

## KOMATSU ISITE TERMS AND CONDITIONS

### 1. GENERAL

#### 1.1 Definitions

**Administrative Advanced Training** means the mandatory advanced administrative course (as detailed in **Error! Reference source not found.**) which the User(s) must complete within three (3) months of Commissioning.

**Administrative Basic Training** means the mandatory basic administrative course (as detailed in **Error! Reference source not found.**) which the User(s) must complete within three (3) months of Commissioning.

**Agreement** means the agreement between Komatsu and the Customer for the supply of the System and Services, comprising of the relevant quotation and these Terms and Conditions. To the extent of any inconsistency between the terms of the relevant quotation and these Terms and Conditions, the terms of the quotation will prevail.

**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.

**Cloud Services** means the cloud services to be supplied by Komatsu in accordance with this Agreement and updated and changed by Komatsu from time to time.

**Commencement Date** means the date the Purchase Order is issued by the Customer.

**Commissioning** (or to **Commission**) means the setup, configuration and installation of the System by Komatsu.

**Confidential Information** means all competitive, sensitive or secret business, marketing, technical or other similar confidential information belonging to, or licensed to Komatsu and disclosed to the Customer as part of, or in connection with, the System and/or Services, including any and all Hardware, Software and related documentation, report formats, screen displays, menu features and any technical information relating thereto.

**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.

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

**Customer Data** means all information or data which:

- (a) is generated from or relates to the performance, operation or maintenance of a Vehicle; or
- (b) otherwise relates to the Customer and is:
  - (i) provided to Komatsu in the course of this Agreement;
  - (ii) entered or received into, stored in, generated by or processed through the System; or
  - (iii) created, produced or derived from the use, processing, storing or hosting of that information or data,

but does not include System Data.

**Delivery** means when the Hardware is picked up by a carrier or otherwise leaves Komatsu's premises.

**Force Majeure Event** means any event, occurrence or circumstance beyond the reasonable control of a party including those caused by any of the following:

- (a) war, invasion or other act of foreign enemies or terrorists;
- (b) earthquake, flood, storm, tempest or other natural disaster;
- (c) legislative or executive act of government;
- (d) failure of suppliers, vendors or internet services;
- (e) internet outages;
- (f) infrastructure outages – including satellite or other communications outages;
- (g) pandemic;
- (h) freight and shipping delays caused by national or international port closures or port congestion, trans-shipment delays, re-tasking or rescheduling of ships, shortage of sea freight containers or space restrictions; or
- (i) industrial disputes other than those caused by Komatsu breaching, or failing to observe, any industrial award, certified agreement, Australian or New Zealand (as applicable) workplace agreement, other employment agreement or legislation.

**Hardware** collectively or individually means the, XD8 in cab Monitor, XD-Series Cable, Sim Card, Antenna(s), BM2 Kit, RAM Monitor Mount, and associated firmware.

**Insolvency Event** means the happening of any of these events:

- (a) an application is made to a court for an order or an order is made that a body corporate be wound up, and the application is not withdrawn, stayed or dismissed within twenty one (21) days of being made;
- (b) an application is made to a court for an order appointing a liquidator or provisional liquidator in respect of a body corporate and the application is not withdrawn, stayed or dismissed within twenty one (21) days of being made, or one of them is appointed, whether or not under an order;
- (c) except to reconstruct or amalgamate while solvent, a body corporate enters into, or resolves to enter into, a scheme of arrangement, deed of company arrangement or composition with, or assignment for the benefit of, all or any class of its creditors, or it proposes a reorganisation, moratorium or other administration involving any of them;
- (d) a body corporate resolves to wind itself up, or otherwise dissolve itself, or gives notice of intention to do so, except to reconstruct or amalgamate while solvent or is otherwise wound up or dissolved;
- (e) a body corporate is or states that it is insolvent;
- (f) as a result of the operation of section 459F(1) of the Corporations Act 2001 (Cth), a body corporate is taken to have failed to comply with a statutory demand;
- (g) a body corporate is or makes a statement from which it may be reasonably deduced by the other party that the body corporate is, the subject of an event described in section 459C(2)(b) or section 585 of the Corporations Act 2001 (Cth);
- (h) a body corporate takes any step to obtain protection or is granted protection from its creditors, under any applicable legislation or an administrator is appointed to a body corporate; or
- (i) a person becomes an insolvent under administration as defined in section 9 of the Corporations Act 2001 (Cth) or action is taken which could result in that event;
- (j) a party not being able to meet its debts as they fall due; or
- (k) anything analogous or having a substantially similar effect to any of the events specified above happens under the law of any applicable jurisdiction.

**Intellectual Property Rights** means all present and future rights in relation to copyright, trademarks, designs, patents or other proprietary rights, or any rights to registration of such rights whether created before or after this Agreement is made, and whether existing in the Territory or otherwise.

**Komatsu** refers to Komatsu Australia Pty Ltd, Komatsu New Zealand Limited and its Related Bodies Corporate including Komatsu Ltd (incorporated in Japan).

**OEM** means an original equipment manufacturer other than Komatsu.

**Operation and Maintenance Manual** means any operation, service, or other manual or instruction or recommendation or other information supplied by Komatsu to the Customer in relation to the System.

**Operator Training** means the mandatory operator training course (as detailed in **Error! Reference source not found.**) which the User(s) must complete following Commissioning.

**Personal Information** has the same meaning as in the Privacy Act 1988 (Cth) as amended.

**Price** means the total monetary amount for the sale of the System and/or Services (excluding GST) specified in the quotation.

**Purchase Order** means the separate ordering document(s) under which the Customer purchases the System and Services.

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

**Services** means any Support and Maintenance Services, Commissioning, Cloud Services, training and any other services to be provided by Komatsu under this Agreement.

**Software** means the software provided with, or embedded in the Hardware, including Komatsu iSite, iControl, iReport, Dashboard and GoLine. The Software includes any updates or new releases that may be provided or made available by Komatsu to the Customer from time to time.

**Support and Maintenance Services** means the support and maintenance services to be provided by Komatsu in accordance with the terms in **Error! Reference source not found.** as amended from time to time.

