

TERMS AND CONDITIONS OF HIRE

I. GENERAL

1.1. All rentals of machinery, plant and equipment to the Customer from KMH are made under, in accordance with, and incorporating these General Terms and Conditions.

2. DEFINITIONS AND INTERPRETATION

2.1. In these General Terms and Conditions, unless otherwise required:

'Business Day' means a day that is not a Saturday, Sunday or public holiday in Karratha, Western Australia.

'Certificate of Currency' means a certificate issued by the insurer under a policy of insurance obtained by the party as specified in Clause 17.1.

'Collection' means collection of the Equipment, whether by the Customer or any agent of the Customer (including without limitation KMH under Clause 4.6), from KMH's Premises or from the premises of any manufacturer or other person or company where the Equipment are for the time being located.

'Customer' refers to the person, firm, organisation, partnership, corporation, trust or other entity hiring Equipment from and the reference to 'Customer' includes any of the Customer's employees, agents and contractors.

'Damage Waiver' means an agreement by KMH to limit the Hirer's liability in certain circumstances and is not insurance.

'Delivery' means Collection or the delivery of the Equipment to a site specified by the Customer, as specified in the Quotation.

'Delivery Address' means the delivery address specified in the Quotation.

'Dispute' means a dispute between the parties arising out of or in connection with this Agreement (including any dispute as to the validity, breach or termination of the contract, or as to any claim in tort, in equity or pursuant to any statute).

'Dispute Notice' means a notice issued by one party to the other party under Clause 27.3 notifying the other party that there is a Dispute to be resolved.

'Environmental Laws' means any statute, regulations or other laws made or issued by a regulatory body or government regulating or otherwise relating to the environment including without limitation the use or protection of the environment.

'Event of Default' means an event of default within the meaning of Clause 19.1.

'Equipment' means any equipment including any associated or attached tools, accessories and parts available for hire, manuals, documentation, spare items, medical kits, fire extinguishers and Sub Hire Equipment (if any) hired to the Customer as detailed in the Agreement.

'General Terms and Conditions' means these terms and conditions.

'Hire' means the hire of the Equipment by the Customer.

'Hire Charge' means a charge for hire or transport of the Equipment, and any other amount which may be charged by KMH to the Customer under the Agreement calculated as set out in the Quotation or arising from or in relation to any cost or expense incurred by KMH under the Agreement.

'Hire Rate' means a rate at which Hire Charges are calculated pursuant to the Quotation.

'Invoice' means an invoice in respect of Hire Charges issued under Clause 9.

'KMH' means SSH Group Machinery Hire Pty Ltd (ABN 96 656 965 374) trading as Karratha Machinery Hire, and its successors and assigns.

'KMH's Premises' means KMH's premises at 1105 Lambden Road, Karratha, Western Australia 6714, or such other premises as KMH may notify in writing from time to time.

'Long Distance Location' is a location in excess of 50km from KMH's Premises'.

'Loss' means:

- (a) loss, including but not limited to direct loss, consequential loss, special loss, loss of anticipated profits and/or loss of business opportunity;
- (b) liability;
- (c) damage including but not limited to any damages or compensation and/or any damage to reputation; and/or
- (d) cost or expense including legal costs on a full indemnity basis;

'Nominated Specialist Mechanic/Technician' means ODH Mechanical Pty Ltd.

'Nomination' means a nomination to have a mediator appointed within the terms of Clause 27.

'Off Hire Date' means the date stated in the Quotation on which the Hire Period will end.

'Parties' means KMH and the Customer, and **'party'** means either of them.

'Purchase Order' means a purchase order issued by the Customer to KMH for the hire of any Equipment that is consistent with a Quotation.

'PPSA' means the Personal Property Securities Act 2009 (Cth) (as amended) and any other legislation and regulations in respect of it.

'Quotation' means a quotation, estimate or pricing provided by KMH to the Customer.

'Related Body Corporate' has the same meaning as in the Corporations Act 2001.

'Security Agreement', 'Commingled Goods', 'Financing Statement', 'Financing Change Statement', 'Collateral', 'Notice of Objection', 'Personal Property', 'After Acquired Personal Property', 'Secured Party', 'Purchase Money Security Interest' or 'PMSI', 'Register', 'Registration' and 'Security Interest' have the meanings given to them in the PPSA.

'Sub Hire Equipment' means any Equipment not owned by KMH but which may be under KMH's (as bailee) bailment from a third party (as bailor), or KMH has hired or leased such Equipment and/or accessories from a third party, and those Equipment being specified in 'Item 4 of this Agreement or as notified in writing between KMH and the Customer from time to time.

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'Term' means the hire term agreed in writing between the Parties.

'Termination Date' means the date of expiry or earlier termination of the Contract.

