

Vossloh Rail Services Australia Pty Ltd General Terms & Conditions of Supply of Services

Status: 03/2024

1. Definitions and interpretation

1.1 Definitions

In this Agreement unless the context indicates otherwise, the following words have the following meanings:

- 1.1.1 \$A, Dollar and \$ mean Australian Dollars.
- 1.1.2 Agreement means these terms and conditions and the Quotation.
- 1.1.3 Background IP means Intellectual Property of the Supplier which was in existence prior to the commencement of this Agreement or which is subsequently developed by the Supplier independently of and for purposes unconnected with this Agreement.
- 1.1.4 Business Hours means the period from 8.30 am to 5 pm on a Business Day.
- 1.1.5 Business Day means a day on which banks are open for business in the city or nearest city in which the Services are performed, other than a Saturday, Sunday or public holiday in that city.
- 1.1.6 Claims means all demands, claims, proceedings, penalties, fines and liability (whether criminal or civil, in contract, tort or otherwise).
- 1.1.7 Commencement Date means the date on which the Supplier is to start performing the Services, specified in the Quotation.
- 1.1.8 Completion Date means the date on which the Supplier completes the Services.
- 1.1.9 Customer means the person or entity specified in the Quotation.
- 1.1.10 Confidential Information includes any information marked as confidential and any information received or developed by the Supplier during the term of this Agreement, which is not publicly available and relates to processes, equipment and techniques used by the Customer in the course of the Customer's business. This includes all information, data, drawings, specifications, documentation, source or object code, designs, construction, workings, functions, features and performance notes, techniques, concepts not reduced to material form, agreements with third parties, schematics and proposals and intentions, technical data and marketing information such as customer lists, financial information and business plans.
- 1.1.11 Consumer Guarantee means a guarantee applicable to the supply of goods or services which is incorporated into this Agreement pursuant to division 1 part 3-2 of the Australian Consumer Law.
- 1.1.12 Consumables means consumable items including fuel and grinding stones used for the operation of the Equipment.
- 1.1.13 Contract IP means Intellectual Property created by the Supplier in the course of performing its obligations under this Agreement.
- 1.1.14 Customer Furnished Information or CFI means those items of information supplied by or on behalf of the Customer to the Supplier to assist in the performance of this Agreement.
- 1.1.15 Date for Completion means the date specified in the Quotation the Supplier is required to complete the Services or if there is no specified date for completion, the expiry date of a reasonable period after the Effective Date.
- 1.1.16 Deliverables means the goods or written reports to be supplied by the Supplier pursuant to this Agreement.
- 1.1.17 Effective Date means the date of acceptance of the Quotation by the Customer in accordance with clause 2.1, or such other day as agreed by the parties.
- 1.1.18 Equipment means the Supplier's HSG-city High Speed Grinding and Rail Measuring Machine (which requires independent propulsion for operation) and associated Consumables.
- 1.1.19 Facilities means suitable stabling facilities for the storage of the Supplier's Equipment with railway access, as specified in the Quotation.
- 1.1.20 Fees means the price for the Services calculated in accordance with the rates per unit specified in the Quotation, as adjusted in accordance with this Agreement.
- 1.1.21 Force Majeure Event means any occurrence or omission as a direct or indirect result of which the Party relying on it is prevented from or delayed in performing any of its obligations under this Agreement and which is beyond the reasonable control of that Party and could not have been prevented or mitigated by reasonable diligence or precautionary measures, including forces of nature, natural disasters, acts of terrorism, riots, revolution, civil commotion, epidemic, industrial action and action or inaction by a government agency.
- 1.1.22 GST Law means the same as in the A New Tax System (Goods and Services Tax) Act 1999 (Cth).
- 1.1.23 Indirect Loss means liability or losses under the Agreement, in tort, in contract, in equity, by operation of statute or otherwise for any kind of indirect or consequential loss; loss of opportunity; loss of revenue; loss of profit or anticipated profit; loss of contracts; loss of goodwill; loss arising from business interruption; or liability arising out of or in connection with pollution or contamination, arising out of or in connection with this Contract, or the work conducted under it, incurred or suffered by a party, or any other person.
- 1.1.24 Intellectual Property means all present and future rights conferred by statute, common law or equity in or in relation to any copyright, trademarks, service marks, designs, patents, circuit layouts, plant varieties, business and domain names, database rights, confidential information, know how, inventions and other results of intellectual activity in the industrial, commercial, scientific, literary or artistic fields existing anywhere in the world, whether or not registered or capable of registration, and any goodwill associated with such activity and any applications, renewals and extensions of such rights.