**System** means the Hardware, Software and Cloud Services.

**System Data** means all information or data that relates to the performance or operation of the System but which does not relate to the Customer or a Vehicle.

**Subscriptions** means SaaS (subscriptions as a service) for the System to be provided by Komatsu to the Customer.

**Terms and Conditions** means these Terms and Conditions of Use, as amended from time to time.

**Territory** means Australia, New Zealand and New Caledonia.

**User** means a person authorised by the Customer to use the System.

**User Guides** means any use guides for operational visualisation tools, dashboards, instruction or recommendation or other information supplied by Komatsu to the Customer in relation to the System.

**Vehicle** means a vehicle or other item of equipment on which the Hardware is installed.

**Warranty** means the warranty document provided to the Customer by Komatsu from time to time for the System (or a component of it) and/or Services.

## 1.2 Interpretation

Headings are for convenience only and do not affect interpretation. The following rules of interpretation apply unless the context requires otherwise:

- (a) the singular includes the plural and vice versa;
- (b) a reference to a clause or Annexure is to a clause or Annexure to this Agreement;

- (c) a reference to any party to this Agreement or any other agreement or document includes the party's successors and permitted assigns;
- (d) a reference to legislation or a legislative provision includes any statutory modification or substitution of that legislation or legislative provision and any subordinate legislation issued under that legislation or legislative provision;
- (e) a reference to a breach of warranty includes that warranty not being complete, true or accurate;
- (f) monetary amounts are expressed in Australian dollars unless stated otherwise;
- (g) including and includes are not words of limitation; and
- (h) a reference to conduct includes any omission, statement or undertaking, whether or not in writing.

## 2. CONDITIONS

### 2.1 Conditions of Sale and Licensing

- (a) The System and Services are supplied solely on the basis of this Agreement.
- (b) The issuing of a Purchase Order by the Customer will be deemed to be acceptance of this Agreement. Any terms of contract, conditions or offer in any specification, Purchase Order or other document submitted by the Customer are excluded and will have no force or effect.
- (c) Variations or additions to this Agreement are effective only if agreed in writing and signed by an authorised representative of Komatsu.
- (d) Komatsu may vary this Agreement from time to time and will provide the Customer with a replacement Agreement. The continued use of the System and Services by the Customer will be deemed to be acceptance of the revised Agreement.
- (e) The Customer must ensure that its Users comply with this Agreement in relation to their use of the System as though they were the Customer.

### 2.2 Use Restrictions

#### Data

- (a) The Price for the Cloud Services includes usage of 300MB of data per month for each Vehicle. Data use for each Vehicle will be measured over each 12-month period commencing on the Commencement Date ("**Measurement Period**").
- (b) An excessive data use fee (as specified in the quotation or otherwise notified by Komatsu from time to time) will apply if the average monthly data use for any Vehicle exceeds the monthly limit of 300MB. Any excessive data use fee must be paid in accordance with clause 4 of this Agreement.

#### SMS Notifications

- (c) The Price for the Cloud Services includes 100 SMS notifications per month for each Vehicle. The number of SMS notifications for each Vehicle will be measured on a monthly basis commencing on the Commencement Date.
- (d) An excessive SMS use fee (as specified in the quotation or otherwise notified by Komatsu from time to time) will apply if the 100 SMS notifications limit for each Vehicle is exceeded. Any excessive data use fee must be paid in accordance with clause 4 of this Agreement.

#### iControl

- (e) The Price for the Cloud Services includes installation and use of iControl on 5 devices.
- (f) The Customer may purchase rights to use iControl on additional devices by agreement with Komatsu.

## Dashboards

- (g) The Price for the Cloud Services includes standard dashboards ("fuel", "fleet focus" and "utilisation").
- (h) The Customer may purchase additional dashboards (including "production trucks" and "operator scorecard") by agreement with Komatsu.

## **2.3 Connectivity and Compatibility**

- (a) The System may only be used on:
  - (i) Komatsu equipment equipped with Komtrax, Komtrax Plus, including but not limited to: Komatsu excavators, trucks, loaders, dozers and graders; and
  - (ii) OEM equipment with telemetry data available via J1939 broadcast, PLM (Payload Meter) broadcast via RS232 or J1939, or Komtrax ISO API, or where a compatible aftermarket payload system is installed.
- (b) The Customer must ensure 24/7 connectivity to either site provided and maintained WLAN, cellular data (3G/4G), or site provided and maintained private LTE. The cellular connectivity requires a nano SIM be installed into the XD8 monitor. Any infrastructure costs associated with this connectivity are the responsibility of the Customer.
- (c) The Customer acknowledges that, in the event that network connection is unavailable in accordance with clause 2.3(b), the System will not have the ability to communicate and pass data (equipment to equipment) until an uplink is available and data is transferred.
- (d) The Customer must allow for Komatsu to audit any Komatsu branded equipment eligible for System installation for ICT systems data broadcast capability prior to the System being installed. The Customer must provide Komatsu with access to determine if ICT system components, the relevant ICT system controller or interface harness, require installation or upgrade. The Customer must allow for data collection via PC download and data review.
- (e) For any OEM equipment, the Customer must independently arrange for the applicable OEM to audit the equipment for eligibility for System installation for ICT systems data broadcast capability prior to the System being installed. The Customer must provide Komatsu with access to the results of the independent audit for review and assessment.
- (f) Komatsu does not provide any warranties or support for malfunction of or defects in any Customer-supplied equipment. The Customer will be responsible for the supply, installation, maintenance and repair of any Customer-supplied equipment (at the Customer's expense).
- (g) Komatsu will complete a machine health assessment on the Customer's Komatsu branded equipment. In the event that the machine health assessment identifies any defects or incompatibilities in the Customer-supplied equipment, the Customer must rectify the defect or incompatibilities before the System can be installed on the equipment.
- (h) For any OEM equipment, the Customer must independently arrange for the applicable OEM to complete a machine health assessment on the OEM equipment. The Customer must provide Komatsu with access to the results of the OEM conducted machine health assessment for review.