2.2. In these General Terms and Conditions:

- (a) the singular includes the plural and vice versa; and
- (b) terms cognate with defined terms have corresponding meanings;

3. AGREEMENT FOR HIRE

- 3.1. Any Quotation is indicative only, is not an offer to contract, and may be withdrawn or varied by KMH at any time prior to acceptance.
- 3.2. For any Purchase Order, the Customer offers to contract with KMH on the basis of the terms and conditions set out in the Purchase Order and the Quotation.
- 3.3. KMH accepts a Purchase Order made by the Customer in accordance with clause 3.2 of these Terms, on the earlier of:
 - (a) when KMH notifies the Customer that it accepts the Purchase Order;
 - (b) when the Equipment is delivered to the Customer in performance of the Purchase Order; and
 - (c) Three (3) days after KMH receives the Purchase Order and does not dispute it or any part of it.
- 3.4. Upon KMH accepting under clause 3.3, a binding contract comes into existence between KMH and the Customer incorporating the following documents (together the 'Agreement'):
 - (a) any Quotation,
 - (b) any invoice or other document of KMH whether attaching these Terms to the back of it or not;
 - (c) any notice of acceptance provided by KMH in accordance with clause 3.3(a);
 - (d) these Terms;
 - (e) the Purchase Order placed by the Customer including any attached or associated terms and conditions.
- 3.5. In the event of any inconsistency, ambiguity or discrepancy, the order of precedence set out above applies with the first listed document taking the highest priority and so on.
- 3.6. If, after applying the order of precedence, there remains an inconsistency, ambiguity or discrepancy, either party may give the other party written notice.
- 3.7. If notice is given under clause 3.6, KMH shall (acting reasonably) direct the Customer as to the proper interpretation and any liability for additional costs.

4. TERM

- 4.1. The Customer rents the Equipment from KMH for the Initial Rental Period specified in the Quotation, as extended under clause 4.2 or terminated earlier in accordance with this Agreement (the **Rental Period**).
- 4.2. Upon expiration of the Initial Rental Period specified in the Quotation, the Customer may continue renting the Equipment on the same terms and conditions but the Rental Period will be deemed to be on a month to month basis only,

and;

- (a) KMH may terminate the Agreement by giving the Customer three (3) days' prior written notice and on expiry, the Customer must immediately return the Equipment to KMH and pay the charges specified in the Quote up to the time of the return of the Equipment to KMH.

5. COLLECTION, DELIVERY AND RISK

- 5.1. The Customer will be responsible for the collection of the Equipment from KMH's premises unless otherwise agreed between the parties, and the Customer is responsible for all delivery costs unless stated otherwise agreed in writing between the parties.
- 5.2. Equipment supplied by KMH to the Customer will be at the Customer's risk upon
 - (a) delivery to the Customer; or
 - (b) delivery to the Customer's possession or control, custody,
 whichever is the sooner.
- 5.3. If KMH is to deliver the Equipment to the Customer's Delivery Address, the Customer will ensure that delivery is enabled by way of vehicular access via a properly constructed roadway to the Delivery Address. If for any reason whatsoever access to the Delivery Address does not comprise of a constructed roadway KMH will use reasonable endeavours to effect delivery of the Equipment as close to the Delivery Address as conditions prudently allow and KMH will not be liable to the Customer for any costs or expenses incurred or suffered by the Customer arising directly or indirectly from any inability to effect delivery to the Delivery Address, or for any damage or injury to the Equipment or to any other property or to any person arising directly or indirectly from the circumstances or manner of delivery, whether to the Delivery Address or otherwise.
- 5.4. The Equipment is deemed to be delivered and in good condition unless written notice of any shortages or defects is received by KMH within forty-eight (48) hours after Delivery.
- 5.5. Unless specifically stated otherwise in the Agreement or the Quotation, the Customer is responsible for all transport charges incurred by KMH in relation to the return of the Equipment to KMH's Premises or such other premises as may be agreed in writing between the parties.
- 5.6. The Customer may request to use KMH's resources for the delivery or return of the Equipment, in which case a minimum of seven (7) days advance notice in writing from the Customer is required, and, if the Customer elects for KMH to deliver the Equipment, Collection will be deemed to take place when KMH first moves the Equipment in order to effect Delivery.

If the Customer elects with the written approval of KMH to organise its own transport and demobilisation resources for the purposes of returning the Equipment to KMH at the expiry of the Term or upon earlier termination in accordance with Clause 21, then, notwithstanding the method of delivery, the Customer will return the Equipment at its own expense ;
- 5.7. The Customer is solely responsible for the operation of the Equipment, and the Customer covenants that:
 - (a) the Customer must not modify or alter the Equipment

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in any manner whatsoever, including without limitation by the removal of any item,

- (b) the Customer must not allow nor authorise any other person or entity to use, re-hire, or have possession of the Equipment at any time; and,
- (c) the Customer must, at its own cost and prior to the return of the Equipment, rectify all modifications and alterations of any nature whatsoever to the Equipment, and any damage caused to the Equipment.

5.8. The Customer warrants that it will comply with all applicable legislation and regulations, including without limitation any relevant equipment operating codes, and that it will comply with all applicable equipment operating standards and good equipment operating practice.

5.9. Without limiting in any manner whatsoever any other indemnity given by the Customer under the Contract, the Customer will indemnify KMH and hold it harmless in respect of all claims, costs, damages, expenses and losses which KMH may incur or suffer arising out of any failure or default in respect of the Customer's obligations under this Clause 5 including without limitation any remedial or rectification action in respect of improper or unlawful installation of the Equipment.

6. INSPECTION, LIMITATION OF LIABILITY AND WARRANTIES

6.1. Inspection of Equipment and Accessories

Prior to taking delivery of the Equipment the Customer acknowledges that it is satisfied as to the suitability and condition of the Equipment and will ensure that the Equipment is used only for the purpose for which it was designed by the manufacturer.

