

## KOMATSU AUSTRALIA

### TERMS & CONDITIONS OF SALE

#### 1. DEFINITIONS

**commissioning** means when the goods are assembled and operating under normal conditions. For used goods, commissioning means assembly only.

**consequential loss** means any consequential, indirect exemplary or punitive loss or damage (including without limitation direct or indirect loss of actual or anticipated profits or revenues, loss by reason of shutdown or non-operation, increased cost of borrowing capital or financing, or loss of use, or productivity) 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 these terms and conditions and the documents expressly incorporated herein.

**parts** means goods other than equipment.

**equipment** means those goods which comprise mobile equipment and /or vehicles and attachments as described in the quotation.

**exchange means** the exchange of the purchaser's own part for a part remanufactured by the seller.

**goods** or services (or both) collectively and severally means the goods, parts, equipment (new or used) or services relating to the contract or expressed in the quotation and excludes all things not expressly specified in writing by the seller.

**GST** means *as defined in the A New Tax System (Goods and Services Tax) Act 1999 have the same meaning when used herein.*

**intellectual property or IP** means all industrial and intellectual property rights whether protectable by statute, common law or equity including without limitation, all copyright in the goods and all materials provided in connection with the goods, rights in relation in inventions (including all patents and patent applications), trade secrets and know-how, design rights (registrable or not), trade mark rights (registered or not), circuit layout designs rights and excluding non-assignable moral rights.

**price** means the total monetary amount for the sale of the goods or services (excl GST).

**purchaser** means the entity purchasing the goods or services or as otherwise described in the quotation or final sale invoice.

**seller** means Komatsu Australia Pty Limited ABN 63 053 514 739 of Level 1, 2 Richardson Place, North Ryde NSW.

#### 2. APPLICATION OF CONDITIONS

##### Conditions of sale

2.1 The goods or services are supplied and trade-in or exchange received solely on the basis of these terms.

2.2 By issuing a purchase order, invoice or similar to seller the purchaser unconditionally accepts to be bound by these terms and conditions of the contract in its entirety and without alteration. Purchaser unconditionally agrees that any terms attached to such purchase order, invoice or otherwise are null and void and that the Seller is entitled to ignore such writings.

##### Orders

2.4 Submission by purchaser of a purchase order for the goods or services is deemed to be an offer to purchase the

goods or services (**offer**) subject to these conditions. Seller may accept or reject such offer in its sole discretion.

2.5 An offer to purchase is only deemed accepted by seller when it is acknowledged by seller:

2.5.1 in respect of new or used equipment, in writing by way of 'Acceptance Notice' found at [www.komatsu.com.au/acn](http://www.komatsu.com.au/acn);

2.5.2 in respect of all other goods, either orally or in writing or by the seller's delivery of the goods;

#### 3. PRICE

3.1 Unless otherwise stated, price quoted excludes GST, delivery costs and any other matter of thing not expressly specified in writing by seller.

3.2 For sale of new equipment, price is indicative only and may rise due to fluctuations in foreign currency or as governed by the provisions contained in the "Price Escalation Formula" found at [www.komatsu.com.au/pef](http://www.komatsu.com.au/pef), but is otherwise fixed for the period described in any quotation.

3.3 Unless otherwise stated, price is valid for 30 calendar days after which time it will lapse.

4.5 The Seller may at any time require the Purchaser to provide security against default by the payable by unconditional bank guarantee, such security to be released within 7 days of completion of the sale.

#### 4. DELIVERY, PICKUP AND COMMISSIONING

##### When goods are to be delivered or services performed

If the parties agree that the seller will provide Delivery then :

4.1 Delivery, service and pick-up dates are indicative only.

4.2 Seller will use reasonable efforts to deliver the goods to the site or perform the services as agreed with purchaser. If seller is prevented from or delayed in making delivery or performing services for a reason beyond seller's control, seller may either extend the date for a reasonable period or terminate the contract, without liability to purchaser or seller.

4.3 Seller is not liable, and the Purchaser releases the Seller, for any damage or loss to purchaser resulting from any delay in delivery or service.

##### Early Acceptance

4.4 Purchaser may not take possession, custody or control of goods before they are ready for delivery

4.5 In the event that purchaser takes possession, custody or control of goods before they are ready for delivery:

4.5.1 it is deemed that the purchaser accepts the goods on that date;

4.4.2 early acceptance of the goods does not relieve or delay the purchaser's payment obligations under the contract.

