

TERMS AND CONDITIONS OF HIRE

VACANT HOLDINGS PTY LTD TRADING AS KARRATHA MACHINERY HIRE (ACN 009 420 464)

All Equipment hired to the Customer by KMH will be hired on the following General Terms and Conditions, which form part of the Quotation and the Hire Agreement.

1. DEFINITIONS AND INTERPRETATION

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

'Accessories' means furniture, equipment and loose items not permanently attached to the Equipment, which are provided by KMH with the Equipment (if any);

'Agreement' means any agreement for the hire of Equipment by the Customer, and comprises the Quotation, the Hire Agreement (but subject always to these General Terms and Conditions) and the KMH's acceptance of the Hire Agreement and these General Terms and Conditions by way of transmission of the accepted Hire Agreement to the Customer;

'KMH' means VACANT HOLDINGS Pty Ltd (ACN 009 420 464) trading as Karratha Machinery Hire of Suite 3, 14 Peelwood Parade, Halls Head, Western Australia 6210, and its successors and assigns.

'KMH's Premises' means KMH's premises at 1105 Lambden Road, Karratha, Western Australia 6714, or such other premises as KMH may specify in writing for the purpose;

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

'Certificate of Currency' means a certificate issued by the insurer under a policy of insurance obtained by the Party as specified in Clause 18.1.

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

'Customer' means the person or company with whom or which KMH makes the Contract;

'Delivery' means Collection or the delivery of the Equipment to a site specified by the Customer, as specified in the Quotation or as otherwise agreed in writing between the parties;

'Delivery Address' means the delivery address specified in the Quotation or such alternate delivery address as may be agreed in writing between the parties;

'Dispute' means a dispute between the parties arising out of or in connection with this Agreement;

'Dispute Notice' means a notice issued by one party to the other party under Clause 27.2 notifying the other party that there is a Dispute to be resolved;

'Event of Default' means an event of default within the meaning of Clause 20.1;

'Equipment' means the Equipment including the Accessories and Sub Hire Equipment (if any) hired to the Customer as detailed in the Contract or as may be agreed in writing by KMH and the Customer;

'General Terms and Conditions' means these terms and conditions, and includes the Quotation;

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

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

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

'Invoice' means an invoice in respect of Hire Charges issued under Clause 7;

'Loss' means:

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

'Nomination' means a nomination to have a mediator appointed within the terms of Clause 27.3;

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

'Hire Charge' means the charges payable for the Equipment as agreed between KMH and the Customer in accordance with Clause 7 of this Agreement.

'Purchase Order' means a purchase order issued by the Customer to KMH for the hire of any Equipment;

'Personal Property Securities Act' means the Personal Property Securities Act (Cth) 2009, as amended from time to time.

'Quotation' means a quotation given by KMH to the Customer detailing the Equipment, Hire Rate, Term and related conditions, such Quotation being subject at all times to these General Terms and Conditions;

'Security Agreement', 'Commingled Goods', 'Financing Statement', 'Financing Change Statement', 'Collateral', 'Notice of Objection', 'Personal Property', 'After Acquired Personal Property', 'Purchase Money Security Interest', 'Registration' and 'Security Interest' have the meanings given to them in the Personal Property Securities Act.

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

'Term' means the hire term agreed in writing between the Parties; and

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

1.2. In these General Terms and Conditions:

- (a) the singular includes the plural and *vice versa*;
- (b) terms cognate with defined terms have corresponding meanings; and
- (c) the Customer must not represent to any third party that it is acting for KMH, and KMH will not be bound by any contracts with third parties to which the Customer is a party.

2. CONTRACT FOR HIRE

2.1. Subject to the Customer providing such security payments and its directors providing such guarantees as KMH may require under Clause 2.3, the Agreement is formed upon KMH's acceptance of the Purchase Order, and comprises the Quotation, these General Terms and Conditions and the Purchase Order.

2.2. In the event of any inconsistencies, the documents comprised in this Agreement will take precedence in the following order: the Agreement, these

General Terms and Conditions, the Purchase Order and the Quotation.

2.3. Prior to accepting the Purchase Order, KMH may require the Customer to provide security payments in advance and the Customers' directors to provide personal guarantees.