6.2. Implied terms and conditions regarding Equipment and Accessories excluded

To the fullest extent permitted by law, the Customer acknowledges that KMH has not given or made any warranty or representation whatsoever in favour of the Customer:

- (a) as to the condition or quality of the Equipment including, without limitation, latent and other defects and whether or not discoverable by KMH or the Customer; and
- (b) as to the suitability or fitness for ordinary or any special use or purpose of the Equipment.

6.3. Indemnity

To the fullest extent permitted by law, the Customer indemnifies and shall keep indemnified KMH and its agents and employees from and against:

- (a) all claims and demands in respect of any Loss or damage whatsoever and whenever caused to the Customer or its agents or employees or any other person or company whatsoever, whether by way of death of, or injury to, any person of any nature or kind, accident or damage to property, delay, financial loss or otherwise arising from the transport of the Equipment to and from the Delivery Address and the Customer's possession or use of the Equipment; and
- (b) any and all costs and disbursements incurred by KMH in pursuing any debt arising from a default in payment of an invoice by the Customer when due, including legal costs (on a solicitor and own client basis).

6.4. Exclusion of liability for Loss

In no event will KMH be liable (whether before or after the expiry or earlier termination of the Agreement) for any special, indirect, consequential or punitive Loss, costs, expenses or damages as a result of a breach by KMH of the Agreement including, but not limited to, loss of profits or revenue, the costs arising from the loss of use of the Equipment and the costs of any substitute Equipment which the Customer acquires. The provisions of this clause will apply regardless of the form of action, damage, claim, liability, cost, expense or Loss whether in contract, statute or tort (including, without limitation, negligence) or otherwise. To the extent that the provisions of this clause refer to the person other than KMH, KMH holds the benefit of this clause on trust for them.

7. OWNERSHIP

- 7.1. The Customer acknowledges that in all circumstances KMH retains legal and equitable title to the Equipment (or rights as bailee for the Sub Hire Equipment). The Customer's right to use the Equipment is as bailee only.
- 7.2. Except in the circumstances set out in clause 8, the Customer is not entitled to offer, sell, assign, sub-let, charge, mortgage, encumber, pledge or create any form of security interest over, or otherwise deal with the Equipment in any way.
- 7.3. In no circumstances will the Equipment be deemed to be a fixture.
- 7.4. The Customer acknowledges that KMH may hire or lease equipment from a third party if KMH cannot provide the Equipment to the Customer ('Third Party Owner') and if this occurs, title in the Equipment remains with the Third Party Owner.
- 7.5. The Customer must store the Equipment in such a manner that all Equipment is readily distinguishable from any other equipment held by the Customer and that the Equipment clearly shows that it is the property of KMH. The Customer must not alter, deface, obscure or remove any signage, documentation.

8. PPSA

- 8.1. Security Interest or Security Interests may be registered by KMH in relation to the Equipment (including any Commingled Equipment) (and the Proceeds arising in respect of any dealing in the Equipment in accordance with the PPSA and in any other manner KMH considers appropriate).
- 8.2. The Customer must do anything (such as obtaining consents and signing documents) which KMH requires for the purposes of:
 - (a) ensuring that KMH's security interest is enforceable, perfected and otherwise effective under the PPSA;
 - (b) enabling KMH to gain first priority (or any other priority agreed to by KMH in writing) for its security interest; and
 - (c) enabling KMH to exercise rights in connection with the security interest.
- 8.3. The rights of KMH under this document are in addition to and not in substitution for KMH's rights under other law (including the PPSA) and KMH may choose whether to exercise rights under this Agreement, and/or under such

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other law, as it sees fit. To avoid any doubt, KMH's security interest will attach to proceeds.

8.4. The following provisions of the PPS Law; section 123 (seizing collateral); section 126 (apparent possession); section 128 (secured party may dispose of collateral); section 129 (disposal by purchase); and section 134(1) (retention of collateral) may, if applicable, confer rights on KMH. The Customer agrees that in addition to those rights, KMH shall, if there is default by the Customer, have the right to seize, purchase, take possession or apparent possession, retain, deal with or dispose of any goods, not only under those sections but also, as additional and independent rights, under this Agreement and the Customer agrees that KMH may do so in any manner it sees fit including (in respect of dealing and disposal) by private or public sale, lease or licence.

8.5. The Customer waives:

- (a) its rights to receive any notice that is required by:
 - i. any provision of the PPSA including a notice of a verification statement in relation to registration events in respect of commercial property under section 157 of the PPSA. This waiver also extends to any verification statement in respect of security interests arising or provided for under security agreements prior to the date of this agreement.
 - ii. any other law before a secured party or Receiver exercises a right, power or remedy; and
- (b) any time period that must otherwise lapse under any law before a secured party or if the law which requires a period of notice or a lapse of time cannot be excluded, but the law provides that the period of notice or lapse of time may be agreed, that period or lapse is one day or the minimum period the law allows to be agreed (whichever is the longer).

8.6. However, nothing in this clause prohibits any Secured Party or any receiver from giving a notice under the PPSA or any other law.

8.7. KMH shall have a lien over any of the Renter's other goods under KMH's control for all Rental Charges claimed due and payable to KMH until payment is received in full, cleared funds without deduction or set-off.

