

TERMS AND CONDITIONS

1. Definitions and interpretation

For the purpose of these terms and conditions:

A reference to "**we**" or "**us**" or "**our**" is a reference to Sydney Earthmoving and Machinery Hire Pty Ltd (ABN 13 647 231 534) t/as SEM Hire its related parties, successors and assigns.

A reference to "**you**" or "**your**" is a reference to the person as described on any quotation, authorisation, order, hire schedule, commercial credit application or other form or document provided by us to you, including any person acting on behalf of and with your authority and all executors, administrators, successors and assigns.

Business Day means a day other than a Saturday, Sunday or a public holiday in New South Wales.

Consequential Loss means any loss or damage arising from a breach of contract or agreement (including breach of these terms and conditions), tort, or any other basis in law or equity including, but without limitation to, loss of profits, loss of revenue, loss of production, loss or denial of opportunity, loss of access to markets, loss of goodwill, indirect or remote or unforeseeable loss, loss of business reputation, future reputation or publicity, or any similar loss whether or not contemplated by the parties at the time of entering into these terms and conditions.

Delivery has the meaning ascribed to that term in clause 7.1.

Equipment means all goods, plant, equipment and/or vehicles (and all related parts, tools, devices and accessories) supplied by us to you and are as described on the invoices, quotations, authorisations, orders, hire schedules, delivery dockets or any other form or document as provided by us to you.

Force Majeure Event means any act of God, war, terrorism, strike, lock-out, industrial action, fire, flood, storm, pandemic, epidemic, government order or other event beyond our reasonable control.

GST means the goods and services tax imposed under the *A New Tax System (Equipment and Services Tax) Act 1999* (Cth).

IP Rights means patent, trademark, design, copyright or any other intellectual property right.

PPSA means the *Personal Property Securities Act 2009* (Cth).

Price means all monies payable by you to us in accordance with Equipment and these terms and conditions.

The following interpretational rules apply to these terms and conditions:

- (a) The word "person" includes an individual, a firm, a body corporate, a partnership, joint venture, an unincorporated body or association or any government agency.
- (b) The words "include", "including", "for example" or "such as" are not used as, nor are they to be interpreted as, words of limitation, and, when introducing an example, do not limit the meaning of the words to which the example relates to that example or examples of a similar kind.
- (c) Time is a reference to the time in Sydney, New South Wales.
- (d) Words importing the singular include the plural and vice versa.
- (e) A reference to any matter or thing includes the whole and each part of it separately.
- (f) Headings are for convenience only and do not affect the interpretation of these terms and conditions.

- (g) A rule of construction does not apply to the disadvantage of a party because the party was responsible for the preparation of these terms and conditions or any part of it.

2. Acceptance

- 2.1 Any instructions received by us for the supply of Equipment and:

- (a) your acceptance of Equipment supplied; or
- (b) you signing any quotations, authorisations, orders, hire schedules, delivery dockets or any other form or document as provided by us to you,

(whichever occurs first) will constitute acceptance of these terms and conditions.

- 2.2 Where more than one (1) party has entered into these terms and conditions with us, all parties will be jointly and severally liable.

- 2.3 The person instructing us and/or signing any form of document provided by us for and on your behalf covenants with us that they have the authority to do so and is empowered to bind you and hereby indemnifies us against all losses, costs and claims incurred by us arising out of that person not in fact having such power and/or authority.

- 2.4 Upon acceptance of these terms and conditions, these terms and conditions will be legally binding and can only be amended in accordance with these terms and conditions or with our written consent.

- 2.5 You must give us not less than fourteen (14) days prior written notice of any proposed change of your ownership (including any change in your name, any change to the majority ownership in shares, sale of business and/or any other change in your details (including but not limited to, changes in your address, other contact details, or business practice). You will be liable for any loss incurred by us as a result of your failure to comply with this clause.

- 2.6 It is your sole responsibility to:

- (a) obtain any approvals, licences or permits necessary for you to perform your obligations under these terms and conditions, comply with any laws and to use Equipment; and
- (b) at all times comply with any and all laws in connection with your use of Equipment.

3. Terms of supply

- 3.1 Our hire of Equipment to you is governed by the following documents comprising our contract with you and which is the entire agreement between you and us (in order of precedence):

- (a) Any invoices, quotations, authorisations, orders, hire schedules, delivery dockets or any other form or document as provided by us to you with respect to Equipment and includes any terms and conditions contained within those forms and documents.
- (b) These terms and conditions.
- (c) Any commercial credit application you sign with us and includes the terms and conditions included in such commercial credit application.

- 3.2 In the event of any inconsistency between the documents comprising our contract with you, the documents will prevail

to the extent of that inconsistency in the order set out in clause 3.1.

4. Our commitment to you

- 4.1 We will provide Equipment to you in good working order.
- 4.2 You are (as hiree) permitted to exclusively use Equipment during the hire period. Notwithstanding the preceding sentence, we reserve the right to replace Equipment hired to you at any time with suitable substitute Equipment.
- 4.3 You acknowledge and agree that we are in no way obliged to hire Equipment to you and may refuse to hire Equipment to you at our absolute discretion and without providing reasons for such refusal.

5. Hire period

- 5.1 The hire period for Equipment:
- (a) commences when you take Delivery of Equipment; and
 - (b) ends on the earlier of:
 - (i) an agreed date and/or time between you and us;
 - (ii) the expiry of the period referred to in clause 5.6,subject to you having returned the Equipment into our possession and control.
- 5.2 If you do not return Equipment to into our possession and control:
- (a) on the agreed date and/or time; or
 - (b) on the expiry of the period referred to in clause 5.6, notwithstanding your breach of these terms and conditions and without prejudice to our rights under these terms and conditions:
 - (c) your hire of Equipment will continue until such time as Equipment is returned into our possession and control;
 - (d) these terms and conditions will continue to apply in all respects to the hire of Equipment (including you being liable for charges and costs for Equipment until it is returned into our possession and control); and
 - (e) this does not constitute an extension of the hire period for Equipment and is not a waiver of your breach of these terms and conditions.
- 5.3 Subject to us allowing for stand-downs in our quotation, the hire period is continuous and includes all times when Equipment is in your possession and control, including weekends and public holidays.
- 5.4 If you wish to extend the hire period for Equipment, such request for extension must be made to us in writing within twenty-four (24) hours of the expiry of the hire period and agreed to by us (at our absolute discretion) on the conditions specified by us.
- 5.5 If a minimum hire period applies to Equipment and you return Equipment to us prior to the end of the minimum hire period, you will be required to pay the full Price payable for the minimum hire period.
- 5.6 In addition and without prejudice to our other rights in these terms and conditions, we may terminate these terms and conditions and/or all or any part of any supply of Equipment during any hire period:

- (a) immediately if we consider that there is an imminent risk of loss or damage of Equipment; or
- (b) at our absolute discretion (with or without providing reasons) by providing you with twenty-four (24) hours written notice.

