

1. TERMS AND CONDITIONS OF HIRE AGREEMENT (Definitions, interpretation and certification)

1.1 Definitions

In this Hire Agreement unless the context otherwise requires:

Agreement means this Hire Agreement including these Terms and Conditions, the Schedule and any variation to this Hire Agreement agreed in writing by the parties;

Australian Consumer Law means:

- a. Schedule 2 to the Competition and Consumer Act 2010 (Cth) as applied as a law of the Commonwealth under section 131 of that Act; and
- b. the Australian Consumer Law (WA) as defined in and applied as a law of Western Australia under section 19 of the Fair Trading Act 2010 (WA).

Encumbrance means a mortgage, charge, pledge, lien, encumbrance, Security Interest, title retention, preferential right, trust arrangement, contractual right of set-off, or any other security agreement or agreement in favour of any person, whether registered or unregistered;

End Date means the last day of the Hire Period or the date the Equipment is returned to the point of collection, or an alternative location agreed between the parties, whichever is the earlier;

Equipment means the equipment and/or machinery specified in the Schedule and any other equipment and/or machinery hired by the Hirer from the Owner on terms stipulated to incorporate this Agreement and includes any replaced, altered or substituted items;

Hirer means the hirer specified in the Schedule and, as the context requires, includes its officers, employees, agents and contractors;

Hire Period means the hire period specified in the Schedule, unless extended by the written agreement of the parties or terminated earlier in accordance with the terms of this Agreement;

Law means any Act, regulation, treaty, decree, convention, statute, rule, ordinance, proclamation, subordinate legislation, delegated legislation, by-law, judgment, rule of common law or equity, including the rules or regulations of any recognised exchange;

Maintenance Responsibilities Matrix means the maintenance responsibilities matrix in clause 6.4;

Manufacturer means the manufacturer of the Equipment or an item of the Equipment as the context requires;

Owner means Western Plant Hire (WA) Pty Ltd ABN 91 091 713 218 and includes, as the context requires, its officers, employees, agents and contractors;

Owner's Wrongful Act means the negligence, wilful default or fraudulent act of the Owner.

Parts means any and all appliances, parts, instruments, appurtenances, accessories and other equipment of whatever nature constituting part of the Equipment or which may from time to time be incorporated or installed in, or attached to, the Equipment;

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

PPS Register means the Personal Property Securities Register established under the PPSA.

rock means any material over 300mm in size and with a specific gravity of 2 or more;

Schedule means the Plant & Equipment Hire Agreement Schedule to this Agreement;

Security Interest has the meaning given to it in the PPSA.

SMU means service meter unit.

Specified means specified in this Agreement;

Start Date means the first day of the Hire Period or the date of collection of the Equipment as agreed between the parties, whichever is the earlier;

1.2 Interpretation

Unless otherwise specified in this Agreement:

- a. a reference to a party, clause, schedule, attachment or annexure is a reference to a party, clause, schedule, attachment or annexure to or of this agreement, and a reference to this Agreement includes all schedules, attachments and annexures to it;
- b. if a word or phrase is given a defined meaning, any other part of speech or grammatical form of that word or phrase has a corresponding meaning;
- c. a word importing the singular includes the plural (and vice versa), and a word indicating a gender includes every other gender;
- d. a reference to an opinion of the Owner means an opinion reasonably held by an officer or employee of the Owner;
- e. a reference to an obligation of the Hirer to pay money to the Owner or to indemnify the Owner means an obligation to pay or indemnify the Owner on demand;
- f. a reference to an obligation of the Hirer to provide any document or information to the Owner means that such document or information is to be provided by the Hirer to the Owner on demand;
- g. a reference to any approval, agreement, notice, demand or report means an approval, agreement, notice, demand or report in writing;
- h. any notice required to be given under this Agreement must be given as soon as practicable after the occurrence of the event giving rise to the requirement;
- i. where the context so requires or permits, a reference to the Equipment means all or part of the Equipment; and
- j. time is of the essence in all respects.

2. Agreement for hire

The Owner hereby hires the Equipment to the Hirer for the Hire Period on the terms in this Agreement. Hire commences on the Start Date which will be no later than 24 hours from collection unless agreed between both parties beforehand and ends on the End Date on the basis the equipment is returned within 48 hours of the off-hire notification to the Owners yard.

3. Monthly reports by the Hirer

The Hirer will provide to the Owner within 3 days of the conclusion of each calendar month, and on the End Date:

- a. a written report of any breakdown of the Equipment and the hour meter reading on the day of each such report; and
- b. the SMU reading for the machine at the conclusion of the calendar month.