8.8. The Customer accepts, acknowledges and agrees that:

- (a) KMH obtains a Security Interest in all Equipment supplied by KMH to the Customer, including any Commingled Equipment;
- (b) KMH can, without notice to the Customer, affect and maintain a Registration (in any manner that KMH considers appropriate) of its Security Interest on the Personal Property Securities Register ('PPSR') in relation to any security interest contemplated or constituted by the Agreement including but not limited to the Equipment, contract rights or intellectual property; and
- (c) Pursuant to section 275(6) of the PPSA, neither the Customer nor KMH will disclose information of the kind mentioned in section 275(1) of the PPSA unless required to do so pursuant to the PPSA or at law generally.

8.9. The Customer must:

- (a) not register a financing change statement in respect of a Security interest contemplated or constituted by the Agreement without KMH's prior written consent.
- (b) not register, or permit to be registered, a financing statement of a financing change statement in respect of a Security interest contemplated or constituted by this Agreement in favour of a third party without KMH's prior written consent.
- (c) not offer, sell assign, sub-hire, charge, mortgage, pledge or create any form of security interest or otherwise deal with the Equipment in any way.
- (d) give KMH not less than 14 days' written notice of any proposed change in their name and/or any other changes in their details (including but not limited to, changes in their address, facsimile number, email address, trading name or business activities).
- (e) indemnifies KMH against any costs KMH incurs in perfecting and maintaining its perfected Security Interest in the Equipment or such other Personal Property under the PPSA and any costs KMH may incur in the course of enforcing any of its rights under this Agreement, the PPSA or at law generally.
- (f) procure from any persons considered by KMH to be relevant to its security position, such agreement and waivers as KMH may at any time reasonably require.

8.10. If Chapter 4 of the PPSA would otherwise apply to the enforcement of a Security Interest arising in connection with this Agreement to which these terms and conditions apply, the Customer agrees that the following provisions of the PPSA will not apply to the enforcement of the Agreement:

- (a) Section 95 (notice of removal of accession), to the extent that it requires KMH to give a notice to the Customer;
- (b) Section 96 (when a person with an interest in the whole may retain an accession);
- (c) Subsection 121(4) (enforcement of liquid assets - notice to grantor);
- (d) Section 125 (obligation to dispose of or retain collateral);
- (e) Section 129 (disposal by Purchase);
- (f) Section 130 (notice of disposal of collateral), to the extent that it requires KMH to give a notice to the Customer;
- (g) Section 132(3)(d) (contents of statement of account after disposal);
- (h) Section 132(4) (statement of account if no disposal);
- (i) Section 135 (notice of retention of collateral);
- (j) Section 142 (redemption of collateral); and
- (k) Section 143 (reinstatement of security agreement).

8.11. Notices or documents required or permitted to be given to KMH for the purposes of the PPSA must be given in accordance with the PPSA.

9. HIRE CHARGES

9.1. The Customer will pay KMH the Hire Charge.

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- 9.2. The Quotation will specify the type of rate which will apply to the Customer and the method of calculation. Additional Hire Charges as set out in the Quotation will apply if the Equipment is used for more than twelve hours per day. The Customer will be charged for the hire of Equipment for the full Initial Rental Period. For the avoidance of doubt, the Customer must continue to pay the Hire Charges and other charges after the Initial Rental Period if the Customer has not returned the Equipment to KMH by the Initial Rental Period. This obligation survives termination of the Agreement.
- 9.3. Hire Charges will commence from the Hire Period and continue until the date the Equipment is returned to KMH in accordance with clause 5.
- 9.4. The Hire period is for the period set out in the Quotation notwithstanding the return of the Equipment prior to the end of the Hire Period.

Payment

- 9.5. The Customer must pay all Hire Charges and other fees, charges and costs that become due and payable under this Agreement within 30 days of the date of invoice.
- 9.6. If the Customer does not pay the invoice in full by the payment due date, KMH may charge, in addition to any other costs recoverable under this Agreement:
- interest, calculated monthly, on the total outstanding balance. The interest rate used to calculate the interest payable for the month is the 90-day Bank Bill Swap Rate published on the first business day of that month plus 9%; and
 - any costs and expenses, including without limitation, any commission payable to any commercial or mercantile agents and legal costs (on a full indemnity basis) incurred by KMH in recovering any unpaid amounts under this Agreement.
- 9.7. KMH are entitled to set off against any amount KMH owes the Customer with any amount owed to KMH by the Customer or any Related Bodies Corporate of the Customer. The Customer may not set-off any amounts owed to KMH whatsoever or assert any purported right to set-off or make any claim whatsoever based upon a set-off.

10. OTHER CHARGES

In addition to the Hire Charges, the Customer will pay:

- for any consumables, fuel or trade materials supplied by KMH, including replacement and repair of items including of glass and tyres;
- if KMH deliver, collect or install the Equipment, the cost of delivery, collection or installation, as detailed in the Hire Schedule. Such charge may include a waiting fee (charged at cost) in addition to the delivery and collection fee if the nominated time for delivery or collection of the Equipment is delayed by the Customer;
- if the Customer does not return the Equipment in clean and good working condition, charges for the cleaning and repair of the Equipment, including, however not limited, to the removal of weeds and seeds and cleaning the Equipment of soil and mud;
- a charge for pumping out waste tanks or refilling water or fuel tanks;

- any stamp duty or GST arising out of this Agreement;
- any other applicable levies, fines, penalties and any other government charges arising out of the Customer's use of the Equipment;
- charges for payment made by credit card;
- an environmental charge in relation to any item of Equipment, as detailed in the Hire Schedule;
- if the Customer requests operational guidance or training on the use of the Equipment and KMH's staff are available to provide this, the cost for the provision of these services at rates stipulated by KMH;
- charges in connection with the administration of the Customer's Credit Account, as detailed in the Hire Schedule, which may include printing and postage costs; and
- any reasonable charges incurred by KMH if we are unable to inspect or carry out maintenance on the Equipment during normal working hours.

