

1. DEFINITIONS

AUD means Australian dollar.

Claim means any claim made (whether in the form of an allegation, demand, suit, action or other proceeding of any kind) under or in connection with this Contract or its subject matter, whether arising under contract (including under any warranty or indemnity or any other breach, actual or anticipatory), in equity, in restitution, negligence or any other tort, strict liability, under statute or otherwise at all.

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

Consequential Loss means all loss of actual or anticipated profit, loss of use, loss of productivity, loss of revenue, business interruption of any nature, loss of contracts, loss of opportunity, increased costs and expenses, wasted expenditure, loss arising from delay, loss by reason of shutdown or non-operation or increased cost of borrowing capital or financing, loss of business reputation or goodwill and all special, indirect and consequential losses 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 are picked up by the Purchaser's carrier or delivered to the Purchaser's nominated delivery point by Komatsu's carrier or as otherwise agreed in writing.

EUR or **EURO** means European currency.

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

Goods or **Services** (or both) collectively and severally means the goods, 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 Komatsu.

GST has the meaning specified in the *A New Tax System (Goods and Services Tax) Act 1999*, at the rate prevailing from time to time 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.

OEM means original equipment manufacturer.

Party means either the Purchaser or Komatsu.

Parties means both the Purchaser and Komatsu.

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, purchaser order, 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.

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 by Komatsu, or traded-in by the Purchaser, solely on the basis of these terms and conditions.

2.2 By issuing a purchase order, invoice or similar document to Komatsu or signing or accepting a quotation issued by Komatsu, the Purchaser unconditionally accepts to be bound by this Contract in its entirety and without alteration. The Purchaser unconditionally agrees that any terms and conditions attached to such purchase order, invoice or otherwise are null and void and Komatsu 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. Komatsu may accept or reject such offer in its sole discretion.

2.4 An offer to purchase Goods and/or Services is only deemed accepted by Komatsu when it is acknowledged by Komatsu in writing.

3. PRICE

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

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

3.3 Komatsu 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. Komatsu reserves the right not to accept a purchase order until such time as a Purchaser makes this election. If Komatsu 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 Komatsu has advised the Purchaser, in writing, at the time of acceptance of the purchase order that Komatsu 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 Komatsu will issue a revised final Price in AUD and thereafter Komatsu 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, Komatsu 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 Komatsu, when measured against the daily foreign exchange rate available to Komatsu. Komatsu 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 Komatsu 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 Komatsu 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 April from the date of the Contract for the mining classified Goods, which will be provided by Komatsu to the Purchaser as required.

Custom Import Duties, Levies and Tariffs

3.6 Unless otherwise specified, the Price is exclusive of any custom import duties, levies and tariffs payable by Komatsu in respect of import of the Goods by Komatsu into Australia. If the Price is specified to be inclusive of any such custom import duties, levies and tariffs then if there is any change in the dutiable classification or effective rate of the applicable custom import duties, levies or tariffs 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 Komatsu 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 and not guaranteed;

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

4.3 Komatsu is not liable, and the Purchaser releases Komatsu, 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 Komatsu, which agreement may be conditional and at the sole discretion of Komatsu.

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 Komatsu in writing, the following clauses are applicable to the grant of IP in the Goods:

5.1 Komatsu grants the Purchaser a non-exclusive, non-transferable, revocable licence to use the IP provided by Komatsu to the extent necessary for the operation, maintenance and use of the Goods as the OEM intended (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, provided that this licence does not extend to:

5.1.1 IP that Komatsu does not own that is licensed by Komatsu from a third party;

5.1.2 IP that is governed by a separate agreement between the parties (including but not limited to KOMTRAX and KPAR); and

5.1.3 any IP that is developed by Komatsu or by a third party and which is installed or which is available for installation on or in Komatsu's goods, but not included on or in the Goods, or the scope of the Contract for those Goods, at the date of sale to the Purchaser.

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

5.3 The Purchaser may only use IP for the operation, maintenance and use of the Goods in accordance with this clause 5 and Komatsu 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 terms

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 Komatsu 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 of the Price. 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 Komatsu as a liquidated debt and Komatsu will be entitled to commence and maintain an action against the Purchaser for the Price as a liquidated debt.

6.1B Notwithstanding clauses 6.1 and 6.1A, if payment terms have been provided to the Purchaser by Komatsu, the Price becomes due and payable by the date as agreed to by the parties.