4. Pre-delivery

- a. The Hirer and the Owner will jointly inspect and agree a report (**Inspection Report**) as to the condition of the Equipment before the Equipment is removed from the Owner's premises prior to the Start Date. The Hirer and the Owner will each execute the Inspection Report forthwith after its completion to signify their agreement to the contents of that report.
- b. If the Hirer does not attend for the pre-delivery inspection, and otherwise takes delivery of the Equipment, then the Hirer will be deemed to have agreed and accepted the Inspection Report as executed by the Owner.
- c. The Owner will provide to the Hirer a copy of the executed Inspection Report and photographs (if any) of the Equipment as at the Start Date with this Agreement.
- d. If the Owner need to incur any additional expense to prepare the Equipment to the Hirer's site specifications, whether before or after the Equipment has left the Owner's premises, the Owner will notify the Hirer of those additional expenses and agree on a position prior to any expenses being incurred by the Owner.

- e. Save for any representations in this Agreement and subject to applicable Laws, whether express or implied, the Owner has made and makes no representations as to the suitability of the Equipment for the purpose intended by the Hirer and the Hirer has entered into this Agreement in reliance upon its own judgment and investigations.
- f. To the full extent permitted by Law, all conditions, warranties and guarantees that would be implied (by Law, customs or otherwise) are expressly excluded. However, nothing in this Agreement excludes, restricts or limits a condition, warranty or guarantee that is implied under the Australian Consumer Law (or other applicable legislation) that cannot be excluded.
- g. If any condition, warranty or guarantee is implied into this Agreement under the Australian Consumer Law (or any other applicable legislation) that cannot be excluded, then, to the extent permitted by the Australian Consumer Law (or other applicable legislation), the Owner's liability is limited to:
 - i. in the case of goods:
 - 1. the replacement of the goods or the supply of equivalent goods;
 - 2. the repair of the goods;
 - 3. the payment of the cost of replacing the goods or of acquiring equivalent goods; or
 - 4. the payment of the cost of having the goods repaired; or
 - ii. in the case of services:
 - 1. the supplying of the services again; or
 - 2. the payment of the cost of having the services supplied again.

5. Hire Rates, invoicing and payment

- a. **Hire Rate:** As specified in the Schedule.
- b. **Invoicing:** Invoices issued monthly by the Owner for the duration of the Hire Period.
- c. **Payment:** The Hirer must pay the amount specified in an invoice within 30 days from the date of the invoice.
- d. If any money payable by the Hirer under this Agreement is not paid to the Owner in accordance with this Agreement then the Hirer will also pay to the Owner interest at the rate of 10% per annum for the amount unpaid and for the period of non-payment.
- e. If the Hirer disputes the accuracy of an invoice the Hirer shall notify the Owner accordingly within 14 days of receipt of that invoice and the parties shall negotiate to resolve the dispute in accordance with clause 28. If no such notice is given the Hirer shall be deemed to have accepted the invoice. The full invoiced amount must be paid by the Hirer notwithstanding any disputed items or amounts. If agreed or resolved in accordance with the procedure in clause 28, the Owner must pay the relevant disputed amount to the Hirer within 30 days of the agreement or resolution.
- f. The Owner may set-off or deduct any money due or which may become due from the Hirer to the Owner under this Agreement or otherwise.
- g. In addition to the hire fee the Hirer will pay any government charges or imposts levied in respect of this Agreement or anything done pursuant to this Agreement including any GST.

6. Maintenance of the Equipment

6.1 Minor and major servicing

- a. The Hirer or its nominee shall at its cost conduct all maintenance and servicing of the Equipment in accordance with good operating practice, the manufacturer's recommendations, and the Maintenance Responsibilities Matrix. Any nominee of the Hirer must be a reputable contractor engaged in the business of maintenance and repair of equipment the same as the Equipment and must be reasonably acceptable to the Owner. The Hirer will, prior to the Start Date, and thereafter upon being so required, provide to the Owner copies of all such maintenance contracts, together with satisfactory evidence that those maintenance contracts are at that time still in force.
- b. The Hirer will keep the Equipment in good working order and condition at all times during the Hire Period.
- c. The Hirer is responsible for and shall bear the cost of all labour and materials associated with the service, maintenance and repair of the Equipment in accordance with this Agreement and the Maintenance Responsibilities Matrix.
- d. The Owner will only be liable for repairs as per the Maintenance Responsibilities Matrix.
- e. All engine oil shall be changed after 250 hours use or in accordance with the manufacturer's specifications. Schedule oil samples and reports shall be prepared and provided to the Owner promptly after the oil change.
- f. The Owner or its contractors shall be entitled to carry out any repairs that may be required on site where the Equipment is located, and the Hirer shall do all things reasonably required to facilitate access for such repairs, including arranging flights and accommodation
- g. If the parties agree in writing that repairs shall be carried out by the Hirer on the Owner's behalf, the Owner will forward a written purchase order outlining the details of the repairs to the Hirer. The Hirer must carry out the repairs as soon as practicable after receipt of the purchase order, and after completion of the repairs invoice the Owner for payment that will be payable by the Owner within 30 days of receipt of the invoice. The Hirer is not permitted to set-off or deduct any repair costs against the hire fee or any other money due to the Owner under this Agreement or otherwise.

