

## KOMATSU AUSTRALIA PTY LTD - EQUIPMENT RENTAL - TERMS AND CONDITIONS

### 1. Definitions

In this Agreement, defined terms have the following meaning:

**Agreement** means this agreement between Komatsu and the Customer 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 earlier of the commencement date set out in the Rental Details or the date on which the Customer takes possession of the Equipment.

**Commencement SMU** means the service meter units (Hours) registered on the Equipment at the Commencement Date and stated in the Rental Details.

**Completion Date** means the later of:

- (a) the completion date set out in the Rental Details (as may be extended on request by the Customer with Komatsu's prior written approval); or
- (b) the date on which Komatsu retakes possession of the Equipment;

or such other date as the parties may agree in writing.

**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 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.

**Consumables** means all fuel, oil, fuses, light globes, fire extinguishers, fire systems, buckets, dump bodies (including liner packages), ground engaging tools, undercarriage, tyres, hydraulic hoses (external/work equipment/lift cylinder area only), brake linings (operational wear), drive and ancillary belts, and all other non-OEM items (including fast fuels, service couplers, isolation switches).

**Customer** means the customer as set out in the Rental Details.

**Customer Maintenance Obligations** has the meaning given in Part A of Schedule 3.

**Enforcement Costs** means 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 condition required by the Rental Return Conditions (including cleaning costs).

**Equipment** means the equipment set out in the Rental Details, including any and all accessories, keys, tools, attachments, parts, manuals, instructions and packing and transferable materials, and any substitute or replacement Equipment or parts provided (unless otherwise indicated in this Agreement).

**Equipment Delivery Fee** means any costs reasonably incurred and/or charged by Komatsu with respect to:

- (a) the delivery of the Equipment to the Site;
- (b) for Standard Rentals only, any mobilisation, commissioning, decommissioning or demobilisation of the Equipment; and/or
- (c) the collection, transport and return of the Equipment to the designated Komatsu branch.

**Equipment Rental Agreement** means the equipment hire schedule setting out the details of the Equipment and signed by the Customer.

**Fees** means any fees or charges payable by the Customer to Komatsu under this Agreement.

**Final Inspection Report** means the Equipment inspection report prepared by Komatsu following a physical inspection of

the Equipment to assess its condition as against the Inspection Report:

- (a) for Komatsu Quick Rent, on the Completion Date; and
- (b) for Standard Rentals, on the Completion Date or at the Site prior to demobilisation (as applicable).

**Inspection Report** means the Equipment inspection report set out in Schedule 1 detailing the condition of the Equipment as at the Commencement Date.

**Hours** means the total number of hours of operation of the Equipment as measured by on-board electronic measuring systems, including by reference to the Commencement SMU.

**Insurance Value** means the amount specified in the Rental Details.

**Interest Rate** means the ANZ Bank Indicator Lending Rate from time to time plus 3% per annum.

**KOWA** means Komatsu's oil wear analysis.

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

**Komatsu Maintenance Obligations** has the meaning given in Part B of Schedule 3.

**Komatsu Quick Rent** means Equipment hire that is specified as a "Komatsu Quick Rent" equipment rental in the Rental Details;

**Liability** includes all liabilities, losses, damages, costs, charges, fines, penalties and expenses (including legal costs on a full indemnity basis) of whatever description however arising, whether actual contingent or prospective and whether present or future, fixed or unascertained.

**Maintenance Schedule** means the OEM maintenance schedule, a copy of which will be provided to any Standard Rental Customer on or before the Commencement Date.

**Other Charges** has the meaning given in clause 3.2.

**Operation and Maintenance Manual** means any manual issued or approved by Komatsu containing the operating and service instructions for the Equipment, the current manufacturer's instructions or Komatsu requirements as to the Equipment issued to the Customer.

**Payment Processing Fees** means any costs reasonably incurred by Komatsu in processing the Customer's payment of the Fees, including a 1.5% administration fee for credit card payments.

**Personal Information** has the meaning given in the *Privacy Act 1988* (Cth).

**Personnel** means, to the extent applicable, any officers, employees, contractors, agents, executors, administrators or representatives of the Customer.

**Privacy Policy** means Komatsu's Privacy Policy available at [www.komatsu.com.au/pages/privacy-policy](http://www.komatsu.com.au/pages/privacy-policy).

**Refuelling and Ad Blue Charge** means the charge specified in the Rental Details, payable where the Equipment is returned without full tank(s) of fuel and Ad Blue (if applicable).

**Rental Charges** means the amount shown in the Rental Details and payable by the Customer to Komatsu for the Equipment hire.

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

**Rental Return Conditions** means the conditions set out in Schedule 2.

**Repair Costs** means any costs incurred by Komatsu under clause 4.2(c), 4.3(b) and/or 5.3 in undertaking the maintenance, repair or replacement of the Equipment during the Term.

