

- 1 GENERAL**
- 1.1 All new and used vehicles, machinery, plant and equipment (excluding rentals), materials, consumables, software, hardware, components and parts (including remanufactured and rebuilt parts) (**Goods**) and all labour or services in connection with such Goods (**Services**) sold or supplied to you (the **Customer**) by Westrac Pty Ltd ACN 009 342 572 or its related entities (**Westrac**) is or are supplied on these terms and conditions (**Terms**).
- 2 THE CONTRACT**
- 2.1 Until Westrac has accepted an Order in accordance with clause 2.3 of these Terms:
- (a) any quotation, estimate or price prepared or represented by Westrac (**Quote**) is:
- (i) indicative only;
- (ii) not an offer to contract; and
- (iii) only valid for 14 days.
- (b) no Order by the Customer to Westrac following a Quote will by itself or in association with a Quote bind Westrac; and
- (c) all Quotes prepared by Westrac may be withdrawn or varied by Westrac prior to acceptance.
- 2.2 If the Customer:
- (a) requests or orders Goods or Services from Westrac; and
- (b) that order is consistent with a Quote, (an **Order**) the Customer offers to contract with Westrac on the basis of the Order and the Quote.
- 2.3 Westrac accepts and is deemed to have accepted an Order made by the Customer under clause 2.2 of these Terms:
- (a) to the extent it is for materials, consumables, hardware, software, components or parts (including remanufactured and rebuilt parts) or Services on the earlier of:
- (i) when those Goods are delivered to the Customer or the Services are completed by Westrac as the case may be; when notification of acceptance is provided by Westrac to the Customer; and
- (ii) 3 days after Westrac receives an Order and does not dispute it or any part of it.
- (b) to the extent it is for new and used vehicles, machinery, plant and equipment (excluding rentals) on the earlier of:
- (i) when notification of acceptance is provided by Westrac to the Customer; and
- (ii) 7 days after Westrac receives an Order and does not dispute it or any part of it.
- 2.4 Upon acceptance by Westrac under clause 2.3, a binding contract comes into existence between Westrac and the Customer incorporating the following documents (together the **Contract**):
- (a) any Quote, invoice or other document of Westrac whether attaching these Terms or not;
- (b) any notice of acceptance provided by Westrac in accordance with clause 2.3(a)(i) or 2.3(b);
- (c) these Terms;
- (d) any document attached or annexed to these Terms by Westrac; and
- (e) the Order placed by the Customer including any attached or associated terms and conditions.
- 2.5 In the event of any inconsistency, ambiguity or discrepancy, the order of precedence set out above applies with the first listed document taking the highest priority and so on.
- 2.6 If, after applying the order of precedence, there still remains an inconsistency, ambiguity or discrepancy, either party may give the other party written notice.
- 2.7 If notice is given under clause 2.6, Westrac shall (acting reasonably) direct the Customer as to the proper interpretation and determine (acting reasonably) liability for any additional costs.
- 2.8 The terms of Schedule 5 of the *Motor Vehicle Dealers (Sales) Regulations 1974 (WA)* are expressly incorporated into these Terms for the sale of on-highway trucks in Western Australia.
- 3 CREDIT**
- 3.1 Upon completion by the Customer of an Application for Commercial Credit (Credit Application), a copy of which is available at www.westrac.com.au, a credit facility may, in the sole and absolute discretion of Westrac, be made available to the Customer.
- 3.2 The Customer is not entitled to any credit or use of other funds from Westrac until Westrac accepts a Credit Application by formal written notice to the Customer from a properly authorised credit officer stating that a credit facility has been made available and the limit.
- 3.3 Westrac may, acting in its sole and absolute discretion, and without being obliged to do so
- (a) specify the maximum amount that may be charged to the credit facility within a specified time (**Credit Limit**); and
- (b) regularly assess the Credit Limit and adjust it accordingly by increasing or decreasing it, or changing these terms.
- 3.4 The Customer must not charge to the credit facility amounts that exceed the Credit Limit. To the extent that it does, Westrac is entitled to immediate repayment of any and all amounts charged to the credit facility in excess of the Credit Limit.
- 3.5 If the personal guarantee on the Credit Application is selected, in consideration of Westrac supplying the Goods or Services and a credit facility to the Customer, the guarantors jointly and severally guarantee payment to Westrac of all money due and payable by the Customer to Westrac on any existing or future account or in any manner whatsoever.
- 4 THE PRICE AND PAYMENT TERMS**
- 4.1 The rates or prices payable for the Goods and Services, including any deposits, slot fees or advance payments, are as specified in the Contract (**Price**).
- 4.2 The Price excludes freight, consumables (including grease, oil, coolant, water, diesel), taxes and duties (including import and customs duties) and any other necessary or incidental items, work or services unless expressly stated in the Contract.