2.4. Except as provided by Clause 2.6, by its acceptance of the Quotation by transmitting the Purchase Order to KMH or by agreeing to any requirements which KMH may make under Clause 2.3, the Customer agrees to be bound by these General Terms and Conditions, and the signing of these General Terms and Conditions, or of any document of hire or lease of the Equipment which attaches or incorporates these General Terms and Conditions, by an officer of the Customer with apparent authority to do so will be conclusive evidence for all purposes whatsoever of the Customer's acceptance of these General Terms and Conditions to the exclusion of all other terms and conditions.

2.5. Upon the Agreement becoming binding, KMH agrees to hire to the Customer, and the Customer agrees to take on hire from KMH, the Equipment and Accessories for the Term on the terms and conditions contained in the Agreement, including these General Terms and Conditions.

2.6. It is expressly agreed between KMH and the Customer that, notwithstanding the terms and conditions of any document (including the Purchase Order) provided by the Customer to KMH purportedly regulating the legal relations between them, the Agreement and these General Terms and Conditions will prevail and KMH will only be bound by the terms and conditions of such document to the extent, not inconsistent with the Agreement and these General Terms and Conditions, that it agrees with the Customer in writing to be so bound.

3. TERM

Subject to Clause 19, the Term of the Hire will be as agreed in writing between the parties, and as may be extended or varied from time to time by agreement in writing between the parties.

4. COLLECTION, DELIVERY AND RISK

4.1. The Customer will be responsible for the collection of the Equipment from KMH's premises unless otherwise agreed between the parties, and the Customer is responsible for all delivery costs unless stated otherwise agreed in writing between the parties.

4.2. Risk in the Equipment and Accessories passes to the Customer in accordance to clause 6.1.

4.3. If KMH is to deliver up the Equipment to the Customer's Delivery Address, the Customer will ensure that delivery is enabled by way of vehicular access via a properly constructed roadway to the Delivery Address, and if for whatever reason the Customer does not provide such access and KMH

will use reasonable endeavours to effect delivery of the Equipment and Accessories as close to the Delivery Address as conditions allow or as it otherwise considers appropriate in all the circumstances, and KMH will not be liable to the Customer for any costs or expenses incurred or suffered by the Customer arising directly or indirectly from any inability to effect delivery to the Delivery Address, or for any damage or injury to the Equipment and Accessories or to any other property or to any person arising directly or indirectly from the circumstances or manner of delivery, whether to the Delivery Address or otherwise.

- 4.4. The Customer agrees that the Equipment and Accessories will be deemed to be delivered and in good condition unless written notice of any shortages or defects is received by KMH within forty eight (48) hours after Delivery.
- 4.5. Unless specifically stated otherwise in the Agreement or the Quotation, the Customer is responsible for all transport charges incurred by KMH in relation to the return of the Equipment and Accessories to KMH's Premises or such other premises as may be agreed in writing between the parties.
- 4.6. The Customer may elect to use KMH's resources for the delivery or return of the Equipment and Accessories, in which case a minimum seven (7) days advance notice in writing from the Customer is required, and, if the Customer elects for KMH to deliver the Equipment and Accessories, Collection will be deemed to take place at the instant when KMH first moves the Equipment and Accessories in order to effect Delivery.
- 4.7. If the Customer elects with the written approval of KMH to organise its own transport and demobilisation resources for the purposes of returning the Equipment and Accessories to KMH at the expiry of the Term or upon earlier termination in accordance with Clause 20, then, notwithstanding such approval, it will return the Equipment and Accessories:
- (a) at its own expense;
 - (b) in the same condition as the Equipment and Accessories were in at the commencement of the Hire, cleaned and properly maintained, subject only to fair wear and tear; and
 - (c) with a full tank of fuel otherwise KMH will charge the Customer for the costs of refuelling.
- 4.8. The Customer will be responsible for ensuring that all Accessories are safely packed prior to the return of the Equipment and Accessories in accordance with any and all instructions given by KMH.
- 4.9. The Customer will be solely responsible for the operation of the Equipment and Accessories after Delivery, and KMH and the Customer agree and the Customer specifically acknowledges that:

- (a) the Customer must not modify or alter the Equipment and Accessories in any manner whatsoever, including without limitation by the removal of any item, without KMH's prior written consent; and
- (b) the Customer must, at its own cost and prior to the return of the Equipment and Accessories at the expiry of the Term or the earlier termination of the Contract, rectify all modifications and alterations of any nature whatsoever to the Equipment and Accessories, and any damage caused to the Equipment and Accessories.