#### 5. INTELLECTUAL PROPERTY

Where IP rights are expressly granted by seller in writing, the following clauses are applicable to the grant of IP in the goods:

5.1 Seller grants purchaser a non-exclusive, non transferable revocable licence to use the IP provided to it by seller for the operation of the goods (including without limitation, the collection, manipulation and reporting of data associated with the goods) for such period as the purchaser owns and operates the goods.

5.2 The IP and where applicable, all user documentation for it, are the seller's IP and seller retains all title and ownership

therein.

5.3 Purchaser must use IP only for the operation, maintenance and use of the goods and seller accepts no liability whatsoever for any other use. Purchaser must not modify the IP in any way, decompile, copy, disassemble, reverse, engineer or derive software source code or otherwise do any thing which conflicts with the licensed use of the IP.

## **6. PAYMENT**

### **Payment**

6.1 Unless otherwise agreed in writing, Purchaser must pay the price of the goods or services (together with GST and delivery costs) without deduction or set-off, on or prior to delivery. For new mining equipment, Purchaser must pay within 7 days of commissioning. Time is of the essence for payment.

6.2 Purchaser will indemnify the seller with respect to any loss, cost or fee incurred or arising in connection with recovery of any overdue payment.

### **Goods remain property of seller until payment**

6.3 The goods remain seller's property until the price is received in full in clear funds by seller, and purchaser must:

6.3.1 keep the goods in its possession and control;

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 seller's property and if requested, promptly inform seller 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 encumbrance to be created in relation to them.

### **Purchaser disposal of goods**

6.4 If purchaser disposes of any of the goods while they remain seller's property, or if any of those goods become part of another product sold by purchaser, purchaser holds the proceeds on trust for seller up to the amount it owes seller in respect of those goods, and must immediately pay that amount to seller.

### **Purchaser indemnity for breach**

6.5 Purchaser will indemnify seller for any loss or damage resulting from a breach of clause 6.

### **Seller's right to repossess and suspend delivery**

6.6 If purchaser fails to pay on time, seller has the right and irrevocable licence from the purchaser, to at any time and without notice, via its representatives, enter and repossess the goods. Seller is entitled to keep or sell the repossessed goods. Seller is also entitled to suspend any other delivery to purchaser without liability for such suspension. Purchaser remains bound by its obligations to seller.

6.7 Seller is not liable for any loss, damage or liability suffered as a result of exercising its right in condition 6.6.

## **7. COMMISSIONING**

### **Seller notice of commissioning**

7.1 If commissioning is specified by seller:

7.1.1 for Komatsu Equipment - seller will carry out any such commissioning in accord with any applicable mandatory manufacturer's specifications and manuals including any

applicable mandatory assembly, inspection and testing.

7.1.2 for Non-Komatsu Equipment - seller will use best endeavours to assist commissioning of non-Komatsu equipment but no liability is accepted by seller for such commissioning and the purchaser releases the seller from any such liability howsoever caused.

7.1.3 seller is not liable for loss resulting from any delay in commissioning and purchaser releases seller from any such liability howsoever caused;

7.1.4 if done other than at seller's premises:

7.1.4.1 it will only be done during normal business hours, and only if purchaser gives reasonable and safe access, space and facilities fit for the purpose of commissioning. If purchaser fails to do so, seller may terminate the contract;

7.1.4.2 purchaser must obtain all necessary permits, licences and approvals prior to commissioning;

7.1.4.3 seller is not responsible for any hazardous or toxic waste or substances (unless brought to the site by seller) and purchaser indemnifies seller against all costs and expenses seller 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 howsoever caused.

### **Purchaser notice for additional commissioning**

7.2 No notice, demand, instruction or request from purchaser shall oblige seller to provide additional commissioning works, nor shall it delay payment of the price once notice of commissioning has been provided by seller.

## **8. RISK, INSURANCE AND DAMAGE**

### **Risk passes to purchaser on delivery**

8.1 Risk in the goods passes to purchaser on the earlier of collection or upon delivery.

### **Purchaser must insure goods**

8.2 Purchaser must insure and keep the goods insured 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 purchaser until the time the title in the goods passes to purchaser.

8.3 Purchaser holds the proceeds of any insurance claim relating to the goods on trust for seller up to the amount it owes seller in respect of those goods, and must immediately pay that amount to seller.