5.7 You cannot make any claim (of any nature) against us if we elect to exercise our rights under clause 5.6.

6. Price

- 6.1 You must pay the Price for the hire of Equipment until such time as Equipment has been returned into our possession and control.
- 6.2 The Price payable for Equipment hired to you will be based on the following:
- (a) As indicated on invoices provided by us in respect of Equipment supplied.
 - (b) Our current price as at the date of Delivery of Equipment according to our current Price list (if any).
 - (c) Our quoted Price as set out in any documents provided by us to you.
 - (d) If Equipment hired to you has a timing device installed and your use of Equipment is subject to maximum hours of use, then the Price is based on the number of hours recorded on the timing device while Equipment is in your possession.
- 6.3 Where there is any discrepancy, the document as advised by us will prevail to the extent of any inconsistency.
- 6.4 In respect to clause 5.2, irrespective of the time of day that you return Equipment into our possession and control, you will be charged the Price for that day at the rate of a full day's hire of Equipment.
- 6.5 In respect to clause 6.2(d):
- (a) usage will be charged on a pro-rata basis in one (1) hour blocks. For example, if you use Equipment for 8 hours and 15 minutes, you will be liable to pay an additional full hour (i.e. 9 hours); and
 - (b) if you exceed the maximum hours of use for Equipment, notwithstanding your default of these terms and conditions, in addition to the application of clause 5.2, you will be liable to pay the Price based on the number of hours recorded on the timing device while Equipment is in your possession.
- 6.6 In addition to the Price for the hire Equipment, you agree to pay the following (if applicable):
- (a) Our costs incurred in transporting Equipment to and/or from the site(s) nominated by you. For Delivery to your site(s), such charges will commence from the time Equipment leaves our premises.
 - (b) At our discretion, we may charge a holding bond for machinery which can be charged at what we deem fit.
 - (c) An environmental levy in consideration of any oil, grease or other environmental contaminants used, applied or discarded in connection with Equipment and which comprises 3.50% of the hire fees/Price. We may, at our discretion, change the percentage referred to in the preceding sentence by notice in writing to you from time to time.
 - (d) A consumable fee at 2% will be charged on hires.

- (e) A kilometre charge for Equipment that is a vehicle and that has been driven by you in excess of one hundred (100) kilometres during the hire period.
 - (f) Any consumables, fuel or trade materials that we supply to you at rates determined by us.
 - (g) If you do not return Equipment in clean and/or good working condition free of damage, charges for the cleaning, quarantine, disassembly, reassembly and/or repair of Equipment and which will include the imposition of ongoing hire charges for the time required to attend to those acts with respect to the Equipment.
 - (h) A charge for refilling water or fuel tanks.
 - (i) Any applicable levies, fines, penalties, tolls and any government charges arising out of your use of Equipment or these terms and conditions.
 - (j) Operational, training or installation services provided by us to you (at your request) in connection with Equipment at hourly rates determined by us plus any associated travel and accommodation costs.
 - (k) Any reasonable charges incurred by us if we are unable to inspect or carry out maintenance on Equipment during normal working hours.
 - (l) If applicable, charges under the Loss and Damage Waiver as set out in clause 21.
 - (m) Any rates, costs or charges notified to you in writing prior to you entering into these terms and conditions.
- 6.7 At our sole discretion and as notified by us to you, a non-refundable deposit may be required prior to us supplying any Equipment under these terms and conditions.
- 6.8 Time for payment of the Price will be of the essence and will be (at our election and direction):
- (a) stated on the invoice issued by us or in your commercial credit application; or
 - (b) will be due prior to Delivery.
- 6.9 You agree, accept, consent and irrevocably authorise all costs, charges or monies (including the Price) that become payable under these terms and conditions and any contract we have with you to be charged to your credit card, the details of which you have supplied for this purpose.
- 6.10 If you do not pay an invoice in full by the due date, we may charge the following:
- (a) interest, accrued and calculated daily from the date when payment becomes due until the date of payment, on the total outstanding balance of the invoice at ten percent (10%) per annum; and
 - (b) any costs and expenses incurred by us in recovering any unpaid amounts owed by you.
- 6.11 We will be under no obligation to provide or release any Equipment, unless all amounts owed by you are paid to us.
- 6.12 Payment must be made by cash, credit or by any other method as agreed to between you and us. Some payment methods may be subject to administration fees, processing fees and surcharges and such fees and such charges will be disclosed to you as applicable and from time to time. In the event that your payment is dishonoured for any reason you will be liable for any dishonour fees incurred by us.
- 6.13 Unless otherwise expressly stated, GST and other taxes and duties that may be applicable will be added to the Price.
- 6.14 You are not entitled to deduct, counterclaim or set off against any sums owed by you to us at any time.
- 6.15 We may set off against any credit owed to you any amount owing to us.
- 6.16 You are not entitled to any discount or rebate if the Equipment is not used by you for any part of the hire period.
- 6.17 We reserve the right at any time to revise the Price by providing you with written notice. However, the Price cannot be increased during the period of an agreed fixed term hire unless you agree to the increase in writing or you are in default of these terms and conditions.
- 7. Delivery of Equipment**
- 7.1 **Delivery** of Equipment will be deemed to have taken place upon the earlier of:
- (a) you taking possession of Equipment at our premises;
 - (b) if we are responsible for the delivery of Equipment, once Equipment is delivered to your nominated site(s); or
 - (c) if a carrier is engaged and takes possession of Equipment from our premises for delivery to your nominated site(s), at the time the carrier takes possession of Equipment at our premises, in which event the carrier will be deemed to be your agent.
- 7.2 The costs of Delivery are your responsibility and if we incur the costs of Delivery, those costs are in addition to the Price.
- 7.3 You must make all arrangements necessary to take Delivery of Equipment whenever it is tendered, at your cost. This includes, but is not limited to:
- (a) ensuring that Delivery is taken safely and without risk to persons or property;
 - (b) ensuring the safe loading, securing and transporting of Equipment in accordance with all laws, manufacturer directions and our directions;
 - (c) ensuring that a transporting vehicle is suitable to transport Equipment; and
 - (d) you being solely responsible for unloading Equipment.
- 7.4 In the event that you are unable to take Delivery of Equipment as arranged, then we will be entitled to recover from you reasonable fees and charges incurred by us at our discretion, including but not limited to, additional delivery fees, waiting fees and re-delivery fees.
- 7.5 Delivery of Equipment to a third party nominated by you is deemed to be Delivery to you for the purposes of these terms and conditions.
- 7.6 Our failure or delay in delivering Equipment will not constitute a breach of these terms and conditions by us and will not entitle either party to treat these terms and conditions as repudiated.
- 7.7 Any times or dates quoted for Delivery of Equipment is an estimate only and we do not guarantee Delivery by quoted times and dates.
- 7.8 We will not be liable for any loss or damage whatsoever due to failure by us to deliver Equipment (or any of them)