- 4.10. The Customer warrants that it will comply with all applicable legislation and regulations, including without limitation any relevant equipment operating codes, and that it will comply with all applicable equipment operating standards and good equipment operating practice.
- 4.11. Without limiting in any manner whatsoever any other indemnity given by the Customer under the Contract, the Customer will indemnify KMH and hold it harmless in respect of all claims, costs, damages, expenses and losses which KMH may incur or suffer arising out of any failure or default in respect of the Customer's obligations under this Clause 4 including without limitation any remedial or rectification action in respect of improper or unlawful installation of the Equipment and Accessories.

5. INSPECTION, LIMITATION OF LIABILITY AND WARRANTIES

5.1. Inspection of Equipment and Accessories

The Customer may inspect the Equipment and Accessories prior to taking possession of them at KMH's premises or the Delivery Address, and the Customer will be deemed to be satisfied as to the condition, quality and safety of the Equipment and the Accessories, their fitness for the Customer's purposes and their compliance with their description unless a written notice of shortage and defects is given to KMH in accordance with Clause 4.4.

5.2. Implied terms and conditions regarding Equipment and Accessories excluded

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

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

5.3. Indemnity

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

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

5.4. Exclusion of liability for Loss

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

6. RISK, TITLE AND THE PERSONAL PROPERTY SECURITIES ACT ('PPSA')

KMH retains full title to the Equipment (or rights as bailee for the Sub Hire Equipment) and the Accessories notwithstanding their delivery to the Customer, their possession and use by the Customer and any temporary attachment of the Equipment to any land or buildings to facilitate use of the Equipment.

6.1. Equipment supplied by KMH to the Customer will be at the Customer's risk upon

- (a) delivery to the Customer; or
 - (b) delivery to the Customer's custody, possession or control,
- whichever is the sooner.

6.2. Ownership of the Equipment remains with KMH until all the amounts owing by the Customer to KMH (including without limitation to the Hire

charge of the Equipment and other debts owing to KMH) have been paid in full.

6.3. The Customer must store the Equipment in such a manner that they are readily distinguishable from other equipment held by the Customer so they clearly show that they are the property of KMH.

6.4. The Customer acknowledges that the Agreement and these Terms and Conditions constitute a Security Agreement which creates (or may create) a Security Interest in favour of KMH in all Present and After Acquired Personal Property owned the Customer and the Equipment and Accessories described in the Agreement provided by KMH to the Customer from time to time, to secure the payment from time to time and at a time, including future payments. The Customer agrees to grant to KMH a Purchase Money Security Interest.

6.5. The Customer accepts, acknowledges and agrees that:

- (a) KMH obtains a Security Interest in all Equipment supplied by KMH to the Customer, including any Commingled Equipment;
- (b) KMH can, without notice to the Customer, affect and maintain a Registration (in any manner that KMH considers appropriate) of its Security Interest on the Personal Property Securities Register ('PPSR') in relation to any security interest contemplated or constituted by the Agreement including but not limited to the Equipment, contract rights or intellectual property; and
- (c) Pursuant to section 275(6) of the PPSA, the Customer agrees KMH is not required to disclose to an interested person information pertaining to KMH's Security Interest unless required to do so pursuant to the PPSA or at law generally.

6.6. The Customer will:

- (a) sign any documents and/or provide any further information (which information the Customer warrants to be complete, accurate and up-to-date in all respects) and/or assistance which KMH may reasonably require to enable perfection of its Security Interest or Registration of a Financing Statement or Financing Change Statement on the PPSR;
- (b) not register a Financing Change Statement or make a demand to alter the Financing Statement pursuant to section 178 of the PPSA in respect of the Equipment, including any Services, without the prior written consent of KMH;
- (c) not offer, sell assign, sub-hire, charge, mortgage, pledge or create any form of security interest or otherwise deal with the Equipment in any way.

