

# TERMS AND CONDITIONS OF EQUIPMENT RENTAL

## Definitions

**Agreement** means the agreement between Komatsu and the Customer for the rental of the Equipment comprising the Equipment Rental Agreement, these rental terms and conditions and any attached schedules.

**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 Agreement 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.

**Commencement Date** means the commencement date set out in the Rental Details.

**Completion Date** means the completion date set out in the Rental Details.

**Consequential Loss** means all loss of actual or anticipated profit, loss of use, loss of productivity, loss of revenue, loss of contracts, loss of opportunity, increased costs and expenses, wasted expenditure, loss or corruption of data, loss arising from delay, loss or corruption of data, loss by reason of shutdown or non-operation or increased cost of borrowing capital or financing 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.

**Customer** means the customer set out in the Rental Details and includes the Customer's employees, executors, administrators, agents and representatives.

**Equipment** means the equipment set out in the Rental Details including any manuals, instructions and packing and transferable materials, substitute and replacement Equipment, unless indicated to the contrary in these terms.

**Equipment Rental Agreement** means the cover page or pages entitled "Equipment Rental Agreement".

**Inspection Report** means the inspection report set out in Schedule 1 outlining the condition of the Equipment prior to the Commencement Date and the condition of the Equipment on the Completion Date. The physical inspection and subsequent report on the Completion Date.

**Insurance Value** means the value the Equipment must be insured for, if the Customer is responsible for insuring the Equipment under this Agreement.

**Komatsu** means Komatsu Australia Pty Ltd ABN 63 053 514 739 for Australian Customers and/or Komatsu New Zealand Limited NZBN 9429050679508 for New Zealand Customers.

**Operations Manual** means the most current manual issued or approved by Komatsu containing the operating instructions for the Equipment and includes all other manuals, the most current Manufacturer's instructions or Komatsu requirements as to the Equipment issued to the Customer.

**Personal Information** has the meaning as in the *Privacy Act 1988 (Cth)* as amended (including as amended by the *Privacy Amendment (Enhancing Privacy Protection) Act 2012 (Cth)*).

**Rental Charges** means the rental charged by Komatsu to the Customer for the rent of the Equipment as set out in the Rental Details.

**Rental Details** means the section of the Equipment Rental Agreement entitled "Rental Details".

**Site** means the location at which the Equipment is to be located as set out in the Rental Details, or such other location as agreed by Komatsu.

**Term** means the period from the Commencement Date to the Completion Date or such other period as the parties may agree in writing.

## 1 Agreement

- (a) Komatsu rents the Equipment to the Customer on the terms and conditions set out in this Agreement. This Agreement constitutes the entire agreement between the parties with respect to its subject matter and supersedes any and all prior negotiations, representations, warranties or agreements.
- (b) This Agreement may only be varied in writing signed by both parties.
- (c) This Agreement commences on the Commencement Date and continues for the Term unless terminated sooner in accordance with its terms.

## 2 Rental Charges and Other Charges

- (a) Rental Charges are payable from the Commencement Date and until this Agreement is terminated in accordance with clause 7.
- (b) The Customer must pay all amounts specified or determined in the Rental Details together with:
  - (i) any taxes, duties (including stamp duty) levies, charges or imposts payable in respect of this Agreement or the transactions contemplated by it;
  - (ii) a sum equal to the amount of any goods and services tax (GST) payable by Komatsu on any supplies made by Komatsu under or in connection with this Agreement, calculated by multiplying the GST exclusive consideration payable for the relevant supply or supplies by the prevailing GST rate; and
  - (iii) any costs or expenses reasonably incurred by Komatsu in enforcing this Agreement, as a result of the Customer's breach or in order to return the Equipment to the same condition as at the Commencement Date
- (c) The Customer must pay the Rental Charges within 30 days of invoice date.
- (d) The Customer must pay interest, calculated daily, on any amount not paid within 30 days of the date due for payment. The rate of interest is the Westpac Banking Corporation's indicator lending rate from time to time plus 3% per annum. Interest is payable on demand and may be capitalised at such times as Komatsu may determine in its sole discretion.

## 3 Use of Equipment (Customer Obligations)

- (a) The Equipment always remains Komatsu's property and the Customer only has a right to use it. Title to the Equipment will at all times remain in Komatsu's name. Unless expressly set out in the Agreement, the Customer has no option or right to purchase the Equipment.
- (b) The Customer must do everything necessary to protect the interests of Komatsu in the Equipment, making it clear to others that Komatsu is the owner of the Equipment.
- (c) The Customer must immediately inform Komatsu of any repairs required to the Equipment and these repairs must be completed by Komatsu unless agreed in writing.
- (d) The Customer must permit Komatsu to affix plates or marks of ownership on the Equipment to indicate Komatsu's ownership.
- (e) The Customer must not in any way deface, remove, vary or otherwise erase any identifying marks, plates, numbers, notices or safety information on the Equipment.
- (f) The Customer must not alter, modify, tamper with, damage or repair the Equipment without Komatsu's prior written consent.

