

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 the 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 as specified in clause 7. 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 operating costs and expenses, wasted expenditure, loss or corruption of data, 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 the agreement between Komatsu and Customer for the supply of Goods and/or Services comprising these terms and conditions and the documents expressly incorporated therein.

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

Customer Nominated Item(s) means any attachment, option or other item including, but not limited to, dump body, bucket, fire suppression, tyres, wheel rims, accident avoidance/detection, mine or payload management system, access and/or egress systems, automatic grease systems or any other items nominated by Customer that are not supplied as OEM standard or part of the OEM or Komatsu specification.

Delivery means when the Goods are picked up by Customer's carrier or delivered to Customer'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 collectively and severally means the goods, Equipment (new or used) and any documentation supplied by Komatsu in connection with the Goods 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* (Cth), at the rate prevailing from time to time and has the same meaning when used herein.

Intellectual Property or **IP** means all present and future rights in relation to copyright, trade marks, designs, patents or other proprietary rights, or any rights to registration of such rights whether created before or after the Contract is made, and whether existing in Australia or otherwise.

JPY means Japanese Yen.

Komatsu means Komatsu Australia Pty Ltd ABN 63 053 514 739.

OEM means original equipment manufacturer.

Price means the total monetary amount for the sale of the Goods or Services as determined in accordance with the Contract.

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

Services mean any service relating to the Contract or expressed in the quotation, including Commissioning, and excludes all things not expressly specified in writing by Komatsu.

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 Customer, solely on the basis of the Contract.

2.2 By issuing a purchase order, invoice or similar document to Komatsu or signing or accepting a quotation issued by Komatsu, Customer unconditionally accepts to be bound by the Contract in its entirety and without alteration. Customer unconditionally agrees that any terms and conditions attached to such purchase order, invoice or otherwise (including under any Customer's system or its vendor set-up process) are null and void and Komatsu is entitled to ignore such terms.

Orders

2.3 Submission by Customer 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 the Contract. Komatsu may accept or reject such Offer in its absolute 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 or Komatsu otherwise proceeds with the performance of the Contract.

3. PRICE

3.1 Unless otherwise stated by Komatsu, the 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 days from the date of quotation after which time it will lapse.

3.3 If specified in the quotation, Customer will provide security against default by way of a monetary deposit as set out in the quotation.

3.3A If a monetary deposit is required under the quotation, Customer must pay the monetary deposit to Komatsu within 7 days of receipt of invoice for the deposit. If Customer cancels the Contract in accordance with its rights under clause 3.4.5 or 3.5, any monetary deposit Customer has paid to Komatsu in relation to Goods or Services which have not been delivered will be returned. If Komatsu ends the Contract under clause 10.3, or the Contract is ended under clause 14.3, the monetary deposit may be retained by Komatsu in accordance with the Contract.

Price variation due to currency fluctuations

3.4.1. The Price may include an imported content of Goods, in which case the quotation will specify the Price for the imported content in the relevant foreign currency (being USD/JPY/EUR) and an equivalent AUD amount based on the currency exchange rate as specified in the quotation.

3.4.2. Customer 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 Customer makes this election. If Komatsu chooses to accept a purchase order in circumstances where Customer 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 Customer is taking the exchange rate risk unless Komatsu has advised Customer, in writing, at the time of acceptance of the purchase order that Komatsu will take the exchange rate risk.

3.4.3. Where Customer 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 Contract. The relevant foreign exchange rate(s) that will be used in the final Price will be the spot buying rate of the foreign currency specified being USD/JPY/EUR minus the appropriate forward points from the date of receiving the purchase order from Customer 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 Customer 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 Customer'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 as at the date of quotation. 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 Customer. If Komatsu exercises its rights under this clause 3.4.5, it will give Customer 7 days from notification of the revised Price to exercise a right to cancel the Contract for purchase of the Goods, without penalty.

3.4.6 Where the Price quoted for the Goods includes a separate quote for freight and shipping costs, those costs are an estimate only. If the actual cost of freight and shipping increases after the date of quotation but before Delivery, Komatsu reserves the right, at its discretion, to charge the actual cost to Customer.

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 notified by Komatsu to Customer as required. If Komatsu exercises its rights under this clause 3.5, it will give Customer 7 days from notification of the revised Price to exercise a right to cancel the Contract for purchase of the Goods, without penalty.

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 Customer and Customer must pay the adjusted Price.

4. DELIVERY, PICKUP AND COMMISSIONING

When goods are to be delivered or Services performed

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 or perform the Services as specified in the quotation or otherwise agreed with Customer. Customer must not prevent or delay Komatsu in making Delivery of Goods or performing Services. If Komatsu is prevented from or delayed in making Delivery of Goods or performing Services by Customer or for any other reason or event beyond Komatsu's reasonable control, Komatsu may extend the date for a reasonable period (and has the right to make an equitable adjustment to the Price and charge its reasonable costs arising from the delay) or (where the delay is caused by Customer) end the Contract under clause 10.3.