promptly or at all, including but not limited to, due to circumstances beyond our control or a Force Majeure Event.

7.9 We are not a common carrier and do not accept the obligation or liability of common carriers. We may refuse the handling and/or carriage of Equipment at our absolute discretion and without being bound to give reasons for such refusal.

8. Defective Equipment on Delivery

8.1 You must inspect Equipment on Delivery and must within four (4) hours of Delivery (time being of the essence) notify us in writing of any alleged defect, shortage in quantity, damage or failure to comply with the description, specification or quote.

8.2 You must afford us an opportunity to inspect Equipment within a reasonable time following notification under clause 8.1 if you believe Equipment is defective in any way. If you fail to comply with these provisions Equipment will be deemed to be free from any defect or damage.

8.3 Within a reasonable time after inspection of Equipment by us, we will make a written determination as to the outcome of the inspection and will inform you of the outcome.

9. Return of Equipment

9.1 Unless we otherwise agree in writing, you are responsible for returning Equipment to us at our premises during normal business hours at your cost for any reason under and in accordance with these terms and conditions.

9.2 You must return Equipment to us in the same clean condition and good working order as given to you (ordinary fair wear and tear excepted) on the day the hire period ends or as otherwise set out in these terms and conditions.

9.3 If we agree to collect Equipment from your nominated site(s):

- (a) you must ensure that Equipment is kept safe and secure until the time of collection;
- (b) you remain responsible for all risk in Equipment until it is collected by us;
- (c) any specified hire period will not be deemed notice to us that Equipment is available for collection and:
 - (i) you must give us sufficient notice in advance that Equipment is ready for collection and not later than 3:00PM on the day the hire period ends; and
 - (ii) if you fail to give us sufficient notice, you will be charged for such additional period of time that we consider is necessary to arrange the collection of Equipment, being no less than a full day's rate of hire for Equipment; and
- (d) if we cannot take collection of Equipment, then we will be entitled to recover from you reasonable fees and charges incurred by us at our discretion.

10. Your obligations

10.1 You must not allow or authorise any other person to use, re-hire or have possession of Equipment at any time, unless expressly agreed by us in writing.

10.2 Your authorised personnel are permitted to use Equipment, provided such use complies with these terms and conditions.

10.3 You agree that before taking Delivery of Equipment, you have satisfied yourself as to the suitability and condition of

Equipment and you will ensure that Equipment is used only for the purpose for which it was designed by the manufacturer. You acknowledge that we have made the manufacturer's operating and safety instructions available to you.

10.4 We make no representations and give no guarantee or warranty that Equipment is suitable for your intended purpose.

10.5 You must:

- (a) at all times maintain possession of Equipment;
- (b) not remove Equipment from your nominated site(s) without our prior written consent;
- (c) operate Equipment safely, strictly in accordance with all laws, only for its intended use and purpose and in accordance with the manufacturer's instructions and our instructions;
- (d) ensure persons operating, installing or erecting Equipment are suitably trained on safe and proper use, qualified to use Equipment and where necessary, hold the appropriate licences and authorisations and provide evidence of such to us on request;
- (e) ensure persons operating, installing or erecting Equipment exercise reasonable care and securely store Equipment;
- (f) ensure persons operating Equipment wear suitable clothing and protective equipment when operating Equipment as required by law, recommended by us or the manufacturer;
- (g) ensure that no persons operating Equipment are under the influence of drugs or alcohol;
- (h) conduct a job safety analysis each time prior to using Equipment;
- (i) ensure that no person carries illegal, prohibited or dangerous substances in or on Equipment;
- (j) display all safety signs and instructions (as required by law) and ensure that all instructions and signs are observed by operators of Equipment;
- (k) carry out daily checks of Equipment and clean, fuel, lubricate and keep Equipment in good condition and in accordance with the manufacturer's and our instructions at your own cost;
- (l) not in any way alter, modify, tamper with, damage or repair Equipment without our prior written consent;
- (m) not deface, remove, vary or erase any identifying marks, plate, number, notices or safety information on Equipment;
- (n) not remove fuel or oil tank caps, plugs or seals from Equipment and ensure that they are in place when you return Equipment to us; and
- (o) arrange for the emptying of any tanks and carts on Equipment.

10.6 At all times during the hire period, you must store Equipment safely and securely and use all appropriate security measures to protect Equipment and do everything reasonably necessary to avoid any theft, loss or damage to Equipment.