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- 1.1.25** Losses means all losses including financial losses, damages, legal costs and other expenses of any nature whatsoever other than Indirect Loss.
- 1.1.26** Parties means the Supplier and the Customer, and Party means either one of them.
- 1.1.27** Quotation means the document headed "Binding Offer" to which these terms and conditions are annexed.
- 1.1.28** Related Body Corporate has the meaning given in section 50 of the Corporations Act 2001 (Cth) (Corporations Act).
- 1.1.29** Services means the rail grinding and machining services utilising the Equipment, the Maple-e software service and other services or Deliverables to be provided by the Supplier under this Agreement as specified in the Quotation.
- 1.1.30** Shift means pre-agreed times during which the Services are to be provided as further specified in the Quotation.
- 1.1.31** Special Conditions means any conditions, assumptions or requirements specified in the Quotation.
- 1.1.32** Specification means the specification or description of the Services, if any, included in the Quotation.
- 1.1.33** Supplier means Vossloh Rail Services Australia Pty Ltd 673 877 739.
- 1.1.34** Supplier's Personnel means any person or persons that the Supplier designates to perform the Services on the Supplier's behalf.
- 1.1.35** Termination Date means the earlier of:
 - (I) the date of termination of this Agreement by the Customer or the Supplier; and
 - (II) the date of expiry of this Agreement.
- 1.1.36** Track means the site, depot, yard or location of the rail track section and/or Facilities at which the Services are to be provided by the Supplier under this Agreement as specified in the Quotation.
- 1.1.37** Traction Vehicle means the independently propelled railway vehicle providing necessary traction for haulage and/or operation of the Equipment, provided and operated by the party specified in the Quotation.
- 1.1.38** Work Hours means the hours during which the Supplier shall provide the Services at the Track, as specified in the Quotation.

1.2 Interpretation

- 1.2.1** In this Agreement unless the context otherwise requires:
- 1.2.2** words importing any gender include every gender;
- 1.2.3** words importing the singular number include the plural number and vice versa;
- 1.2.4** words importing persons include firms, companies and corporations and vice versa;
- 1.2.5** references to numbered clauses, paragraphs and schedules are references to the relevant clause or paragraph in or schedule to this Agreement;

- 1.2.6** reference in any schedule to this Agreement to numbered paragraphs relate to the numbered paragraphs of that schedule;
- 1.2.7** any obligation on any Party not to do or omit to do anything is to include an obligation not to allow that thing to be done or omitted to be done;
- 1.2.8** the headings to the clauses and schedules of this Agreement are not to affect the interpretation;
- 1.2.9** any reference to an enactment includes reference to that enactment as amended or replaced from time to time and to any subordinate legislation or byelaw made under that enactment; and
- 1.2.10** the word "including" (and related forms including "includes") means "including without limitation".

2. General

2.1 Acceptance

The Customer shall be deemed to have accepted the Quotation and these terms and conditions by signing a copy of the Quotation within the Quotation validity period and returning it to the Supplier or otherwise directing the Supplier to proceed with the Services.

2.2 Entire Agreement

This Agreement constitutes the entire agreement between the parties and no other terms and conditions including customer purchase orders variation or amendment of the Agreement shall be effective unless expressly agreed in writing by the parties.

2.3 Effective Date

Subject to the satisfaction of any applicable Special Conditions, this Agreement shall enter into force on the Effective Date.

2.4 Order of precedence

In the event of any inconsistency, the Quotation and any Special Conditions shall take precedence over these terms and conditions to the extent of such inconsistency.

3. Services, Reports and timing

3.1 Services

- 3.1.1** The Supplier will provide the Services to the Customer in consideration for the Customer paying the Fees to the Supplier, subject to the provisions of this Agreement.
- 3.1.2** The Supplier shall provide reports on the Services as required by clause 3.3.

3.2 Commencement and completion

The Supplier shall commence supply of the Services on the Commencement Date and subject to clause 3.4, complete the Services by the Date for Completion, if any.

3.3 Daily Status Reports

3.3.1 The Supplier shall, within 24 hours of completion of a Shift, provide a report to the Customer on the Services provided.

3.3.2 The report shall be in writing and shall include the following information:

(I) Start and finish time;

(II) Section of track subject of Service; and

(III) Any deviations or unexpected occurrences.

3.3.3 The Customer shall check and countersign the daily status report which shall constitute evidence of the Customer's acceptance of the report.

3.3.4 The Customer's representative shall sign the report if it agrees with the report or if it does not agree with the report, notify the Supplier of such non-acceptance or objection. If the Customer's representative does not sign and return the signed report or give a notice of non-acceptance or objection within 24 hours of receipt, the relevant Service shall be deemed to have been accepted by the Customer.