11. STAND DOWN

KMH will not make any allowance for stand down arising for any reason whatsoever unless expressly stipulated in the Quotation.

12. USE OF EQUIPMENT

12.1. The Customer must:

- operate the Equipment safely, strictly in accordance with all laws, only for its intended use and in accordance with the manufacturer's instructions;
- ensure persons operating or erecting the Equipment are suitably trained on its safe and proper use, qualified to use the Equipment and where necessary, hold a current licence to perform high risk work;
- wear suitable clothing and protective equipment when operating the Equipment as required or recommended by KMH or the manufacturer;
- ensure that no persons operating the Equipment are under the influence of drugs or alcohol;
- conduct a job safety analysis prior to using the Equipment;
- ensure that any operator of the Equipment complete and adhere to the requisite job safety analysis as prescribed by law and the relevant site manager; and
- Properly log and maintain all daily and monthly pre—starts and vehicle logs, as prescribed by law
- ensure that no persons carry illegal, prohibited or dangerous substances in or on the Equipment; and
- display all safety signs and instructions (as required by law), and ensure that all instructions and signs are observed by operators of the Equipment.

12.2. Whenever the Customer is moving the Equipment, the Customer must ensure the safe loading, securing and transporting of all Equipment in accordance with all laws and manufacturer's guidelines. The Customer (or any contractor engaged by the Customer) must observe any safety directions advised by KMH and/or the manufacturer of the Equipment to ensure its safe loading and handling.

12.3. The Customer must not use the Equipment off-shore, in a

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mine, in an area where friable asbestos is present, or move the Equipment over water without KMH's prior written consent, which may be reasonably withheld.

- 12.4. The Customer warrants to comply with all Environmental Laws from time to time and immediately rectify any breach of an Environmental Law caused by the use of the Equipment.
- 12.5. The Customer must not use the Equipment where it may be exposed, or there is some possibility the Equipment may be exposed, to any corrosive or caustic substance, including however not limited to cyanide, salt water and acid.
- 12.6. The Customer must use best endeavours to ensure that the Equipment is not contaminated with any hazardous substances (including asbestos). Subject to clause 12.3, the Customer must advise KMH of any risks of hazardous substance contamination to the Equipment as soon as they become apparent. Where Equipment may have been subjected to contamination, the Customer must effectively decontaminate the Equipment, as well as provide KMH with written details of decontamination processes applied. If, in KMH's opinion acting reasonably, the Equipment is not capable of being decontaminated, the Customer will be charged for the replacement cost of the Equipment.
- 12.7. Any electrical Equipment provided by KMH will be tested and tagged before it is hired to the Customer, but during the Hire Period, the Customer is responsible for arranging the re-testing and re-tagging of any electrical Equipment in accordance with the manufacturer's instructions and the applicable Australian Standard(s) and Regulatory Authority requirements at the Customer's cost. KMH are able to arrange for such re-testing and re-tagging of the electrical Equipment at the Customer's cost. Except where KMH arrange for re-testing and re-tagging of the electrical Equipment, the Customer will be liable for any damage caused to the Equipment resulting from incorrect testing.

13. MAINTENANCE OF EQUIPMENT

- 13.1. The Customer will be fully and solely responsible for any Loss or damage to the Equipment in excess of normal wear and tear, and will notify KMH in writing and will pay for any Loss or damage to the Equipment, however occasioned (fair wear and tear only excluded).
- 13.2. The Customer must:
- clean, fuel, lubricate and keep the Equipment in good condition and in accordance with the manufacturer's and KMH's instructions at the Customer's cost;
 - not in any way alter, modify, tamper with, damage or repair the Equipment without KMH's prior written consent;
 - not deface, remove, vary, obscure or erase any identifying marks, plate, number, notices, safety information or graphic of KMH including any KMH logo on the Equipment;
 - not remove fuel or oil tank caps, bund plugs or seals from the Equipment and ensure that they are in place when the Equipment is returned; and
 - arrange for the emptying of any waste tanks and water carts.
- 13.3. The Customer must at its own expense, conduct monthly

mechanical audits of the Equipment and Accessories, by:

- Nominated Specialist Mechanic/Technician; or
 - Personnel with equivalent qualifications to the Nominated Specialist Mechanic/Technician' subject to KMH's prior written approval and on such conditions that KMH may require.
- 13.4. All repairs and replacement parts must be approved in writing by KMH prior to commencing, and all repairs and replacements must be carried out by:
- Nominated Specialist Mechanic/Technician; or
 - Personnel with equivalent qualifications to the Nominated Specialist Mechanic/Technician' subject to KMH's prior written approval and on such conditions that KMH may require.

