

KOMATSU AUSTRALIA
TERMS & CONDITIONS – PARTS AND SERVICE

1. DEFINITIONS

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

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

"*Consequential Loss*" means all loss of actual or anticipated profit, loss of use, loss of productivity, loss of revenue, business interruption of any nature, loss of contracts, loss of opportunity, increased costs and expenses, wasted expenditure, loss 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 the Customer for the supply of the Goods and/or Services, comprising the relevant purchase order and these Conditions.

"*Customer*" means the entity placing an order for Goods or Services.

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

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

"*Goods*" or "*Services*" (or both) collectively and severally means the parts, components, fluids, oils or other parts or services described in the attached quotation or invoice for purposes of supply by Komatsu to Customer.

"*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 this Contract is made, and whether existing in Australia or otherwise.

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

"*Price*" means the total monetary amount for the sale of the Goods or Services (excluding GST).

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

"*Services*" means any service or repair of specified equipment or any other services relating to the Contract supplied under a Komatsu service quotation or invoice and excludes all things not expressly specified by Komatsu in writing.

2. APPLICATION OF CONDITIONS

- 2.1 Goods and Services are supplied or Exchanged, solely on the basis of these Conditions, any terms put forward by the Customer are rejected.
- 2.2 Terms of contract, conditions or offer in any specification, purchase order or other document submitted by the Customer are excluded.
- 2.3 Variations or additions to these Conditions are effective only if agreed in writing by Komatsu.

- 2.4 The Customer's request to buy Goods or Services or submission by the Customer of a purchase order for the Goods or Services is deemed to be an offer to purchase the Goods or Services (order) subject to these Conditions. Komatsu may accept or reject an order in its sole discretion.
- 2.5 An order to purchase Goods or Services is only accepted when it is acknowledged by Komatsu either orally or in writing or by Delivery.
- 2.6 Komatsu may vary these Conditions from time to time and will provide the Customer with replacement Conditions. The subsequent placing of an order by the Customer is deemed as acceptance of these Conditions.
- 2.7 Unless stated otherwise by Komatsu, the Price for the Goods and Services is firm for 30 days from its original date unless sooner withdrawn by Komatsu.

3. PRICE

- 3.1 Unless otherwise stated by Komatsu:
 - (a) Prices exclude GST, customs duty, levies, tariffs, delivery costs and any export packing or special packing if required, taxes whether present or future, direct or indirect (except for taxes levied on Komatsu's income); and
 - (b) Goods pricing will be invoiced and payable in accordance with Komatsu's standard list price applying at the date of acceptance of an order of the Goods.

4. DELIVERY

- 4.1 Delivery and availability dates are indicative only. Komatsu will use reasonable efforts to deliver the Goods by the delivery date specified by it.
- 4.2 Komatsu (including its Related Bodies Corporate) is not liable for any damage or loss, including Consequential Loss, to the Customer resulting from any delay in delivery of Goods or Services.

5. PAYMENT

- 5.1 The Customer must pay the Price without deduction or set-off within 30 days of a purchase order or on or before Delivery whichever occurs first. Time is of the essence for payment.
- 5.2 Where the Customer is approved by Komatsu for trading on credit terms, payment is due for all Goods and Services provided, within 30 days from the end of the month of invoicing. All other sales are on a full payment on Delivery basis.
- 5.3 The Customer indemnifies Komatsu for any losses, costs or fees incurred or arising in connection with recovery of any overdue payment.
- 5.4 The Goods remain Komatsu's property until the Price is paid in full. The Customer must: (a) keep the Goods in its possession and control; (b) keep the Goods in good repair and condition, excluding fair wear and tear; (c) keep the Goods stored separately and marked so that the Goods are clearly and easily identifiable as Komatsu's property and if requested, promptly inform Komatsu of the location of the Goods; and (d) not sell, assign or lease the Goods or any interest in them, or permit any Security Interest, charge, pledge, lien or other encumbrance to be created in relation to them.
- 5.5 If the Customer fails to pay to Komatsu all monies due under this Contract by the due date, Komatsu has the right and irrevocable licence from the Customer, to, at any time and without notice, via its representatives, enter the Customer's premises and to repossess the Goods or any part of them.