- (g) The Customer must not part with possession or control of the Equipment without Komatsu's prior written consent.
- (h) The Customer must not give, or permit any person to take an interest in, or any form of security over, the Equipment.
- (i) Prior to the Commencement Date, the Inspection Report must be signed by both parties. By signing the Inspection Report, the Customer agrees that the Inspection Report is accurate, complete and free of error and ambiguity.
- (j) Risk in the Equipment passes to the Customer upon delivery of the Equipment to the Customer and remains with the Customer until the Equipment is returned to Komatsu's premises by the Customer.
- (k) The Customer bears the risk of any loss or damage (including without limitation, damage to the Equipment caused by vandalism, theft, any force majeure event), whether caused by the Equipment or its operation and all costs incurred with respect to the Equipment, including the cost of repairing or replacing the Equipment at full replacement value, salvage costs and Rental Charges incurred while the Equipment is repaired or replaced during the Rental Term whether or not the Equipment or the Customer is insured.
- (l) The Customer must ensure that the Equipment is:
  - (i) operated accordance with the Operations Manual and Komatsu's instructions;
  - (ii) returned to Komatsu in accordance with the Inspection Report; and
  - (iii) used for the purpose for which it was designed.
- (m) The Customer must:
  - (i) pay all costs, expenses, fees and charges incurred in connection with the use and operation of the Equipment.
  - (ii) at its expense, promptly comply with the reasonable requirements of Komatsu as to the repair, renewal or replacement of any portion or part of the Equipment; and
  - (iii) at its expense, keep the Equipment secure in a lockable area when not in use.
- (n) The Customer must immediately notify Komatsu in writing, and provide full details, of any loss, theft, breakdown or damage to the Equipment.
- (o) If the Equipment breaks down or becomes unsafe to operate, the Customer must immediately stop using the Equipment, notify Komatsu, and ensure that the Equipment does not sustain any further damage and prevent the Equipment from causing injury, loss or damage to any person or property. The Customer must not repair, or attempt to repair, the Equipment without Komatsu's prior written consent.
- (p) Komatsu reserves the right to exchange or replace the Equipment with an equivalent item and if the Equipment is exchanged all terms and conditions of this Agreement apply to the exchanged or replaced Equipment.

#### 4 Privacy

- (a) The Customer agrees that Komatsu may obtain, disclose or use information, including Personal Information:
  - (i) about Customer's credit worthiness, or for the purpose of obtaining and maintaining credit information file about the Customer or collecting overdue payments; and
  - (ii) about the Customer employees for the purpose of providing services to the Customer.
- (b) Komatsu will ensure that any Personal Information that it collects, uses and transfers in the course of providing goods and services under this Agreement will comply with all applicable laws in Australia, including the Australian Privacy Principles in the *Privacy Act 1988* (Cth) and all applicable laws in New Zealand, including the *Privacy Act 2020* (NZ).

#### 5 Insurance

- (a) During the Term, the Customer, at its own expense, must effect, with a reputable insurance company in Australia or New Zealand, the following insurances in the joint names of Komatsu and the Customer for their respective interests:
  - (i) equipment insurance for physical loss of or damage to the Equipment for the insurance value (refer to Rental Details);
  - (ii) third party and public liability in respect of bodily injury (including death) and property damage for not less than AUD\$10 million for any one occurrence;
  - (iii) workers' compensation insurance required by law; and
  - (iv) such other insurance as Komatsu may reasonably require.
- (b) The Customer must provide evidence of the currency of these insurances to Komatsu on request.

#### 6 Termination, Expiry and Return of Equipment

- (a) At the end of the Term:
  - (i) a report as to the condition of the Equipment must be signed by both parties. All expenses required to bring the Equipment to the condition required by clause 3 must be paid by the Customer;
  - (ii) any money owing under this Agreement must be paid by the Customer within 30 days of the final invoice;
  - (iii) the Customer must make the Equipment available to Komatsu at the Site and provide all reasonable assistance for its removal. ;
- (b) If the Customer fails to return the Equipment to Komatsu at the end of the Term, the Customer must continue to pay the Rental Charges and observe its other obligations under this Agreement. Continued payment of the Rental Charges does not give the Customer any right to retain possession of the Equipment or limit any other rights which Komatsu may have.
- (c) The fundamental provisions of this Agreement are that the Customer pays all money due under this Agreement on time and fulfils its obligations under clause 3 (Use of Equipment), clause 7 (Return of Equipment) and clause 6 (Insurance).
- (d) Komatsu may, on notice to the Customer, terminate this Agreement with immediate effect if:
  - (i) the Customer does not comply with a fundamental provision of this Agreement;
  - (ii) the Customer is in breach of any other provision of this Agreement and that breach is not remedied within 30 days of receipt of notice from Komatsu;
  - (iii) an order is made or proceedings are taken for the winding up of the Customer; or
  - (iv) the Customer becomes insolvent or a receiver, manager, provisional liquidator or administrator/s is appointed or takes possession of the whole or a substantial part of the assets of the Customer.
- (e) On termination of this Agreement by Komatsu, the Customer must:
  - (i) immediately return the Equipment to Komatsu in accordance with clause 7(a), failing which the Customer must pay Komatsu the replacement value of the Equipment; and

