of Delivery.

## **9. WARRANTIES AND EXCLUSIONS**

### **Manufacturer's liability for defective or used goods**

9.1 If Goods are under any manufacturer's warranty applicable to the Goods, the Purchaser must comply with all applicable warranty terms. Failure to do so may void the warranty in full or in part. All applicable warranties for new Goods are available from Komatsu upon request. Any used Goods warranty will only apply if given in writing prior to sale (if any) otherwise the used Goods are sold 'as is' and without any manufacturer's warranty.

### **Exclusion or limitation of warranties**

9.2 All legal, statutory or equitable liability, conditions or warranties of any type in relation to the Goods or Services are excluded. However, nothing herein shall limit those provisions of the *Competition and Consumer Act 2010 (Cth)* including the Australian Consumer Law, nor statutes, rules or regulations from time to time in force in Australia which imply or guarantee certain conditions or warranties or impose obligations on the Seller which conditions, warranties and obligations cannot, or cannot except to a limited extent be excluded, restricted or modified. If any such statutory provisions apply, then to the extent to which the Seller is entitled to do so, its liability under those statutory provisions shall be limited at its option to:

9.2.1 in the case of Goods:

- (a) the replacement of Goods or the supply of equivalent Goods; or
- (b) the payment of the cost of replacing the Goods or of acquiring equivalent Goods; or
- (c) the payment of the cost of having the Goods repaired; or
- (d) the repair of the Goods; and

9.2.2 in the case of Services:

- (a) the supply of the Services again; or
- (b) the payment of the cost of having the Services supplied again.

### **Seller indemnified if goods used improperly**

9.3 Without limitation, the Purchaser will keep the Seller, its officers, agents, employees and other contractors indemnified against any loss, damage or liability arising directly or indirectly from a use of the Goods or any modification to them which is not in accordance with the manufacturer's, operator's or maintenance manual, authorised by manufacturer's recommendations, in accordance with any applicable law, or in accordance with good safety and operating practices relating to the Goods.

### **General indemnity**

9.4 The Purchaser shall in connection with the supply of Goods and/or Services, indemnify and keep indemnified the Seller, its officers, agents, employees and other contractors (Indemnitees) against all claims demands losses costs liabilities and expenses

arising out of:

- (a) injury to or death of any person (including Indemnitees) to the extent not caused by the Seller; and
- (b) damage to or destruction of any property (including that of Indemnitees) to the extent not caused by the Seller.

### **Exclusion of Consequential Loss**

9.5 Notwithstanding anything to the contrary in these conditions, the Seller shall not be liable to the Purchaser, at law, equity, statute or otherwise for any Consequential Loss howsoever caused.

### **Cap on Liability**

9.6 Notwithstanding anything to the contrary in these conditions or elsewhere and to the full extent permitted by law, the Seller's cumulative liability to the Purchaser under or connection with the Contract, including any liability for breach of the Contract, negligence or under any indemnity or law, shall be limited to the amount paid by the Purchaser to the Seller for the Goods and Services.

### **Exclusion of liquidated damages, etc**

9.7 Notwithstanding anything to the contrary in these conditions or elsewhere, the Seller shall not be liable to the Purchaser for any liquidated damages, delay penalties, delay damages, performance guarantees or any other similar obligation.

### **Purchaser Nominated Items**

9.8 The Seller will:

- (a) assess the installation procedure provided by a third party supplier; and
- (b) if the installation procedure satisfies Occupational Health and Safety requirements, the Seller will install the Purchaser Nominated Items in accordance with the third party installation procedure;
- (c) take reasonable steps to pass on the benefit of any third party supplier's warranty to the Purchaser.

Except as provided above, the Seller disclaims all liability in relation to Purchaser Nominated Items. The Purchaser will indemnify the Seller against all liability, loss, damage or expense suffered by the Purchaser or any third party arising out of or in any way related to Purchaser Nominated Items.

## **10. DEFAULT**

### **Purchaser must pay interest if payment late**

10.1 The Purchaser must pay the Seller interest on any amount not paid from when payment falls due until payment in full is received, at a rate as determined by the Westpac Indicator Lending Rate effective from time to time plus 2% per annum calculated on daily balances of amounts unpaid and capitalised daily.