- (d) give KMH not less than 14 days' written notice of any proposed change in their name and/or any other changes in their details (including but not limited to, changes in their address, facsimile number, email address, trading name or business activities);
- (e) indemnify KMH against any costs KMH incurs in perfecting and maintaining its perfected Security Interest in the Equipment or such other Personal Property under the PPSA and any costs KMH may incur in the course of enforcing any of its rights under this Agreement, the PPSA or at law generally;
- (f) procure from any persons considered by KMH to be relevant to its security position, such agreement and waivers as KMH may at any time reasonably require.

6.7. The Customer undertakes to:

- (a) not register a financing change statement in respect of a Security Interest contemplated or constituted by the Agreement without KMH's prior written consent;
- (b) not register, or permit to be registered, a financing statement of a financing change statement in respect of a Security Interest contemplated or constituted by this Agreement in favour of a third party without KMH's prior written consent.

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

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

- (k) Section 143 (reinstatement of security agreement).

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

7. HIRE CHARGES AND TERMS OF PAYMENT

7.1. The Customer will pay the Hire Charges during the Term calculated in accordance with the Hire Rate set out in the Quotation and as subject to the Invoices issued from time to time. The Customer must pay the invoice within 30 days from the date of the invoice.

7.2. The Customer will pay KMH on demand interest at the Reserve Bank of Australia cash rate plus 12% per annum on all overdue amounts owed by the Customer to KMH, which interest will be calculated daily and will be payable together with the overdue amount.

7.3. (a) The Hire Rate excludes GST unless otherwise stated in the Quotation.

(b) Notwithstanding Clause 7.3(a), KMH will, on the Customer's request and in any case as required by law, provide tax invoices to the Customer in order to assist the Customer to comply with legislation relating to GST.

7.4. (a) Hire periods are a minimum of one (1) day unless otherwise agreed in writing.

(b) Hire Charges will be calculated on a weekly basis, each week of the Hire ending on Friday, and unless otherwise agreed in writing, Invoices will be issued monthly in advance at the start of each month of the Term.

(c) It is stated for certainty that the Hire Charge for a broken period not amounting to a full week from Sunday to Saturday inclusive will be charged as if it were a full week.

7.5. If the Customer terminates the Contract prior to expiry of the Term, it shall pay KMH all monies owing at the time of termination plus all amounts which would have become due for the balance of the Term, provided that, if KMH is able to re-hire the Equipment to another person or company before the date on which the Term would otherwise have expired, there will be deducted from the amount which KMH would otherwise be due under this Clause such amount as KMH receives or is entitled to receive from that other person or company during the period ending on the date on which the Term would otherwise have expired.

7.6. The Customer may not set-off any amounts owed to KMH whatsoever or assert any purported right to set-off or make any claim whatsoever based upon a set-off.

7.7. If the parties have agreed in writing that KMH will transport or install the Equipment and Accessories, all costs relating thereto will be

invoiced by KMH in the month in which the service is performed or as soon thereafter as is practicable, and are payable by the Customer as specified in the Quotation.

8. CALCULATION OF CHARGES

- 8.1. Charges are based on the entire duration of the period of hire;
- 8.2. One day's hire is for twelve (12) hours work in twenty four (24) hours and extra shifts are chargeable. If the Equipment is returned late by the Customer, KMH will charge an additional day of hire.
- 8.3. One week is seven (7) consecutive days including weekends and holidays;
- 8.4. Extra days are charged at 1/7th of the weekly rate. Double shift rates as agreed between the parties.

9. STAND DOWN

Should the Customer wish to stand down an item of equipment he must phone the KMH each day on the day stand down is required and seek a stand down number from the KMH who will have the discretion to refuse the stand down and require the equipment to be returned forthwith or made available for collection. Any stand down will commence from the time permission is granted to the Customer by the KMH. A reduced rate of 60% of the normal daily rate may apply at the sole discretion of the KMH.

10. VARIATION TO HIRE CHARGES

If during the Term the Customer requires the hire of any Equipment other than the Equipment (including Sub Hire Equipment if any) and Accessories originally hired pursuant to this Agreement ("**Further Equipment**"), then KMH shall specify the Hire Charge of such Further Equipment and subject to the Customer agreeing with that Hire Charge, the Further Equipment will also be hired to the Customer by KMH pursuant to the terms of this Agreement.

11. DUTIES, TAXES, ETC

The Customer must pay all duties, rates, taxes and imposts, and all registration, permit, licence and other fees which may be levied by any statutory or public authority at any time directly or indirectly upon the Equipment and Accessories or in relation to their transportation, installation and/or use for the purposes of the Contract.