- 4.3 Any costs for third party goods or services incurred by Westrac (including freight and handling) must be reimbursed by the Customer with a margin (profit and overhead) of 30% on costs to Westrac unless otherwise expressly stated in the Contract.
- 4.4 (**Payment of deposits, advance payments and slot fees**) Any applicable deposits, slot fees or other advance payments must be paid and received by Westrac in full, cleared and available funds as a condition precedent to any liability or obligation of Westrac arising under this Contract.
- 4.5 (**Payment on credit excluding for machines**) For Goods and Services, other than for new or used machines, and to the extent that the Customer has a Westrac approved credit facility with immediately available and sufficient funds to pay the full Price:
- (a) Westrac may issue an **invoice** or claim for payment on the **last day of each month** on account of Goods or Services supplied, or undertaken to be supplied, up to and including the date of that invoice;
- (b) if the Customer disputes the whole or any part of the invoice issued under clause 4.5(a) or claim, the Customer must, **within 14 days** of the invoice date or claim, give Westrac notice in writing with reasons why it disputes the amount claimed and provide adequate reasons; and
- (c) **within 28 days** after the date of an invoice or claim under clause 4.5(a), except to the extent validly disputed under clause 4.5(b), the Customer must pay, and Westrac must receive, in full, cleared funds and without any deduction or set off, the amount invoiced or claimed.
- 4.6 Any invoice or claim issued by Westrac before or after the last day of each month is taken to be issued on the last day of the month in which it is issued, and for the above payment process to apply accordingly.
- 4.7 (**Payment not on credit and for all machines**) For the supply of new or used machines, and if the Customer orders Goods and Services but does not have a Westrac approved credit facility with immediately available and sufficient funds to pay the full Price, the Customer must pay the price **upfront and in full**, cleared and available funds before any collection or delivery of Goods or the carrying out of any Services (including travel) will take place.
- 4.8 Time is of the essence in relation to payment for Goods and Services and if the Customer fails to pay Westrac any amount when due, Westrac is, without limitation, entitled to payment of interest at the rate of 10% per annum above the Reserve Bank of Australia target cash rate in simple interest calculated daily from the time the amount falls due to the extent and for the duration that it remains unpaid.
- 4.9 Westrac may set off, or otherwise account for, amounts paid by the Customer against any other amounts owed by the Customer to Westrac or claimed to be so owed whether arising under or in connection with this Contract or otherwise.
- 4.10 (**payment in foreign currency**) To the extent that payment relates to imported base machines (but not in-stock or local items) or incidental items (including freight, handling, taxes), payment is payable at the option of the Customer:
- (a) in the currency invoiced by the third party supplier to Westrac which may be a **foreign currency**; or
- (b) in **SAUD** as exchanged at the closing RBA rate on the day of arrival of the machine at Westrac
- which must be elected by the Customer and notified by the Customer to Westrac within any Order, and if no such election is made or notice given, option (a) above applies.
- 4.11 To the extent that the payment for imported base machines (not in-stock or local items) under clause 4.10 relates to **deposits, slot fees or advance payments** then:
- (a) if payment is to be made in **SAUD** under clause 4.10(b), any deposits, slot fees and any other advance payments will be exchanged on payment and reconciled on the day of arrival of the relevant machine at Westrac as if payment was made, and exchanged at the closing RBA rate on that day; or
- (b) if payment is to be made in the foreign currency of the third party supplier under clause 4.10(a), payment of any deposits, slot fees or advance payments will also be in the currency of the supplier.
- 5 TIME FOR PERFORMANCE**
- 5.1 Westrac will carry out its supply under this Contract during usual business hours for the branch from which the supply is to be carried out unless otherwise agreed.
- 5.2 The Customer must ensure that Westrac has access to its site, the relevant work area and equipment as is safe and reasonably necessary for Westrac to supply the Goods and Services.
- 5.3 Westrac will deliver the Goods to the delivery place specified in the Contract, or if no place for the delivery of the Goods is specified:
- (a) Westrac will notify the Customer promptly when the Goods are ready for collection at Westrac; and
- (b) the Customer must promptly (and within 48 hours) collect its Goods from the Westrac premises specified in the Contract.
- 5.4 If no place for the carrying out of Services is specified in the Contract, they will be carried out at a suitable and convenient location as determined by Westrac acting reasonably.
- 5.5 If a date or dates for delivery of the Goods or completion of the Services is specified in the Contract, Westrac will deliver or complete as the case may be by those dates.
- 5.6 If no date or dates for delivery or completion are specified in the Contract, Westrac will deliver the Goods and complete the Services with due diligence, expedition and without delay.