6.2 Replacement parts

- a. The Hirer must, as soon as reasonably practicable after becoming aware that a Part requires replacement, replace all Parts which may from time to time become worn, lost, stolen, removed, destroyed, damaged beyond repair or permanently rendered unfit for use by damage or obsolescence.
- b. Unless otherwise agreed in writing, all replacement Parts fitted to the Equipment or supplied by the Hirer will be the property of the Owner.
- c. The Hirer must ensure that all replacement Parts are:
 - i. fit for purpose;
 - ii. of merchantable quality;
 - iii. free of all Encumbrances; and
 - iv. of a value and utility at least equal to the Parts replaced.
- d. The Hirer must not, without the prior written consent of the Owner, make any replacement, alteration or addition of any nature which may lead to a reduction in the value of the Equipment.

6.3 Breakdown repairs

- a. The Hirer shall conduct all repairs aligned to the Maintenance Responsibilities Matrix (not including major failures specified in the Maintenance Responsibilities Matrix) in accordance with the Manufacturer's recommendations and at the Hirer's expense.
- b. The Owner may serve on the Hirer a notice in writing of any defect or deficiency in the Equipment or its operation or both (whether or not that defect or deficiency comes to the Owner's attention in the course of any inspection) requiring repair or replacement for which the Hirer is or may be responsible under this Agreement, that must be undertaken within a reasonable time

6.4 Maintenance Responsibilities Matrix

Item	HIRER	OWNER
Tyre wear and replacement if required (measure in, measure out)	X	
Track and undercarriage wear and replacement if required (measure in, measure out)	X	
Machine fluids (oils, greases, coolant)	X	
Scheduled servicing as per manufacturers recommendations	X	
Oil sampling as per manufacturers recommendation	X	
Bucket, Body, Blade, Bowl wear (measure in measure out)	X	
Minor repairs (reference to Minor Repair Cap on page 1. Relates to parts cost only, per repair event) <ul style="list-style-type: none"> • Electrical wiring • Electrical switches • Lights • Oil leaks • Hose replacement • Grease system repairs • Batteries • Air conditioning repairs • V-belts • Uni joints • Starter motors • Alternators • Water pumps • Fuel system parts (ie pumps, lines) • Valves • Roto chambers • Pins • Bearings • Air compressor • Brake pads • Boom minor repairs • Stick minor repairs • Seat repairs 	X	
Major repairs (repair > Minor Repair Cap for parts cost only, not attributed to misuse, abuse or damage, per repair event) <ul style="list-style-type: none"> • Engine replacement • Drive coupling replacement • Pump drive replacement • Turbo replacement • Transmission replacement • Converter replacement • Hydraulic pump replacement • Differential replacement • Drive shaft replacement • Wheel end replacement • Final drive replacement • Wet brake pack replacement • Hydraulic cylinder replacement • Gearbox replacement • Hydraulic motor replacement • Slew bearing replacement • Seat replacement 		X
Labour for Minor repairs	X	
Labour for Major repairs		X
Cleaning the equipment back to the same standard the machine was cleaned to when on-hired	X	
Repair of Damage to equipment	X	

7. Liability for damage to Equipment generally

- a. The Hirer is liable and responsible for the repair (or the cost of repair as appropriate) of any damage to the Equipment, during the Hire Period except to the extent that such damage is caused by the Owner's Wrongful Acts. The Hirer must give notice to the Owner of any such damage in excess of fair wear and tear.
- b. The Hirer will pay the Owner any minimum hire as per the Hire Schedule for the duration of any damage repairs, whether performed by or on behalf of the Owner or the Hirer, or any period of time required for the Owner to replace the Equipment (as applicable).

8. Undercarriage

- a. The Hirer must adhere to the Manufacturer's recommended track tension at all times.
- b. The Owner shall conduct an undercarriage measurement report at the Start Date and at the End Date and notify the Hirer of such report. The Hirer shall pay the Owner, within 30 days of receipt of such notice, the cost specified in the notice for the cost of undercarriage usage so as to compensate the Owner for undercarriage wear during the Hire Period.