- (ii) pay Komatsu the present value of all Rental Charges that would have been payable during the Term (assuming a rate of usage the same as that prior to termination).
- (f) Komatsu may enter the Site or any other premises on which the Equipment is located and take possession of the Equipment.
- (g) Any termination of this Agreement does not affect any other right or remedy which Komatsu might have.

## 7 Indemnities

- (a) The Customer irrevocably indemnifies Komatsu against and holds Komatsu harmless from:
  - (i) all loss or destruction of or damage to the Equipment however caused; and
  - (ii) all costs, charges, expenses, liabilities, losses, damages, claims, fines and penalties (including legal costs on a full indemnity basis) suffered or incurred by Komatsu, its officers, directors, employees or agents in connection with:
    - (A) the condition, use, operation, control, maintenance, repair or storage of the Equipment;
    - (B) any breach of this Agreement by Customer or Komatsu exercising any of its rights under this Agreement.
- (b) The Customer is not liable under this clause to the extent that the relevant matter was caused or contributed to by the negligent act, error or omission of Komatsu nor in respect of matters for which Komatsu is liable under this Agreement.
- (c) These indemnities continue after this Agreement expires or terminates.

## 8 Repair

- (a) Subject to the Customer complying with the Customer Obligations in clause 3, Komatsu will repair any defects of design or manufacture in the Equipment during the Term.
- (b) Komatsu will have no liability under this clause, and the Customer is liable to the extent that:
  - (i) the Customer breaches or does not comply with any of its obligations under this Agreement, including the Customer obligations;
  - (ii) the defect or malfunctions are caused by or in connection with the misuse, negligence, accident or failure to maintain or use the Equipment in accordance with the instructions issued by Komatsu;
  - (iii) Komatsu in its sole discretion determines any use of the Equipment to be improper.
- (c) Komatsu does not provide any performance guarantee of the Equipment nor of its availability.

## 9 Limitations of Liability

- (a) Australia only:

to the extent permitted by law, all legal, statutory or equitable liability, conditions or warranties of any type in relation to the Equipment are excluded. Nothing in this Agreement 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 Komatsu is entitled to do so, its liability under those statutory provisions will be limited at its option to:

  - (i) in the case of goods:
    - (A) the replacement of the goods or the supply of equivalent goods;
    - (B) the payment of the cost of replacing the goods or of acquiring equivalent goods;
    - (C) the payment of the cost of having the goods repaired; or
    - (D) the repair of the goods; and
  - (ii) 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.
- (a1) New Zealand only:

All legal, statutory or equitable liability, conditions or warranties of any type in relation to the goods or services are excluded. Where the Customer is acquiring, or holds itself out as acquiring, any goods or services for the purposes of a business, in terms of section 43(2) of the *Consumer Guarantees Act 1993* (the **Act**) the Customer will not assert or attempt to assert any rights of claims against Komatsu under the provisions of the Act. However, nothing herein limits those provisions of the Act, nor statutes, rules or regulations from time to time in force in New Zealand which imply 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:

  - (i) 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; or
    - (E) a refund of any money paid or other consideration provided; and
  - (ii) 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; or
    - (C) a refund of any money paid or other consideration provided.
- (b) Notwithstanding anything to the contrary in this Agreement, Komatsu will not be liable for any Consequential Loss.
- (c) Notwithstanding anything to the contrary in this Agreement or elsewhere and to the full extent permitted by law, Komatsu's total cumulative liability to the Customer for all liabilities, damages, losses, costs and expenses suffered or incurred under or connection with this Agreement by the Customer, for all Claims, is limited to the amount paid by the Customer to Komatsu for the Equipment.
- (d) These limitations of liability continue after this Agreement expires or is terminated.

## 10 Sub Hire

The Customer must not sub-hire the Equipment without the prior written consent of Komatsu in its absolute and unfettered discretion.