- 6 ACCEPTANCE AND COMPLETION**
- 6.1 The delivery of any Goods is deemed to have occurred and be carried out in accordance with these Terms:
- (a) if the Goods are to be collected by the Customer or its carrier from Westrac, when loading of the Goods commences by the Customer or its carrier; and
- (b) if the Goods are to be delivered by Westrac or its carrier to the Customer, when the Goods are unloaded at the delivery place.
- 6.2 Westrac will notify the Customer, orally or in writing, promptly when it considers (acting reasonably) that the Services have been completed.
- 6.3 The Customer must:
- (a) promptly inspect the Goods on delivery in accordance with clause 6.1 and any Services following the notice given under clause 6.2; and
- (b) notify Westrac of any non-compliance with the Contract in writing within fourteen (14) days of delivery or from the notice of completion as applicable.
- 6.4 Unless Westrac receives a notice under clause 6.3(b) within the time required by that clause, the Customer is deemed, to the extent relevant, to have:
- (a) accepted that the Goods comply with, and have been delivered in accordance with, the Contract; and
- (b) certified that the Services are complete, and that they have been completed in accordance with, the Contract, and that Westrac may claim and invoice for, and is entitled to payment of, the Price for those Goods and Services.
- 6.5 If Westrac receives a written notice from the Customer under clause 6.3(b) within the time required by that clause:
- (a) for Goods that are **not new or remanufactured parts** and Services:
- (i) Westrac must promptly rectify the Goods and Services so that they comply with the Contract;
- (ii) notify the Customer again under clause 6.1 when they are rectified or re-delivered as applicable; and
- (iii) following that notification, follow the process under this clause 6 again.
- (b) for Goods that are **new or remanufactured parts**, the Customer may:
- (i) reject and return them (at Customer's cost) to the Westrac branch set out in the Contract; or
- (ii) accept them and notify Westrac of a dispute under clause 20.1 of the Contract.
- 6.6 For Goods that are **new or remanufactured parts**, to receive a credit for their return under clause 6.5(b) above, the relevant part:
- (a) must be in a good saleable condition (except to the extent damaged by Westrac) and in its original packaging, without an expired shelf life (if applicable) and with the original invoice; and
- (b) must not be custom made parts, CPRO, FDO, backorders, unstocked parts, used parts, unsealed filters, gaskets, batteries, ball or roller bearings, cups, cones, belts, seals, hoses, opened kits or parts.
- 6.7 If the conditions in clauses 6.6(a) and 6.6(b) above are satisfied, the Customer will be entitled to receive the following credit for the parts purchased:
- (a) if the part is returned **within twenty-eight (28) days** of delivery, the Customer is entitled to receive a credit for the full Price of the parts;
- (b) if returned **after twenty-eight (28) days but on or before forty-two (42) days** after delivery, a credit for the full Price less a restocking fee of \$55 or 15% of the Price whichever is the greater; and
- (c) if the part is returned **after forty-two (42) days** of delivery, Westrac will determine a reasonable credit and the terms applicable and as a minimum apply the restocking fee under clause 6.7(b).
- 7 LIMITED WARRANTY**
- 7.1 Westrac warrants and the Customer agrees that:
- (a) in relation to **Services**, that for a 12 month period following the date of completion of any of those Services, that those Services were carried out and completed with due skill and care, in a proper and workmanlike manner and in accordance with all relevant law;
- (b) in relation to **Goods supplied by Westrac to which a manufacturer's warranty applies**, that the benefits and obligations of the manufacturer's warranty apply in all respects and is the sole and exclusive warranty for those Goods;
- (c) in relation to **new Goods supplied by Westrac to which a manufacturer's warranty does not apply**, that for a 12 month period (unless otherwise specified) following the date of delivery, those Goods will be free from defects in materials and workmanship, and to the extent designed by Westrac, be fit for the purpose specified in the Contract; and
- (d) In relation to **used or second-hand Goods supplied by Westrac**, except to the extent that a manufacturer's warranty applies (such as for remanufactured components and to which the warranty under clause 7.1(b) applies):
- (i) all used or second-hand Goods are sold on an "as is where is" basis with all existing or future inadequacies, faults or defects, if any, whether known or unknown;
- (ii) Westrac does not warrant used or second-hand goods to any extent or that they are fit for any purpose or free from any defects;
- (iii) Westrac does not warrant the accuracy of machine meter readings, SMU hours or the service and repair history; and
- (iv) to the extent permitted by law, the Customer releases Westrac from all liability arising or in connection with any defects, faults or inadequacies in such Goods.
- 7.2 In relation to any used or second-hand Goods supplied by the Customer to Westrac by way of trade-ins or otherwise, the Customer warrants that those Goods are owned by it outright and free from all encumbrances, defects and are fit for purpose.