**Site** means the location where the Equipment will be located, used and/or stored during the Term, as set out in the Rental Details (and such other locations as may be approved by Komatsu in writing).

**Standard Rental** means any Equipment hire except those specified as "Komatsu Quick Rent" in the Rental Details.

**Taxes** means any taxes, duties (including stamp duty) levies, charges or imposts payable with respect to this Agreement or the transactions contemplated by it.

**Term** means the period commencing on the Commencement Date and ending on the Completion Date, unless otherwise terminated under clause 8.

**Theft Damage Waiver Fee** has the meaning given in clause 7.2(c)(ii).

## **2. Agreement**

### **2.1 Agreement to Hire**

The Customer has requested and Komatsu has agreed to rent the Equipment to the Customer for the Term on the terms set out in this Agreement. The Customer agrees to pay the Fees to Komatsu in accordance with this Agreement. The Customer agrees and acknowledges that if the Term exceeds 12 months, the rent of Equipment under this Agreement, will for accounting purposes, be considered a lease.

### **2.2 Inspection**

- (a) Prior to the Commencement Date, the parties must conduct an inspection of the Equipment and, based on that inspection, Komatsu will prepare the Inspection Report for signature by both Komatsu and the Customer.
- (b) The Customer acknowledges and agrees that the signed Inspection Report is accurate, complete and free of error and ambiguity and reflects the condition of the Equipment as at the Commencement Date.

### **2.3 Term**

This Agreement commences on the Commencement Date and continues for the Term unless terminated sooner in accordance with its terms.

### **2.4 Rental Details**

The Customer acknowledges and agrees that if the technical specifications required to be included in the Rental Details (such as the serial number of the Equipment) are not available for insertion on the date of this Agreement, then Komatsu will and must insert the additional information as soon as practicable after it becomes available and will notify and provide a copy of the updated Details to the Customer at which point that information will form part of this Agreement.

## **3. Fees**

### **3.1 Rental Charges**

- (a) The Customer must pay the Rental Charges to Komatsu for the Term in accordance with this Agreement.
- (b) The Rental Charges are payable:
  - (i) for Customers that do not hold an active trading account with Komatsu, by credit or electronic funds transfer on or before the Commencement Date; and
  - (ii) for Customers that hold an active trading account with Komatsu, within 30 days of the date of the invoice pursuant to clause 8.1(b)(ii).
- (c) The Rental Charges are payable notwithstanding any period of the Term during which the Equipment is subject to repairs or replacement as a result of the Customer's use.

### **3.2 Other charges**

In addition to the Rental Charges, the Customer must pay the following additional charges to Komatsu immediately on request:

- (a) the Equipment Delivery Fee, if applicable;
- (b) the Theft Damage Waiver Fee, if applicable;
- (c) any Taxes, if applicable;
- (d) the Refuelling and Ad Blue Charge, if applicable;
- (e) any Enforcement Costs, if applicable;
- (f) any Payment Processing Fees, if applicable; and
- (g) any Repair Costs, if applicable.

### **3.3 Late payment**

If the Customer fails to pay the Fees within 30 days of the due date, Komatsu may charge interest on the outstanding amount payable at the Interest Rate, calculated daily. Interest is payable on demand and may

be capitalised at such times as Komatsu may determine in its sole discretion.

## **3.4 Right to suspend services**

If the Customer fails to pay any Fees due under this Agreement within 30 days of the payment due date, Komatsu may, on written notice to the Customer, suspend access to and/or remotely disable the Equipment until payment has been made. The Customer must, upon receipt of notice, ensure that the Equipment is safely positioned prior to being disabled.

## **4. Komatsu Obligations**

### **4.1 General**

Subject to this Agreement, Komatsu must:

- (a) allow the Customer to take and utilise the Equipment for the Term;
- (b) ensure that the Equipment is in good working order as at the Commencement Date;
- (c) with respect to Standard Rentals only, perform the Komatsu Maintenance Obligations in accordance with clauses 4.2(a) to (d);
- (d) where the Equipment is eligible for delivery (as reasonably determined by Komatsu), deliver the Equipment to the Site as soon as reasonably practicable following receipt of the Customer's Site details, or as otherwise agreed with the Customer; and
- (e) where the Equipment is eligible for collection (as reasonably determined by Komatsu), collect the Equipment from the Site on the Completion Date, or as otherwise agreed with the Customer.

### **4.2 Maintenance by Komatsu**

- (a) Clauses 4.2(b) to (d) only apply to Standard Rentals.
- (b) Komatsu will perform the Komatsu Maintenance Obligations at the Site or as otherwise notified by Komatsu to the Customer in writing.
- (c) If Komatsu performs maintenance work in addition to the Komatsu Maintenance Obligations, then Komatsu may charge the Customer for such work (including any goods supplied) at its then applicable rates and prices.
- (d) If the Site is located more than 100 kilometres from a Komatsu branch, Komatsu may, on a per kilometre basis, charge the Customer for any travel kilometres in excess of 100 kilometres required for the provision of maintenance or repair services under this Agreement.
- (e) The Customer warrants that, for the duration of the Term, unless otherwise notified to Komatsu in writing:
  - (i) the Customer has fully and properly performed the Customer Maintenance Obligations;
  - (ii) the details provided by the Customer in respect to the Equipment are complete and accurate; and
  - (iii) no third party attachments have been fitted to the Equipment without Komatsu's prior written consent, and acknowledges that the Komatsu Maintenance Obligations are performed in reliance on these warranties.