10.2 The Seller may demand payment of interest by the Purchaser at any time. Failure to demand interest does not constitute a waiver of the entitlement to interest.

### **Seller's right to end Contract**

10.3 The Seller may by written notice to the Purchaser end the Contract immediately in any of the following circumstances:

- 10.3.1 the Purchaser fails to perform any of its obligations under this Contract or otherwise;
- 10.3.2 the Purchaser dies or becomes incapacitated, or ceases, or indicates that it is about to cease to trade;
- 10.3.3 anything happens that reasonably indicates that there is a significant risk that the Purchaser is or will become unable to pay debts as they fall due. This includes publication of any unfavourable credit report against the Purchaser, non payment by the Purchaser of any debt due to any third party, execution or distress being levied against any income or assets of the Purchaser; a meeting of the Purchaser's creditors being called or held; a step being taken to make the Purchaser bankrupt; and the Purchaser entering into any type of agreement, composition or arrangement with, or assignment for the benefit of, all or any class of its creditors, or being subject to a deed of company arrangement; or
- 10.3.4 a step is taken to have a receiver, receiver and manager, provisional liquidator, liquidator or administrator appointed to the Purchaser or any of its assets.

### **Seller's rights if it ends Contract**

10.4 If the Contract is ended by the Seller under clause 10 and the Purchaser owes the Seller money, the money becomes payable immediately to the Seller and bears interest in accordance with clause 10.1:

### **Seller's other rights and remedies**

10.5 The rights and remedies provided in these conditions will not affect any other rights or remedies available to the Seller.

## 11. TRADE-IN OR EXCHANGE

### Restrictions

11.1 If any amount is allowed by way of trade-in or Exchange, the credit or value given to the trade-in or Exchange is conditional upon the following:

11.1.1 the Seller accepting an order for the Goods by any stated quotation validity date; and

11.1.2 Delivery of the trade-in or Exchange to the Seller at the Purchaser's expense and in the same state and condition as it was on the date of the Seller's appraisal or inspection (if any) and there being no undisclosed defect or damage.

11.1.3 If the Purchaser does not deliver the trade in or Exchange to the Seller within the time nominated by the Seller or fails to deliver the correct trade in or Exchange or fails to disclose any material condition, deficiency or defect in the trade in or Exchange, then the difference between the Price for the trade in or Exchange and the cost of the Seller purchasing a replacement trade in or Exchange is a debt owing by the Purchaser to the Seller. If a used Part or Equipment is not available then a new Part will be purchased by the Seller and this cost will be a debt owed by the Purchaser to the Seller.

11.1.4 If upon inspection of the trade in or Exchange by the Seller, the trade in or Exchange is in such a state that it cannot be reconditioned for resale or is otherwise not of merchantable quality then any value attributed to the sale of the Goods will be reduced accordingly and the difference becomes a debt owing by the Purchaser to the Seller.

11.2 Risk in the trade-in or Exchange remains with the Purchaser until inspection and acceptance of Delivery of the trade-in or Exchange at the Seller's nominated point of Delivery, such Delivery to be at the Purchaser's risk and expense;

11.3 The Purchaser warrants that it has or will have unencumbered title to any trade-in or Exchange at the time of completion of the sale;

11.4 The Purchaser authorises the Seller to pay any monies given to it for the purposes of removing any encumbrance on the trade-in or Exchange;

11.5 The Seller may without obligation to the Purchaser, refuse to purchase any trade-in or Exchange at any time until acceptance and inspection of the trade-in or Exchange or if condition 11.1.2 is breached, and may recover the credit or value given in the trade-in or Exchange and any loss arising thereof as a debt due from the Purchaser to the Seller.

## 12. FORCE MAJEURE

If the Seller's ability to perform its obligations is adversely affected by any cause beyond the Seller's reasonable control, then the Seller may, if it chooses, end the Contract of sale or suspend it for up to 3 months by giving the Purchaser written notice. The Seller will not be liable for any loss, damage or liability which the Purchaser incurs as a result, whether directly or indirectly.