## **2.4 Customer Conduct**

- (a) The Customer will not:
  - (i) perform, permit, or allow any abuse or fraudulent or unlawful use of the System;

- (ii) use the System for any fraudulent, unlawful or abusive purpose;
- (iii) remove the Hardware from a Vehicle or attempt to install the Hardware on another piece of equipment; or
- (iv) allow for installation of the Hardware by any third party other than a third party approved by Komatsu.

- (b) Abuse and/or unlawful or fraudulent use of the System includes:
  - (i) accessing, altering or interfering with the communications and/or information in the System, including by rearranging, tampering or making an unauthorized connection, or any related facilities, or attempting, allowing or assisting any other person, to do the foregoing; and/or
  - (ii) using the System in such a manner so as to interfere unreasonably with the use of the System by other person.
- (c) The Customer will use the System in accordance with applicable laws, rules and regulations of the jurisdiction in which the System is being used.
- (d) The Customer acknowledges and agrees that the System may require licenses or other approvals from applicable governmental authorities. Komatsu will not be liable for a failure by the Customer to obtain all necessary licenses or approvals prior to using the System.
- (e) The Customer acknowledges and agrees that any information the Customer may upload, post, e-mail, publish, reproduce, disseminate, make available, distribute or otherwise transmit via use of the System:
  - (i) will not be unlawful, threatening, harmful, abusive, defamatory, fraudulent, harassing, tortious, obscene, pornographic, libelous, racist, invasive of another's privacy, or contain otherwise objectionable information of any kind, including any transmissions constituting or encouraging conduct that would give rise to civil liability or constitute illegal activity;
  - (ii) will not violate any contractual or fiduciary relationships, including with respect to inside information, proprietary and Confidential Information learned or disclosed as part of employment relationships or under nondisclosure agreements;
  - (iii) will not infringe any copyright, patent, trademark, service mark, trade name, trade secret or other proprietary or confidentiality rights of any third party;
  - (iv) will not contain unauthorised advertising, bulk e-mails, promotional materials, chain letters, pyramid schemes, investment opportunities, "junk mail," "spam," or any other similar unsolicited commercial communications, solicitations or offers for sale of goods or provision of service;
  - (v) will not contain a virus, worm, trojan horse, or other harmful component or instruction designed to interrupt, destroy or limit the functionality of any computer software, hardware or telecommunications; and
  - (vi) will not intentionally or unintentionally violate any applicable local, state, federal or international law, without exclusivity to those of Territory.

## **2.5 Customer Obligations**

- (a) The Customer must at its cost and expense:

- (i) provide access to the Customer's equipment to allow for Komatsu to Commission the System;
  - (ii) provide access and authorise Komatsu's use of the Customer's internet service or Wi-Fi-connection to allow for the System to be Commissioned (if required by Komatsu);
  - (iii) provide access to all computer and telecommunications equipment necessary to access the System including data collection and transmission Hardware;
  - (iv) procure and enter into any agreements (including any confidentiality agreements) which may be required with Komatsu's third party suppliers; and
  - (v) provide adequate conditions for Komatsu at the Customer's premises and site, including workspaces, heating, lighting, ventilation, electric current and outlets, internet and communications access.
- (b) The Customer must ensure that its Users complete the Administrative Basic Training and Administrative Advanced Training before or within three (3) months of Commissioning. Upon Commissioning, the Customer must ensure that its Users complete the Operator Training for each Vehicle.
- (c) Once the Operator Training, Administrative Basic Training and Administrative Advanced Training are completed, the Customer will be responsible for the following items:
- (i) maintaining the Customer Data;
  - (ii) managing the Customer's site requirements under the Agreement;
  - (iii) User signup for new operators and ID creation;
  - (iv) Prestart management;
  - (v) master data management;
  - (vi) ensuring that Komatsu is notified of any support issue that the Customer is unable to rectify;
  - (vii) maintaining all Vehicles, including ensuring that all maintenance is completed in accordance with the applicable Operation and Maintenance Manual;
  - (viii) making timeslots available to Komatsu if System updates are required;
  - (ix) scheduling available reports generated by the System; and
  - (x) managing access requests to Komatsu for GoLine.

## 2.6 Komatsu Obligations

- (a) Komatsu must at its cost and expense:
- (i) complete the site readiness survey to check site readiness for connectivity, equipment compatibility, equipment functionality, controller health, check and complete manual downloads on eligible Komatsu equipment;
  - (ii) complete Commissioning of the System;
  - (iii) provide the Warranty support;
  - (iv) provide Operator Training;
  - (v) provide the Administrative Basic Training to the Customer and/or User(s) (at the Customer's expense);

- (vi) provide the Administrative Advanced Training to the Customer and/or User(s) (at the Customer's expense); and
- (vii) provide the Cloud Services.

## 2.7

### Goods and Services Limitation

- (a) The Customer acknowledges and agrees that Komatsu's obligations under this Agreement do not extend to any problems, defects, faults or errors:
- (i) caused by misconfiguration that existed prior to the Commencement Date, or which arose independently of the Agreement;
  - (ii) caused by hardware or software that is not fit for the intended task and/or was not sourced or installed by Komatsu;
  - (iii) caused by a virus, malware or any other form of harmful code which was introduced by the Customer;
  - (iv) caused by software product conflicts on any device or website that was not approved, sourced or installed by Komatsu;
  - (v) reasonably known to and understood by the Customer that the Customer has failed to bring to the attention of Komatsu; and
  - (vi) caused when Komatsu has made reasonable written recommendations (with reasoning and justification) to the Customer and/or Users for changes to the System or configurations where such recommendations were not complied with by the Customer and/or Users and compliance with the recommendations would have prevented the problems, defects, faults or errors from occurring.

## 2.8

### Support and Maintenance Services

Komatsu will use reasonable endeavours to provide the Customer with the Support and Maintenance Services detailed in **Error! Reference source not found..** Komatsu may amend the Support and Maintenance Services from time to time in its sole discretion, provided that no such modification will materially degrade the level of service or other benefits provided to the Customer.