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

Goods remain property of Komatsu until payment

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

6.3.1 keep the Goods in its possession and control, hold the Goods as agent for Komatsu, and not part with the possession of the Goods or, if the possession has been parted with, recover possession of the Goods;

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 Komatsu's property and if requested, promptly inform Komatsu 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 agrees and acknowledges that the retention of title in clause 6.3 gives rise to a Purchase Money Security Interest under the PPSA in favour of Komatsu 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 Komatsu may reasonably require to enable Komatsu to attach, enforce, register, protect and maintain the perfection of its first priority security interest; and

6.4.2 give Komatsu 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 Komatsu (and at the Purchaser's expense) obtain from any third party such agreements,

waivers and releases (as the case may be) of any Purchase Money Security Interest that any third party has, or may have, in the Goods, to ensure that the retention of title in clause 6.3 provides Komatsu 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, Komatsu has the irrevocable right to seize the Goods without notice.

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

6.8 To the maximum extent permitted by law, the Purchaser and Komatsu agree that 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.

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 Komatsu's consent, authorise the disclosure of information pursuant to section 275(7)(c) of the PPSA nor request Komatsu to give information pursuant to section 275(7)(d) of the PPSA.

6.10 In this clause 6 and clause 11, "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 Komatsu's property, or if any of those Goods become part of another product sold by the Purchaser, the Purchaser holds those proceeds on trust for Komatsu up to the amount it owes Komatsu in respect of the Goods, and must immediately pay that amount to Komatsu.

Purchaser indemnity for breach

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

Komatsu's right to repossess and suspend Delivery

6.13 If the Purchaser fails to pay to Komatsu all monies due under this Contract 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 and repossess the Goods. Komatsu 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. Komatsu 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 Komatsu repossesses the Goods, the Purchaser remains bound by its obligations to Komatsu in accordance with this Contract, including its obligation to pay the Price.

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

6.15 The Parties irrevocably acknowledge and agree that in the event of repossession of Goods in accordance with clause 6.13, Komatsu 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 Komatsu 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 Komatsu 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

Komatsu notice of Commissioning

7.1 If Commissioning is specified by Komatsu:

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

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

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

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

7.3.1. it will only be carried out during normal business hours, where practical and safe, 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, Komatsu

may terminate the Contract;

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

7.3.3 Komatsu is not responsible for any hazardous or toxic waste or substances (unless brought to the site by Komatsu) and the Purchaser indemnifies Komatsu against all costs and expenses Komatsu 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

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

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 Komatsu 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 Komatsu up to the amount it owes Komatsu in respect of those Goods, and must immediately pay that amount to Komatsu.

Damage after Delivery

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

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

8.4.2 The Purchaser gives Komatsu 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 warranty from Komatsu or the OEM.

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 will 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 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 under those statutory provisions is 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.

9.3 The Vienna Convention on the Sale of International Goods (and any enabling legislation in any State or Territory) is excluded from this Contract.

Indemnity

9.4 The Purchaser, in connection with the Goods and Services, indemnifies and keeps indemnified Komatsu, its officers, agents, employees, subcontractors, vendors and Related Bodies Corporate (Indemnitees) against all Claims, demands, losses, costs, liabilities and expenses arising directly or indirectly out of:

(a) injury to or death of any person (including Indemnitees) to the extent not caused by Komatsu;

(b) damage to or destruction of any property (including that of Indemnitees) to the extent not caused by Komatsu; or
(c) any 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.

Limitation of Liability and exclusion of Consequential Loss

9.5 Notwithstanding anything to the contrary in these conditions, Komatsu (including its Related Bodies Corporate) is not liable to the Purchaser, at law, equity, statute or otherwise for any Consequential Loss howsoever caused.

9.6 Notwithstanding anything to the contrary in these conditions or elsewhere and to the full extent permitted by law, Komatsu's total cumulative liability to the Purchaser for all liabilities, damages, losses, costs and expenses suffered or incurred under or in connection with this Contract by the Purchaser for all Claims in the aggregate, is limited to the amount paid by the Purchaser to Komatsu for the Goods and Services the subject of the Claim.