- 7.3 Subject to the inclusions and exclusions as provided by the manufacturer's warranty, any warranty under this Contract excludes liability for costs in connection with:
- (a) labour (including overtime labour) other than is reasonable or customary to rectify the defect;
- (b) the removal or re-installation of parts and components, unless Westrac carried out the original installation, and does the removal and installation of the replacements; and
- (c) standby, freight, transportation, travel, travel time, packaging and handling, demobilisation and re-mobilisation, commissioning and testing.
- 8 WARRANTY CLAIM PROCEDURE**
- 8.1 The Customer must **notify** Westrac of any event or circumstance which may give rise to a warranty claim by the **earlier** of:
- (a) the time expressly required by the manufacturer's warranty for the notification of claims, if any such time applies; or
- (b) if no such time applies, within 90 days of the event or circumstance occurring that gave rise to the warranty claim, and in any event, within the relevant warranty period stipulated in clause 7.
- 8.2 If the Customer fails to notify in accordance with clause 8.1, Westrac may, in its sole discretion, rectify the defect but otherwise has no liability to do so.
- 8.3 The Customer must send a warranty claim to:
- Westrac Pty Ltd
128-136 Great Eastern Highway, South Guildford, WA
Telephone: 08 9377 9444 (or local branch)
Fax: 08 9377 1791
Email: warranty@westrac.com.au.
- 8.4 The Customer warrants that any claim made by it on warranty is valid and one to which the warranty responds.
- 8.5 To the extent that the Customer makes an invalid warranty claim, it must reimburse Westrac for that work at list rates and prices.
- 9 DELAY AND DISRUPTION**
- 9.1 To the extent that Westrac is, or is likely to be, delayed or disrupted in the supply of any Goods or Services, and that is due to:
- (a) any fact, event, matter or circumstance beyond Westrac's reasonable control; or
- (b) any breach, act or omission of the Customer, its agents or contractors.
- Westrac is entitled to a reasonable extension of time to supply those Goods or Services.
- 9.2 To the extent that Westrac is delayed or disrupted under clause 9.1(b), the Customer must pay Westrac its reasonable additional costs caused by the delay or disruption including (without limitation) holding (capital) costs on Goods ordered for the Customer to the extent that they remain unpaid at 0.041% per day accruing daily.
- 9.3 If a delay or delays under clause 9.1(b) exceed a single or aggregated period of 90 days, Westrac may terminate the relevant Order or part thereof for convenience in its sole discretion by written notice to the Customer, in which case, Westrac will be entitled to compensation in accordance with clause 16.2 as if the Customer had cancelled or terminated for convenience.
- 10 VARIATIONS AND EXTRAS**
- 10.1 Prior to delivery or completion (as applicable), the Customer may request to add, delete, omit, or change the nature, quality, location or quantity of any Goods or Services (**Variation**).
- 10.2 To the extent that Westrac can reasonably comply with the Variation, Westrac will endeavour to do so and if it does, will be entitled to payment as follows:
- (a) an amount as agreed between the parties;
- (b) failing agreement, an amount calculated according to the Contract rates and prices to the extent reasonably applicable; or
- (c) to the extent that rates and prices in the Contract do not reasonably apply:
- (i) for additions, or changes in nature, quality or location, an amount based on reasonable rates or prices (including profit and overhead of 30% on costs); and
- (ii) for deletions or omissions, deducting reasonable rates or prices from the Price including profit but retaining an allowance for overhead of 5% on the original costs.
- 10.3 Westrac may at any time and from time to time request a Variation, and the Customer will reasonably and in good faith, determine whether such a Variation should apply and agree to it accordingly.
- 10.4 Unless otherwise expressly stated in the Contract, Westrac is entitled to increase or decrease the rates or prices under the Contract as a Variation in the following circumstances:
- (a) for **Services**, by applying rise and fall calculated on 1 January and 1 July of each year proportional to the change in the relevant Westrac employees' salary increase;
- (b) for **new machines**, in accordance with any Caterpillar Inc (USA) price changes which may occur from time to time after the date of the Quote;
- (c) for parts and components:
- (i) in accordance with the Caterpillar Inc (USA) parts price index as revised on 1 January and 1 July of each year; and
- (ii) in accordance with any other Caterpillar Inc (USA) price changes which may occur from time to time after the date of the Quote but prior to delivery; and
- (d) to the extent Westrac incurs additional costs due to a change in law that was not reasonably anticipated by Westrac as at the date of Contract; and
- (e) to the extent that any ground conditions on or around the site or relevant work area could not reasonably have been anticipated by Westrac as at the date of Contract.