## 3.

### CLOUD SERVICES

### 3.1

#### Upgrades and Downtime

- (a) Komatsu reserves the right to schedule downtime of the Cloud Services to allow for routine maintenance and/or upgrades of the Cloud Services (**Scheduled Upgrades**). Komatsu shall use commercially reasonable efforts to provide prior notice to the Customer at least three (3) business days before any Scheduled Upgrades.
- (b) Komatsu may amend the Cloud Services from time to time in its sole discretion, provided that no such modification will materially degrade the level of service or other benefits provided to the Customer.
- (c) Komatsu reserves the right to perform emergency maintenance services at any time and without prior notice to the Customer, provided that Komatsu uses commercially reasonable endeavours to provide prior notice to the Customer.

### 3.2

#### Renewal

- (a) Komatsu will use reasonable efforts to provide the Customer with a notice two (2) calendar months prior to expiration of this Agreement. The notice may set out a different Price which will apply to the renewal term.
- (b) The Customer may renew the Agreement at its discretion.



### 3.3 Third Party Terms

The Customer agrees to comply with the then current version of any third party terms applicable to the Cloud Services as notified by Komatsu from time to time.

## 4. PRICE AND PAYMENT

### 4.1 Price

- (a) The Price of the Hardware, Subscriptions Cloud Services and training will be specified separately in the quotation.
- (b) The Price of the Hardware includes Commissioning.
- (c) The Price of Software will include the standard Subscription cost and any optional Subscriptions will specified separately in the quotation.
- (d) The Price of the Cloud Services includes the Support and Maintenance Services.
- (e) The Price excludes any other software or cloud services which are available, or may become available.
- (f) 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).

### 4.2 Payment

- (a) Komatsu will issue an invoice for the Prices at the times set out in the quotation.
- (b) The Customer must pay the Price in accordance with the payment terms specified in the quotation but in any event payment of the Price for Software and/or Subscription(s) is due prior to activation of the Software and/or Subscription(s). Time is of the essence for payment.
- (c) Payment for Hardware is due prior to Delivery. Payment for all other components of the System and Services is due within 30 days from receipt of an invoice from Komatsu.
- (d) The Customer indemnifies Komatsu for any losses, costs or fees incurred or arising in connection with recovery of any overdue payment.

### 4.3 Set Off and Cancellation

- (a) Except as specifically set out in this Agreement, this Agreement, including all payment obligations, is non-cancelable and all payments made are non-refundable.
- (b) All amounts payable to Komatsu under this Agreement must be paid by the Customer to Komatsu in full without any set off deduction or withholding for any reason (other than any deduction or withholding of tax as may be required by applicable laws).

### 4.4 Hardware remains property of Komatsu until payment

- (a) The Hardware remains Komatsu's property until all monies owed by the Customer to Komatsu in respect of the Hardware are received in clear funds by Komatsu, and whilst the Hardware remains Komatsu's property the Customer must:
  - (i) keep the Hardware in its possession and control, hold the Hardware as agent for Komatsu, and not part with the possession of the Hardware or, if the possession has been parted with, recover possession of the Hardware;
  - (ii) keep the Hardware in good repair and condition, excluding fair wear and tear;
  - (iii) keep the Hardware stored separately and marked so that the Hardware is clearly and easily identifiable as Komatsu's property and if requested, promptly inform Komatsu of the location of the Hardware; and

- (iv) not sell, assign or lease the Hardware or any interest in it, or permit any charge, pledge, lien or other encumbrance to be created in relation to it.

## 4.5 Default

- (a) If the Customer fails to pay to Komatsu all monies due under this Agreement by the due date:
  - (i) 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 Hardware or any part of it; and
  - (ii) 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.
- (b) The rights and remedies provided in this Agreement do not affect any other rights or remedies available to Komatsu.

## 5. TERM

### 5.1 Commencement

This Agreement will commence on the Commencement Date and continue until the date set out in the quotation.

### 5.2 Transfer of equipment

- (a) In the event that the Customer sells or otherwise transfers ownership or possession of a Vehicle:
  - (i) the Customer agrees to provide Komatsu with thirty (30) days' advance written notice; and
  - (ii) this Agreement will automatically terminate in respect of that Vehicle on the date that the Vehicle is sold or otherwise transferred.
- (b) If this Agreement terminates in respect of a Vehicle under this clause **Error! Reference source not found.**:
  - (i) if there are no other Vehicles – this Agreement terminates entirely; and
  - (ii) the Customer will not be entitled to a refund for any amounts paid in advance under this Agreement.

### 5.3 Third party components

The Customer acknowledges that some components of the System may be provided by a third party. If any third party supplied components of the System are unavailable, discontinued or otherwise withdrawn, Komatsu may terminate or suspend this Agreement by giving the Customer thirty (30) days' written notice of termination.

### 5.4 Termination by Komatsu

Komatsu may immediately terminate this Agreement by notice to the Customer in writing if:

- (a) the Customer fails to perform any of its obligations under this Agreement;
- (b) the Customer suffers an Insolvency Event;
- (c) the Customer ceases, or indicates that it is about to cease, to carry on business;
- (d) anything happens that reasonably indicates that there is a significant risk that the Customer is, or will become, unable to pay its debts as they fall due; or
- (e) the Customer has conducted itself in a manner which, in the reasonable opinion of Komatsu, will detrimentally affect Komatsu.

## 5.5 Effect of Termination

- (a) Upon termination of this Agreement for any reason in accordance with clauses 5.3 or 5.4:
- (i) all rights granted to the Customer under this Agreement will terminate immediately and the Customer will cease all use of the Software and Cloud Services;
  - (ii) Komatsu may immediately terminate or suspend the Customer's access to the Software and Cloud Services;
  - (iii) the Customer must provide Komatsu or its designee access to the Customer's site and/or Vehicles to allow for removal pursuant to any termination in accordance with this clause. The Customer will indemnify and hold Komatsu harmless from any liability for such termination or discontinuation of the Software and Cloud Services; and
  - (iv) the Customer will pay any fees or expenses payable to Komatsu in respect of the System supplied and Services rendered up to the date of termination within ten (10) Business Days of the date of termination of this Agreement.
- (b) Where this Agreement terminates under clause 5.2, this clause 5.5 applies only in respect of that Vehicle.

