

KOMATSU AUSTRALIA

TERMS & CONDITIONS – PARTS AND SERVICE

1. DEFINITIONS

"Agreement" means the agreement between Komatsu and the Purchaser for the supply of the Goods and/or Services, comprising the relevant order and these Conditions.

"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 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 otherwise.

"Conditions" means these terms and conditions, as amended from time to time.

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

"Goods" or "Services" (or both) collectively and severally means the parts, components, fluids, oils or other parts or services described in the attached quotation or invoice for purposes of supply by Komatsu to Purchaser.

"IP" means all industrial and intellectual property rights whether protectable by statute, common law or equity.

"Komatsu" means Komatsu Australia Pty Ltd ABN 71 143 476 626.

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

"Purchaser" means the entity placing an order for Goods or Services.

"Service Exchange" means the exchange of the Purchaser's own used part for a new, remanufactured or used part supplied by Komatsu.

2. APPLICATION OF CONDITIONS

2.1 Goods and Services are supplied or Service Exchanged, solely on the basis of these Conditions.

2.2 Terms of contract, conditions or offer in any specification, purchase order or other document submitted by the Purchaser are excluded.

2.3 Variations or additions to these Conditions are effective only if agreed in writing by Komatsu.

2.4 The Purchaser's request to buy Goods or Services or submission by the Purchaser of a purchase order for the Goods or Services is deemed to be an offer to purchase the Goods or Services (order) subject to these Conditions. Komatsu may accept or reject an order in its sole discretion.

2.5 An order to purchase Goods or Services is only accepted when it is acknowledged by Komatsu either orally or in writing or by Delivery.

2.6 Komatsu may vary these Conditions from time to time and will provide the Purchaser with replacement Conditions. The subsequent placing of an order by the Purchaser is deemed as acceptance of these Conditions.

3. PRICE

3.1 Unless otherwise stated by Komatsu: (a) Prices exclude GST, customs duty and delivery costs; and (b) Goods pricing will be invoiced and payable in accordance with Komatsu's standard price list applying at the date of order of the Goods.

4. DELIVERY

4.1 Delivery and availability dates are indicative only. Komatsu will use reasonable efforts to deliver the Goods by the delivery date specified by it.

4.2 Komatsu is not liable for any damage or loss, including Consequential Loss, to the Purchaser resulting from any delay in delivery of Goods or Services.

5. PAYMENT

5.1 The Purchaser must pay the Price without deduction or set-off, on or before Delivery. Time is of the essence for payment.

5.2 Where the Purchaser is approved by Komatsu for trading on credit terms, payment is due for all Goods and Services provided, within 30 days from the month of invoicing. All other sales are on a cash on delivery basis.

5.3 The Purchaser indemnifies Komatsu for any losses, costs or fees incurred or arising in connection with recovery of any overdue payment.

5.4 The Goods remain Komatsu's property until the Price is paid in full. The Purchaser must: (a) keep the Goods in its possession and control; (b) keep the Goods in good repair and condition, excluding fair wear and tear; (c) keep the Goods stored separately and marked so that the Goods are clearly and easily identifiable as Komatsu's property and if requested, promptly inform Komatsu of the location of the Goods; and (d) 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.

5.5 If the Purchaser fails to pay to Komatsu all monies due under this Agreement by the due date, Komatsu has the right and irrevocable licence from the Purchaser, to, at any time and without notice, via its representatives, enter the Purchaser's premises and to repossess the Goods or any part of them.

6. PERSONAL PROPERTY SECURITIES ACT 2009 (CTH) ("PPSA")

6.1 The retention of title in clause 5.4 gives rise to a Purchase Money Security Interest under the PPSA in favour of Komatsu in respect of the Goods and their proceeds.

6.2 If the Purchaser defaults on any monies due under this Agreement, Komatsu has the irrevocable right to seize the Goods without notice and deal with the Goods as Komatsu sees fit.

6.3 To the maximum extent permitted by law, the following provisions of the PPSA do not apply to the enforcement by Komatsu of its security interest in the Goods: sections 95, 118, 121(4), 125, 130, 132(3)(d), 132(4), 135, 142 and 143. The Purchaser waives its rights to receive any verification statements under Section 157 of the PPSA.

6.4 In this clause "proceeds", "Purchase Money Security Interest" and "Security Interest" have the meanings given in the PPSA.

7. RISK AND INSURANCE

7.1 Risk in the Goods passes to the Purchaser upon Delivery. The Purchaser must fully insure the Goods, and hold the benefit of any claim on trust for Komatsu, from the time risk in the Goods passes to the Purchaser until title in the Goods passes from Komatsu to the Purchaser.