### **4.3 Repair**

- (a) Subject to this clause, Komatsu will repair any defects in the Equipment during the Term at its cost.
- (b) Komatsu will have no liability for defect repairs under this clause, and the Customer will be liable for any repair costs incurred by Komatsu, to the extent that:
  - (i) the defect is a result of or in connection with the Customer's failure to comply with its obligations under this Agreement, including the Customer Maintenance Obligations;
  - (ii) the defect is caused by or in connection with the misuse, negligence, accident or failure to maintain or use the Equipment in accordance with the Operation and Maintenance Manual;
  - (iii) with respect to Standard Rental Customers only, the defect arises out of, or in connection with, a

condition identified through the Maintenance Schedule or otherwise and with respect to which Komatsu provided a rectification recommendation to the Customer which the Customer subsequently failed to observe or perform;

- (iv) in relation to alterations, modifications or repairs to the Equipment made by or on behalf of the Customer (including the fitting of attachments) that are not permitted or approved by Komatsu under clause 5.4 or 5.3(b) (as applicable) and in the reasonable view of Komatsu adversely affect the performance or safety of the Equipment;
- (v) the Customer delayed providing the Equipment to Komatsu after notifying the potential defect under clause 5.3(e); or
- (vi) the defect is a result of any use of the Equipment which Komatsu, acting reasonably, determines to be improper.

## 5. Customer Obligations

### 5.1 Equipment operation

(a) The Customer must, with respect to the Equipment:

- (i) operate the Equipment in accordance with the Operation and Maintenance Manual, Komatsu's reasonable directions and all applicable laws, regulations, rules and regulatory guidelines;
- (ii) satisfy itself that the Equipment is fit for the Customer's purposes as at the Commencement Date;
- (iii) ensure that the Site where the Equipment is operated complies with any applicable health, safety and environment laws;
- (iv) return or procure the return of the Equipment to Komatsu on the Completion Date in accordance with the Rental Return Conditions;
- (v) only permit the Equipment to be operated by suitably trained, licensed, experienced and (where necessary) certified operators;
- (vi) keep it clean, including the removal of excess material in Equipment undercarriage, to allow for safe and efficient operation;
- (vii) if the Customer transports the Equipment (including on a trailer), comply with all applicable laws, regulations, rules and guidelines relating to transport or towing;
- (viii) if required by law, obtain and hold all required licences to operate the Equipment, including any licences or accreditation required under health, safety and environment laws; and
- (ix) only permit the Equipment to be used for the purpose for which it was designed, in suitable terrain and in a manner which has regard to the capacity, capabilities and limitations of the Equipment.

(b) The Customer must not, with respect to the Equipment:

- (i) deface, remove, vary or otherwise erase any identifying marks, plates, numbers, notices or safety information on the Equipment;
- (ii) disable, interfere or tamper with any electronic monitoring systems attached to the Equipment (including KOMTRAX satellite positioning systems);
- (iii) alter, modify, tamper with or damage the Equipment without Komatsu's prior written consent;
- (iv) part with possession or control of the Equipment without Komatsu's prior written consent;
- (v) give or encumber, or permit any person to take an interest in, or any form of security over, the Equipment and must do all things reasonably necessary to protect and make known Komatsu's interest in the Equipment;
- (vi) exceed the recommended or permitted load limits, speed or capacity of any Equipment;

- (vii) permit any person to operate the Equipment while under the influence of drugs or alcohol; and
- (viii) remove or permit to be removed the Equipment from the Site, without Komatsu's prior written consent.

### 5.2 Title and Risk

- (a) Title to the Equipment remains with Komatsu at all times. The Equipment is at all times Komatsu's property and the Customer only has a right to use it. Unless expressly set out in this Agreement, the Customer has no option or right to purchase the Equipment.
- (b) Risk in the Equipment passes to the Customer upon delivery and remains with the Customer until the Equipment has been collected by Komatsu or returned to Komatsu's premises by the Customer.

### 5.3 Repairs and maintenance

- (a) The Customer must maintain the Equipment in accordance with the Customer Maintenance Obligations. Subject to clause 5.3(c), the Customer must not repair, or attempt to repair, the Equipment and all repairs must be completed by Komatsu, except as otherwise permitted by Komatsu's prior written approval.