## 11 Personal Property Securities Act 2009 (Cth) ("PPSA") (Australia only)

- (a) The Customer acknowledges that the lease of Equipment under this Agreement gives rise to a Purchase Money Security Interest under the PPSA in favour of Komatsu in respect of the Equipment and any proceeds.
- (b) The Customer undertakes to:
  - (i) 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
  - (ii) 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
  - (iii) immediately on request by Komatsu (and at the Customer's expense) obtain from any third party such agreements and waivers of any Security Interest that any third party has in the Equipment, to ensure that Komatsu is provided with or retains a first priority security interest in the Equipment.
- (c) The Customer waives its rights to receive a copy of any verification statements under Section 157 of the PPSA.
- (d) If the Customer defaults on any monies due under this Contract, Komatsu has the right to seize the Equipment after giving written notice of such intention to the Customer.
- (e) Equipment seized under clause 11(d) may be disposed of, retained by, or otherwise dealt with by Komatsu, in any way Komatsu sees fit.
- (f) The Customer must give Komatsu notice if another party with a security interest in the Equipment seizes or otherwise deals with the Equipment in a way that might impact Komatsu's Purchase Money Security Interest.
- (g) To the maximum extent permitted by law, the Customer and Komatsu agree that the following provisions of the PPSA do not apply to the enforcement by Komatsu of its security interest in the Equipment: sections 95, 118, 121(4), 125, 130, 132(3)(d), 132(4), 135, 142 and 143.
- (h) The Customer 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 Customer must not, without Komatsu's consent, authorise the disclosure 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.
- (i) In this clause "proceeds", "Purchase Money Security Interest" and "Security Interest" have the meanings given to those expressions in the PPSA.

## 11A Personal Property Securities Act 1999 (NZ) ("PPSA") (New Zealand only)

- (a) In accordance with the retention of title in clause 3(a), the Customer grants to Komatsu a security interest in the Equipment and any proceeds to secure payment of all amounts due from the Customer to Komatsu from time to time and the performance of the Purchaser's obligations to Komatsu.
- (b) The Customer undertakes to:
  - (i) promptly do all things, execute all documents and/or provide any information which Komatsu may reasonably require to enable Komatsu to register, protect and maintain the perfection of its security interest (including by registration of a financing statement);
  - (ii) 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
  - (iii) immediately on request by Komatsu (and at the Customer's expense) obtain from any third party such agreements, waivers and releases (as the case may be) of any security interest that a third party may have in the Equipment, to ensure that at all times Komatsu has a first priority security interest in the Equipment.
- (c) The Customer waives its rights to receive a copy of any verification statements under the PPSA (section 148) and agrees that as between Komatsu and the Customer:
  - (i) the Customer will have no rights under (or by reference to) sections 114(1)(a), 116, 120(2), 121, 125, 129, 131, 133 and 134 of the PPSA; and
  - (ii) where Komatsu has rights in addition to those in Part 9 of the PPSA, those rights will continue to apply.

## 12 Force Majeure

If Komatsu's ability to perform its obligations under this Agreement is adversely affected by any cause beyond Komatsu's reasonable control (**Force Majeure Event**), then Komatsu may, if it chooses, end this Agreement or suspend it for up to 3 months by giving the Customer written notice. Komatsu will not be liable for any loss, damage or liability which the Customer incurs as a result, whether directly or indirectly.

## 13 Rental Details

The Customer agrees and acknowledges that not all of the information set out in the Rental Details relating to the Equipment, such as the serial number of the Equipment, may be available for insertion into the Rental Details at the date of execution of the Equipment Rental Agreement. When such information is available Komatsu will notify the Customer and the Customer authorises Komatsu to insert such details into the Rental Details.

## 14 General Provisions

- (a) The Customer must not assign this Agreement without the prior written consent of Komatsu.
- (b) The Customer, or the person signing this Agreement on the Customer's behalf, warrants that it is authorised to enter this Agreement.
- (c) No time or indulgence by Komatsu will be deemed to be a waiver of any of Komatsu's rights.
- (d) Notices and other communications under this Agreement must be in writing sent by mail to or left at the addresses set out in the Rental Details (or as subsequently advised in writing by the relevant party).
- (e) In this Agreement, "including" and "includes" are not words of limitation.
- (f) If the Customer is in Australia, this Agreement is governed by the laws of the State of New South Wales and the parties submit to then non-exclusive jurisdiction of the courts of that State and all courts which may hear appeals there from.
- (g) If the Customer is in New Zealand, this Agreement is governed by the laws of New Zealand and the parties submit to then non-exclusive jurisdiction of the courts of New Zealand and all courts which may hear appeals there from.

## **SCHEDULE 1- INSPECTION REPORT**

See attached.

If not included at the time of signing the Agreement, the Inspection Report is to be prepared by Komatsu and signed on behalf of both parties prior to the Commencement Date.