10.7 Whenever you are moving Equipment, you must ensure the safe loading, securing and transportation of Equipment in accordance with all laws, the manufacturer's guidelines

and our requirements. You must observe any safety directions advised by us or the manufacturer to ensure safe loading and handling of Equipment.

- 10.8 You must not remove Equipment from New South Wales without our written consent.
- 10.9 You must not use Equipment off-shore, in a mine, in an area where friable asbestos is present, or over, in or close proximity to water or in forestry projects, without our prior written consent. Our consent will be subject to terms and conditions specified by us and which may include ensuring that you effect all necessary insurances or paying to us an extreme worksite levy in the amount specified by us.
- 10.10 You warrant that you will comply with all laws in relation your use of Equipment and immediately rectify any breach of an law caused by the use of Equipment.
- 10.11 You must use best endeavours to ensure that Equipment are not contaminated with any contaminants and/or hazardous substances (including, without limitation, asbestos, insects, fire ants, weeds or seeds). You must advise us of any risks of hazardous substance or contamination to Equipment as soon as they become apparent. Where Equipment may have been subjected to contamination, you must immediately and effectively decontaminate Equipment at your cost, as well as provide us with written details of the decontamination processes applied. If, in our opinion acting reasonably, Equipment is not capable of being decontaminated or you have failed to effectively decontaminate Equipment, you will be charged for the replacement cost of Equipment.
- 10.12 Any electrical Equipment (including but not limited to, battery powered Equipment) provided by us will be tested and tagged before it is hired to you, but during the hire period you are responsible for arranging the re-testing and re-tagging of any electrical Equipment in accordance with our or the manufacturer's instructions and the applicable laws and standards at your cost and you will be liable for failure to undertake such testing and any damage that may result from incorrect testing of, or your failure to test, electrical Equipment.

11. Responsibility for Equipment

- 11.1 You are responsible for any loss, theft or damage to Equipment, except where any such loss, theft or damage was caused by our act or omission.
- 11.2 We are responsible for the cost of ordinary wear and tear to tyres, track gear, ground engaging tools and wear on blades/buckets/rippers. Such wear will be determined and evidenced by a measurement taken at the commencement and completion of a hire period.
- 11.3 You are responsible and liable for the cost of:
- repairing or replacing flat or damaged tyres;
 - repairing or replacing all wear and tear and damage to tyres, track gear, ground engaging tools and/or wear on blades/buckets/rippers which is caused by use of the tyres, track gear and ground engaging tools and/or blades/buckets/rippers in conditions which we reasonably consider adverse or abnormal;
 - any daily service checks covered under clause 11.5 which include top ups of oils and lubricants as required; and
 - fuel and refuelling during the hire period. Equipment returned us without a full tank of fuel will incur further charges which will be payable by you at rates determined by us.

- 11.4 At all times you must adhere to the manufacturer's recommended tyre pressure and track tension. You are responsible for replacing tyres, track gear, ground engaging tools and/or wear on blades/buckets/rippers and fuel lubricants when they become worn out or used up during the hire period.
- 11.5 You are responsible for undertaking the daily operator safety checks and pre-start checks for Equipment.
- 11.6 You are responsible for the correct installation, calibration and use, as per the manufacturer's instructions of any attachments fitted to Equipment.
- 11.7 If you wish to use any attachments fitted to Equipment which have not been supplied by us, you must seek our approval in writing.
- 11.8 You:
- must use your best endeavours to prevent the theft of any parts, tools, devices and accessories forming part of or designed to guide the operation of Equipment;
 - must remove any detachable operator display, receiver of device from Equipment at the end of every use of Equipment and store it in a safe place;
 - are responsible for verifying the accuracy of any device during the hire period; and
 - must check the calibration of any device on Equipment before each use and calibrate it at frequent intervals during use of Equipment.

12. Inspection

- 12.1 Upon request being made by us, you must immediately allow us to enter your site(s) on which Equipment is located, and inspect and maintain Equipment from time to time during the hire period during normal working hours.
- 12.2 If you cannot, or refuse to allow us to inspect or maintain Equipment during normal working hours, then additional charges may apply at our absolute discretion.
- 12.3 You may request to conduct a joint inspection of Equipment with us at the end of the hire period.

13. Breakdown of Equipment

- 13.1 In the event that Equipment breaks down or becomes unsafe to use during the hire period, you must:
- immediately stop using Equipment and notify us;
 - take all steps necessary to prevent injury or damage occurring to persons or property as a result of the condition of Equipment;
 - take all steps necessary to prevent any further damage to Equipment; and
 - not repair or attempt to repair Equipment without our written consent.
- 13.2 Subject to clause 13.4, upon receiving notice from you, we will:
- take all reasonable steps to repair Equipment or provide suitable substitute Equipment as soon as reasonably possible; and
 - not impose a hire charge forming part of the Price for that portion of the hire period for which Equipment was broken down or unsafe, nor the costs associated with any repair or replacement of Equipment.

13.3 We will not be liable for any expenditure, damages, loss (including Consequential Loss) or inconvenience incurred by you or any claim made against you by a third party arising from or in any way connected with a breakdown or malfunction of Equipment or Equipment being unsafe or otherwise inoperable, no matter the cause.

13.4 If Equipment breaks down or becomes unsafe as a result of your acts or omissions or your failure to comply with these terms and conditions, then you will be liable to us for the full Price of the hire period for which Equipment are inoperable, as well as all costs associated with any repair or replacement of Equipment.

14. Stand-Downs

14.1 In circumstances where we have provisioned or allowed for stand-downs in our quotation, you will only be entitled to those stand-downs provisioned or allowed in our quotation.

14.2 Stand-downs may be charged by us at a percentage of the applicable Price.

14.3 You must notify us prior to 9.00am on the morning of such stand-downs for stand-downs to be considered by us.

14.4 If approved (which will be at our absolute discretion), a stand-down number will be quoted by us which should be recorded by you as proof of stand-down. If you do not record proof of stand-down, we will not acknowledge the stand-down.

14.5 For the avoidance of doubt, a stand-down date must be a current or future date and cannot be retrospectively applied.