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

Early Acceptance

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

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

5. INTELLECTUAL PROPERTY

5.1 IP in the Goods (**Licensed IP**) belongs to Komatsu and its licensors. Subject to this clause 5, Komatsu grants Customer a non-exclusive licence to use the Licensed IP solely to the extent necessary for the use, operation and maintenance of the Goods in accordance with the manufacturer's operation and maintenance manual. Provided that Customer obtains the prior written consent of Komatsu, Customer may sublicense these rights only to a person who is providing services to Customer. Customer is responsible for the acts of a sub-licensee as though they were the acts of Customer.

5.2 The licence under clause 5.1 does not extend to:

5.2.1 any IP that is governed by a separate agreement between the parties (including Komtrax and KPAR); and

5.2.2 any IP in optional features or functionality that are installed or available for installation on or in the Goods, but which are not expressly included in the Contract for the Goods at the date of sale to Customer and have not been subsequently purchased by Customer.

5.3 If Customer transfers ownership of the Goods to another person (**Transferee**):

5.3.1 the licence under clause 5.1 is automatically assigned to the Transferee;

5.3.2 Transferee will become Customer for the purposes of this clause 5; and

5.3.3 Customer will ensure Transferee complies with Customer's obligations under this clause 5.

5.4 To the extent the Goods include software, Customer must not modify, reverse engineer, decompile, disassemble or otherwise create or attempt to create the source code of the software, except to the extent permitted by law.

5.5 Customer must not use, register or attempt to register any interest in or otherwise deal with Licensed IP, except to the extent permitted by this clause 5 or by law.

5.6 Customer must not remove, alter or add to any copyright notice or similar marking on the Goods supplied by Komatsu in connection with the Goods.

6. PAYMENT

Payment terms

6.1 Customer must pay the Price (together with GST and Delivery costs) without deduction or set-off, on or prior to the date nominated on the tax invoice issued by Komatsu, or otherwise on or prior to Delivery. If Delivery is delayed by Komatsu, the date nominated on the invoice will be adjusted to account for the delay. If Delivery is delayed by Customer, then Customer must pay the Price required by this clause when Delivery would have occurred if not for the delay by Customer.

6.1A Once Delivery has been made in accordance with the Contract, the Price becomes immediately payable by Customer to Komatsu as a liquidated debt and Komatsu will be entitled to commence and maintain an action against Customer for the Price as a liquidated debt.

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

6.2 Customer 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 Customer to Komatsu are received in clear funds by Komatsu, and whilst these Goods remain Komatsu's property Customer 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 Property Securities Act 2009 (Cth) ("PPSA")

6.4 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.

Customer 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 Customer'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 Customer waives its rights to receive a copy of any verification statements under section 157 of the PPSA.

6.6 Customer must give Komatsu notice if a third 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.

6.7 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.

6.8 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. Customer 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.

6.9 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.

Customer disposal of goods

6.10 If Customer disposes of any of the Goods while they remain Komatsu's property, or if any of the Goods become part of another product sold by Customer, Customer 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.

Customer indemnity for breach

6.11 Customer indemnifies Komatsu for any loss or damage resulting from a breach of clause 6 by Customer.

Komatsu's right to repossess and suspend Delivery

6.12 If Customer fails to pay to Komatsu all monies due under the Contract by the due date, Komatsu has the right and irrevocable licence from Customer, 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 Customer without liability until the failure to pay is rectified by Customer. If Komatsu repossesses the Goods, Customer remains bound by its obligations to Komatsu in accordance with the Contract, including its obligation to pay the Price. If Komatsu ends the Contract under clause 10.3, Komatsu will refund the Price paid for any Goods it has repossessed, but may deduct from the refund a reasonable amount for any loss or expense incurred by Komatsu as a result of Customer's failure to pay and Komatsu exercising its rights under this clause.

6.13 Komatsu is not liable for any loss, damage or liability suffered by Customer as a result of Komatsu exercising its rights under clause 6.12.

6.14 In the event of repossession of Goods in accordance with clause 6.12, Komatsu is not required to give notice in accordance with section 135 of the PPSA.

Finance

6.15 Customer may finance the purchase of the Goods through a separate agreement entered into between it and a finance company selected by Customer (such as Komatsu Australia Corporate Finance Pty Ltd). If Customer elects to finance the purchase of the Goods, Customer 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. The Contract will apply as between Komatsu and Customer 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 in the quotation:

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

7.1.2 for Non-Komatsu Equipment - Komatsu will use best endeavours to assist with Commissioning but, to the extent permitted by law and except where Komatsu is negligent, no liability is accepted by Komatsu for such Commissioning and Customer releases Komatsu from any such liability.