6. PERSONAL PROPERTY SECURITIES ACT 2009 (CTH) ("PPSA")

- 6.1 The retention of title in clause 5.4 gives rise to a Purchase Money Security Interest under the PPSA in favour of Komatsu in respect of the Goods and their proceeds.

- 6.2 If the Customer defaults on any monies due under this Contract, Komatsu has the irrevocable right to seize the Goods without notice and deal with the Goods as Komatsu sees fit.
- 6.3 To the maximum extent permitted by law, the following provisions of the PPSA do not apply to the enforcement by Komatsu of its security interest in the Goods: sections 95, 118, 121(4), 125, 130, 132(3)(d), 132(4), 135, 142 and 143. The Customer waives its rights to receive any verification statements under Section 157 of the PPSA.
- 6.4 In clauses 5 and 6 "proceeds", "Purchase Money Security Interest" and "Security Interest" have the meanings given in the PPSA.

7. RISK AND INSURANCE

- 7.1 Risk in the Goods passes to the Customer upon Delivery. The Customer must fully insure the Goods, and hold the benefit of any claim on trust for Komatsu, from the time risk in the Goods passes to the Customer until title in the Goods passes from Komatsu to the Customer.

8. WARRANTIES AND EXCLUSIONS

- 8.1 Unless Komatsu states otherwise, the Goods or Services are warranted in accordance with the applicable warranty relevant at the date of supply listed at:
<https://www.komatsu.com.au/pages/terms-conditions>
- 8.2 All other conditions and warranties of any type in relation to the Goods or Services are excluded to the maximum extent allowed by the law. Nothing in these Conditions limits those provisions of the *Competition and Consumer Act 2010* (Cth) nor any other statutes, rules or regulations from time to time in force in Australia which imply or guarantee certain conditions or warranties or impose obligations on Komatsu which conditions, warranties and obligations cannot, or cannot except to a limited extent be excluded, restricted or modified. If any such statutory provisions apply, then to the extent to which Komatsu is entitled to do so, its liability is limited at its option to:
- (a) in the case of Goods:
 - (i) the replacement of Goods or the supply of equivalent Goods; or
 - (ii) the payment of the cost of replacing the Goods or of acquiring equivalent Goods; or
 - (iii) the payment of the cost of having the Goods repaired; or
 - (iv) the repair of the Goods; and
 - (b) in the case of Services:
 - (i) the supply of the Services again; or
 - (ii) the payment of the cost of having the Services supplied again.
- 8.3 The Customer, in connection with the Goods or Services, indemnifies and keeps indemnified Komatsu, its Related Bodies Corporate, its officers, agents, employees, subcontractors, vendors and other contractors (**Indemnitees**) against all claims, demands, losses, costs, liabilities and expenses arising directly or indirectly out of:
- (a) injury to or death of any person (including Indemnitees) to the extent not caused by Komatsu;
 - (b) damage to or destruction of any property (including that of Indemnitees), to the extent not caused by Komatsu; and
 - (c) any modification, alteration or use of the Goods that is not in accordance with (without limitation) any applicable law or the Goods manufacturer's recommendations or Komatsu's instructions or the manuals relating to the Goods.

- 8.4 Notwithstanding anything to the contrary in these Conditions or elsewhere and to the full extent permitted by law, Komatsu (including its Related Bodies Corporate) is not liable to the Customer under contract, at law or otherwise for any Consequential Loss, liquidated damages, delay penalties or any performance guarantees.
- 8.5 Notwithstanding anything to the contrary in these Conditions or elsewhere and to the full extent permitted by law, Komatsu's total cumulative liability to the Customer for all liabilities, damages, losses, costs and expenses suffered or incurred under or connection with this Contract by the Customer, for all Claims in the aggregate, is limited to the amount paid by the Customer to Komatsu for the Goods and Services the subject of the Claim.