(c) For Standard Rentals, the Customer must:

- (i) ensure that the Equipment is maintained in accordance with the Equipment Maintenance Schedule, or as directed by Komatsu, by making the Equipment available to Komatsu at the relevant times for Komatsu to carry out the Komatsu Maintenance Obligations; and
- (ii) undertake the KOWA oil sampling program throughout the Term and ensure that submission cards are completed correctly.

(d) The Customer is responsible for any costs, expenses, fees and charges incurred:

- (i) in connection with the day-to-day use and operation of the Equipment including all Consumables, fittings and accessories required to maintain and operate the Equipment; and
- (ii) keeping the Equipment securely stored and parked with any supplied vandal protection fitted and, where possible, within a lockable compound when not in use.

(e) The Customer must promptly notify Komatsu in writing of any accidents or damage suffered to the Equipment and any repairs which are required in order to maintain the safe and good working operation of the Equipment.

(f) In the event of loss or damage to the Equipment:

- (i) the Customer must immediately:
  - (A) if the Equipment breaks down or becomes unsafe to operate, cease use of the Equipment;
  - (B) take reasonable steps to ensure no further damage to the Equipment and prevent the Equipment from causing any injury, loss or damage to persons or property; and
  - (C) notify Komatsu in writing, and provide full details, of any accidents, loss, theft, breakdown or damage to the Equipment (including any additional information or evidence reasonably requested by Komatsu);
- (ii) upon receipt of notice and subject to clause 7, Komatsu will use reasonable endeavours to promptly repair or replace (at Komatsu's discretion) the Equipment, at the Customer's expense; and
- (iii) any Equipment provided as a replacement will be treated as the Equipment for the purposes of this Agreement for the remainder of the Term.

### 5.4 Additional parts and attachments

Any attachments and replacements to any part of the Equipment must be approved by Komatsu in writing prior to being affixed to the Equipment (**Permitted Parts**).

Unless otherwise agreed in writing prior to attachment to the Equipment, any Permitted Parts that are affixed to any part of the Equipment become Komatsu's property immediately on attachment. Once affixed, any adjustments required to accommodate approved attachments must be made by Komatsu.

## 5.5 Ongoing access and inspection

- (a) The Customer must provide Komatsu with reasonable access to the Site on request for the purpose of:
- (i) inspecting the state of repair of the Equipment;
  - (ii) with respect to Standard Rentals, performing the Komatsu Maintenance Obligations; and
  - (iii) otherwise exercising its rights under this Agreement.
- (b) Access to the Site will take place during normal business hours and reasonable notice will be given to the Customer by Komatsu (except in an emergency or circumstances where Komatsu reasonably believes that there is a risk of damage to the Equipment or injury or damage to persons or property, in which case no notice is required).

## 6. Privacy

- (a) The Customer acknowledges and agrees that Komatsu may collect, use and disclose Personal Information:
- (i) from the Customer and its Personnel, including but not limited to name and address, driver's licence details, credit card details, date of birth and business history;
  - (ii) about the Customer's credit worthiness, or for the purpose of obtaining and maintaining credit information file about the Customer or collecting overdue payments;
- and warrants that, to the extent the Customer provides Personal Information about a third party, that it has the requisite consent or authority to provide that information.
- (b) Komatsu will manage any Personal Information it collects from the Customer in accordance with the *Privacy Act 1988* (Cth) and Komatsu's Privacy Policy.

## 7. Insurance

### 7.1 Insurance policies

- (a) Standard Rental Customers must comply with this clause 7.1.
- (b) On the Commencement Date and throughout the Term, the Customer must effect and maintain at its own expense, with a reputable insurance company in Australia, the following insurances:
- (i) plant and equipment insurance for physical loss of or damage to the Equipment for an amount not less than the Insurance Value;
  - (ii) third party and public liability insurance for not less than AUD\$20 million for any one occurrence (including personal injury, death and property damage);
  - (iii) any workers' compensation insurance required by applicable law; and
  - (iv) such other insurance as Komatsu may reasonably require by notice.
- (c) If requested by Komatsu, the Customer must:
- (i) procure that Komatsu is noted as an interested party on the above policies; and
  - (ii) promptly provide certificates of currency of these insurances.

### 7.2 Loss Theft Damage Waiver ("LTDW")

- (a) This clause applies to all Komatsu Quick Rent Customers, except those who hold the insurances referred to in clause 7.1. The LTDW is not insurance but an agreement by Komatsu to limit the Customer's liability for Equipment damage in certain circumstance.
- (b) If a Komatsu Quick Rent Customer does not hold insurance in accordance with clause 7.1, the Customer must pay the Theft Damage Waiver Fee in accordance with this clause 7.2.

- (c) If the Equipment is lost, stolen or damaged and the LTDW is not excluded under clause 7.2(e), the Customer must pay on demand (and consents to being charged by Komatsu) the amount equal to (**Theft Damage Waiver Fee**):

- (i) the actual cost of the Equipment repair, if the cost is less than \$1,500; or
- (ii) \$1,500, if the cost of the repairs is greater than \$1,500 and is insured by Komatsu or if the Equipment is stolen.

