

**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.

"*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.

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

"*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.

"*Delivery*" means when the Goods are picked up by a carrier or otherwise leave Komatsu's premises or as agreed in writing.

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

"*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 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.

"*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.

"*Related Bodies Corporate*" means related bodies corporate as defined in the Corporations Act 2001.

"*Services*" means any service or repair of specified equipment supplied under a Komatsu service quotation or invoice.

**2. APPLICATION OF CONDITIONS**

- 2.1 Goods and Services are supplied or Exchanged, solely on the basis of these Conditions, any terms put forward by the buyer are rejected.
- 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.
- 2.7 Unless stated otherwise by Komatsu, the Price for the Goods and Services is firm for 30 days from its original date unless sooner withdrawn by Komatsu.

### **3. PRICE**

- 3.1 Unless otherwise stated by Komatsu:
  - (a) Prices exclude GST, customs duty, levies, tariffs, delivery costs and any export packing or special packing if required, taxes whether present or future, direct or indirect (except for taxes levied on Komatsu's income); 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 (including its Related Bodies Corporate) 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 within 30 days of an order or on or before Delivery whichever occurs first. 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 end of 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 Security Interest, 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 clauses 5 and 6 "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 relevant at the date of supply listed at:  
<http://www.komatsu.com.au/Site%20Documents/Service/Komatsu%20-%20New%20Parts%20Warranty.pdf>
- 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 is 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, in connection with the Goods or Services, indemnifies and keeps indemnified Komatsu, its Related Bodies Corporate, its officers, agents, employees, subcontractors, vendors and other contractors (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
  - (c) any modification, alteration or use 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 Notwithstanding anything to the contrary in these Conditions or elsewhere and to the full extent permitted by law, Komatsu (including its Related Bodies Corporate) is not liable to the Purchaser under contract, at law or otherwise for any Consequential Loss, liquidated damages, delay penalties or any performance guarantees.
- 8.5 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 connection with this Agreement 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.

## **9. DEFAULT**

- 9.1 The Purchaser must pay Komatsu interest (at the ANZ Bank Indicator Lending Rate effective from time to time 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. EXCHANGE**

- 10.1 If the Purchaser requests the Exchange of its used part, Komatsu may, in its sole and absolute discretion decide whether it will accept the Purchaser's Exchange used part and if so on what terms. If Komatsu accepts the Purchaser's Exchange used part, Komatsu will invoice the Purchaser ("Exchange Invoice") on the basis that the Purchaser's Exchange used part is provided to Komatsu within 10 business days of receipt by the Purchaser of Komatsu's Exchange part and the Purchaser's Exchange used part meets Komatsu's minimum condition requirements as notified by Komatsu from time to time ("Core Return Criteria"). If Komatsu determines within 10 business days of receipt of the Purchaser's Exchange used part that it does not meet the Core Return Criteria then Komatsu may charge the Purchaser an amount required to bring the Purchaser's Exchange used part up to the standard of the Core Return Criteria. If Komatsu determines that the Purchaser's Exchange used part is beyond economic repair, Komatsu will invoice the Purchaser, at Komatsu's list price of a corresponding new part less the Exchange Invoice amount. If the Purchaser's Exchange used part is not provided to Komatsu within 10 business days of receipt by the Purchaser of Komatsu's Exchange part (or such later date as may be agreed by Komatsu in writing) then Komatsu will invoice the Purchaser, at Komatsu's list price of a corresponding new part less the Exchange Invoice amount.
- 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 an 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 an 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, interest and ownership in all 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.