12. USE OF EQUIPMENT

- 12.1. The Customer must operate and maintain the Equipment, Accessories and all parts thereof in accordance with any applicable Commonwealth and/or State legislation (including without limitation legislation relating to occupational health and safety) and in accordance with the requirements and recommendations of the manufacturer or supplier of the Equipment and Accessories, and all

recognised methods and standards for Equipment of their type.

- 12.2. The Customer will ensure at all times that only competent and (where appropriate) properly qualified, trained and licensed personnel, using appropriate methods and standards of operation, are permitted to operate the Equipment and Accessories.

13. MAINTENANCE OF EQUIPMENT

- 13.1. The Customer will be fully and solely responsible for any Loss or damage to the Equipment and Accessories in excess of normal wear and tear, and will notify KMH in writing and will pay for any Loss of or damage to the Equipment and Accessories, however occasioned (fair wear and tear only excluded).
- 13.2. The Customer must at its own expense, when, where and as often as is needed, keep and maintain the Equipment and Accessories clean and properly serviced, in proper working order and condition and in good and substantial repair, and will replace parts and tyres which become worn out or damaged. The Customer must also supply all fuel, oil and lubricants, necessary for operation of the equipment at its own expense.
- 13.3. The Customer must at its own expense, conduct monthly mechanical audits of the Equipment and Accessories, by:
 - (a) KMH's preferred specialist mechanic or technician (i.e. ODH Mechanical Pty Ltd at a rate of \$140.00/hour); or
 - (b) Any personnel with equivalent qualifications to ODH Mechanical Pty Ltd, subject to KMH's prior written approval.
- 13.4. All repairs and replacement parts must be prior approved in writing by KMH, and all repairs and replacements must be carried out by:
 - (a) KMH's preferred specialist mechanic or technician (i.e. ODH Mechanical Pty Ltd at a rate of \$140.00/hour); or
 - (b) Any personnel with equivalent qualifications to ODH Mechanical Pty Ltd, subject to KMH's prior written approval.
- 13.5. The Customer must ensure that all replacement parts are appropriate to the Equipment and Accessories and to the function they are to perform in relation thereto, that they are free and clear of all liens, security interests, and rights of others, and that they have a value and utility at least equal to the parts replaced (assuming that the replaced parts were in the condition and repair in which they were required to be maintained by the Contract).
- 13.6. KMH and the Customer agree and the Customer specifically acknowledges that all replacement parts will, upon incorporation into the Equipment and Accessories, become and thereafter remain the property of KMH.

13.7. The Customer does not need to obtain the prior written approval of KMH to carry out cleaning and maintenance not amounting to equipment audit or repair or replacement of parts, but if the Customer has any doubt whether any proposed action properly amounts to equipment audit or replacement or repair, it will refer the matter to KMH, whose decision will be final.

14. EQUIPMENT FAILURE

If Equipment becomes unsafe, in a state of disrepair or not in working order, the Customer agrees to immediately discontinue the use of the Equipment and to notify KMH immediately. The Customer will on no account attempt to repair the Equipment without the consent of KMH and will immediately return the Equipment to KMH's premises if required to do so by KMH. If the failure is caused by reasonable wear and tear and for no other reason including the Customer's negligence or misuse, KMH agrees, in its discretion, to:

- (a) Repair the equipment within a reasonable time;
- (b) Make similar equipment available, or
- (c) Adjust the rental charge.

KMH shall in no circumstances be liable for any loss sustained by the Customer.

15. VEHICLE LOGS AND JSA'S

The Customer shall ensure that all operators qualified to operate the Equipment:

- (a) Conduct a job safety analysis prior to using the Equipment;
- (b) Complete and adhere to the requisite JSA's as prescribed by law and the relevant site manager; and
- (c) Properly log and maintain all daily and monthly pre-starts and vehicle logs, as prescribed by law.

16. ACCESSORIES

16.1. The Customer is responsible for placement of the Accessories in good working order for use with the Equipment.

16.2. The Customer agrees to service, clean and maintain in proper working order any Accessories included in the Contract.

16.3. All Accessories will be returned to KMH clean and in good and working order upon expiry or earlier termination of the Contract.