- (d) Subject to clause 7.2(e) if the Customer pays the Theft Damage Waiver Fee, Komatsu will waive its rights to Claim against the Customer for loss, theft or damage to the Equipment if the Customer immediately reported the incident to the police and notified Komatsu in accordance with clause 5.3(f), including a copy of any police report and provides all assistance reasonably requested by Komatsu in relation to the incident.

- (e) Notwithstanding the Customer has the paid the LTDW, Komatsu will not waive its rights to Claim against the Customer for any Liability suffered or incurred in connection with the loss, theft or damage to the Equipment if such loss, theft or damage arises as a result of:

- (i) the Equipment being operated by a person who is unlicensed or under the influence of alcohol or drugs;
- (ii) a breach of a clause of this Agreement by the Customer or its Personnel;
- (iii) the use or transport of the Equipment in violation of any laws by the Customer or its Personnel;
- (iv) a failure by the Customer or its Personnel to use the Equipment for its intended purpose or in accordance with the Operation and Maintenance Manual;
- (v) a failure by the Customer or its Personnel to comply with its Customer Maintenance Obligations; or
- (vi) vandalism by a third party or wilful damage by the Customer or its Personnel,

and the Customer will be liable for the full amount of any Liability incurred by Komatsu.

## 8. Termination and Return

### 8.1 Inspection and return

At the end of the Term:

- (a) the parties must conduct an inspection of the Equipment and, based on that inspection, Komatsu will prepare the Final Inspection Report which must be signed by both parties and any expenses incurred by Komatsu to repair or rectify any defects in the condition of the Equipment in order to comply with the Rental Return Conditions must be paid by the Customer on demand by Komatsu;
- (b) the Customer must pay any outstanding Fees:
- (i) for Komatsu Quick Rent, on or before the Completion Date; and
  - (ii) for Standard Rentals, within 30 days of the date of the invoice issued by Komatsu;
- (c) the Customer must:
- (i) make the Equipment available to Komatsu at the Site and provide all reasonable assistance for its removal or otherwise return the Equipment to Komatsu; and
  - (ii) return to Komatsu the keys, the Operation and Maintenance Manual and any instruction and/or maintenance manuals provided with the Equipment. If the keys and Operation and Maintenance Manual are not returned to Komatsu, the Customer must pay Komatsu the replacement cost at Komatsu's then current price list rate.

### 8.2 Failure to return

- (a) If the Customer fails to return the Equipment to Komatsu by the agreed Completion Date (end of the Term) in

accordance with this Agreement, then the Customer must:

- (i) pay any additional Rental Charges accruing with respect to the additional period;
- (ii) continue to observe and perform its other obligations under this Agreement; and

Komatsu may exercise its access rights under clause 5.5 to take possession of the Equipment at the Customer's cost.

### 8.3 Termination

(a) Komatsu may terminate this Agreement with immediate effect on written notice to the Customer, if:

- (i) the Customer fails to 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;
- (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; or
- (v) if the Customer is an individual, the Customer is declared bankrupt.

(b) On termination of this Agreement by Komatsu, the Customer must:

- (i) immediately return the Equipment to Komatsu in accordance with clause 8.1;
- (ii) if the Customer fails to comply with clause (i):
  - (A) pay to Komatsu on demand an amount equal to the Insurance Value of the Equipment; and
  - (B) with respect to Standard Rentals, pay to Komatsu on demand an amount equal to the current value of the Rental Charges payable during the Term (assuming a rate of usage the same as that prior to termination). The present value will be calculated using the ANZ Bank Indicator Lending Rate on the date of termination.

(c) On termination of this Agreement, Komatsu may enter the Site or any other premises on which the Equipment is located and take possession of the Equipment.

(d) Termination of this Agreement by Komatsu is without prejudice to any other right or remedy which Komatsu might have.

(e) The fundamental provisions of this Agreement are clauses 3, 5, 7 and 8.1.

## 9. Liability and Indemnity

### 9.1 Liability

(a) To the extent permitted by law and except as stated in this Agreement, Komatsu makes no representations and gives no warranties with respect to the Equipment or any ancillary services provided under this Agreement and all legal, statutory or equitable liability, conditions or warranties of any type in relation to the Equipment are excluded.

(b) Notwithstanding clause 9.1(a), nothing in this Agreement will limit or exclude any rights accruing to the Customer under 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.

(c) Except as expressly stated otherwise in this Agreement, Komatsu will not be liable to the Customer for any Claim or Liability (including Consequential Loss) suffered or incurred by the Customer in relation to the hiring of the Equipment under this Agreement.

(d) Notwithstanding anything else in this Agreement and to the full extent permitted by law, Komatsu's total cumulative liability to the Customer for any Claims or Liability suffered or incurred under or connection with this Agreement is limited to the amount paid by the Customer to Komatsu for the Equipment.