Exclusion of liquidated damages, etc

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

Purchaser Nominated Items

9.8 Komatsu will:

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

9.9 Except as provided in clause 9.8, Komatsu disclaims all liability in relation to Purchaser Nominated Items. The Purchaser will indemnify Komatsu against, and release Komatsu from, 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 Komatsu interest on any amount not paid from when payment falls due until payment in full is received, at a rate as determined by the ANZ Bank Indicator Lending Rate effective from time to time plus 2% per annum calculated on daily balances of amounts unpaid and capitalised daily.

10.2 Komatsu 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.

Komatsu's right to end Contract

10.3 Komatsu 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 its 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.

Komatsu's rights if it ends Contract

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

Komatsu'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 Komatsu.

11. TRADE-IN OF USED MACHINE

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

- 11.1.1 Komatsu accepting an order for the Goods by any stated quotation validity date; and
- 11.1.2 delivery of the trade-in to Komatsu at the Purchaser's expense and in the same state and condition as it was on the date of Komatsu's appraisal or inspection (if any), all attachments and accessories being included, and there being no undisclosed defect or damage.
- 11.2 If the Purchaser does not deliver (or if agreed, make available for collection) the trade-in to Komatsu within the time nominated by Komatsu or fails to deliver (or make available) the correct trade-in (including all attachments and accessories) in the state and condition required under clause 11.1.2 or fails to disclose any material condition, deficiency or defect in the trade-in, then the credit or price for the trade-in is a debt owing by the Purchaser to Komatsu. If a used attachment or other part of the Equipment is not available then a new replacement will be purchased by Komatsu and this cost will be a debt owed by the Purchaser to Komatsu.
- 11.3 If upon inspection of the trade-in by Komatsu, the trade-in 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 will be a debt owing by the Purchaser to Komatsu.
- 11.4 Risk in the trade-in remains with the Purchaser until inspection and acceptance of delivery of the trade-in at Komatsu's nominated point of delivery, such delivery to be at the Purchaser's risk and expense.
- 11.5 The Purchaser warrants that it has or will have unencumbered title to any trade-in at the time of completion of the sale and the trade-in will be free of any and all Security Interests at completion.
- 11.6 The Purchaser authorises Komatsu to pay any monies given to it for the purposes of removing any encumbrance on the trade-in.
- 11.7 Komatsu may, without obligation to the Purchaser, refuse to purchase any trade-in at any time until acceptance and inspection of the trade-in or if clause 11.1.2 is breached, and may recover the credit or value given in the trade-in and any loss arising thereof as a debt due from the Purchaser to Komatsu.

12. FORCE MAJEURE

If Komatsu's ability to perform its obligations is adversely affected by any cause beyond Komatsu's reasonable control, then Komatsu may, if it chooses, end the Contract of sale or suspend it for up to 3 months by giving the Purchaser written notice. Komatsu 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 must confer at least once to attempt to resolve the dispute. The parties must act in good faith 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 Disputes Centre in Sydney, New South Wales or such other capital city agreed by the parties. The rules of commercial mediation of that body will 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 Komatsu (which Komatsu is entitled to withhold in its absolute discretion). Failure to obtain the consent of Komatsu constitutes a fundamental breach of these terms and conditions.
- 14.2 Komatsu is be entitled, without obtaining the consent of the Purchaser, to assign, transfer or otherwise dispose of any or all of its rights or obligations under this Contract to a Related Body Corporate of Komatsu or to any other entity which is financially sound and capable of performing all of the obligations of Komatsu under this Contract by giving notice of such assignment, transfer or disposal to the Purchaser.

Cancellation

- 14.3 An order may not be cancelled. Komatsu is entitled to insist on completion of the Contract or at its sole discretion elect to charge the Purchaser Komatsu'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 Komatsu whatsoever, as reasonably determined by Komatsu ("**Cancellation Costs**") and as a condition of consent to any order cancellation. Komatsu may, at its sole discretion, apply any Cancellation Costs against any credit account for parts and services sales provided by Komatsu 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. Komatsu 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 Komatsu is expressly excluded. The Purchaser relies solely upon its own inspection skill and judgment. No Equipment will be recommended by Komatsu for use in any specific application without supply by Komatsu of a formal applications study.

Electronic Data Retrieval

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

14.7.1 Physical 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 Komatsu 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. The parties submit to the non-exclusive jurisdiction of the New South Wales courts in respect of all matters relating to the Contract.