17. INSPECTION OF EQUIPMENT BY KMH

17.1. On giving the Customer reasonable notice, KMH may enter with its servants and agents upon or into the Customer's site to inspect the Equipment and Accessories and carry out such inspections

and tests on the Equipment and Accessories as may seem reasonable to KMH.

17.2. KMH may serve on the Customer a notice in writing of any defect or deficiency in the Equipment and Accessories and their operation, requiring the Customer within a reasonable time (specified in the notice) to repair or replace the Equipment or Accessories or to make good the defect or deficiency.

17.3. If the Customer fails to carry out any requirements under Clause 17.2, KMH may carry out those requirements and the costs of such maintenance will be payable by the Customer.

18. INSURANCE

18.1. Extent of insurance

The Customer must effect before the commencement of the Hire and maintain during the Term, and provide KMH with requisite Certificates of Currency and notify KMH of same, for:

- (a) **General insurance:** insurance of the Equipment and Accessories for their full insurance value against theft, Loss, damage or destruction caused by accident and any insurable risk commonly insured against in regard to equipment of a similar nature to the Equipment and Accessories; and
- (b) **Third party risks:** insurance against all third party risks including liability for all damage or injury of any kind to any property or person and otherwise as required to the full extent required by law,

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

18.2. Insurance for KMH

The Customer's insurance coverage referred to in Clause 18.1 must also contain the following provisions:

- (a) either an indemnity in favour of KMH or cover at no cost to KMH up to the limits of the policy regardless of any act or neglect of the Customer or any breach or violation by the Customer of any warranties, declarations or conditions contained in the policy;
- (b) notwithstanding the lapse of the policy (except by reason of expiration in accordance with its terms) or any right of cancellation by the insurer or cancellation by the Customer (whether voluntary or involuntary), the insurer will notify KMH of the same and the policy will continue in force for the benefit of KMH for at least thirty (30) days after written notice of cancellation has been given to KMH and the Customer will indemnify and hold KMH harmless in respect of any damage, cost or expense suffered or incurred by KMH as a

result of the insurer's omission or failure to so continue the policy in force; and

- (c) if for any reason whatsoever, any such policy is lapsed or cancelled before the expiry of the Term, the Customer must forthwith take out and maintain for the balance of the Term a replacement insurance policy satisfying the requirements of this Clause.

19. EXTENSION OF HIRE TERM

19.1. If the Customer wishes to extend the Hire for a further period, it may make a written request to KMH to do so at least ten (10) Business Days prior to the expiry of the Term, and KMH will endeavour to notify the Customer in writing not later than the expiry of the Term whether or not KMH agrees to grant that request and, if so, at what Hire Rate.

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

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

20. DEFAULT AND TERMINATION

20.1. Events of default

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

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

20.2. Consequences of default

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

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

20.3. Early termination by the Customer

The Customer may by notice in writing to KMH terminate the Contract before the expiry of the Term, in which case Clause 7.6 will apply and the Customer will remain liable to KMH for the Hire Charges applicable to the balance of the Term subject only to reduction in the circumstances set out therein.

21. RETURN OF EQUIPMENT

21.1. Delivery-up of Equipment by the Customer

- (a) Upon the expiry or earlier termination of the Contract, the Customer must at its own expense immediately deliver up the Equipment and Accessories to KMH's Premises or as otherwise directed in writing by KMH.
- (b) The Customer will return the Equipment and Accessories in accordance with clause 4.7, and if upon the return of the Equipment, KMH determines that the Customer has failed to observe the provisions contained herein, the Customer will pay the costs of any repairs and extraordinary cleaning determined by KMH to be necessary.
- (c) Notwithstanding the expiry of the Term or earlier termination of the Contract under Clause 20, the Equipment and Accessories will remain on Hire at the Hire Rate then current until they are cleaned and any repairs (other than in relation to fair wear and tear) are completed and the Equipment are able to be re-hired.
- (d) Without limiting in any manner whatsoever any other indemnity given by the Customer under the Contract, the Customer will indemnify KMH and hold it harmless in respect of all costs and expenses which KMH may incur or suffer arising out of any failure or default in respect of the Customer's obligations under this Clause 21 including without limitation any cleaning and maintenance required in respect of the Equipment (other than in relation to fair wear and tear) after their return by the Customer.