### 9.2 Indemnity

(a) The Customer irrevocably indemnifies and holds harmless Komatsu and its Personnel against any Claims or Liability suffered or incurred as a result of or in connection with:

- (i) any breach of this Agreement by the Customer or its Personnel;
- (ii) any breach of law or non-compliance with any registration, licence permit, authorisation, regulation or by-law relating to the use of the Equipment;
- (iii) any gross negligence, fraud or wilful misconduct by the Customer or its Personnel with respect to the Equipment;
- (iv) Komatsu exercising any of its rights under this Agreement; or
- (v) the use, operation, control, condition, maintenance, repair or storage of the Equipment.

(b) The Customer is not liable under this clause to the extent that the relevant matter was caused or contributed to by the gross negligence, fraud or wilful misconduct of Komatsu.

### 10. Sub-Hire

(a) The Customer must not sub-hire or part with possession or control of the Equipment except with Komatsu's prior written consent (which may be withheld in its absolute discretion).

(b) If Komatsu provides consent under clause 10(a), the Customer must:

- (i) provide Komatsu with detailed information about the identity of each sub-hirer and the location at which the Equipment will be kept;
- (ii) ensure that any subcontract agreement provides Komatsu the right to enter the Site or any other place where ever the Equipment is located for the purpose of inspection, repair and/or exercising its rights under this Agreement;
- (iii) not vary the terms of any subcontract agreement without Komatsu's prior written consent (which may be withheld in its absolute discretion); and
- (iv) if Komatsu requests and as security for the Customer's obligations to Komatsu, assign all the Customer's rights under those sub-hire arrangements to Komatsu in such form as Komatsu may request.

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

(a) In this clause, the terms *proceeds*, *Security Interest* and *PPS Lease* have the meanings given to those expressions in the PPSA.

- (b) To the extent this Agreement gives rise to a Security Interest (including a PPS Lease), Komatsu may register a Security Interest in favour of Komatsu with respect to the Equipment and any proceeds.
- (c) 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 gain, attach, enforce, register, protect and maintain the perfection of a first priority Security Interest;
  - (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.
- (d) If the Customer defaults on any monies due under this Agreement, Komatsu has the right to seize the Equipment after giving written notice of such intention to the Customer. Equipment seized under this clause may be disposed of, retained by, or otherwise dealt with by Komatsu, in any way Komatsu sees fit.
- (e) 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 Security Interest.
- (f) The Customer waives its rights to receive a copy of any verification statements under Section 157 of the PPSA and, 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 Equipment: sections 95, 118, 121(4), 125, 130, 132(3)(d), 132(4), 135, 142 and 143.
- (g) 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 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.

## 12. GST

Unless otherwise specified, all amounts payable under this Agreement are exclusive of GST and must be calculated without regard to GST. If a supply made under this Agreement is a taxable supply, the recipient of that taxable supply (**Recipient**) must, in addition to any other consideration, pay to the party making the taxable supply (**Supplier**) the amount of GST with respect to the supply.

## 13. 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, in its absolute discretion, terminate or suspend this Agreement for up to 3 months by written notice to the Customer.

## 14. Dispute Resolution

- (a) If any dispute arises in relation to this Agreement, including in relation to its interpretation or any aspect of its performance, no party may commence any court or arbitration proceedings, including disputes which arise under this clause 14, unless and until the parties have

complied with the procedures set out in this clause 14, except where a party seeks urgent interlocutory relief.

- (b) If any dispute arises in relation to this Agreement, including in relation to its interpretation or any aspect of its performance, a party may give written Notice of dispute (**Notice of Dispute**) to the other parties which states that a dispute has arisen, specifies the nature of the dispute and requests that a meeting of the authorised representative of each party be held within 10 Business Days.
- (c) If a party receives a Notice of Dispute, that party must cause an authorised representative to attend a meeting and each party must use their best endeavours to reach a resolution to the dispute.
- (d) If, within 10 Business Days of the meeting (or such further period as agreed in writing by them), the parties do not agree as to a resolution to the dispute, then any party may commence court proceedings to resolve the dispute.