9. **Tyres**
- a. The Hirer must adhere to the Manufacturer's recommended tyre pressure at all times.
 - b. The Owner shall conduct a tyre measurement report at the Start Date and at the End Date and notify the Hirer of such report. The Hirer shall pay the Owner, within 30 days of receipt of such notice, the cost specified within the notice for the cost of tyre usage so as to compensate the Owner for tyre wear during the Hire Period
10. **Attachments**
- a. The Hirer must adhere to the Manufacturer's recommended use with respect to all attachments including but not limited to the blade, blade mould board, blade push arms, ripper and ripper assembly, bucket, stemming bucket, tyre handler, pallet fork, compactor drum, water tank, service module crane, truck body and rock hammer, as may be applicable (**Attachments**).
 - b. The Hirer is liable for the cost to make good wear and tear of any nature including but not limited to ordinary wear and tear and wear resulting from any Attachments being used in working conditions that were, in the reasonable opinion of the Owner, abnormal or resulting from incorrect use. Within 30 days of receipt of notice from the Owner of the Hirer's liability under this paragraph (b), the Hirer must pay the amount specified in the notice to compensate the Owner for such wear and tear.
11. **Ground Engaging Tools**
- a. The Hirer shall adhere to the Manufacturer's recommended use with respect to all ground engaging tools including but not limited to all cutting edges, bucket teeth, bucket pins and bushings, hardwire, stick, bucket end, H bracket pins and bushings, ripper teeth, ripper tyres, blade faces, blade push arms, blade mould boards, roller feet (**GETs**).
 - b. All GETs are to be returned from hire in as supplied condition. The Owner shall measure the usage of the GETs at the Start Date and at the End Date (by comparing the percentage used at each of those dates) and notify the Hirer of the measurement. The Hirer shall pay the Owner, within 30 days of receipt of such notice, the cost specified within the notice, to compensate the Owner for wear and tear during the Hire Period
12. **Oil Sampling**
- The Hirer must adhere to the Manufacturer's recommended oil sampling analysis at every oil change period on all compartments. If the Hirer does not carry out the necessary servicing as per the Manufacturer's recommendation then the Owner may undertake the servicing at the cost of the Hirer. The Owner may require oil sampling analysis details from the Hirer at any time during the Hire Period and such details will be provided by the Hirer promptly to the Owner as so required.
13. **Fuel and Lubricants**
- All lubricating oils and engine fuel used by the Hirer on or for the Equipment must be in accordance with the manufacturer's recommendations.
14. **Return of Equipment**
- a. The Hirer will return the Equipment to the point of collection within 48 hours from the off-hire notification to the Owner, or an alternative location agreed between the parties, at the end of the Hire Period. If the Equipment is not returned within 48 hours from the off-hire notification to the Owner, the Owner has every right to continue to charge the rates per the agreement which will be charged hourly.
 - b. All oil reservoirs must be full on return on the Equipment.
 - c. The Equipment fuel tank will be full at the Start Date and shall be returned full, otherwise the Hirer will be invoiced for the difference at a rate of \$1.90 per litre.
 - d. The Hirer must return the Equipment in the condition supplied and in a condition consistent with compliance by the Hirer of the terms of this Agreement.
 - e. Any work that the Owner is required to undertake to repair or restore the Equipment to the condition supplied and in a condition consistent with compliance by the Hirer of the terms of this Agreement will be at the cost of the Hirer, and such costs must be paid by the Hirer within 30 days of receipt of notice of such costs from the Owner.
15. **Use of the Equipment generally**
- a. The Hirer must only operate and maintain the Equipment in accordance with recognised methods and standards for Equipment of that type and only by competent and (where appropriate) properly qualified, trained, tested and licensed personnel and by appropriate methods and standards of operation.
 - b. The Hirer must comply in all respects with the instructions and recommendations of the Manufacturer or other supplier relating to the Equipment and its use.
 - c. The Hirer must properly and carefully store and protect the Equipment during the Hire Period.
16. **Compliance with Laws**
- a. The Hirer must comply in all respects with all applicable Laws reasonably necessary for the safe and lawful operation of the Equipment and in discharging its obligations under this Agreement.
 - b. If any addition or alteration is required to be made to the Equipment in order to comply with applicable Laws then the Owner has the right to negotiate any additional hire charges as a result of such imposed additions or alterations. If the Owner and Hirer cannot agree on a reasonable hire rate, the Owner has the right to terminate the hire agreement.
17. **Inspection of the Equipment by Owner**
- Subject to the Owner giving reasonable notice to the Hirer, the Owner will be entitled at all reasonable times to enter any premises or site where the Equipment is located with its employees, agents and experts to:
- a. inspect the state of repair of the Equipment;
 - b. carry out such tests on the Equipment as may seem necessary to the Owner;
 - c. observe the use of the Equipment;
 - d. inspect any maintenance records in respect of the Equipment; and
 - e. do any act, matter or thing which may be required to be done to give proper effect to the terms of this Agreement or to protect the Owner's rights in the Equipment including but not limited to retaking possession of the Equipment if the Owner is so entitled.
18. **Insurances**
- 18.1 **Hirer's obligations to insure**
- The Hirer at its cost must effect and maintain at all times during the Hire Period and any extension thereof or during any period of holding over, policies of insurance as follows (together, the **Insurance Policies**):
- a. **(equipment insurance)**: All risk insurance for all physical loss (including theft) and/or damage to the Equipment for its full insurable value as specified in the Schedule, including but not limited to whilst in transit. Such insurance shall note the Owner as owner and loss payee.
 - b. **(third party liability)**: Public & Products Liability insurance for a minimum of \$20,000,000 in respect of all third party risks arising from, or in relation to the hire of the Equipment to the Hirer, including liability for damage or injury of any kind to any property or person. Such insurance will name the Owner and Hirer as co-insureds.
 - c. **(worker's compensation)**: Workers compensation and occupational/industrial disease and any other insurance required by any law relating to the Hirer's workers compensation liability to any person, including common law cover for not less