- 11 CORE RETURNS**
- 11.1 If the Customer wishes to return a used component (**Core**), including a Core that was rebuilt by Westrac (**Parts Exchange**) or Caterpillar (**Cat Reman**) and exchange it for a new or rebuilt component:
- (a) the Core being returned by the Customer must have the same configuration and consist as the new or rebuilt component that was supplied to the Customer;

- (b) WesTrac must receive the Core being returned within 30 days of delivery of the corresponding new or rebuilt component that was supplied;
- (c) a Parts Exchange Core returned by the Customer must be in good and clean condition and comply with WesTrac's Core return conditions;
- (d) a Cat Reman Core returned by the Customer must be in good and clean condition and comply with the Caterpillar Core return conditions; and
- (e) upon stripping down the Core, the Core returned by the Customer must be in a condition that is, in WesTrac's sole discretion, suitable for a standard rebuild.
- 11.2 If the Customer complies with clause 11.1, WesTrac will grant the Customer a credit for its deposit paid for the returned Core in accordance with its parts exchange and rebuild price lists.
- 11.3 If the Customer fails to comply with any of the conditions required by clause 11.1:
- WesTrac is entitled to payment of the full list price for the new or rebuilt component supplied to the Customer; and
 - any credit to be applied for the value of the returned Core will be determined by WesTrac acting reasonably.
- 12 RISK AND TITLE**
- 12.1 Risk in connection with any Goods sold or supplied to the Customer passes upon delivery occurring in accordance with clause 6.1 of these Terms, but passes back in the event of any returned Goods.
- 12.2 Legal and equitable title, property and ownership in any Goods sold or supplied by WesTrac under this Contract only passes on receipt of payment by WesTrac of the Price in full, cleared funds and without any deduction or set off.
- 12.3 Prior to title passing, WesTrac may register a Security Interest under the Personal Property Securities Act 2009 (Cth) (PPSA) in relation to the Goods and any proceeds arising in respect of any dealing in the Goods.
- 12.4 If the Quote expressly permits the Customer to on-sell any Goods prior to title passing, the Customer may do so in the ordinary course of its business provided that the Customer pays the proceeds into a separate bank account and holds them as trustee for WesTrac.
- 12.5 After title passes, the Customer may register a Security Interest in relation to the Goods and any proceeds arising in respect of any dealing in the Goods, and WesTrac must promptly remove any existing registrations made under clause 12.3 of these Terms.
- 12.6 To the extent permitted by law, each party waives its rights or entitlements to any verification statements or other notices or communications that may be necessary, required or desirable under the PPSA.
- 12.7 WesTrac shall have a lien over any of the Customer's other goods under WesTrac's control for all amounts claimed due and payable to WesTrac until payment is received in full, cleared funds without deduction or set-off.
- 12.8 Neither party may register, sell, dispose of or otherwise deal in any security interest in the Goods or proceeds from any dealing in the Goods other than as permitted by this clause.
- 13 INDEMNITY AND INSURANCE**
- 13.1 Subject to clause 17.5, each party indemnifies the other, its employees and agents against losses for physical destruction of or damage to property, death, injury, illness or disease, and to the extent that a credit facility applies, any act or omission or breach by the Customer of these Terms, arising out of or in connection with the carrying out its obligations under this Contract, save to the extent caused or contributed to by the other party.
- 13.2 WesTrac will effect and maintain, in relation to Services, for the duration of carrying out the Services, and for Goods, while risk in the Goods rests with WesTrac:
- a **public liability insurance** policy for at least the amount of **\$20,000,000** for any one occurrence;
 - a **products liability insurance** policy for at least the amount of **\$20,000,000** limited in the aggregate during any single term of insurance; and
 - such insurances as are required by law including workers compensation insurance.
- 13.3 From the time that risk in the Goods transfers to the Customer and continuing until title also transfers in accordance with these terms, the Customer must insure the Goods with an insurance company with an S&P Financial rating of not less than "A" for their full replacement value against loss or damage including but not limited to fire, malicious damage, theft and transit risks.
- 13.4 The insurance required under clause 13.3 must cover the respective rights and interests of the Customer and WesTrac (as owner), note the interests of WesTrac as owner if required by WesTrac, and include:
- a cross-liability clause, to the intent that each insured party shall be deemed to be separate insureds under the policy;
 - an express provision requiring the insurer to notify WesTrac if the policy of insurance is not renewed, lapses or is cancelled midterm; and
 - an acknowledgement from the insurer that in the event of loss or damage to the Goods, all monies derived from any insurance settlement will be used to either repair or replace the Goods. Such determination will be at the sole discretion of WesTrac.
- 13.5 The Customer must not do or permit or allow to be done anything which might or could prejudice any insurance of the Goods.
- 13.6 Whenever requested by a party, the other party will promptly provide the first party with copies of the certificates of currency for insurances required under this Contract.
- 13.7 The parties shall be responsible for and must pay any excess or deductible under insurance policies required by these Terms to the extent of their respective contributions to the loss or damage.
- 13.8 If the Customer fails to insure the Goods in accordance with this clause 13.3 and 13.4, WesTrac may, but is not obliged to, procure and maintain such insurance and the cost of doing so will be a debt due and immediately payable from the Customer to WesTrac.