## 13. DISPUTE RESOLUTION

13.1 If a dispute arises, either party may notify the other in writing identifying the details of the dispute.

13.2 Within 14 days of notification of a dispute, an executive officer of each party empowered to resolve the dispute, shall confer at least once to attempt to resolve the dispute.

13.3 If the dispute is not resolved within 7 days of the meeting of the executive officers, either party may commence mediation by referring the dispute to the Australian Commercial Disputes Centre in Sydney. The rules of commercial mediation of that body shall apply and both parties must comply with those rules.

## 14. MISCELLANEOUS

### Assignment

14.1 The Purchaser must not assign, sub-contract or otherwise deal with this Contract or any right or obligation under it except with the prior written consent of the Seller (which the Seller is entitled to withhold in its absolute discretion). Failure to obtain the consent of the Seller constitutes a fundamental breach of these terms and conditions.

14.2 The Seller shall be entitled to assign this Contract to a Related Body Corporate of the Seller which is financially sound and capable of performing all of the obligations of the Seller under this Contract by giving notice of such assignment to the Purchaser but otherwise shall not be entitled to assign this Contract or any right under it without the prior written consent of the Purchaser (which must not be unreasonably withheld or delayed).

### Cancellation

14.3 An order may not be cancelled. The Seller is entitled to insist on completion of the Contract or at its sole discretion elect to charge the Purchaser the Seller's direct and indirect costs and expenses in connection with the cancellation (including without limitation, works required on the Goods and the transport and holding of Goods or standby of personnel until such time as the Goods are re-sold, any demobilisation costs, third party costs for attachments, foreign exchange variances) plus indirect costs, loss of profit and any administration or other costs, expenses or fees incurred by the Seller whatsoever, as reasonably determined by the Seller ("**Cancellation Costs**") and as a condition of consent to any order cancellation. The Seller may, at its sole discretion, apply any Cancellation Costs against any credit account for parts and services sales provided by the Seller to

the Purchaser or its related body corporate.

### **Description of Goods or Services**

14.4 The description of the Goods and/or Services is given for identification only and does not create a Contract of sale by description.

14.5 All photographs, brochures, weights, illustrations, dimensions or other particulars as to the Goods and/or Services are indicative only. The Seller has no liability to the Purchaser for any deviations or inaccuracy in such documentation.

14.6 Any representation, promise, statement or description or other information of whatever nature not included in the Contract documentation or made in writing by an authorised company representative of the Seller is expressly excluded. The Purchaser shall rely solely upon its own inspection skill and judgment. No Equipment will be recommended by the Seller for use in any specific application without supply by the Seller of a formal applications study.

### **Electronic Data Retrieval**

14.7 The Purchaser grants to the Seller and its personnel, a non-exclusive and irrevocable licence to enter premises and to access the Equipment, at no cost to the Seller, to enable the Seller to perform data retrieval functions for the purpose of monitoring component life, service intervals or machine availability of the Equipment.

14.7.1 Access to the Equipment will be scheduled wherever possible to minimise disruption to the Purchaser's operations.

### **Severability**

14.8 If a clause or part of a clause can be read in a way that makes it illegal, unenforceable or invalid, but can also be read in a way that makes it legal, enforceable and valid, it must be read in the latter way. If any clause or part of a clause is illegal, unenforceable or invalid, that clause or part is to be treated as removed from this document, but the rest of this document is not affected.

### **Waiver**

14.9 The fact that either party fails to do, or delays in doing, something it is entitled to do under the Contract of sale, does not amount to a waiver of its right to do it. Any waiver must be in writing. A written waiver by the Seller is only effective in relation to the particular obligation or breach in respect of which it is given. It is not to be taken as an implied waiver of any other obligation or breach; or as an implied waiver of that obligation or breach in relation to any other occasion.

### **GST**

14.10 If GST is imposed on any supply made in accordance with these conditions, the recipient must pay an additional amount equal to the GST payable in connection with that supply promptly following receipt of a tax invoice. Expressions used in this condition which are defined in the *A New Tax System (Goods and Services Tax) Act 1999* have the same meaning when used herein.

### **Governing law**

14.11 The Contract of sale is governed by the laws of New South Wales.