## 5.6 No claim for compensation

If this Agreement is terminated by Komatsu under clauses **Error! Reference source not found.** or 5.4, the Customer will not be entitled to claim any amounts by way of damages or any other payments as a consequence of termination.

## 5.7 Survival of Customer's Obligations on Termination

Without prejudice to any of Komatsu's rights under this Agreement, clause 4, 6.3, 6.4, 8 and 10 will survive the termination of this Agreement.

# 6. WARRANTIES AND EXCLUSIONS

## 6.1 Warranties

Unless Komatsu states otherwise, the System is warranted in accordance with the applicable Warranty relevant at the date of supply, provided to the Customer by Komatsu.

## 6.2 Exclusion of Implied Warranties

- (a) All other conditions and warranties of any type in relation to the System are excluded to the maximum extent allowed by the law.
- (b) Nothing in this Agreement 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 the Territory (as applicable) 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:
- (i) in the case of goods:
    - a. the replacement of 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.

## 6.3 Exclusion of Consequential Loss

Notwithstanding anything to the contrary in this Agreement or elsewhere and to the full extent permitted by law, Komatsu and its Related Bodies Corporate are not liable to the Customer and/or Users under contract, at law or otherwise for any Consequential Loss, liquidated damages, delay penalties or any performance guarantees.

## 6.4 Indemnity

- (a) The Customer will indemnify and keep indemnified Komatsu and its Related Bodies Corporate, and their officers, agents, employees, subcontractors, vendors and other contractors, (**Indemnitees**) against all losses, costs, liabilities and expenses (**Losses**) arising directly or indirectly out of:
- (i) the Customer's breach of this Agreement;
  - (ii) injury to or death of any person (including Indemnitees);
  - (iii) damage to or destruction of any property (including that of Indemnitees);
  - (iv) any modification, alteration or use of the System that is not in accordance with (without limitation) any applicable law, the System manufacturer's recommendations or Komatsu's instructions or the manuals relating to the System; and
  - (v) an infringement or allege infringement of Intellectual Property Rights where that claim arose by reason of an act or omission of Komatsu or its licensees which is in accordance with Komatsu's rights and obligations under this Agreement.
- (b) The Supplier's liability under this clause 6.4 will be reduced to the extent the liability was caused or contributed to by the wilful misconduct, or an unlawful or negligent act or omission, of Komatsu.

## 6.5 Limitation of Liability

Notwithstanding anything to the contrary in this Agreement or elsewhere and to the full extent permitted by law, Komatsu's total cumulative liability to the Customer for all liabilities, damages, losses, costs and expenses suffered or incurred under or connection with this Agreement by the Customer, for all Claims in the aggregate, is limited to the amount paid by the Customer to Komatsu for the relevant component of the System and/or Services which are the subject of the Claim.

# 7. DELIVERY, RISK AND TITLE

## 7.1 Delivery

- (a) Komatsu will use reasonable efforts to deliver and install the System by the delivery date specified in the quotation.
- (b) 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 installation and/or delivery of the System or Services.

## 7.2 Risk and Title

- (a) Risk in the Hardware passes to the Customer upon Delivery.
- (b) Where title to the Hardware does not pass to the Customer on Delivery, the Customer must fully insure the Hardware and hold the benefit of any claim on trust for Komatsu, from the time risk in the Hardware passes to the Customer

until title in the Hardware passes from Komatsu to the Customer.

- (c) Title in the Hardware will pass to the Customer upon Komatsu receiving full payment for the Hardware.

### 7.3 Insurance

The Customer must, and warrants that it will maintain the following insurance policies:

- (a) public and products liability for an amount of not less than \$20 million per occurrence;
- (b) workers compensation insurance as required by Law;
- (c) plant and equipment insurance for physical loss of or damage to Komatsu's goods or equipment;
- (d) such other insurances as Komatsu may require from time to time.

### 7.4 Damage after Delivery

Komatsu is not liable for defects or damage to the Hardware discovered after Delivery unless:

- (a) the Customer gives written notice to Komatsu and, if applicable, Komatsu's carrier within 4 days after the date of Delivery or within 4 days of Commissioning;
- (b) the Customer gives Komatsu reasonable opportunity to inspect the System in the same condition and place in which it was Delivered; and
- (c) the defects or damage are reasonably shown to have existed as at the date of Delivery.

## 8. INTELLECTUAL PROPERTY, CONFIDENTIALITY, PRIVACY AND DATA

### 8.1 Intellectual Property Rights

- (a) Intellectual Property Rights in the System and any documentation supplied by Komatsu in connection with the System (**Licensed IP**) belongs to Komatsu and its licensors. Subject to this Agreement, Komatsu grants the Customer a non-exclusive licence to use the Licensed IP to the extent necessary for the purpose of using, operating and maintaining the System in accordance with the Operation and Maintenance Manual and User Guides for the term of this Agreement. 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.
- (b) The licence under clause 8.1 does not extend to:
  - (i) any Intellectual Property Rights that are governed by a separate agreement between the parties (including KOMTRAX and KPAR); and
  - (ii) any Intellectual Property Rights in optional features or functionality that are installed or available for installation on or in the System, but which are not expressly included in the Agreement at the date of sale or licensing to the Customer and have not been subsequently purchased by the Customer.
- (c) The Customer must not modify, reverse engineer, decompile, disassemble or otherwise create or attempt to create the source code of the Software and/or Cloud Services, except to the extent permitted by law.
- (d) 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 8.1 or by law.
- (e) The Customer must not remove, alter or add to any copyright notice or similar marking on the System or documentation supplied by Komatsu in connection with the System.