- 13.9 The Customer must promptly inform WesTrac in writing of any event or circumstance that may give rise to a claim under insurance required by clause 13.3 and keep WesTrac informed of subsequent developments and take all reasonable steps to ensure a prompt and favourable settlement of the claim.
- 14 TERMINATION OF CREDIT**
- 14.1 WesTrac reserves the right, in its sole and absolute discretion and without any obligation or duty to do so, to suspend, withdraw or cancel the credit facility at any time with or without notice.
- 14.2 WesTrac is not liable for any loss, damage or delay whatsoever arising from the refusal, suspension, withdrawal or cancellation by WesTrac to provide credit.
- 14.3 If WesTrac terminates a credit facility pursuant to clause 14.1, WesTrac may, without limitation, exercise its entitlements under clauses 15.3 and 15.4 of these Terms.
- 15 TERMINATION FOR CAUSE**
- 15.1 WesTrac may terminate the Contract, or any part of it, immediately by giving written notice to the Customer if the Customer:
- commits a material breach of the Contract which is not remedied to WesTrac's satisfaction within seven (7) days of written notice from WesTrac; or
 - fails to take delivery pursuant to clause 5.3, which is not remedied within twenty-four (24) hours after receipt of written notice from WesTrac.
- 15.2 Either party may terminate the Contract, or any part of it, effective immediately, if the other party:
- commits a material breach which is not remedied within fourteen (14) days after written notice from the other party;
 - is the subject of an insolvency event meaning:
 - the party becomes insolvent or is otherwise unable to pay its debts as and when they fall due;
 - proceedings are commenced to appoint an external administrator or liquidator to the party;
 - the party is placed under official management or administration;
 - the party is presumed to be insolvent under the Corporations Act following a statutory demand; or
 - circumstances occur which, in WesTrac's sole discretion, indicate the Customer's inability to pay.
- 15.3 If either party terminates under clause 14 of these Terms or this clause 15, its rights will be as if the other party had repudiated and the first party elected to treat the Contract as at an end, and in the case of WesTrac terminating:
- any deposits, slot fees and any other advanced payments paid, or required to be paid, will be forfeited to WesTrac;
 - all amounts owing to WesTrac or already invoiced by WesTrac to the Customer, shall immediately become due and payable;
 - WesTrac shall immediately be entitled to retake possession of all Goods in the possession or under the control of the Customer not paid for in full; and
 - if WesTrac has installed Goods on a machine which are not paid for in full, take possession of the machine and transport it to WesTrac's premises to remove WesTrac's Goods.
- 15.4 For the purpose of enabling WesTrac to retake possession of the Goods or a machine under clause 15.3, the Customer irrevocably:
- authorises WesTrac, its employees, officers and appointed subcontractors to enter any of the Customer's premises in which the Goods may be located; and
 - appoints WesTrac, its employees, officers and appointed subcontractors as the Customer's agent as its agent to enter any premises in which Goods may be located.
- 16 TERMINATION FOR CONVENIENCE**
- 16.1 Either party may, in its sole discretion and for any reason whatsoever, cancel or terminate this Contract, or any part of it, by giving the other party 14 days' prior written notice.
- 16.2 If the Customer cancels or terminates this Contract, or any part of it, under clause 16.1, the Customer must pay to WesTrac as compensation for termination:
- the Price for any Goods already delivered and Services (or part thereof) already completed;
 - the cost of any equipment, parts, components and materials ordered by WesTrac which it is liable to accept and cannot reasonably avoid or cancel;
 - any costs or losses arising due to the cancellation or termination of third party contracts including contract break-costs, cancellation fees and necessary relocations;
 - reasonable demobilisation costs and any additional transport, freight, handling, packaging, consumables (fluids), insurance or maintenance costs; and
 - in the event of a cancellation or termination of a base machine which WesTrac is liable to accept and cannot reasonably avoid or cancel:
 - any deposits, slot fees and any other advance payments paid or required to be paid by the Customer;
 - the difference between 15% of the Price and the amount paid or required to be paid under clause 16.2(e)(i) if any; and
 - holding costs at the rate of 0.054% per day (for interest and depreciation) on the balance of the unpaid Price accruing daily from the date or dates for payment.
- 16.3 If the Customer terminates under clause 14, WesTrac must mitigate its losses in all respects including by endeavouring to on-sell base-machines and other equipment and minimising all costs payable.
- 16.4 If WesTrac cancels or terminates this Contract or any part of it under clause 16.1, the Customer may claim its material, reasonable and additional proven direct costs assessed on an open book basis.