14. LONG DISTANCE MAINTENANCE

- 14.1. This clause 14 applies if the Equipment is hired for use at a Long Distance Location.
- 14.2. Maintenance for all Equipment located at a Long Distance Location will be subject to a per kilometre charge both to and from the premises nominated by the Customer. There will be no charge for the first 50 km either way.
- 14.3. Maintenance for multiple items of Equipment which are located at the Long Distance Location will only be charged as one call out.
- 14.4. For the avoidance of doubt, the Customer remains responsible for daily maintenance and care of all Equipment in accordance with clauses 12 and 13, including but not limited to, checking of all fluids (fuel, oil, water, battery levels, waste tanks etc.), checking of all hoses (hydraulic, fuel and water), replace and repair of tyres and glass, general tightening of any loose nuts, bolts, belts or fittings and lubrication of all grease points.
- 14.5. If the Equipment breaks down at a Long Distance Location, the Customer will also pay KMH the costs associated with any attendance to the Long Distance Location in addition to any other costs payable under this Agreement.

15. EQUIPMENT FAILURE

If Equipment becomes unsafe, in a state of disrepair or not in working order, the Customer will immediately discontinue the use of the Equipment and notify KMH. Any repair must be made pursuant to clause 13.4

KMH will not be liable for any loss sustained by the Customer.

16. INSPECTION OF EQUIPMENT BY KMH

- 16.1. The customer authorises and consents to KMH and its servants and agents entering the Customer's site from time to time to carry out such inspections and tests on the Equipment as may seem reasonable to KMH, subject to KMH providing the Customer will reasonable notice.
- 16.2. KMH may serve on the Customer a notice in writing of any defect or deficiency in the Equipment and their operation, requiring the Customer within a reasonable time (specified in the notice) to repair or replace the Equipment in accordance with clause 13.4 or to make good the defect or deficiency.
- 16.3. If the Customer fails to carry out any requirements under Clause 16.2, KMH may carry out those requirements and

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the costs of such maintenance will be payable by the Customer.

17. INSURANCE

17.1. Extent of insurance

If the Damage Waiver is not taken by the Customer, Insurance must be effected. The Customer must effect before the commencement of the Hire and maintain during the Term, and provide KMH with requisite Certificates of Currency and notify KMH of same, for:

- (a) **General insurance:** full comprehensive insurance of the Equipment for their full insurable value (value of the equipment as noted in the Hire Particulars) against any loss or damage, however caused, and any insurable risk commonly insured against in regard to equipment of a similar nature to the Equipment and Accessories;
- (b) **Third party road risks (for all registered equipment):** insurance against all third party risks including liability for all damage or injury of any kind to any property or person and otherwise as required to the full extent required by law;
- (c) **Public and products liability (for all unregistered equipment):** to a limit of \$20M any one loss (Public Liability) and \$20M any one loss and in the aggregate (Products Liability); and
- (d) **Any other insurance required by law:** (i.e Workers Compensation)

pursuant to policies insuring for the benefit of KMH, the Customer and any Sub Hire Equipment' owner.

17.2. Insurance for KMH

The Customer's insurance coverage referred to in Clause 17.1 must also contain the following provisions:

- (a) an indemnity in favour of KMH or cover at no cost to KMH up to the limits of the policy regardless of any act or neglect of the Customer or any breach or violation by the Customer of any warranties, declarations or conditions contained in the policy;
- (b) notwithstanding the lapse of the policy (except by reason of expiration in accordance with its terms) or any right of cancellation by the insurer or cancellation by the Customer (whether voluntary or involuntary), the insurer will notify KMH of the same and the policy will continue in force for the benefit of KMH for at least thirty (30) days after written notice of cancellation has been given to KMH and the Customer will indemnify and hold KMH harmless in respect of any damage, cost or expense suffered or incurred by KMH as a result of the insurer's omission or failure to so continue the policy in force; and
- (c) if for any reason whatsoever, any such policy is lapsed or cancelled before the expiry of the Term, the Customer must forthwith take out and maintain for the balance of the Term a replacement insurance policy satisfying the requirements of this Clause.

18. EXTENSION OF HIRE TERM

- 18.1. If the Customer wishes to extend the Hire for a further period, it may make a written request to KMH to do so at least ten (10) Business Days prior to the expiry of the Term,

and KMH will endeavour to notify the Customer in writing not later than the expiry of the Term whether or not KMH agrees to grant that request and, if so, at what Hire Rate.

- 18.2. If KMH has not given the Customer its written response by the expiry of the Term, the Contract will continue on the current terms and conditions until KMH gives its written response and KMH may without limitation:

- (a) advise the Customer that the Equipment must be delivered up in accordance with Clause 21.1;
- (b) send the Customer a new quotation and new terms and conditions; or
- (c) request that the Customer provide a new Purchase Order under the current terms and conditions.

19. DEFAULT AND TERMINATION

19.1. Events of default

Each of the following events is an Event of Default, namely:

- (a) if the Customer fails to pay the Hire Charges on the due date for payment thereof and such failure continues after notification of such by KMH to the Customer for more than three (3) Business Days;
- (b) if the Customer fails to perform or observe any of the covenants or provisions of the Contract and (if capable of remedy) such default continues for more than seven (7) Business Days after notice from KMH requiring the Customer to remedy the same;
- (c) if the Customer or any Related Body Corporate of the Customer commits any act of insolvency or ceases to carry on business;
- (d) if the Customer is unable to take out a replacement insurance policy as required by Clause 18;
- (e) if any of the Equipment are abandoned or condemned or are seized or appropriated by any third party.