7.2 Komatsu is not liable for loss resulting from any delay in Commissioning and Customer 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 Customer gives reasonable and safe access, space and facilities fit for the purpose of Commissioning;

7.3.2 Customer 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 Customer 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, except where the loss or damage is caused by Komatsu's negligence.

Customer notice for additional Commissioning

7.4 No notice, demand, instruction or request from Customer will oblige Komatsu to provide additional Commissioning works.

8. RISK, INSURANCE AND DAMAGE

Risk passes to Customer on Delivery

8.1 Risk in the Goods passes to Customer upon Delivery.

Customer must insure Goods

8.2 Customer 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 Customer until the time title in the Goods passes to Customer.

8.3 Customer 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 damage discovered after Delivery unless:

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

8.4.2 Customer gives Komatsu reasonable opportunity to inspect the Goods in the same condition and place in which they were Delivered; and

8.4.3 the damage is 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, Customer 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 (if any) will only apply if given in writing prior to sale otherwise, the used Goods are sold 'as is' and without any warranty from Komatsu or the OEM.

Exclusion or limitation of warranties

9.2 Customer may have rights under applicable consumer protection law (including Schedule 2 of the *Competition and Consumer Act 2010* (Cth)) with respect to the Goods or Services. The Contract does not exclude or limit any guarantee, condition, warranty or any other right or remedy Customer may have under applicable consumer protection law (**Consumer Guarantees**), to the extent such Consumer Guarantees cannot be excluded or limited at law. Any disclaimer, exclusion or limitation in the Contract applies to the fullest extent permitted by law and subject to any Consumer Guarantees that cannot be excluded or limited at law. If any such Consumer Guarantees apply, then to the extent permitted by law and subject to Customer's right under applicable law, Komatsu's liability will 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.

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

Indemnity

9.4 Customer, 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) caused by Customer or its officers, agents, employees or subcontractors;
- (b) damage to or destruction of any property (including that of Indemnitees) caused by Customer or its officers, agents, employees or subcontractors; or
- (c) any use of or modification to the Goods by Customer or its officers, agents, employees or subcontractors which is not in accordance with the manufacturer's operation and 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 the Contract, Komatsu (including its Related Bodies Corporate) is not liable to Customer, at law, equity, statute or otherwise for any Consequential Loss howsoever caused.

9.6 Notwithstanding anything to the contrary in the Contract or elsewhere and to the full extent permitted by law, Komatsu's total cumulative liability to Customer for all liabilities, damages, losses, costs and expenses suffered or incurred under or in connection with the Contract by Customer for all Claims in the aggregate, is limited to the amount paid by Customer 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 the Contract or elsewhere, Komatsu is not liable to Customer for any liquidated damages, delay penalties, delay damages, performance guarantees or any other similar obligation.

Customer Nominated Items

9.8 Komatsu may, in its absolute discretion, reject any Customer Nominated Item, in which case Komatsu will (if applicable) remove Customer Nominated Item from the quotation and make a reasonable adjustment to the Price. If Komatsu's acceptance requirements for the Customer Nominated Item are met, 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 Customer 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 Customer.

9.9 Except as provided in clause 9.8 or where loss or damage is caused by Komatsu's negligent installation, Komatsu disclaims all liability in relation to Customer Nominated Items. Customer will indemnify Komatsu against, and release Komatsu from, all liability, loss, damage or expense suffered by Customer or any third party arising out of or in any way related to Customer Nominated Items.

10. DEFAULT

Customer must pay interest if payment late

10.1 Without limiting Komatsu's other rights under the Contract or at law, Customer 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 Reference 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 Customer 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 Customer end the Contract immediately in any of the following circumstances:

- 10.3.1 Customer materially breaches the Contract or otherwise breaches any laws in connection with the Contract;
- 10.3.2 Customer breaches the Contract and the breach cannot be remedied, or the breach can be remedied but Customer has not remedied the breach within 7 days of Komatsu issuing a notice of breach to Customer;
- 10.3.3 Customer dies or becomes incapacitated, or ceases, or indicates that it is about to cease to trade;
- 10.3.4 anything happens that reasonably indicates that there is a significant risk that Customer is, or will become, unable to pay its debts as they fall due. This includes publication of any unfavourable credit report against Customer, non-payment by Customer of any debt due to any third party, execution or distress being levied against any income or assets of Customer; a meeting of Customer's creditors being called or held; a step being taken to make Customer bankrupt; and Customer 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
- 10.3.5 a step is taken to have a receiver, receiver and manager, provisional liquidator, liquidator or administrator appointed to Customer or any of its assets.