## 15. General Provisions

- (a) The Customer must not assign this Agreement without the prior written consent of Komatsu.
- (b) 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.
- (c) Except as otherwise stated in these terms, this Agreement may only be varied in writing signed by both parties.
- (d) A reference to time in this Agreement is a reference to the time in Sydney, NSW.
- (e) Komatsu may do anything that the Customer should have, but has not done under this Agreement and the Customer must reimburse Komatsu for all costs reasonably incurred by Komatsu as a result.
- (f) The Customer, or the person signing this Agreement on the Customer's behalf, warrants that it is authorised to enter this Agreement.
- (g) No time or indulgence by Komatsu will be deemed to be a waiver of any of Komatsu's rights.
- (h) 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).
- (i) In this Agreement, "including" and "includes" are not words of limitation.
- (j) This Agreement is governed by the laws of the State of New South Wales and the parties submit to the non-exclusive jurisdiction of the courts of that State and all courts which may hear appeals there from.
- (k) If any provision of this agreement is invalid, illegal or unenforceable in any respect, the validity, legality and enforceability of the remaining provision will not be affected and such invalid, illegal or unenforceable provision is to be severed from this agreement.
- (l) In the event of any inconsistency between the:
  - (i) the Rental Details;
  - (ii) Equipment Rental Agreement;
  - (iii) these terms and conditions; and
  - (iv) any attached schedules,
 the document higher in the list prevails to the extent of the inconsistency.
- (m) Clauses 3, 7, 8, 9, 14 and 15 will survive the expiry or termination of this Agreement.

## **Schedule 1 Inspection Report**

See the attached Inspection Report for the Equipment.

Note: 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.

## Schedule 2 Rental Return Conditions

1. Capitalised terms not otherwise defined in this document have the meaning given to them in the Definitions section of the Terms and Conditions of Equipment Rental.
2. The Equipment must meet the following minimum condition requirements (as applicable to the Equipment type) upon its collection by or return to Komatsu on termination or expiration of the Term.
3. Part A applies to both Komatsu Quick Rent and Standard Rentals.
4. Part B only applies to Standard Rentals.

### Part A General rental return conditions

#### 1 Physical Condition and Appearance

- 1.1 The Equipment must have the same overall appearance as at the Commencement Date as recorded in the Inspection Report.
- 1.2 The Equipment must have good overall appearance and must function properly for the purpose for which it was intended. All corrosion and impact damage to cabin or panel-work must have been repaired in a professional manner and repainted either in manufacturer's standard colours or in the colours in which it was painted at the Commencement Date. The Equipment serial number plate must be in place and legible.
- 1.3 There must be no obvious damage and any accident, abuse and vandal damage must have been repaired and/or otherwise corrected in accordance with the manufacturer's recommendations and good engineering practice.
- 1.4 All Equipment controls, including the controls of ancillary Equipment must operate correctly and the Equipment must be capable of consistent operation through the full range of its functions in accordance with the manufacturer's specifications.
- 1.5 All windows, windscreens, mirrors, lenses, gauges or glass which is broken, missing or defaced must be replaced. OEM monitoring, warning, alarm, bucket load weighing systems and data recording systems, including KOMTRAX, must be complete and operational.
- 1.6 All service, working, and travel lights, must be complete and in full operating order. All electrical wiring, batteries, switches, fuses and circuit breakers must be complete and operational.
- 1.7 The interior fittings and accoutrements of the cabin must be free from damage, abuse and deficiencies with all seating, linings, mouldings, dashboard, accessory Equipment and services being complete and functioning properly. This includes radios/CD players, audio speakers, UHF/2 way radios, cabin lighting, heater, demister, air conditioner, cabin pressuriser, windscreen washers and windscreen wipers.
- 1.8 All decals, labels, and signwriting showing any name or identification marks other than those applied by the manufacturer or required under Australian regulations must have been removed and any remedial work required as a result of the removal of such decals, labels or signwriting must be carried out to the body or structure of the Equipment prior to the return of the Equipment and to a standard appropriate for resale purposes.
- 1.9 The ROPS/FOPS structure must be complete, undamaged, and must not have been modified in any way by welding, drilling, cutting, extending or the attachment of accessories. The certification plate must be in place and legible.
- 1.10 Upon return to Komatsu, the Equipment must comply with State workplace health and safety regulations and/or relevant safety/industrial regulations pertaining to this type of Equipment including relevant noise emission regulations. The Equipment must be capable of being immediately operated by a third party purchaser or hirer, without further major repair, replacement, alteration or improvement.

#### 2 Mechanical Condition

- 2.1 The Equipment must have been serviced and maintained in accordance with the manufacturer's recommendations and if the Customer has maintained or repaired the Equipment, a copy of the service history is to be submitted to Komatsu upon the return of the Equipment. Parts used in maintenance and repair, with the exception of ground engaging tools and manufacturer approved hardware or filters, must be of genuine OEM supply.
- 2.2 The engine must operate according to the specification of the manufacturer with no oil or coolant leaks or excessive smoke. There must be no ingress of coolant into the lubrication or hydraulic systems. The mountings of the engine, engine accessories, engine controls and radiator must be secure with no broken or missing fittings, fasteners or connections. Any engine protection devices fitted must be complete and operational.
- 2.3 The transmission, torque converter, HST motors and pumps, drop box, differentials and final drives must function correctly without binding, grabbing, unintended slippage, overheating or excessive noise. The mountings of these components must be free from any breakage or damage.
- 2.4 The radiator and cooling system in general must not be clogged with dust, mud or any other blocking substance and will be free from leaks, punctures or holes. The system must be capable of sustaining the Equipment within the normal operating temperature range as specified by the manufacturer and must be filled with the correct coolant solution (including anti-freeze additive) in compliance with the manufacturer's recommendations.
- 2.5 All hydraulic cylinders and actuators must be in good working order, not bent and must operate as originally specified when new. Any scoring or pitting that may have occurred must be limited to the extent that the cylinder does not leak in normal operation. All hydraulic pumps and motors are to function properly and to be devoid of cracked casings and damaged mountings. All hydraulic hoses, valves, connections and couplings must be free from leaks and damage to hoses must be limited to the outer casing only.
- 2.6 All operation, maintenance, and service manuals must be returned with the unit at the end of the Term along with any service records.
- 2.7 In general, the dump body, bucket or blade must be free from distortion. Cutting edges/ground engaging tools/body liners of the Equipment must be intact and of good appearance. Pro rata contribution towards wear of dump bodies, buckets, blades and GET will apply as determined by Komatsu.