19.2. Consequences of default

If an Event of Default occurs, KMH may at its option do any one or more of the following, namely:

- (a) terminate the Contract and the Customer's right to possession of the Equipment and Accessories by notice in writing to the Customer;
- (b) take such court action as it considers appropriate, whether to enforce performance by the Customer or otherwise; and
- (c) recover damages for the breach concerned.

20. RETURN OF EQUIPMENT

20.1. Delivery-up of Equipment by the Customer

- (a) Upon the expiry or earlier termination of the Contract, the Customer must at its own expense immediately deliver up the Equipment to KMH's Premises or as otherwise directed in writing by KMH.
- (b) The Customer will return the Equipment in accordance with clause 1.1, and if upon the return of the Equipment, KMH determines that the Customer has failed to observe the provisions contained herein, the Customer will pay the costs of any repairs

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and extraordinary cleaning determined by KMH to be necessary.

- (c) Notwithstanding the expiry of the Term or earlier termination of the Contract under Clause 19.2(a), the Equipment will remain on Hire at the Hire Rate then current until they are cleaned and any repairs (other than in relation to fair wear and tear) are completed and the Equipment are able to be re-hired.
- (d) Without limiting in any manner whatsoever any other indemnity given by the Customer under the Contract, the Customer will indemnify KMH and hold it harmless in respect of all costs and expenses which KMH may incur or suffer arising out of any failure or default in respect of the Customer's obligations under this Clause 20 including without limitation any cleaning and maintenance required in respect of the Equipment (other than in relation to fair wear and tear) after their return by the Customer.

20.2. Repossession of Equipment

If, pursuant to Clause 20.1, the Customer does not return the Equipment to KMH as and when required, the Customer consents to KMH, at KMH's absolute discretion, retaking possession of the Equipment, and KMH and its employees and agents may for this purpose, without notice, liability or legal process, enter upon or into the Customer's site and may break open any gate, door or fastening and detach or dismantle the Equipment from any part of the location to which the Equipment have been affixed and the Customer indemnifies KMH for all costs incurred.

21. NOTIFICATION OF KMH'S OWNERSHIP OF THE EQUIPMENT

In the event that any person executes any judgment against the Customer or otherwise purports to seize the Customer's property or any part thereof, the Customer must notify such person of KMH's ownership of the Equipment (or KMH's rights as bailee of any Sub Hire Equipment) and must contact KMH immediately to advise KMH regarding such execution or purported seizure and must forthwith give written notice thereof to KMH.

22. NO DEALING WITH EQUIPMENT

The Customer must not without KMH's prior written consent:

- (a) sell, assign, sublet, lend, pledge, mortgage, let on hire or otherwise part or deal with any of the Equipment and Accessories and any part thereof, or agree with or offer to any person or company, or attempt or purport, to do any of the foregoing;
- (b) modify or alter any of the Equipment or any part thereof or make any addition thereto, except as previously agreed in writing by KMH, or remove, change, alter or deface any name, name plate, identification number, trade mark or any other identifying mark or number on the Equipment, except so as to indicate any replacement, alteration or addition which has been authorised by KMH in writing; or
- (c) suffer any encumbrance, charge or lien of any kind to arise or remain on any of the Equipment or any part thereof.

23. DAMAGE WAIVER

23.1. The Damage Waiver is calculated as a percentage of the hire rate that is set by KMH. The Damage Waiver fee will be automatically charged to you in addition to your hire charges and will be set out in your hire schedule. The

Damage Waiver will be charged for the full Term regardless of stand downs/stand offs and payable at the time of hire as part of the hire charges until the Item is returned to KMH in a condition satisfactory to the owner.

23.2. Subject to the conditions specified in clause 23.3, where the Hirer has paid the Damage Waiver fee, in accordance with this Agreement; and

- (a) The Equipment is lost, destroyed or damaged as a result of, or attributable to fire, storm, earthquake, collision or accident;
- (b) In the case of Theft, where the Hirer has supplied to KMH satisfactory evidence that the Hirer has taken all precautions to safeguard the property in the first instance, the Hirer has reported the theft to the Police and KMH immediately after it is discovered as stolen;
- (c) the Hirer has co-operated with KMH and provided KMH with the details of the incident, including any written or photographic evidence KMH require; and
- (d) an excess of 1% of the items sum insured as listed in the value of the Equipment in the Hire Particulars, subject to a minimum charge of \$2,500, has been paid to KMH,

then KMH agrees to cover the damage or loss to the item.

23.3. The waiver referred to in clauses 23.1 and 23.2 does not cover:

- (a) Damage or loss caused or contributed to by any negligent act, error, omission or default of the Hirer;
- (b) loss or damage caused by misappropriation or wrongful conversion of the Equipment by the Hirer;
- (c) loss or damage due to mysterious or unaccounted disappearance of the Equipment;
- (d) Loss or damage, caused or contributed to, by misuse, abuse, improper servicing of the equipment, overloading or exceeding the capacity of the equipment, use or operation of the equipment in breach of any conditions or in violation of any law, regulation, by-law or appropriate Australian Standard or other Standard applicable, transportation of the equipment, exposure to any corrosive flammable or dangerous chemicals or substances;
- (e) Damage caused to any tyres, tyre tubes, windscreen, mirrors, perspex or glass, or any damage to electric motors, tools or accessories forming part of the equipment.