### 8.2

#### Confidentiality Obligations

- (a) The Customer agrees not to disclose any Confidential Information, except as permitted by this Agreement or with the prior consent of Komatsu.
- (b) The Customer may disclose Confidential Information:
  - (i) where disclosure is necessary or appropriate to employees or consultants in their course of work, provided that the Customer first advises those employees and consultants of the confidential and proprietary nature of the System and obtains agreement from the employees and consultants to abide by the obligations of the Customer in relation to the Confidential Information under this Agreement; and
  - (ii) to the extent required by law, provided the Customer takes reasonable steps to notify Komatsu and give Komatsu an opportunity to defend the requirement for the disclosure or to minimise the effect of the disclosure.
- (c) Information will not be Confidential Information to the extent that such information is:
  - (i) already known by the Customer free of restriction at the time it is obtained;
  - (ii) subsequently learned from an independent third party free of any restriction; or
  - (iii) available publicly.
- (d) The Customer acknowledges that all service marks, trademarks and trade names used in connection with the System and/or Services are the service marks, trademarks and/or trade names of their respective owners, and that the Customer does not have any license or other rights or licenses whatsoever with respect to such service marks, trademarks or trade names.

### 8.3

#### Privacy

- (a) The Customer must ensure that any collection, use and transfer of any Personal Information in the course of using or receiving the System and Services under this Agreement complies with all applicable privacy laws, including the Privacy Act 1988 (Cth).
- (b) Where necessary, the Customer must obtain all necessary consents in relation to the collection, use and transfer of Personal Information required under this clause from the relevant individual.

### 8.4

#### Data

- (a) As between the parties:
  - (i) the Customer owns all right and title to Customer Data; and
  - (ii) Komatsu owns all right and title to System Data.
- (b) If Komatsu collects or generates any Customer Data, the Customer grants to Komatsu (and will procure that the relevant OEM grants to Komatsu) a perpetual, non-exclusive, royalty-free right to use, and to permit its third party suppliers to use, the Customer Data:
  - (i) for the purpose of performing this Agreement; and
  - (ii) in a deidentified and aggregated form for the purpose of improving the System (or any component of it).
- (c) The Customer will immediately notify Komatsu if it is unable to grant the rights under clause 8.4(b)(i).
- (d) Nothing in this Agreement gives the Customer any rights in respect of System Data.

## 9. NON-KOMATSU EQUIPMENT

- (a) For Commissioning on OEM equipment, the Customer or a Customer site representative must approach the OEM and request access to ICT systems data from the target equipment or fleet in line with the requirements and terms and conditions of the OEM.
- (b) The Customer is responsible for handling the OEM's process for requesting access to ICT system broadcast data (including any physical interference with the System required for Commissioning).
- (c) The Customer must ensure that the OEM confirms ICT systems broadcast capability for each Vehicle. Failure to complete this step could mean that unexpected, incomplete, or no ICT systems broadcast data is available for the System until the OEM completes controller upgrade or interface harness installation. Komatsu accepts no responsibility for unexpected, incomplete, or defective ICT systems broadcast data as a result of OEM equipment being used.
- (d) Access to ICT systems data is required for the Commissioning to be viable, for both Komatsu and OEM equipment.

## 10. DISCLAIMERS

### 10.1 General

- (a) The System is sold and/or licensed on an "AS-IS" basis and Komatsu assumes no responsibility for the timeliness, deletion, accuracy or failure to store any Customer's information or any equipment related information.
- (b) Komatsu will not be responsible for any data loss, corruption or exposure that may occur, or damages arising there from, in the course of the Customer's access or use of the System, or otherwise in connection with the System.
- (c) The Software may be interrupted or suspended for extended periods, or terminated at any time, and Komatsu will have no liability for such interruptions, suspensions or terminations.
- (d) The Customer will only use the System to process Customer Data with respect to equipment that the Customer owns, leases or operates, or Customer Data collected from equipment rented by the Customer to third parties. In the event such rented equipment is used by third parties, whether through rental, lease or otherwise, the Customer agrees to provide notice to such third parties that the equipment will have the System installed. The Customer must notify such third parties that data and information may be collected from the equipment, and any such data or information collected may be used by the Customer and Komatsu in accordance with this Agreement.
- (e) The Customer is solely responsible for providing any security or privacy measures for the Customer's computer networks and any data stored on those networks or accessed through the System. To the extent permitted by law, Komatsu will not be liable to the Customer and/or any User for any loss, damage, costs or expenses suffered or incurred by the Customer or User as a result of the Customer's or User's failure to provide that security or privacy measures.

### 10.2 Modifications

- (a) Komatsu may modify or discontinue, temporarily or permanently, the System (or any part thereof) at any time at its sole and exclusive discretion.
- (b) Unless explicitly stated otherwise, any new features that augment, enhance or otherwise alter the System provided will be subject to this Agreement.
- (c) If any modification is unacceptable to the Customer, the Customer may terminate this Agreement and that is the Customer sole remedy.

- (d) The Customer's continued use of the System following the modification will constitute binding acceptance of the modification. Komatsu will not be liable to the Customer, User or to any third party for any modification, suspension or discontinuance of the System.

## 11. GENERAL

### 11.1 Relationship of the Parties

Nothing contained in this Agreement will be construed as creating a joint venture, partnership, or employment relationship between the parties hereto, nor will either party have the right, power, or authority to assume, create, or incur any expense or obligation on behalf of the other party, except as expressly provided herein.

### 11.2 Entire Agreement

This Agreement constitutes the entire Agreement between the parties regarding the matters set out in it and supersedes any prior representations, understandings or arrangements made between the parties, whether orally or in writing. If the Customer has entered into more than one version of this Agreement for the System and/or Services, the Agreement with the latest revision date will supersede any prior versions.

### 11.3 Waiver

A right created by this Agreement cannot be waived except in writing signed by the party entitled to that right. Delay by a party in exercising a right does not constitute a waiver of that right, nor will a waiver (either wholly or in part) by a party of a right operate as a subsequent waiver of the same right or of any other right of that party.

### 11.4 Severability

If any clause or part of any clause is in any way unenforceable, invalid or illegal, it is to be read down so as to be enforceable, valid and legal. If this is not possible, the clause (or where possible, the offending part) is to be severed from this Agreement without affecting the enforceability, validity or legality of the remaining clauses (or parts of those clauses) which will continue in full force and effect.