15. Telematics data

15.1 We are not liable with respect to your use or reliance on any telemetry data we have provided to you in relation to Equipment.

15.2 You acknowledge and agree that:

- (a) we own all rights, title and interest in such data;
- (b) you must obtain our prior written approval for the purposes for which you intend to use the data and you must not disclose the data to any third party;
- (c) we do not warrant the accuracy of any data nor guarantee that such data will be available to you;
- (d) we are not required to retain any data and such data may not be available for retrieval; and
- (e) we may disclose, from time to time, any data to a third party who is not a party to our contract with you and we are not required to obtain your prior permission with respect to such disclosure.

16. Tracking equipment

16.1 You consent to the installation, use and maintenance of a tracking and preventative maintenance device installed on Equipment to allow us to:

- (a) monitor the geographical location of Equipment from time to time;
- (b) monitor and assist with preventative maintenance scheduling;
- (c) monitor the usage of the Equipment by you (including the hours and times Equipment has been used); and
- (d) monitor anything else in connection with Equipment.

16.2 You will ensure that the notice of the installation and use of such a tracking device is drawn to the attention of every

person that you have authorised to use Equipment before they commence using such Equipment by way of a notice that is affixed to Equipment and which is not obscured, defaced or removed.

17. Title in Equipment

17.1 You acknowledge that we own Equipment and in all circumstances we retain title to Equipment. Your rights to use Equipment are as a bailee only.

17.2 You are not entitled to offer, sell, assign, licence, lease, sub-let, charge, mortgage, pledge or create any form of security interest over, or otherwise deal with Equipment in any way.

17.3 In no circumstances will Equipment be deemed to be a fixture.

17.4 You acknowledge that we may hire or lease Equipment from a third party if we cannot provide Equipment to you and if this occurs, title in Equipment remains with that third party owner.

18. Lost, stolen or damaged Equipment

18.1 If Equipment:

- (a) has broken down or becomes unsafe to use as a result of your acts or omissions or your failure to comply with these terms and conditions; or
- (b) is lost, stolen or damaged beyond fair wear and tear, you must immediately notify us both orally and in writing and you will be liable for:
- (c) any costs incurred by us to recover and repair or replace Equipment; and
- (d) the Price for that portion of the hire period during which Equipment is being recovered and repaired or replaced,

except where you have paid the Damage Waiver Fee, in which case your liability is subject to clause 21.

18.2 Provided that you pay the costs and charges described in clause 21, we will return or replace Equipment, and you must continue to pay the Price for the remainder of the hire period.

19. Risk and insurance

19.1 All risk in Equipment passes to you on Delivery and continues for the entirety of the hire period and only ceases when we acknowledge that Equipment has been returned into our possession and control.

19.2 It is your responsibility to effect carrier/freight insurance and insurance with respect to Equipment when collected from our premises either by you or a carrier.

19.3 Where Equipment is delivered to an unattended location at your direction, then such Equipment may be left at your sole risk and it will be your responsibility to ensure Equipment is insured adequately or at all.

19.4 If any Equipment is damaged or destroyed following Delivery, we are entitled to receive all insurance proceeds received under your insurance up to the amount of the monies payable by you under these terms and conditions. The production of these terms and conditions by us is sufficient evidence of our rights to receive the insurance proceeds without the need for any person dealing with us to make further enquiries.

20. Personal Property Securities Act 2009 ("PPSA")

20.1 In this clause:

- (a) the terms 'attachment', 'financing statement', 'financing change statement', 'purchase money security interest' and 'security interest' have the meaning given to it by the PPSA; and
- (b) the term 'security agreement' means the security agreement under the PPSA created between you and us pursuant to these terms and conditions.
- 20.2 You acknowledge and agree that these terms and conditions:
- (a) constitutes a security agreement for the purposes of the PPSA; and
- (b) creates a security interest in:
- (i) all Equipment previously supplied by us to you (if any); and
- (ii) all Equipment that will be supplied in the future by us to you,
- including, without limitation, a purchase money security interest over Equipment and that the attachment of the security interest over Equipment has in no way been deferred or postponed.
- 20.3 You undertake to:
- (a) promptly sign any further documents and/or provide any further information (such information to be complete, accurate and up-to-date in all respects) which we may reasonably require to:
- (i) register a financing statement or financing change statement in relation to a security interest on the Personal Property Securities Register;
- (ii) register any other document required to be registered by the PPSA; or
- (iii) correct a defect in a statement referred to in paragraph (i) or (ii);
- (b) indemnify, and upon demand reimburse, us for all expenses incurred in registering a financing statement or financing change statement on the Personal Property Securities Register established by the PPSA or releasing any Equipment charged thereby;
- (c) not register a financing change statement in respect of a security interest without our prior written consent;
- (d) not to do anything that results in us having less than the security or priority granted by the PPSA that we assumed at the time of that perfection; and
- (e) not register, or permit to be registered, a financing statement or a financing change statement in relation to Equipment in favour of a third party without our prior written consent.
- 20.4 The parties agree that sections 96, 115 and 125 of the PPSA do not apply to the security agreement created by these terms and conditions.
- 20.5 You hereby waive your rights to receive notices under sections 95, 118, 121(4), 130, 132(3)(d) and 132(4) of the PPSA. You waive your rights as a grantor and/or a debtor under sections 142 and 143 of the PPSA.
- 20.6 Unless we otherwise agree in writing, you waive your right to receive a verification statement in accordance with section 157 of the PPSA.
- 20.7 You must unconditionally ratify any action taken by us under this clause in relation to the enforcement of the security interest.
- 21. Loss and Damage Waiver**
- 21.1 The Loss and Damage Waiver set out in this clause 21 is an agreement to limit your liability in certain circumstances for loss, theft or damage to Equipment to an amount known as the **Damage Waiver Fee**, and which comprises 12.50% of the hire fees/Price. We may, at our discretion, change the percentage referred to in the preceding sentence by notice in writing to you from time to time.
- 21.2 If applicable, the Damage Waiver Fee must be paid on an upfront basis and will be automatically charged to you in addition to the hire fee/Price.
- 21.3 You are not required to pay the Damage Waiver Fee from the date you produce a certificate of currency for an appropriate policy of insurance that covers loss, theft or damage to Equipment for an amount not less than the replacement value of Equipment. For the avoidance of any doubt, you are liable to pay the Damage Waiver Fee for that portion of the hire period where a certificate of currency remains outstanding and you are not entitled to any credit and/or reimbursement of the Damage Waiver Fee charged and/or paid that relates to the uninsured period. You are responsible for any excess and any other costs associated with your insurance and you are responsible for any shortfall in repair or replacement costs of Equipment following payment of any amount received under your insurance, including any loss we suffer as a result of not being able to hire or otherwise utilise Equipment.
- 21.4 Subject to clauses 21.5 and 21.6, where you have paid the Damage Waiver Fee, we will waive our right to claim against you for loss, theft or damage to Equipment if:
- (a) for theft, you have promptly reported the incident to the police and provided us with a written police report; and
- (b) you have co-operated with us and provided us with the details of the incident, including any written or photographic evidence we require.
- 21.5 If any item of Equipment is either lost, stolen or damaged and you have paid the Damage Waiver Fee, you must pay the **Damage Waiver Excess** for each such item of Equipment and which is the amount calculated as follows:
- Replacement where Equipment is lost, stolen or damaged beyond repair:
- (a) *Subject to paragraph (b) below, the Damage Waiver Excess for each item of Equipment that is lost, stolen or damaged beyond repair will be the amount equal to the greater of:*
- (i) \$5,000.00; or
- (ii) *fifteen percent (15%) of market value to replace Equipment with a new item of the same goods, or if the same is not available, then the cost to replace Equipment with a new item of goods of the same quality, function and capacity,*
- (New Replacement Cost).**
- (b) *Where the New Replacement Cost is less than \$5,000.00, the Damage Waiver Excess will be an amount equal to the New Replacement Cost.*
- Repair where Equipment is partially damaged and can be repaired:

(c) Subject to paragraph (d) below, the Damage Waiver Fee for each item of Equipment that is partially damaged and can be repaired will be the amount equal to the greater of:

(i) \$5,000.00; or

(ii) fifteen percent (15%) of the repair cost,

(Prescribed Repair Cost)

(d) Where the repair cost of Equipment is less than \$5,000.00, the Damage Waiver Excess will be an amount equal to the lesser of the repair cost and the Prescribed Repair Cost.

21.6 Even if you have paid the Damage Waiver Fee, we will not waive our rights to claim against you for loss, theft or damage to Equipment and the Loss and Damage Waiver will not apply if the loss, theft or damage:

- (a) has arisen as a result of your breach of these terms and conditions and any contract we have with you;
- (b) has been caused by your negligent, wilful, malicious, and/or reckless act or omission;
- (c) has been caused by any third party;
- (d) has arisen as a result of your use of Equipment in violation of any laws;
- (e) has arisen as a result of your misuse or abuse of Equipment or any part thereof;
- (f) has been caused by your failure to use Equipment for its intended purpose or in accordance with our instructions or the manufacturer's instructions;
- (g) occurs to Equipment whilst it is located, used, loaded, unloaded, transported on or over water, wharves, bridges or vessels of any kind;
- (h) during transport, except where transported by us;
- (i) occurs to Equipment whilst working off-shore, in a mine, in an area where friable asbestos is present, or over, in or close proximity to water or in forestry projects;
- (j) has been caused by a lack of lubrication or a failure to properly service or maintain Equipment;
- (k) has been caused by collision with a bridge, carpark, awning, gutter, tree or any other overhead structure or object due to insufficient clearance;
- (l) has been caused by the overloading of Equipment or any components thereof;
- (m) is to motors or other electrical Equipment or components within Equipment caused by electrical overload, a surge in electrical current or the use of under-rated or excessive lengths of extension leads with the electrical Equipment;
- (n) is caused by paint, texture, coat, overspray, concrete, grinding, welding, gas, cutting, collision, dropping and/or impact;
- (o) is caused by exposure to any corrosive or caustic substance, such as cyanide, salt water, acid etc.;
- (p) is caused by vandalism;
- (q) is to tyres or tubes; or
- (r) is to windscreens, mirrors, glass, or perspex.

22. Your indemnity

22.1 You are liable for and indemnify us against all liability, claims, damages, losses, costs and expenses (including, without limitation, legal fees, costs and disbursements on a full indemnity basis, whether incurred or awarded against us) in respect of:

- (a) personal injury;
- (b) damage to property;
- (c) use or misuse; or
- (d) a claim by a third party,

in respect to or in connection with your hire and use of Equipment and/or breach of these terms and conditions. Your liability under this indemnity is reduced to the extent that such claim or loss was incurred as a result of our negligent acts or omissions.

22.2 Each indemnity in these terms and conditions is a continuing obligation, separate and independent from other obligations and survives termination, completion and expiration of these terms and conditions.

22.3 It is not necessary for us to incur expenses or make any payment before enforcing a right of indemnity conferred by these terms and conditions and you must pay to us on demand any amount under an indemnity.

22.4 We will not be liable to you for any acts or omissions of any person supplied by us where that person is acting under your direction and control and you indemnify us against all losses arising from or incurred in connection with such acts or omissions.

23. Warranty, defects and returns

23.1 To the fullest extent permitted by law, our liability for any breach of these terms and conditions arising as a result of our negligence or for breach of any conditions or warranty implied in these terms and conditions or by law is limited to:

- (a) the replacement of Equipment or the supply of equivalent Equipment limited to the Price for the hire of Equipment;
- (b) the repair of Equipment; or
- (c) the payment of the costs of acquiring the hire of equivalent Equipment.

23.2 To the extent that the limitations of liability in these terms and conditions do not apply, and to the extent permitted by law, our total aggregate liability in respect of any other claim by you or a third party in connection with our contract with you will be limited to damages which under no circumstances must exceed the Price for the hire of the relevant Equipment.