than \$50,000,000. The Hirer shall ensure that the policy extends to include a principal's indemnity extension in favour of the Owner, and further that the policy provides a waiver of subrogation for "Act Benefits" and at common law.

d. **(other insurance):** Any other insurance as required by law.

18.2 Conditions of Insurance

- a. The Hirer shall provide the Owner with copies of the certificates of currency confirming compliance with the Insurance Policies, prior to the Hirer taking possession of any of the Equipment.
- b. The Hirer remains responsible for payment of any excess applicable under any policy of insurance required under clause 18.1.
- c. The Insurance Policies must be taken out with an insurer approved by the Owner in writing prior to the Hirer taking possession of any of the Equipment, which approval will not be unreasonably withheld.

19. Default and termination

- a. In the event of a material breach of this Agreement by a party (the **Defaulting Party**), the other party (the **Non-Defaulting Party**) may issue a written notice notifying the Defaulting Party of such breach. The Non-Defaulting Party is entitled to terminate this Agreement if the material breach is not reasonably capable of being rectified or has not been rectified within 28 days of the date of the notice.
- b. For the avoidance of doubt, the Hirer will commit a material breach of this Agreement if it:
 - I. fails to pay to the Owner any amount under this Agreement, or
 - II. one of the following events occurs in relation to the Hirer:
 - 1. a receiver, manager, receiver and manager or trustee is appointed in respect of the Hirer or any asset of the Hirer;
 - 2. a liquidator or provisional liquidator is appointed in respect of the Hirer;
 - 3. an order is made appointing a person referred to in I or II;
 - 4. an order is made for the winding up of the Hirer; or
 - 5. the Hirer becomes, or admits in writing that it is, is declared to be, or is deemed under any applicable S Law to be, insolvent or unable to pay its debts.
- c. Upon termination of this Agreement by either party, the Owner shall be entitled to all things reasonably required, including entering onto the Hirer's premises, to take possession of the Equipment.
- d. If this Agreement is terminated by the Owner prior to the end of the Hire Period under this clause 19 or otherwise as a result of any default or repudiation by the Hirer, then the Hirer must pay the owner the hire fees as specified in the Schedule that would have been payable in respect of the period between the date of termination and the end of the Hire Period, without prejudice to any other claims the Owner may have against the Hirer.

20. Equipment is used at Hirer's risk

- a. The Hirer uses, operates and possesses the Equipment at the Hirer's sole risk. The Owner has no liability whatsoever for any loss or damage to any property of the Hirer arising from the use of the Equipment, except to the extent such loss or damage was caused by the Owner's Wrongful Act. Notwithstanding the above it is explicitly agreed that the Hirer is not liable for any products liability associated with the equipment.
- b.
- c. To the fullest extent permitted by Law the Hirer releases and discharges the Owner, its related entities, agents and employees from all claims and demands of whatsoever nature for loss or damage caused to or incurred by the Hirer in relation to this Agreement whether by way of death of, or injury or illness to, any person of any nature or kind, accident or damage to property, delay, financial loss or otherwise or any accident to or involving the Equipment or its use, operation, repair, maintenance or for which may otherwise be suffered or sustained in, upon or near the Equipment, except to the extent caused by the Owner's Wrongful Act and which:
 - I. arises from or relates to use of the Equipment; or
 - II. arises from or relates to this Agreement.