- 17 LIMITATION OF LIABILITY**
- 17.1 (Limit and overall cap) To the extent permitted by law, the liability of WesTrac, if any, arising out of or in connection with the supply of Goods or Services under this Contract, including for negligence, is limited:
- in the case of Goods to which a manufacturer's warranty applies or has applied but expired, to that warranty;
 - for any other Goods, at the option and in the (reasonable) discretion of WesTrac:
 - to the replacement of the Goods or the supply of equivalent Goods;
 - to the payment of the cost of replacing the Goods or of acquiring equivalent goods; or
 - to the repair of the Goods by WesTrac or to the payment of the cost of having the goods repaired; and
 - in the case of Services, at the option and in the (reasonable) discretion of WesTrac:
 - to a refund of the amount paid for the Services; or
 - to the supply of the Services again or payment for the cost of having the Services supplied again,
- and in any event and notwithstanding any other provision of this Contract, to an amount in aggregate of all claims up to 35% of the Price.
- 17.2 (Mutual time limit) Each party must notify the other of any claim, right, obligation or liability whatsoever arising under or in connection with the Contract within 12 months of when the party claiming was aware or ought reasonably to have been aware of the events or circumstances giving rise to the claim. Any failure to do so, releases the other party from all liability in connection with that claim and its subject matter.
- 17.3 (Exceptions to limits) The limitations in clauses 17.1 and 17.2 do not apply in relation to, or limit to any extent, a liability by one party to the other party in relation to the damage or destruction of any property (including third party property), injury, illness, disease or death or breach of intellectual property rights.
- 17.4 (Consequential loss) WesTrac shall not be liable to the Customer for any consequential, indirect or incidental loss, loss of profits, lost production or revenue, loss of anticipated savings, loss of opportunity, business reputation or damage to goodwill arising from or in connection with its supply under this Contract.
- 17.5 (Insurable losses) The total liability of either party to the other party arising out of or in connection with any damage to or destruction of property (including third party property), death, injury, illness or disease is limited to amounts recoverable, or that should have been recoverable, if the insurance policies required by the Contract are in place, or should have been in place.
- 18 INTELLECTUAL PROPERTY**
- 18.1 Each party licenses to the other party its intellectual property not created predominantly for the purpose of this Contract, whether coming into existence before or after the date of this Contract, limited to the extent necessary to enable the other party to supply, operate or use the Goods or the Services as the case may be.
- 18.2 In relation to any intellectual property coming into existence after the date of this Contract and predominantly for the purpose of it, ownership vests in and will be the property of WesTrac and WesTrac licenses the Customer to use that property for the purposes of operating or using the Goods or Services.
- 18.3 Each party warrants to the other that it is entitled to grant the intellectual property licenses under this clause, and indemnifies the other against any costs or losses in connection with any breach of third party intellectual property save to the extent caused by the other party.
- 19 ANTI-POACHING**
- 19.1 For the purpose of this clause, employing or employment includes being engaged as an employee, agent, contractor, or consultant, or in any other capacity and whether for remuneration or not.
- 19.2 While WesTrac carries out the Services and for a period of 6 months after completion of the Services, each party is prohibited from employing any individual of the other party engaged (directly or indirectly) in the Services including to solicit, induce or entice an employee of the other party.
- 19.3 The parties agree that to establish a breach it is only necessary to show that the relevant employee was engaged in the Services by the first party and commenced employment with the second (breaching) party.
- 19.4 If a party breaches this clause, it must pay to the innocent party the equivalent of 6 months of the employee's remuneration (with the first employer) to the other party within 14 days of being notified of the breach.
- 20 COMPLAINTS AND DISPUTES**
- 20.1 WesTrac takes complaints, disputes and differences very seriously. If either party wishes to raise a dispute or difference in connection with the Contract, it must promptly give the other notice in writing.
- 20.2 Within 14 days of a party giving notice under clause 20.1, the other party must provide to the first party a written response stating its position and thereafter:
- within 7 days of that response, the respective involved managers must meet in person at least once to try to resolve the dispute in good faith in a **first meeting**;
 - failing a resolution within 7 days of that meeting, within a further 7 days, more senior delegates of each manager must meet in person to try to resolve the dispute in good faith in a **second meeting**;
 - failing a resolution within 7 days of the second meeting, within a further 7 days from that meeting, the managing director of the Customer and a General Manager of WesTrac must meet in person to try to resolve the dispute in good faith in a **third meeting**.
- 20.3 Except for urgent interlocutory or declaratory relief, as a condition precedent to the commencement of any court or tribunal proceedings, if a dispute or difference arises under or in connection with this Contract and the aggregated amount of either party's claims (excluding interest and costs) exceeds \$75,000 (exc GST), the dispute or difference shall be, and is hereby, referred to expert determination.
- 20.4 Failing agreement within 14 days of referral under clause 20.3, the President of the Institute of Arbitrators and Mediators Australia (IAMA) shall nominate and appoint the expert. The expert's determination will be final and binding in all respects and not an arbitration. Each party must bear its own costs of the determination and half of the expert's. The expert determination will be conducted in accordance with the IAMA Expert Determination Rules.