Komatsu's rights if it ends the Contract

10.4 If the Contract is ended by Komatsu under clause 10.3:

- 10.4.1 if Customer owes Komatsu money, the money becomes payable immediately to Komatsu and bears interest in accordance with clause 10.1; and
- 10.4.2 Komatsu may elect to charge Customer the cancellation fee specified in the quotation (if any) or otherwise exercise its rights under the Contract or at law to recover Komatsu's loss and damage.

Komatsu's other rights and remedies

10.5 The rights and remedies provided in the Contract 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 Customer'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, accessories, all required documentation including service history, invoices for attachments, OEM manuals and other manuals and/or instructions for trade-in machine options being included, and there being no undisclosed material condition, deficiency, defect or damage.
- 11.2 If Customer 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, accessories and documentation) in the state and condition required under clause 11.1.2 or fails to disclose any material condition, deficiency, defect or damage in the trade-in, then Komatsu may reject the trade-in and the credit or price for the trade-in will be a debt owing by Customer 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 Customer to Komatsu.
- 11.3 Risk in the trade-in remains with Customer until inspection and acceptance of the trade-in at Komatsu's nominated point of delivery.
- 11.4 If Komatsu rejects the trade-in after it has been delivered to Komatsu, Customer must collect the trade-in from Komatsu within a reasonable time at Customer's expense.
- 11.5 Customer 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 Customer authorises Komatsu to pay any monies given to it for the purposes of removing any encumbrance on the trade-in.

12. FORCE MAJEURE

If Komatsu is prevented from performing its obligations under the Contract due to any cause beyond Komatsu's reasonable control, the Contract will be suspended for a reasonable period. If a suspension under this clause exceeds, or in Komatsu's reasonable opinion is likely to exceed, 3 months, then Komatsu may, if it chooses, end the Contract by giving Customer written notice. Komatsu will not be liable for any loss, damage or liability which Customer incurs as a result, whether directly or indirectly, as a result of the Contract being suspended or ended under this clause.

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 Customer must not assign, subcontract or otherwise deal with the 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 the Contract.

14.2 Komatsu is entitled, without obtaining the consent of Customer, to assign, transfer or otherwise dispose of any or all of its rights or obligations under the Contract to a Related Body Corporate of Komatsu or to any other entity which is financially sound and capable of performing the obligations of Komatsu under the Contract by giving notice of such assignment, transfer or disposal to Customer.

Cancellation

14.3 Except as otherwise expressly permitted under the Contract and to the extent permitted by law, Customer does not have the right to cancel the Contract. If Customer requests to cancel the Contract, Komatsu is entitled to reject such request and insist on completion of the Contract or, at its absolute discretion, may elect to accept the requested cancellation and: (a) charge Customer the cancellation fee specified in the quotation; or (b) if a cancellation fee is not specified in the quotation, an amount otherwise agreed by the parties; or (c) if not agreed by the parties within 7 days of the cancellation request, Komatsu's direct and indirect costs and expenses in connection with the accepted 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.

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 Customer for any deviations or inaccuracy in such documentation.

14.5A For used Goods only, the Equipment's hourly service meter unit (SMU) indicator and date of manufacture will be taken to be indicative, and not representative of the actual number of hours performed by, and the date of manufacture of, the Equipment.

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. Customer 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 engineering applications study.

14.6A Clauses 14.4 to 14.6 only apply to the extent permitted by law.

Electronic Data Retrieval

14.7 Customer grants to Komatsu and its personnel, a non-exclusive, royalty free and irrevocable licence to enable Komatsu to perform data retrieval functions via telemetry systems, such as Komtrax and/or Komtrax Plus and/or Payload Meter (PLM), or similar system, for the purpose of monitoring component life, service intervals, continuous improvement and availability of the Equipment.

14.7.1 Customer may request access to Komtrax and/or Komtrax Plus and Komatsu may grant access subject to Customer's agreement to the Komtrax Terms of Use, a copy of which is located at:

[KOMTRAX-Terms-of-Use.pdf \(komatsu.com.au\)](https://www.komatsu.com.au/KOMTRAX-Terms-of-Use.pdf)

14.7.2 Where physical access to the Equipment is required for data retrieval, Komatsu will schedule access to the Equipment wherever possible to minimise disruption to Customer's operations.

14.7.3 Customer agrees and acknowledges that Komatsu and its Related Bodies Corporate own data from Customer's Equipment where that data has been aggregated with other customers' data for statistical purposes or otherwise anonymised so that the data from Customer's Equipment cannot identify Customer.

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, does not amount to a waiver of its right to do it. Any waiver must be in writing. A written waiver by either party 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 the Contract, 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 clause 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 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.