### 11.5 Notices

Any notice or other communication to or by a party to this Agreement must be in writing, legible and in English addressed as specified in the quotation.

### 11.6 Assignment

- (a) The Customer may not assign its rights under this Agreement without Komatsu's prior written consent.
- (b) Any attempted assignment without Komatsu's consent will be void and without effect and Komatsu may immediately terminate this Agreement and the license rights granted to the Customer without any notice.
- (c) The Customer may not transfer the System (or any component of it) to any different equipment without Komatsu's prior written consent.
- (d) Komatsu reserves the right to assign this Agreement to a Related Bodies Corporate on written notice to the Customer.
- (e) This Agreement and the rights and obligations of each party under it will be binding on the party's respective successors and assigns.

### 11.7 Further Assurances

Each party must promptly execute all documents and do all things that the other party from time to time reasonably requires of it to effect, perfect or complete the provisions of this Agreement and any transaction contemplated by it.

### 11.8 Rights Cumulative

Except as expressly provided to the contrary in this Agreement, the rights, powers, discretions, authorities and remedies provided in this



Agreement are cumulative with and do not exclude the rights, powers, discretions, authorities or remedies provided by law independently of this Agreement.

### 11.9 Force Majeure

Komatsu will not be liable for failure to perform under this Agreement as a result of a Force Majeure Event.

### 11.10 Governing Law

This Agreement will be governed by the laws of New South Wales and New Zealand. The parties submit to the non-exclusive jurisdiction of the New South Wales and New Zealand courts in respect of all matters relating to the Agreement.

## ANNEXURE A – SUPPORT AND MAINTENANCE TERMS

### 1. SUMMARY

The Support and Maintenance Services will follow a hierarchy system where the ticket will be resolved at the lowest possible level and escalated as required. The support for the System will be provided by Komatsu's support consultants (**Support Consultant**), Komatsu's technology advisors (**Technology Advisor**), and third party vendors (**Third Party Vendor**). Komatsu will respond to, and achieve a resolution of, each Support Request in accordance with the "Description of Service Level Request" and required "Action and Resolution" detailed in clause **Error! Reference source not found.** below.

### 2. CONTACT DETAILS

Australian Customer Support Centre: 1300 445 978 and [scsupport@komatsu.com.au](mailto:scsupport@komatsu.com.au)

New Zealand Customer Support Centre: 0800 00 4127 and [info@komatsu.com.au](mailto:info@komatsu.com.au)

### 3. DEFINITIONS

These definitions will apply in addition to the definitions in the Agreement. To the extent there is any inconsistency between the definitions in this Annexure and the other clauses of the Agreement, this **Error! Reference source not found.** will prevail.

**"Business Day"** means Monday through Friday, excluding public holidays in the Territory.

**"Business Hours"** means 8 a.m. – 5 p.m. on Business Days in each of the following time zones: AEST, AEDT, NZST, NZDT, AWST, AWDT.

**"Fault"** means a material failure of the System to conform to the published Komatsu specifications.

**"Feature Request"** means a request by the Customer to incorporate a new feature or enhance an existing feature of the product that is currently not available as part of the existing product.

**"General Usage"** means Customer use of the System in accordance with the applicable Operation and Maintenance Manual and/or User Guides.

**"Resolution"** or **"Resolved"** means, at Komatsu's discretion, a fix or workaround has been provided to the Customer such that the output of the system materially conforms to the published Komatsu specifications.

**"Support Centre"** means the Komatsu support centre responsible for receiving Support Requests.

**"Support Request"** means a request for assistance from a Customer, such as any answered phone call, or answered email.

**"Support Ticket"** means a record in Komatsu's support management system identifying the support request.

**"SQL Server"** means a database server.

## 4. SUPPORT LEVELS AND COVERAGE

Service Level	Description of Service Level Request	Action and Resolution
Initial	Support Requests can be raised with the Support Centre via phone or email.  <b>Customer Assistance Required:</b>  Customer to make direct call or email summarising the System Fault.	<b>Action:</b>  Initial Customer phone calls answered within 10 minutes with a Support Ticket raised. Incoming emails will automatically generate a Support Ticket within 5 minutes.  <b>Resolution:</b> Once a Support Ticket is generated the Support Request will be considered a SL 1.
SL 1	Once an Initial Support Request has been submitted by the Customer, a Support Consultant will assess and categorise the Fault. The Support Request will fall into one of the following primary and secondary categories: <ul style="list-style-type: none"><li>General Usage</li><li>Feature Request</li><li>Fault<ul style="list-style-type: none"><li>Major Component Fault</li><li>Harness Fault</li><li>Physical damage</li><li>Communication Fault</li><li>System Fault</li></ul></li></ul> <b>Customer Assistance Required:</b>  The Customer will: <ul style="list-style-type: none"><li>a) ensure that the System is available for maintenance during the Business Hours;</li><li>b) provide Komatsu with any information not otherwise available to Komatsu, that may be necessary for the Resolution of the Support Request;</li><li>c) provide access to internal computer systems to allow the System to be upgraded, repaired, installed or other works required to be carried out by Komatsu;</li><li>d) provide SQL Server on site for hosting reporting and database software; and</li><li>e) provide WLAN network.</li></ul>	<b>Action:</b>  SL 1 Customer phone calls and emails answered within 180 minutes with a Support Ticket raised.  SL 1 Support Requests will be Resolved within 1 Business Day. Otherwise the Support Request will be escalated to SL 2.  <b>Resolution:</b> The Support Consultant will attempt to reach a Resolution on the Support Request. If the Support Consultant is unable to reach a Resolution at this stage, the Support Request will be escalated to SL 2 which will be provided by the Technology Advisors.