9. DEFAULT

- 9.1 The Customer must pay Komatsu interest (at the ANZ Bank Indicator Lending Rate effective from time to time plus 2% p.a.) on any amount not paid by the due date until payment in full is received by Komatsu.
- 9.2 Komatsu may by written notice to the Customer immediately end this Contract or otherwise refuse to supply Goods or Services if:
- (a) the Customer fails to perform any of its obligations under this Contract;
 - (b) the Customer dies or becomes incapacitated, or ceases, or indicates that it is about to cease, to carry on business;
 - (c) anything happens that indicates that there is a significant risk that the Customer is or will become unable to pay debts as they fall due; or
 - (d) a step is taken to have a receiver, receiver and manager, provisional liquidator, liquidator or administrator appointed to the Customer or any of its assets.
- 9.3 The rights and remedies provided in these Conditions will not affect any other rights or remedies available to Komatsu.

10. EXCHANGE

- 10.1 If the Customer requests the Exchange of its used part, Komatsu may, in its sole and absolute discretion decide whether it will accept the Customer's Exchange used part and if so on what terms. If Komatsu accepts the Customer's Exchange used part, Komatsu will invoice the Customer ("Exchange Invoice") on the basis that the Customer's Exchange used part is provided to Komatsu within 10 business days of receipt by the Customer of Komatsu's Exchange part and the Customer's Exchange used part meets Komatsu's minimum condition requirements as notified by Komatsu from time to time ("Core Return Criteria"). If Komatsu determines within 10 business days of receipt of the Customer's Exchange used part that it does not meet the Core Return Criteria then Komatsu may charge the Customer an amount required to bring the Customer's Exchange used part up to the standard of the Core Return Criteria. If Komatsu determines that the Customer's Exchange used part is beyond economic repair, Komatsu will invoice the Customer, at Komatsu's standard list price of a corresponding new part less the Exchange Invoice amount. If the Customer's Exchange used part is not provided to Komatsu within 10 business days of receipt by the Customer of Komatsu's Exchange part (or such later date as may be agreed by Komatsu in writing) then Komatsu will invoice the Customer, at Komatsu's standard list price of a corresponding new part less the Exchange Invoice amount.
- 10.2 The Customer warrants that it has or will have unencumbered title to any used part provided by it to Komatsu for the purposes of an Exchange.
- 10.3 The Customer authorises Komatsu to pay any monies given to it for the purposes of removing any encumbrance on any used part provided by the Customer to Komatsu in connection with an Exchange.

11. FORCE MAJEURE

- 11.1 A party is not liable for failure to perform, or delay in performing, an obligation, except an obligation to pay money, if the failure or delay arose from a cause beyond the reasonable control of that party.

12. INTELLECTUAL PROPERTY

- 12.1 IP in the Goods (**Licensed IP**) belongs to Komatsu and its licensors. Subject to this clause 12, Komatsu grants the 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 the Customer obtains the prior written consent of Komatsu, the Customer may sublicense these rights only to a person who is providing services to the Customer. The Customer is responsible for the acts of a sub-licensee as though they were the acts of the Customer.
- 12.2 The licence under clause 12.1 does not extend to:
- (a) any IP that is governed by a separate agreement between the parties (including Komtrax and KPAR); and
 - (b) 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 the Customer and have not been subsequently purchased by the Customer.
- 12.3 If the Customer transfers ownership of the Goods to another person (**Transferee**):
- (a) the licence under clause 12.1 is automatically assigned to the Transferee;
 - (b) the Transferee will become the Customer for the purposes of this clause 12; and
 - (c) the Customer will ensure the Transferee complies with the Customer's obligations under this clause 12.
- 12.4 To the extent the Goods include software, the 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.
- 12.5 The 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 12 or by law.
- 12.6 The 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.

13. MISCELLANEOUS

- 13.1 An order may only be cancelled with Komatsu's written consent.
- 13.2 The Customer grants to Komatsu and its personnel, a non-exclusive, royalty free and irrevocable licence to enable Komatsu to perform data retrieval functions for the purpose of monitoring component life, service intervals, continuous improvement or availability of the Goods.
- 13.3 Komatsu will only accept return of any Goods in accordance with its then current credit and return policy.
- 13.4 If GST is imposed on any supply made in accordance with this 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 condition which are defined in the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) have the same meaning when used in this Contract.
- 13.5 The Vienna Convention on the Sale of International Goods (and any enabling legislation in any State or Territory) is excluded from this Contract.
- 13.6 This Contract is governed by the laws of New South Wales.