23.4. The Hirer is not required to pay the Damage Waiver fee from the date the Hirer provides a certificate of currency for an appropriate policy of insurance that covers loss, theft or damage to the Equipment during the Hire Period for an amount not less than the full insurable value (as per Hire Particulars) of the Equipment ("Hirer Insurance"). For the avoidance of any doubt, the Hirer is liable to pay the Damage Waiver fee for that portion of the Term where a certificate of currency required pursuant to this clause 23.4 remains outstanding ("Uninsured Period") and the Hirer is not entitled to any credit and/or reimbursement of the Damage Waiver fee charged and/ or paid that relates to the Uninsured Period. The Hirer is responsible for any excess and any other costs associated with Hirer

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Insurance and the Hirer is responsible for any shortfall in repair or replacement costs of the Equipment following payment of any amount received under Hirer Insurance, including any loss KMH suffer as a result of not being able to hire the Equipment.

24. SEVERABILITY AND SURVIVAL OF COVENANTS

If any provision of the Agreement is or at any time becomes void or unenforceable, the remaining provisions will continue in full force and effect, and the parties agree that they will amend the Agreement forthwith so that such void or unenforceable provision will be replaced forthwith by a lawful and enforceable provision which, so far as possible, achieves the same economic benefit or burden for parties as the unlawful or unenforceable provision was intended to achieve.

25. TIME AND WAIVER

- 25.1. Time is of the essence in relation to any notice given by KMH requiring any matter to be done by the Customer in order to achieve compliance with the Agreement, including without limitation the payment of any sum of money.
- 25.2. No failure or delay on the part of KMH to exercise any power or right operates as a waiver of that power or right, and no single or partial exercise of any power or right precludes any other or further exercise of that power or right.
- 25.3. KMH will only be taken to have waived a power or right under the Agreement, including without limitation a right in respect of an Event of Default, to the extent that the power or right has been expressly waived in writing by KMH and irrespective of any previous waiver of any other breach of the same or any other covenant or provision of the Agreement.

26. NOTICES

Any notice, invoice or document relating to the Agreement will be deemed to be served:

- (a) on the second Business Day after the date on which it was posted - if sent by ordinary pre-paid post addressed to the Customer;
- (b) on the day on which it was sent - if it is sent:
 - (i) by email transmission before or during normal business hours on a Business Day; or
- (c) on the next Business Day following the day on which it was sent - if it is sent:
 - (i) by email transmission after normal business hours on a Business Day or on a day other than a Business Day.

27. DISPUTE RESOLUTION

- 27.1. The parties will use their best endeavours to settle amicably, by negotiation, any Dispute which arises.
- 27.2. If the parties cannot settle the Dispute by negotiation in a reasonable time, before court or arbitration proceedings other than for urgent interlocutory relief may be commenced, the following steps must be taken to attempt to resolve any Dispute.
- 27.3. Notice (the notice of dispute) must be given in writing by the party claiming that a dispute has arisen to the other party (or parties) to this contract specifying the nature of the dispute.

27.4. Upon receipt of the notice of dispute, the parties must attempt to agree upon an appropriate procedure for resolving the dispute.

27.5. If within 10 business days of receipt of the notice of dispute the Dispute is not resolved or an appropriate alternative dispute resolution process is not agreed, either party may make a Nomination in writing to have a mediator appointed for the purpose of conducting a mediation of the Dispute in Perth, Western Australia, such mediator to be independent of the parties and, if the parties cannot agree on a mediator within 7 days of the Nomination, the mediator will be a person appointed by the Chair of Resolution Institute, or the Chair's designated representative..

27.6. The Resolution Institute Mediation Rules shall apply to the mediation.

28. GENERAL

- 28.1. The Agreement will be construed in accordance with the laws of Western Australia, and the parties submit to the non-exclusive jurisdiction of the courts of Western Australia and the courts of appeal therefrom.
- 28.2. If any provision of the Agreement or these Terms and Conditions is invalid, void, illegal or unenforceable then that provision is severed to the minimum extent required by the law and the validity, existence, legality and enforceability of the remaining provisions are not affected, prejudiced or impaired.
- 28.3. KMH is under no liability whatsoever to the Customer for any Loss suffered by the Customer arising out of a breach by KMH of the Agreement or these Terms and Conditions.
- 28.4. In the event of any breach of the Agreement or these Terms and Conditions by KMH, the remedies of the Customer are limited to damages which under no circumstances will exceed the Hire Charge of the Equipment and Accessories.
- 28.5. The Customer is not entitled to set-off against or deduct from the Hire Charge any sums owed or claimed to be owed to the Customer by KMH.
- 28.6. KMH may license or sub-contract all or any part of its rights and obligations without the Customer's consent.
- 28.7. KMH reserves the right to review the Agreement or these Terms and Conditions at any time. If, following any such review, there is to be any change to the Contract or these Terms and Conditions, then that change takes effect from the date on which KMH notifies the Customer of such change in writing.
- 28.8. Neither party is liable for any breach of this Agreement due to any war, terrorism, , fire, flood, drought, storm or other event beyond the reasonable control of either party.
- 28.9. The failure of KMH to enforce any provision of the Agreement or these Terms and Conditions is not a waiver of that provision (unless specifically waived in writing and signed by KMH) nor does it affect KMH's right to subsequently enforce that provision.

the Customer must not represent to any third party that it is acting for KMH, and KMH will not be bound by any contracts with third parties to which the Customer is a party.