Service Level	Description of Service Level Request	Action and Resolution
SL 2	<p>The Technology Advisors will assess the Support Request. All General Usage inquiries should capable of Resolution.</p> <p><b>Customer Assistance Required:</b></p> <p>The Customer will:</p> <ol style="list-style-type: none"> <li>ensure that the System is available for maintenance during the agreed access times;</li> <li>provide Komatsu with any information not otherwise available to Komatsu, that may be necessary for the Resolution of the Support Request;</li> <li>provide access to internal computer systems to allow the System to be upgraded, repaired, installed or other works required to be carried out by Komatsu;</li> <li>provide SQL Server on site for hosting reporting and database software; and</li> <li>provide WLAN network.</li> </ol>	<p><b>Action:</b></p> <p>SL 2 action time will be within 24 hours of escalation from SL 1.</p> <p>SL 2 Support Requests will reach Resolution within 3 Business Days. Otherwise the Support Request will be escalated to SL 3.</p> <p><b>Resolution:</b></p> <ol style="list-style-type: none"> <li>SL 2 Support Request will be identified as a Fault or communication Fault and will be remedied at SL 2. Communications will be made with the Customer to troubleshoot the System to identify the secondary category that applies to the SL 2 Support Request;</li> <li>Bug reports and feature Support Requests related to Software or Cloud Services will be escalated to SL 3 to the relevant Third Party Vendor;</li> <li>Support Requests related to physical damage of the Hardware (either by accident or misuse) will be escalated to SL 3 to the relevant Third Party Vendor;</li> <li>Major component faults, harness faults, and physical damage will be assessed at SL 2 and will be escalated to SL 3 for assessment by Third Party Vendors for Warranty review;</li> <li>If the Fault relates to the System and the machine telemetry system, and the System appears to be functioning correctly then the</li> </ol>

Service Level	Description of Service Level Request	Action and Resolution
		Support Request will be referred to the relevant Third Party Vendor for telemetry support.
SL 3	<p>SL 3 Support Request will be provided by the relevant Third Party Vendor. The Technology Advisor will maintain communication with the Customer, while communicating with the Third Party Vendor.</p> <p><b>Customer Assistance Required:</b></p> <p>The Customer will:</p> <ol style="list-style-type: none"> <li>ensure that the System is available for maintenance during the agreed access times;</li> <li>provide Komatsu with any information not otherwise available to Komatsu, that may be necessary for the Resolution of the Support Request;</li> <li>provide access to internal computer systems to allow the System to be upgraded, repaired, installed or other works required to be carried out by Komatsu;</li> <li>provide SQL Server on site for hosting reporting and database software; and</li> <li>provide WLAN network.</li> </ol>	<p><b>Action:</b></p> <p>SL 3 action time will be within 1 Business Day of escalation from SL 2.</p> <p>SL 3 Support Requests will have a target resolution date of 10 Business Days. In the event that the SL 3 Support Request extends beyond 10 Business Days due to Third Party Vendor delays then Komatsu will update the Customer on the Support Request status weekly, or as any major change to the Support Request arises.</p> <p><b>Resolution:</b> A majority of Support Requests will be Resolved at SL 3.</p> <p>If the outcome of SL 3 is that a component has failed or requires replacement then the Third Party Vendor and Technology Advisor will advise if the Warranty process is applicable for the Fault or if the Customer should be liable for the Fault.</p>

- All action times stated in this **Error! Reference source not found.** are within Business Hours and during Business Days only. Any Support Requests made outside of Business Hours or not on a Business Day will not be actioned until the start of Business Hours on the following Business Day.

## ANNEXURE B – BASIC AND ADVANCED ADMINISTRATIVE TRAINING

### 1. Basic Administrative Training

- The Customer must ensure that all Users complete the mandatory Basic Administrative Training within three (3) months of Commissioning. After completion of the Basic Administrative Training the Customer and/or User(s) will have a basic understanding of the System and will be able to interpret and navigate the data displayed by the System.
- Komatsu must provide the User(s) with the Basic Administrative Training which includes training on the following areas:
  - training on the infrastructure needs that exist on the Customer's site(s) – this includes cellular coverage, GNSS, Wi-Fi mesh and any Wireless Access Points (WAPs);

- (ii) the definition of the Payload Cycle (Dump, Haul, Dump);
- (iii) the relevant information exchanged when onsite equipment pair with each other for operational purposes;
- (iv) introduction to iControl;
- (v) introduction to Komatsu iSite Dashboards;
- (vi) introduction to iReport; and
- (vii) introduction to PreStart and notifications.

## 2. Advanced Administrative Training

- (1) The Customer must ensure that all Users complete the mandatory Advanced Administrative Training within three (3) months of Commissioning in order to manage and maintain master data information specific to the site. The Basic Administrative Training must be completed prior to the Advanced Administrative Training.
- (2) Komatsu may provide the User(s) with the Advanced Administrative Training which includes training on the following areas:
  - (i) refresher of the Basic Administration Training;
  - (ii) introduction on how Customer/User(s) can further edit data in the load data editor to increase the value of the data from the Customer/User(s) operations;
  - (iii) introduction as to how Customer/User(s) can add site maps and current aerial images from a drone to the map's administrator page;
  - (iv) introduction to the master data editor; and
  - (v) refresher of the iReport function.

## 3. Operator Training

- (1) The Customer must provide access to all operational staff that will use the System as part of their daily activities. After completion of the Operator Training, the User(s) will be able to navigate the in cab XD8 screen for operational purposes, including, select working modes, selecting idle modes, interpret various fleet cards and fleet apps that are used within the System.
- (2) Komatsu must provide the User(s) with the Operator Training which includes training on the following areas:
  - (i) the infrastructure needs that exist on the Customer/User(s) site(s) – this includes cellular coverage, GNSS, Wi-Fi mesh and any Wireless Access Points (WAPs);
  - (ii) the definition of the Payload Cycle (Dump, Haul, Dump);
  - (iii) relevant information exchanged when onsite equipment pair with each other for operational purposes;
  - (iv) how to navigate and use the XD8 screen in cab;
  - (v) how to use and interpret preload fleet cards from the XD8 screen;
  - (vi) how to navigate and use relevant preloaded Fleet Apps from the XD8 screen; and

how to enter prestart data into the prestart app loaded onto the X