21.2. Repossession of Equipment

If, pursuant to Clause 21.1, the Customer does not return the Equipment and Accessories to KMH as and when required, KMH may retake possession of the Equipment and Accessories, and KMH and its employees and agents may for this purpose, without notice, liability or legal process, enter upon or into the Customer's site and may break open any gate, door or fastening and detach or dismantle the Equipment from any part of the location to which the Equipment have been affixed and the Customer will pay all costs incurred.

22. NOTIFICATION OF KMH'S OWNERSHIP OF THE EQUIPMENT

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

23. NO DEALING WITH EQUIPMENT

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

- (a) sell, assign, sublet, lend, pledge, mortgage, let on hire or otherwise part or deal with any of the Equipment and Accessories and any part thereof, or agree with or offer to any person or company, or attempt or purport, to do any of the foregoing;
- (b) modify or alter any of the Equipment or Accessories or any part thereof or make any addition thereto, except as previously agreed in writing by KMH, or remove, change, alter or deface any name, name plate, identification number, trade mark or any other identifying mark or number on the Equipment and Accessories, except so as to indicate any replacement, alteration or addition which has been authorised by KMH in writing; or
- (c) subject to clause 6, suffer any encumbrance, charge or lien of any kind to arise or remain on any of the Equipment and Accessories or any part thereof.

24. SEVERABILITY AND SURVIVAL OF COVENANTS

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

25. TIME AND WAIVER

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

26. NOTICES

Any notice, Invoice or document relating to the Contract will be deemed to be served:

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

27. DISPUTE RESOLUTION

- 27.1. Other than in respect of matters requiring urgent injunctive relief, the parties will use their best endeavours to settle amicably, by negotiation, any Dispute which arises.
- 27.2. If the parties cannot settle the Dispute by negotiation in a reasonable time, either party may issue to the other party a Dispute Notice indicating that there is a Dispute to be resolved in accordance with the following provisions of this Clause.

27.3. If the Dispute cannot be settled within 21 days of issuance of the Dispute Notice, either party may make a Nomination in writing within 14 days of that date to have a mediator appointed for the purpose of conducting a mediation of the Dispute in Perth, Western Australia, such mediator to be independent of the parties and, if the parties cannot agree on a mediator within 14 days of the Nomination, the mediator will be a person appointed by the Chair of LEADR (Lawyers Engaged in Alternative Dispute Resolution) or his or her nominee.

27.4. The mediation will be governed by the 'Institute of Arbitrators & Mediators' Australian Mediation and Conciliation Rules or any replacement rules from time to time.

28. GENERAL

28.1. The Contract will be construed in accordance with the laws of Western Australia, and the parties submit to the non-exclusive jurisdiction of the courts of Western Australia and the courts of appeal therefrom.

28.2. If any provision of the Contract or these Terms and Conditions is invalid, void, illegal or unenforceable then that provision is severed to the minimum extent required by the law and the validity, existence, legality and enforceability of the remaining provisions are not affected, prejudiced or impaired.

28.3. KMH is under no liability whatsoever to the Customer for any Loss suffered by the Customer

arising out of a breach by KMH of the Contract or these Terms and Conditions.

28.4. In the event of any breach of the Contract or these Terms and Conditions by KMH, the remedies of the Customer are limited to damages which under no circumstances will exceed the Hire Charge of the Equipment and Accessories.

28.5. The Customer is not entitled to set-off against or deduct from the Hire Charge any sums owed or claimed to be owed to the Customer by KMH.

28.6. KMH may license or sub-contract all or any part of its rights and obligations without the Customer's consent.

28.7. KMH reserves the right to review the Contract or these Terms and Conditions at any time. If, following any such review, there is to be any change to the Contract or these Terms and Conditions, then that change takes effect from the date on which KMH notifies the Customer of such change in writing.

28.8. Neither party is liable for any breach of this agreement due to any force majeure, war, terrorism, strike, lock-out, industrial action, fire, flood, drought, storm or other event beyond the reasonable control of either party.

28.9. The failure of KMH to enforce any provision of the Contract or these Terms and Conditions is not a waiver of that provision (unless specifically waived in writing and signed by KMH) nor does it affect KMH's right to subsequently enforce that provision.