23.3 We will not be under any liability whatsoever to you for any Consequential Loss.

23.4 To the fullest extent permitted by law, except as expressly provided to the contrary in these terms and conditions, all terms, conditions, warranties, liabilities, undertakings, inducements or representations whether expressed or implied, statutory or otherwise, relating to our obligations under these terms and conditions are excluded.

23.5 You assume all risk and liability resulting from the use of Equipment either alone or in conjunction with other goods or materials even if we had or should have had prior knowledge of use to which Equipment would be put.

23.6 Nothing in these terms and conditions excludes, restricts or modifies any right or remedy, or any guarantee, term, condition, warranty, undertaking, inducement or

representation, implied or imposed by any law which cannot lawfully be excluded or limited.

23.7 We acknowledge that Equipment may come with guarantees that cannot be excluded under the Australian Consumer Law. If so (and if the Australian Consumer Law applies to you as a consumer) you are entitled to a replacement or refund for a major failure and for compensation for any other reasonably foreseeable loss or damage. You are also entitled to have Equipment repaired or replaced if Equipment fails to be of acceptable quality and the failure does not amount to a major failure.

23.8 To the fullest extent permitted by law, we are under no obligation to accept any returns, including for change of mind or Equipment not being fit for the purpose or use as intended by you. In that respect, you acknowledge and agree that you have made your own enquiries and undertaken your own due diligence with respect to Equipment provided by us and satisfied yourself in that regard.

24. Default and consequences of default

24.1 If you:

- (a) default in payment of any invoice when due;
- (b) default in the performance of any obligation imposed on you under these terms and conditions; and/or
- (c) breach any warranty or representation contained in these terms and conditions,

you indemnify us from and against all liability, claims, losses (including Consequential Loss), damages, costs, fines and disbursements incurred by us in connection with that default (including, without limitation, pursuing the debt including legal costs on a solicitor and own client basis and our collection agency costs).

24.2 Without prejudice to any other remedies we may have under these terms and conditions or at law, if at any time you are in breach of any obligation (including those relating to payment) we may immediately:

- (a) terminate these terms and conditions;
- (b) terminate all or any part of any supply of Equipment to you (including during any hire period);
- (c) suspend the supply of Equipment to you and any of our other obligations under these terms and conditions;
- (d) preclude you from participating in any special deals, discounts, promotions, redemptions, rebates and all other incentive programs (if any); and
- (e) terminate or suspend your commercial credit account and require the payment of cash prior to Delivery for any further hire of Equipment.

24.3 We will not be liable to you for any loss or damage you suffer because we have exercised our rights under clause 24.2.

24.4 Without prejudice to any other remedies we may have under these terms and conditions or at law, we will be entitled to immediately terminate these terms and conditions and/or all or any part of any supply of Equipment (including during any hire period) and all amounts owing to us will, whether or not due for payment, become immediately payable in the event that:

- (a) any money payable to us becomes overdue, or in our opinion, you will be unable to meet your payments as they fall due; or

(b) you become insolvent, convene a meeting with your creditors or proposes or enters into an arrangement with creditors, or make an assignment for the benefit of your creditors; or

(c) a receiver, manager, administrator, liquidator (provisional or otherwise), trustee in bankruptcy or similar person is appointed in respect of you or any asset of yours.

24.5 On termination of these terms and conditions and/or all or any part of any supply of Equipment, you must immediately:

- (a) pay all outstanding amounts owed to us; and
- (b) return Equipment to us.

24.6 If you do not return Equipment to us, we may take all steps necessary to recover Equipment, including entering your site(s) to do so and you authorise us to do so.

25. Cancellation, variations and delays

25.1 We may terminate these terms and conditions and/or cancel all or any part of any supply of Equipment at any time before Equipment is Delivered by giving you written notice if:

- (a) you are in default under clause 24, in which case all costs incurred by us in that respect will be immediately due and payable by you regardless of the fact that we did not supply the Equipment to you; or
- (b) we are of the opinion that we cannot fulfil the relevant order, in which case we will provide a refund of the monies paid by you in connection with that order, and for the avoidance of doubt, no further monies will be refunded on any account.

25.2 If you cancel or alter an order for Equipment or any part of an order within twenty four (24) hours of the scheduled Delivery, then without prejudice to any other rights we have against you, we may charge you a cancellation fee in an amount equal to the Price for one (1) days hire of Equipment and any costs we have incurred with respect to a scheduled Delivery that will not proceed.

25.3 Whilst we will take all reasonable measures to ensure that orders for Equipment are Delivered by the agreed time, you cannot make any claim (of any nature) as a result of:

- (a) any delays in us completing Delivery whether within our control or otherwise; or
- (b) the non-availability of any Equipment and consequently our refusal or failure to provide that Equipment to you.

26. Intellectual property

26.1 We are not liable to you for any infringement or unauthorised use of any IP Rights arising out of performance of these terms and conditions. If any dispute or claim arises with respect to any such matter then we may terminate these terms and conditions by notice to you without any liability on our part.

26.2 All IP Rights in connection with the provision of Equipment, always remains our sole property. You must not do anything which adversely affects our ownership of those IP Rights.