### **Damage after delivery**

8.4 Seller is not liable for defects or damage discovered after delivery unless:

8.4.1 purchaser gives written notice to seller and, if applicable, seller's carrier within 4 days after the date of delivery;

8.4.2 purchaser gives seller reasonable opportunity to inspect the goods in the same condition and place in which they were delivered; and

8.4.3 the defects or damage are reasonably shown to have been pre-existing as at the date of delivery to purchaser.

## **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, purchaser must comply with all applicable warranty terms. Failure to do so may void warranty in full or in

part. All applicable warranties for new goods are found at [www.komatsu.com.au/warranty](http://www.komatsu.com.au/warranty). Any used goods warranty will only apply if given in writing prior to sale (if any) otherwise the used goods are sold 'as is' and without warranty.

### **Modified and Used goods**

9.3 Seller makes no warranty with respect to and is not liable for any the performance, merchantability, fitness for purpose or any other warranty under this contract, statute, at law or equity in used or second-hand or Non-Komatsu goods or goods that have otherwise been modified or altered from manufacturer's specification.

### **Exclusion or limitation of warranties**

9.4 All legal, statutory or equitable liability, conditions or warranties of any type in relation to the goods or services are excluded. However, nothing herein shall limit those provisions of the Trade Practices Act 1974, nor statutes, rules or regulations from time to time in force in Australia which imply certain conditions or warranties or impose obligations on seller 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 seller is entitled to do so, its liability under those statutory provisions shall be limited at its option to:

9.4.1 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

9.4.2 in the case of services or commissioning:

- (a) the supply of the services again; or
- (b) the payment of the cost of having the services supplied again.

### **Seller indemnified if goods used improperly**

9.5 Purchaser will indemnify and keep seller indemnified against any loss, damage or liability arising directly or indirectly from a use, modification or alteration of the goods that is not in accordance with (without limitation) any applicable law or the goods normal use, manufacturer's commendations or seller's instructions or the manuals or good safety and operating practices relating to the goods.

### **General indemnity**

9.6 Purchaser shall in connection with the supply of goods or services, indemnify and keep indemnified seller, its officers, agents, employees and other contractors (Indemnitees) against all claims demands losses costs liabilities and expenses arising out of:

- (a) injury to or death of any person (including Indemnitees) to the extent not caused by the seller; and
- (b) damage to or destruction of any property (including that of Indemnitees) to the extent not caused by seller.

### **Exclusion of Vienna Convention**

9.7 The United Nations Convention on Contracts for the International Sale of Goods (Vienna Sales convention) is expressly excluded in all respects.

### **Exclusion of Consequential Loss**

9.8 Notwithstanding anything to the contrary in these conditions, seller shall not be liable to purchaser, at law, equity, statute or otherwise for any consequential loss howsoever caused.

### **Exclusion of liquidated damages, etc**

9.9 Notwithstanding anything to the contrary in these conditions or elsewhere, seller shall not be liable to purchaser for any liquidated damages, delay penalties, delay damages, performance guarantees or any other similar obligation.

## **10. DEFAULT**

### **Purchaser must pay interest if payment late**

10.1 Purchaser must pay seller interest on any amount not paid on time. The interest is payable at the Westpac Indicator Lending Rate effective from time to time plus 2% per annum calculated on daily balances of amounts unpaid and capitalised daily.

10.2 Seller may demand payment of interest by purchaser at any time. Failure to demand interest does not constitute a waiver of the entitlement to interest.

### **Seller's right to end Contract**

10.3 Seller may by written notice to purchaser end the contract immediately in any of the following circumstances:

10.3.1 purchaser fails to perform any of its obligations under this contract or otherwise;

10.3.2 purchaser dies or becomes incapacitated, or ceases, or indicates that it is about to cease, to carry on business;

10.3.3 anything happens that reasonably indicates that there is a significant risk that purchaser is or will become unable to pay debts as they fall due. This includes publication of any unfavourable credit report against the purchaser, non payment by purchaser of any debt due to any third party, execution or distress being levied against any income or assets of purchaser; a meeting of purchaser's creditors being called or held; a step being taken to make purchaser bankrupt; and purchaser 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;

10.3.4 a step is taken to have a receiver, receiver and manager, provisional liquidator, liquidator or administrator appointed to purchaser or any of its assets.