- 21 CONFIDENTIALITY AND PRIVACY**
- 21.1 WesTrac respects the privacy of personal information (**Personal Information**) including personal and contact information, such as an individual's name, street, postal and email addresses and telephone and fax numbers, professional information, financial and bank account details and consumer credit information.
- 21.2 The Customer acknowledges, accepts and agrees:
- to WesTrac's privacy statement available from <http://www.westrac.com.au/pages/privacy.aspx>;
 - that WesTrac may obtain and use Personal Information of the Customer and disclose it to its Business Partners; and
 - that without using such information, WesTrac may not be able to properly provide the Goods or the Services.
- 21.3 For the sole purpose of assessing the creditworthiness of the Customer in connection with a credit facility, the Customer undertakes to provide signed written authorities to any third party on request by WesTrac, and authorises WesTrac to make relevant enquiries including:
- reviewing any existing credit facility, obtain credit information or any report containing information about the Customer's commercial activities or credit worthiness, from a credit reporting agency, or any business which provides information about the credit worthiness of a person or an entity in relation to credit provided by WesTrac;
 - use, disclose or exchange with credit providers named in the Credit Application, credit providers that may be named in a credit report issued by a credit reporting agency, credit reporting agencies, and/or any collection agent of WesTrac or its related parties, information about the Customer's credit arrangements, including any information about the Customer's credit worthiness, credit standing, credit history or credit capacity; and
 - disclose a credit report, any information contained in it, and any information about the Customer's credit arrangements to WesTrac's Business Partners, agent or professional advisor involved in assessing the Application or the Customer's ongoing credit worthiness, or collecting payments overdue.
- 21.4 Subject to clause 21.5, neither party may disclose, or allow any person to disclose, confidential information to third parties including:
- the subject matter, correspondence in respect of, and contents of this agreement (but not its actual existence);
 - information regarding a customer's machine;
 - the subject matter and the existence of any dispute or difference; and
 - the Price and any discounts, rebates or cost saving measures.
- 21.5 The obligations to maintain confidentiality under clause 21.3 apply except for a disclosure:
- permitted with the prior written consent of the other party;
 - required by law, any stock exchange or court order; or
 - to the parties' respective Business Partners.
- 22 GOODS AND SERVICES TAX**
- Unless otherwise stated expressly all prices are exclusive of GST and the Customer must on demand pay to WesTrac all GST payable in respect of the supply of the Goods and the Services to the Customer.
- 23 LAW AND JURISDICTION**
- The Contract is governed by and will be construed in accordance with the laws of the State in which the WesTrac office or depot from which the Goods or Services were ordered, is located.
- 24 AMENDMENT**
- Subject to the Customer notifying WesTrac that it objects to any changes notified in writing within 30 days, any such changes notified in writing will bind the Customer in respect of any supply of Goods or Services from the date of notification.
- 25 SUBCONTRACTING AND ASSIGNMENT**
- 25.1 Neither party may assign, novate or transfer, the Contract or any payment, obligation, right, benefit or interest it has under the Contract without the prior written consent of the other party.
- 25.2 WesTrac may supply Goods or Services of Caterpillar Inc. (USA) and its related entities and subcontract any part of its obligations to that entity under this Contract without the consent of the Customer.
- 26 ENTIRE AGREEMENT**
- The Contract constitutes the entire agreement between the parties relating in any way to its subject matter. All prior negotiations, agreements, communications, understandings, representations about the subject matter of the Contract are of no effect.
- 27 MISCELLANEOUS**
- 27.1 If any part of the Contract is void or unenforceable, that part is severable from the Contract and the balance remains enforceable.
- 27.2 The words including, inclusive of, or similar expressions are not words of limitation.
- 27.3 If the Customer is more than one person or entity, each person or entity (as applicable) shall be jointly and severally liable to WesTrac.
- 27.4 Notices shall be deemed received on the earlier of actual receipt, a reply, notice of receipt or a period of 3 days after issue without the issuer having received notice of a non-receipt or failed delivery.
- 27.5 WesTrac may only waive a requirement or breach of the Contract in writing signed by it, and any such waiver is limited to the instance referred to (or if no instance is referred to in the waiver, to past breaches only).
- 27.6 Each party must bear its own legal, accounting and other costs of and incidental to the preparation and entering into the Contract.
- 27.7 Nothing constitutes a joint venture, agency, partnership or other fiduciary relationship between the Customer and WesTrac.
- 28 DEFINITIONS**
- 28.1 **Business Partners** means consultants, agents, financiers, lawyers and in the case of WesTrac, Caterpillar Inc (USA), its subsidiaries, affiliates and related parties including agents and contractors.