- 2.8 For wheel type Equipment only, the Equipment tyres must be in good condition having no side wall or carcass damage. Pro rata contribution towards wear of tyres will apply as determined by Komatsu.
- 2.9 For track type Equipment only, the Equipment undercarriage must be complete with no rollers, track plates, guiding guards or covers missing or broken. All rollers must turn freely when the Equipment is moving and must have no oil leaks. Track adjusting and recoil mechanisms must be complete and operational with no broken recoil springs and no leakage of recoil cylinders. Pro rata contribution towards wear of undercarriage components will apply as determined by Komatsu.
- 2.10 All clearances at work equipment pins, bushes, trunnions and/or linkages, body mount pins & bushes must be within manufacturer's tolerances for normal operation. Front loading frame equipment and/or hoe attachment must be in good operational condition. Any stabilisers must be fully operational.
- 2.11 The main frame of the Equipment must be free from live cracks. Such repairs as may have been carried out to the frame of the Equipment must have been performed in a professional manner and in accordance with both good engineering practice and the recommendations of the manufacturer.

### **3 Other Conditions**

- 3.1 The Customer is to provide access to the Equipment during the Term and allow for mutually convenient demonstration of the Equipment's operation if requested.
- 3.2 The Equipment is to be returned to a location within the state of Australia in which the Equipment was originally delivered or collected from, as nominated by Komatsu at the Customer's cost.
- 3.3 The Equipment must be returned to Komatsu with a full tank of fuel. If the Equipment is returned without a full tank of fuel, Komatsu will fill the tank and charge the Customer the per litre amount indicated in the Rental Details.

## **Part B Standard Rental - Return Conditions**

### **1 Mechanical Condition:**

- 1.1 As part of the scheduled maintenance, the Equipment must have had oil samples taken at the approved intervals. These samples must be of the genuine KOWA (Komatsu Oil Wear Analysis) program and the samples must be submitted and processed correctly, with the correct details completed on the sample submission cards. This includes listing the customer as "Komatsu Australia Rental" and the site listed as the Customer's name and site.

### **2 Other Conditions**

- 2.1 If the Customer is maintaining the Equipment and no maintenance labour is supplied by Komatsu during the Term, the Customer must provide access to the Equipment at least once every six months of the Term, if requested, to allow Komatsu to assess the Equipment.

### **Schedule 3 Maintenance Obligations**

#### **Part A Customer Maintenance Obligations**

The Customer must, at its own cost, maintain the Equipment in accordance with the following:

1. any Daily Start-up Sheet for the applicable Equipment, as issued to the Customer by Komatsu in the Operation and Maintenance Manual;
2. ensure that the Equipment is cleaned as reasonably required to ensure the safe and efficient daily operation (including, for tracked Equipment, removing packed material in undercarriage); and
3. monitor the condition of the Equipment, maintain and replace any Consumables as required in accordance with the Rental Return Conditions.

#### **Part B Komatsu Maintenance Obligations**

(a) Komatsu must, at its own cost, maintain the Equipment in accordance with the Maintenance Schedule, including:

1. 250, 500, 1000 and 2000 Hour scheduled preventative maintenance servicing in accordance with OEM recommendations;
2. 1000 or 2000 Hour scheduled preventative maintenance clinic in accordance with OEM recommendations;
3. Condition monitoring of the Equipment by carrying out inspections and oil wear analysis;
4. Remote monitoring of the Equipment (if the equipment for this has been fitted); and
5. Providing a maintenance procedure and carrying out the maintenance services in accordance with the relevant OEM manuals;

(b) For the avoidance of doubt, Komatsu is not required to undertake any Equipment maintenance which is:

1. included in the Customer Maintenance Obligations (as applicable);
2. a Customer obligation under the Agreement; and
3. maintenance that is required outside of the OEM maintenance schedule that is caused or contributed to by improper, excessive or negligent use of the Equipment by the Customer or its Personnel.