8. WARRANTIES AND EXCLUSIONS

8.1 Unless Komatsu states otherwise, the Goods or Services are warranted in accordance with the applicable warranty listed at

<http://www.komatsu.com.au/Pages/Terms-and-Conditions.aspx>

8.2 All other conditions and warranties of any type in relation to the Goods or Services are excluded to the maximum extent allowed by the law. Nothing in these Conditions limit those provisions of the *Competition and Consumer Act 2010 (Cth)* nor any other statutes, rules or regulations from time to time in force in Australia which imply or guarantee certain conditions or warranties or impose obligations on Komatsu 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 Komatsu is entitled to do so, its liability shall be limited at its option to:

(a) in the case of Goods: (i) the replacement of Goods or the supply of equivalent Goods; or (ii) the payment of the cost of replacing the Goods or of acquiring equivalent Goods; or (iii) the payment of the cost of having the Goods repaired; or (iv) the repair of the Goods; and

(b) in the case of Services: (i) the supply of the Services again; or (ii) the payment of the cost of having the Services supplied again.

8.3 The Purchaser indemnifies and keeps Komatsu indemnified from and against any loss, damage or liability arising directly or indirectly from a use, modification or alteration of the Goods that is not in accordance with (without limitation) any applicable law or the Goods manufacturer's recommendations or Komatsu's instructions or the manuals relating to the Goods.

8.4 The Purchaser, in connection with the Goods or Services, indemnifies and keeps indemnified Komatsu, 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); and

(b) damage to or destruction of any property (including that of Indemnitees),

to the extent caused by the Purchaser, its officers, agents, contractors or employees.

8.5 Komatsu is not liable to the Purchaser under contract, at law or otherwise for any Consequential Loss, liquidated damages, delay penalties or any performance guarantees.

8.6 Komatsu's cumulative liability to the Purchaser under or in connection with this Agreement, including any liability for breach of the contract, negligence or under any indemnity or law, is limited to the amount paid by the Purchaser to Komatsu for the Goods and Services.

9. DEFAULT

9.1 The Purchaser must pay Komatsu interest (at the Westpac Indicator Lending Rate effective plus 2% p.a.) on any amount not paid by the due date until payment in full is received by Komatsu.

9.2 Komatsu may by written notice to the Purchaser immediately end this Agreement or otherwise refuse to supply Goods or Services if:

(a) the Purchaser fails to perform any of its obligations under this Agreement;

(b) the Purchaser dies or becomes incapacitated, or ceases, or indicates that it is about to cease, to carry on business;

- (c) anything happens that indicates that there is a significant risk that the Purchaser is or will become unable to pay debts as they fall due; or
- (d) 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.

9.3 The rights and remedies provided in these Conditions will not affect any other rights or remedies available to Komatsu.

10. SERVICE EXCHANGE

- 10.1 If requested by the Purchaser, Komatsu may, at its sole and absolute discretion, provide the Purchaser with a Service Exchange on such terms as Komatsu may determine from time to time, including the availability of any discount or credit from the receipt by Komatsu of the Purchaser's used part.
- 10.2 The Purchaser warrants that it has or will have unencumbered title to any used part provided by it to Komatsu for the purposes of a Service Exchange.
- 10.3 The Purchaser authorises Komatsu to pay any monies given to it for the purposes of removing any encumbrance on any used part provided by the Purchaser to Komatsu in connection with a Service Exchange.

11. FORCE MAJEURE

- 11.1 A party is not liable for failure to perform, or delay in performing, an obligation, except an obligation to pay money, if the failure or delay arose from a cause beyond the reasonable control of that party.

12. MISCELLANEOUS

- 12.1 Komatsu retains all right, title and ownership in an IP rights in any Goods or Services provided to the Purchaser under this Agreement.
- 12.2 An order may only be cancelled with Komatsu's written consent.
- 12.3 The Purchaser grants to Komatsu and its personnel, a non-exclusive and irrevocable licence to access the Goods, and to enter premises, at no cost, to enable Komatsu to perform data retrieval functions for the purpose of monitoring component life, service intervals or machine availability of Goods.
- 12.4 Komatsu will only accept return of any Goods in accordance with its then current return policy which is available from Komatsu upon request.
- 12.5 If GST is imposed on any supply made in accordance with this Agreement, 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 (Cth)* have the same meaning when used in this Agreement.
- 12.6 The Vienna Convention on the Sale of International Goods (and any enabling legislation in any State or Territory) is excluded from this Agreement.
- 12.7 This Agreement is governed by the laws of New South Wales.