21. Indemnity

The Hirer will save, keep harmless and indemnify the Owner from and against any and all claims, actions, proceedings, demands, liabilities, losses, damages, costs, penalties and all expenses legal and otherwise of whatsoever kind and nature (including claims based upon strict liability in tort):

- a. arising out of or alleged to arise out of the delivery, selection, purchase, acceptance or rejection, ownership, possession, use (including by reason of the use or incorporation of any invention resulting in infringements of patents), repair, maintenance, storage, or operation of the Equipment, and by whomsoever used or operated (except where used by the Owner or any person on behalf of the Owner);
- b. incurred by the Owner in respect of any loss of the Equipment by seizure, distress, execution or other legal process, confiscation or forfeiture of the Equipment;
- c. arising out of any claim for patent, trademark or copyright infringement, for strict liability, or for any other reason being made against the Owner in connection with the Equipment or its operation; or
- d. caused by a breach of this Agreement by the Hirer, except to the extent caused by the Owner's Wrongful Act.

22. Consequential or indirect loss

Except as expressly provided in this Agreement, neither party is in any circumstances liable to the other for any of the following loss or damage, whether arising under a Law, in contract, tort, equity or otherwise:

- a. in the case of loss or damage resulting from a breach of contract (including a breach of a contractual duty of care) - indirect, remote or unforeseeable loss, including:
 - I. loss of revenue or profit;
 - II. loss or denial of opportunity (but excluding loss or denial of any benefit which would otherwise flowed directly from this Agreement had the relevant breach of contract not occurred);
 - III. loss of access to markets;
 - IV. loss of goodwill or business reputation;
 - V. increased overhead costs,or any other similar loss occasioned by that breach, whether or not in the reasonable contemplation of the parties at the time of execution of this Agreement as being a probable result of the relevant breach; and
- b. in the case of loss or damage arising from any tort (including negligence, but excluding any breach of a contractual duty of care in respect of which paragraph (a) of this clause applies) - indirect, remote or unforeseeable loss and, in the case of pure economic loss, loss not flowing directly from the commission of the tort.

23. Force Majeure

23.1 Force Majeure Event

The parties have no liability to each other for any delay or failure of performance by a party, where such delay or failure is caused by an event or circumstance (or combination of events or circumstances) that:

- a. is beyond the reasonable control of the party affected by that event or circumstance;
- b. causes or results in prevention of the performance by the affected party of any of its obligations under this Agreement; and

- c. could not have been prevented, overcome or remedied by the exercise by the affected party of a standard of care and diligence consistent with reasonable technical and commercial diligence and prudence, other than an obligation to pay any amount owing under this Agreement (**Force Majeure Event**).

23.2 **Actions during Force Majeure**

A party affected by a Force Majeure Event (the **Affected Party**) must:

- a. promptly notify the other party of the details of the Force Majeure Event, the date it commenced and an estimate of the time required to resume full performance of its obligations;
- b. use all reasonable diligence to promptly remedy or abate the Force Majeure Event;
- c. resume performance as quickly as possible after the Force Majeure Event has terminated, or abated to an extent that permits it to resume performance (in whole or in part); and
- d. notify the other party when the Force Majeure Event has terminated, or abated to an extent that permits it to resume performance (in whole or in part) and promptly revise such notice as required.

24. **Retention of title**

23.1 **Retention of title**

The Hirer acknowledges that:

- a. it takes the Equipment by way of bailment only;
- b. it does not have an option to purchase the Equipment;
- c. no representation has been made by the Owner to the Hirer that the Hirer may purchase the Equipment at any time; and
- d. title in the Equipment remains with the Owner at all times throughout the Hire Period.

23.2 **Owner's Security Interest**

- a. The Hirer acknowledges that the hire of Equipment under this Agreement may give rise to a Security Interest in the Equipment.
- b. The Owner may register any Security Interest created under this Agreement on the PPS Register in any manner it chooses. The Hirer must provide the Owner with any information it requires for the purposes of effecting such registration.
- c. The Hirer irrevocably and unconditionally waives its right to receive any verification statement or other notice from the Owner in connection with the registration of a Security Interest arising under this Agreement.
- d. The Hirer agrees to take any such steps as the Owner reasonably requires to perfect or other ensure the enforceability and priority of any Security Interest created under this Agreement.
- e. Unless otherwise agreed in writing, the Hirer agrees to ensure that the Equipment does not become a fixture to any land.
- f. The parties agree that for the purposes of section 115 of the PPSA, the following sections of the PPSA will not apply in relation to a Security Interest in the Equipment to the extent, if any, mentioned:
 - I. section 123 (right to seize collateral);
 - II. section 125 (obligation to dispose of or retain collateral);
 - III. section 126 (apparent possession);
 - IV. section 128 (secured party may dispose of collateral);
 - V. section 129 (disposal by purchase);
 - VI. sections 130, 132(3)(d) and 132(4) (right to be provided with a statement of account);
 - VII. subsection 134(1) (retention of collateral); and
 - VIII. section 135 (notice of retention).