### **Seller's rights if it ends contract**

10.4 If the contract is ended by seller under clause 10 and purchaser owes seller money, the money becomes payable immediately to seller and bears interest in accordance with clause 10.1:

### **Seller's other rights and remedies**

10.5 The rights and remedies provided in these conditions will not affect any other rights or remedies available to seller.

## **11. TRADE IN OR EXCHANGE**

### **Restrictions**

11.1 If any amount is allowed by way of trade-in or exchange, the credit or value given in the trade-in or exchange is conditional upon the following:

11.1.1 seller accepting an order for the goods by any stated quotation validity date;

11.1.2 delivery of the trade-in or exchange to seller is at

purchaser's expense and in the same state and condition as it was on the date of seller's appraisal or inspection (if any) and there being no undisclosed defect or damage;

11.1.3 risk in the trade-in or exchange remains with purchaser until inspection and acceptance of delivery of the trade-in or exchange at the seller's nominated point of delivery, such delivery to be at purchaser's risk and expense;

11.1.4 purchaser warrants that it has or will have unencumbered title to any trade-in or exchange at the time of completion of the sale;

11.1.5 purchaser authorises seller to pay any monies given to it for the purposes of removing any encumbrance on the trade-in or exchange;

11.1.6 seller may without obligation to purchaser, terminate the portion of the agreement to purchase any trade-in or exchange at any time until acceptance and inspection of the trade-in or exchange or if condition 11.1.2 is breached, and may recover the credit or value given in the trade-in or exchange and any loss arising thereof as a debt.

**Exchange**  
11.2 If any amount is allowed by way of exchange, the exchange is conditional upon the following:

11.2.1 If upon inspection of the exchange by seller, the exchange is such a state that it cannot be reconditioned for resale or is otherwise un-merchantable then any exchange value already attributed to the sale of the goods will be reduced accordingly and the difference becomes a debt owing by the purchaser to seller.

11.2.2 If purchaser fails, refuses or neglects to deliver the exchange to Seller within the time nominated by seller, fails to deliver the correct exchange (e.g. delivers the wrong replacement part), negligently, knowingly or recklessly fails to disclose any material condition, deficiency or defect in the exchange, then the difference between the price for the goods and the cost of seller purchasing a replacement, including if not possible to obtain a used part or equipment the cost of a new part or equipment, is a debt owing by purchaser to seller.

## **12. FORCE MAJEURE**

If seller's ability to perform its obligations is adversely affected by any cause beyond seller's control including without limitation, those Force Majeure causes in this condition, then seller may, if it chooses, end the contract of sale or suspend it for up to 3 months by giving purchaser written notice. Seller will not be liable for any loss, damage or liability which purchaser incurs as a result, whether directly or indirectly.

## **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, shall confer at least once to attempt to resolve the dispute.

13.3 If the dispute is not resolved within 7 days of its notification, either party may commence mediation by referring the dispute to the Australian Commercial Disputes Centre in Sydney. The rules of commercial mediation of that body shall apply and both parties must comply with those rules.

## **14. MISCELLANEOUS**

### **Assignment**

14.1 Neither party may assign any right under the contract without the other party's written consent.

### **Cancellation**

14.2 An order may not be cancelled. Seller is entitled to insist on completion of the contract or at its sole discretion elect to charge purchaser seller's out of pocket expenses in connection with the cancellation (including without limitation, works required on the goods and the transport and holding of goods or standby of personnel) plus indirect costs, loss of profit and any administration or other costs, expenses or fees incurred by seller whatsoever, as reasonably determined by seller and as a condition of consent to any order cancellation.

### **Description of goods or services**

14.3 The description of the goods or services is given for identification only and does not create a contract of sale by description.

14.4 All photographs, brochures, weights, illustrations, dimensions or other particular as to the goods or services are indicative only. Seller has no liability to purchaser for any deviations or inaccuracy in such documentation.

14.5 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 seller is expressly excluded. Purchaser shall rely solely upon its own inspection skill and judgment.

### **Severability**

14.6 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**

14.7 The fact that either party fails to do, or delays in doing, something it is entitled to do under the contract of sale, does not amount to a waiver of its right to do it. Any waiver must be in writing. A written waiver by seller 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**

14.8 If GST is imposed on any supply made in accordance with these conditions, 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* have the same meaning when used herein.

### **Governing law**

14.9 The contract of sale is governed by the law of New South Wales.