27. Privacy

27.1 You acknowledge and agree that your personal information may be used and handled in accordance with our Privacy

- Policy and that you have read and agreed to that policy located at <https://semhire.com.au/privacy-policy/>.
- 27.2 You agree and consent for us to obtain from a credit reporting agency a credit report containing personal credit information about you in relation to credit provided by us.
- 27.3 You agree that we may exchange information about you with those credit providers either named as trade referees by you or named in a consumer credit report issued by a credit reporting agency for the following purposes:
- (a) To assess an application by you.
 - (b) To notify other credit providers of a default by you.
 - (c) To exchange information with other credit providers as to the status of this credit account, where you are in default with other credit providers.
 - (d) To assess your creditworthiness.
- 27.4 You understand that the information exchanged can include anything about your creditworthiness, credit standing, credit history or credit capacity that credit providers are allowed to exchange under the *Privacy Act 1988* (Cth).
- 27.5 You consent to us being given a consumer credit report to collect overdue payment on commercial credit.
- 27.6 You agree that personal credit information provided may be used and retained by us for the following purposes (and for other purposes as agreed between you and us as required by law from time to time):
- (a) The provision of Equipment.
 - (b) The marketing of Equipment by us, our agents or distributors.
 - (c) Analysing, verifying and/or checking your credit, payment and/or status in relation to the provision of Equipment.
 - (d) Processing of any payment instructions, direct debit facilities and/or credit facilities requested by you.
 - (e) Enabling the daily operation of your account and/or the collection of amounts outstanding in your account in relation to Equipment.
- 27.7 We may give information about you to a credit reporting agency for the following purposes:
- (a) To obtain a consumer credit report about you.
 - (b) Allow the credit reporting agency to create or maintain a credit information file containing information about you.
- 27.8 The information given to the credit reporting agency may include:
- (a) personal particulars (your name, gender, address, previous addresses, date of birth, name of employer and driver's licence number);
 - (b) details concerning your application for credit or commercial credit and the amount requested;
 - (c) advice that we are a current credit provider to you;
 - (d) advice of any overdue accounts, loan repayments, and/or any outstanding monies owing which are overdue by more than sixty (60) days, and for which debt collection action has been started;
 - (e) that your overdue accounts, loan repayments and/or any outstanding monies are no longer overdue in respect of any default that has been listed;
- (f) information that, in our opinion, you have committed a serious credit infringement (that is, fraudulently or shown an intention not to comply with your credit obligations);
 - (g) advice that a cheque drawn by you has been dishonoured more than once; and/or
 - (h) that credit provided to you by us has been paid or otherwise discharged.
- 27.9 Without restriction, we may provide any personal information, credit reports and any other information relating to you to any insurer of ours and you irrevocably consent to the disclosure of such information.
- 28. Dispute resolution**
- 28.1 If a party believes there is a dispute in relation to or in connection with these terms and conditions (**Dispute**), the following will apply:
- (a) That party must give notice in writing to the other party stating that there is a Dispute and what the party believes the Dispute to be, what the party wants to achieve and what the party believes will settle the Dispute.
 - (b) Within fourteen (14) days of the issue of the notice referred to in paragraph (a) (or any such other period as agreed by the parties in writing), each party must nominate a representative and those representatives must meet in order to resolve the Dispute by negotiation in good faith.
 - (c) If the Dispute cannot be resolved by the representatives within fourteen (14) days of first meeting to resolve the Dispute (or any such other period as agreed by the parties in writing), the parties will be free to commence legal proceedings or to take any other means available to settle the Dispute.
- 28.2 A party does not need to comply with this clause 28 in the following circumstances:
- (a) A party can commence legal proceedings or other form of enforcement action when urgent interlocutory relief is required to restrain a breach or threatened breach of these terms and conditions.
 - (b) In addition to any other rights we have under these terms and conditions, we can commence legal proceedings or take other form of enforcement action against you for any monies owed by you to us under these terms and conditions.
- 29. Force Majeure**
- If a Force Majeure Event occurs:
- (a) we are not liable for any failure or delay in performing our obligations imposed on us under these terms and conditions; and
 - (b) our obligations under these terms and conditions are suspended, to the extent to which they are affected by, and for the duration of, the Force Majeure Event.
- 30. Trustee**
- 30.1 This clause applies if you are a trustee of a trust.
- 30.2 You agree that even though you enter into this contact with us as trustee of the trust, you will also be liable personally for the performance and observance of every covenant to be observed and performed by you expressed or implied in these terms and conditions.

30.3 You warrant your complete, valid and unfettered power to enter into these terms and conditions.

31. General provisions

31.1 Any promotions or offers on Equipment is only valid for the time specified in the promotions or offers.

31.2 Our ten percent (10%) price beat guarantee applies to written quotations from reliable and reputable equipment hire businesses only and is subject to our approval (at our absolute discretion) and all such quotes must include the equipment brand, size, capacity, model, year, timeframes and costings and we may quality check the quote with the businesses providing such quotes.

31.3 Any notice or communication under these terms and conditions must be in writing and delivered to a party's last notified principal place of business or email address. A notice will be treated as having been given on:

(a) if delivered to the principal place of business:

(i) the day of delivery if a Business Day, otherwise on the next Business Day; or

(ii) if sent via pre-paid mail, on the third Business Day after posting; and

(b) if transmitted by email, on the day of transmission if a Business Day, otherwise on the next Business Day.

31.4 Each order that you place for Equipment is, a representation by you made at the time that you are, and will remain in the future, solvent and able to pay all of your debts as and when they fall due.

31.5 If any provision of these terms and conditions is held to be invalid, void, illegal or unenforceable then that part will be severed with the intent that all remaining parts will continue to be in full force and effect and be unaffected by the severance of any other parts.

31.6 These terms and conditions will be governed by the laws of New South Wales, Australia and are subject to the

exclusive jurisdiction of the courts of New South Wales. The parties may not seek to have any proceedings removed from the jurisdiction of New South Wales on the grounds of *forum non conveniens*.

31.7 We may license or sub-contract all or any part of our rights and obligations without your consent. In addition, we may assign or novate any or all of our rights and obligations under these terms and conditions to a third party by providing you with notice.

31.8 You agree that we may review these terms and conditions at any time. If, following any such review, there is to be any change to these terms and conditions, then that change will take effect from the date on which we notify you of such change. Except where we supply further Equipment to you and you accept such Equipment, you will be under no obligation to accept such changes with respect to the Equipment already supplied.

31.9 No modification, amendments or other variation of these terms and conditions will be valid and binding on us unless made in writing and duly executed by and on our behalf.

31.10 Each party must keep these terms and conditions and related information confidential, except to the extent it is in the public domain through no fault of a party or if required to be disclosed by law.

31.11 Our failure to enforce any provision of this contact will not be treated as a waiver of that provision, nor will it affect our right to subsequently enforce that provision.

31.12 You acknowledge that we not have made any representation or other inducement to you to enter into these terms and conditions and you have not entered into these terms and conditions in reliance on any representations or inducements except for those representations contained in these terms and conditions.