25. **Entire agreement**

- a. Every quotation issued by the Owner and unsigned agreement is subject to withdrawal or alteration at any time before any order is accepted by the Owner and no order shall be deemed to have been accepted until formal acceptance in writing is delivered to the Hirer. In any event, the quotation and unsigned agreement shall be applicable for a maximum period of 7 days unless renewed by the Owner, and will be subject to equipment availability.
- b. This Agreement constitutes the entire agreement of the parties and any prior agreements, understandings and negotiations in respect hereof are of no effect. If the Hirer does not sign this Agreement but takes delivery of and uses the Equipment then, and in that event, the Hirer appoints any director or officer of the Owner to execute this Agreement as attorney for the Hirer.

26. **Service of notices and process**

Any notice or demand to be given under this Agreement will be deemed to be duly given if it is in writing and:

- a. in the case of the Hirer, sent by facsimile or email to the facsimile number or email address specified for the Hirer in the Schedule; and
- b. in the case of the Owner, sent by facsimile or email to the facsimile number or email address specified for the Owner in the Schedule.

Any process for the institution of proceedings by the Owner against the Hirer in respect of a cause of action arising under this Agreement shall be deemed sufficiently served if sent to the Hirer in the manner prescribed in this clause 26.

27. **Governing law**

This Agreement will be construed in accordance with the Laws of the State of Western Australia and the Commonwealth of Australia. Each party irrevocably submits to the non-exclusive jurisdiction of the courts of Western Australia.

28. **Dispute Resolution**

- a. In this clause 28:
 - Act** means the Commercial Arbitration Act (WA);
 - Arbitrator** means a single arbitrator appointed pursuant to this clause;
 - Award** means an interim or final award by the Arbitrator;
 - President** means the president for the time being of the Law Society of Western Australia.
- b. In the event of any dispute or difference between any parties as to any issue arising under this Agreement that dispute or difference, if unresolved within 7 days after notice in writing of the dispute or difference has been given by a party to another party, shall be referred to an Arbitrator in accordance with the Act.
- c. The Arbitrator shall be a person agreed between the parties. In default of agreement as to the Arbitrator within 7 days after nomination in writing by any party the Arbitrator shall be a person appointed by the President.
- d. The arbitration shall be conducted in accordance with the following provisions:
 - I. the arbitration hearing shall be convened and concluded within 30 days after the date of the Arbitrator's appointment;
 - II. the time permitted for the arbitration hearing shall not exceed 2 days (from 10am to 1pm and 1pm to 4pm on each day) with the presentation of each party's case not to exceed a rateable proportion of the hearing time without the written agreement of the other parties;
 - III. within 7 days after the Arbitrator's appointment each party will pay to the Arbitrator a rateable proportion of the maximum costs that might be payable to the Arbitrator as and by way of security for the Arbitrator's costs so that if the maximum cost payable to the Arbitrator is \$9,000 plus GST and there are 2 parties then each party will pay \$4,500 plus GST. If a party fails to comply with this subclause then the Arbitrator shall determine the dispute or difference in accordance with the claim or defence of the other party;
 - IV. the Arbitrator shall deliver an Award with written reasons not later than on the day following the completion of the arbitration hearing;

- V. forthwith after delivery of the Award the Arbitrator shall determine the liability of the parties, one to the other, for the costs of the arbitration including the Arbitrator's costs;
 - VI. the costs of the Arbitrator will not exceed 15 times the maximum hourly rate, plus GST, for a senior solicitor acting in a contentious matter in the Supreme Court of Western Australia pursuant to the then prevailing determination of the Legal Costs Committee;
 - VII. the costs ordered by the Arbitrator to be paid by a party to any other party (exclusive of the Arbitrator's costs) shall not exceed 150% of the Arbitrator's costs;
 - VIII. the arbitration will be conducted according to Law; and
 - IX. no variation to these terms will be permitted except with the written agreement of the parties.
- e. This clause 28 shall not affect the right of a party to seek urgent injunctive relief from a court of competent jurisdiction.
- 29. Confidentiality**
- a. The terms and conditions of this Agreement and all information exchanged between the parties under or in connection with this Agreement is confidential (**Confidential Information**). Each party undertakes that neither it nor its employees may disclose any Confidential Information to a third party, other than:
 - I. with the written consent of the other party;
 - II. to the extent required by Law or by order of any arbitrator, court or tribunal of competent jurisdiction or by a direction or requirement of any government agency or stock exchange;
 - III. to any of the following persons:
 - 1. the party's employees, officers or legal counsel or a related body corporate of the party or an employee, officer or legal counsel of the related body corporate;
 - 2. the party's independent consultants and contractors, agents, financiers, auditors and insurers provided that such persons have made an undertaking of confidentiality to the party in favour of both parties on terms similar to this clause 29; and
 - 3. a genuine prospective assignee or acquirer of the party (or a related body corporate of the party) or its rights or obligations under this Agreement and their financiers, consultants and advisers, provided the party obtains an undertaking of confidentiality from such persons in favour of both parties on terms similar to clause 29.
 - b. Without limitation paragraph (a), neither party may disclose information of the kind referred to in section 275(1) of the PPSA and this clause constitutes a confidentiality agreement within the meaning of the PPSA. The Hirer waives any right it may have, or but for this clause may have had, under section 275(7)(c) of the PPSA to authorize the disclosure of information of the kind referred to in section 275(1) of the PPSA.
- 30. Variation**
This Agreement may only be varied by a document signed by or on behalf of each party.
- 31. Expenses**
Except as otherwise provided in this Agreement, each party must pay its own costs and expenses in connection with negotiating, preparing, executing and performing this Agreement.
- 32. Waiver**
- a. Failure to exercise or enforce, or a delay in exercising or enforcing, or the partial exercise or enforcement of, a right, power or remedy provided by law or under this Agreement by a party does not preclude, or operate as a waiver of, the exercise or enforcement, or further exercise or enforcement, of that or any other right, power or remedy provided by law or under this Agreement.
 - b. A waiver or consent given by a party under this Agreement is only effective and binding on that party if it is given or confirmed in writing by that party.
 - c. No waiver of a breach of a term of this Agreement operates as a waiver of another breach of that term or of a breach of any other term of this Agreement.
- 33. Assignment**
- a. The Hirer cannot assign, novate or otherwise transfer (**Dispose**) any of its rights or obligations under this Agreement without the prior consent of the Owner, such consent not to be unreasonable withheld. Nothing in this Agreement prevents the Owner from Disposing any of its rights or obligations under this Agreement.
 - b. A party that Disposes of any of its rights or obligations under this agreement must require the party in whose favour the rights or obligations are disposed to enter into a deed agreeing to be bound by the party's obligations under this Agreement.
- 34. GST**
- a. Unless clearly indicated to the contrary, "GST" and other terms used in this clause 34 (and in other provisions of this Agreement where the GST meanings are expressly intended) have the meanings ascribed to those terms by the *A New Tax System (Goods and Services Tax) Act 1999* or any replacement or other relevant legislation and regulations.
 - b. If GST is payable by a person in relation to any supply that it makes under, in connection with or resulting from this Agreement (**Supplier**), the parties acknowledge and agree that:
 - I. any consideration provided for that supply under this Agreement other than under this clause 34(b) or any value deemed for GST purposes in relation to that supply (**Agreed Amount**) is exclusive of GST (unless otherwise stated);
 - II. an additional amount will be payable by the recipient of that supply (**Recipient**) that is equal to the GST payable on that supply;
 - III. the additional amount is payable in the same manner as for the Agreed Amount and at the same time as any part of the Agreed Amount is to be first provided for that supply; and
 - IV. the Supplier will provide a tax invoice to the Recipient.
 - c. If, following the payment of an additional amount pursuant to clause 34(b) in relation to a supply made by the Supplier, the GST payable by the Supplier to the Australian Taxation Office in respect of that supply varies from the total consideration provided by the Recipient to the Supplier on account of GST on that supply such that:
 - I. the Supplier is required to pay a further amount of GST in respect of that supply; or
 - II. the Supplier receives a refund or credit of the whole or any part of the GST paid by the Supplier in relation to that supply,
 then the Supplier will provide a corresponding refund or credit to or will be entitled to receive the amount of that variation from the Recipient (as appropriate). Any payment, credit or refund under this clause 34(c) is deemed to be a payment, credit or refund of the additional amount payable under clause 34(b). Where there is an adjustment event, the Supplier must issue an adjustment note to the Recipient as soon as the Supplier becomes aware of the adjustment event.
 - d. Any payment or reimbursement required to be made under this Agreement that is calculated by reference to a cost, expense, or other amount paid or incurred will be limited to the total cost, expense or amount less the amount of any input tax credit to which an entity is entitled for the acquisition to which the cost, expense or amount relates.
 - e. This clause will not merge on completion of this Agreement.