3.3.5 The Supplier shall provide such other reports specified in the Quotation.

3.4 Date for Completion

The Date for Completion shall be extended if the Supplier is delayed in completing the Services in the following cases:

3.4.1 Access to the Track is delayed through not fault of the Supplier;

3.4.2 Exclusive access to the Track is not granted to the Supplier;

3.4.3 The Supplier is delayed in the performance of the Services due to acts or omissions of other contractors on or near the Track;

3.4.4 Delayed provision of Customer Furnished Information;

3.4.5 Inclement weather;

3.4.6 the occurrence of a Force Majeure Event;

3.4.7 the occurrence of any event outside the reasonable control of the Supplier;

3.4.8 Delayed procurement of any required authorisations, licences or permits from any government or regulatory authority or third party including rail network operators or an adverse change in their conditions as determined in the absolute discretion of the Supplier;

3.4.9 The Customer fails to comply with its obligations under this Agreement.

3.5 Liquidated damages for delayed completion of Services by the Date for Completion

3.5.1 Subject to any extension of time to which the Supplier is entitled under this Agreement, if the Supplier delays completion of the Services by the Date for Completion, the Supplier shall pay to the Customer liquidated damages in the amount specified in the Quotation for each day, up to a maximum of 5% of the aggregate of Fees paid or payable by the Customer.

3.5.2 The parties acknowledge and agree that:

(I) the amount of liquidated damages under this clause has been agreed by the parties in good faith;

(II) is a genuine pre-estimate of the loss and damage which the Customer is likely to suffer if the Supplier delays completion of the Services beyond the Date for Completion;

(III) each party wishes to avoid the difficulties of proof of damages in connection with delayed completion of the Services beyond the Date for Completion;

(IV) the liquidated damages are reasonable and not intended as a penalty; and

(V) liquidated damages payable under this clause are the Customer's exclusive and sole remedy for any delay by the Supplier completing the Services by the Date for Completion;

(VI) each party will not assert in any court, arbitration or other proceedings that any of the liquidated damages provided under this clause is a penalty or that this clause is void or unenforceable (either in whole or in part).

3.5.3 The Customer agrees that if this clause is found for any reason to be void, invalid or otherwise unenforceable or inoperative so the Customer is not able to claim the liquidated damages, the Customer will be entitled to recover common law damages as a result of the Supplier's delayed completion of the Services by the Date for Completion. The Supplier's liability for such damages (whether per day or in aggregate) will not be any greater than the liability which it would have if this clause had not been void, invalid or otherwise inoperative.

3.6 Location and Work Hours

3.6.1 The Supplier will provide the Services in the places and locations set out in the Quotation or Specification.

3.6.2 The Shifts shall be performed during Work Hours or such other times agreed by the parties. The time allocated to the Work Hours includes the journey to and from the Track and the Facility.

4. Fees

4.1 Payment of Fees

4.1.1 In consideration of the provision of the Services in accordance with this Agreement, the Customer will pay the Supplier the Fees.

4.1.2 The Customer acknowledges that the Fees are exclusive of any GST that may be charged by the Supplier to the Customer, and therefore, the Supplier will be entitled to add on GST.

4.2 Surcharges and adjustments

4.2.1 The Fee is based on the conditions or assumptions specified in the Quotation.

4.2.2 The Fee shall be increased to take into account:

(I) any additional Consumables required to complete the Services due to reasons beyond the reasonable control of the Supplier;

(II) any applicable levies and charges payable to the Supplier's personnel if any of the Services are provided outside Business Hours or on a day that is not a Business Day.

4.3 Supplier's entitlement to charge for changes to Shifts

4.3.1 The Customer shall, in relation to Shifts, pay to the Customer such amount, if:

(I) a Shift is cancelled:

(A) 14 days or more prior to the commencement of a planned Shift, being 50% of the Fee for that Shift;

(B) at any time between 8 days and 14 days prior to the commencement of a planned Shift, being 60% of the Fee for that Shift;

(C) any time between 2 days and 7 days prior to the commencement of a planned Shift, being 70% of the Fee for that Shift;

(D) within 48 hours prior to the commencement of a planned Shift, being 85% of the Fee in respect of that Shift;

(II) if the actual time permitted for performance of a Shift was less than the time planned for that Shift, being 100% of the Fee for that Shift ;

(III) an increase in the number or duration of Shifts is required to perform the Services beyond the quantity of Shifts reasonably contemplated by the Supplier at the time of the Quotation due to reasonable beyond the reasonable control of the Supplier, at the rate specified in the Quotation on per Shift basis;

(IV) if due to an act or omission of the Customer or other person, the Supplier's performance of its obligations are delayed or hindered, including being granted access to the Track or its Equipment following arrival of same on the planned date and time for commencement of a Shift, at the rate specified in the Quotation on per Shift basis.

4.3.2 This clause does not limit the Supplier's entitlement to any damage, loss or expense caused by a breach by the Customer of its obligations under this Agreement.

4.4 Invoicing

4.4.1 The Supplier may issue an invoice to the Customer after completion of each Shift or at such other times specified in the Quotation.

4.4.2 The Supplier will provide the Customer with a tax invoice in accordance with the GST Law in relation to fees payable under this clause 4.

4.4.3 The Customer shall pay the invoice within 14 days after receiving the Supplier's invoice.

4.4.4 When making a payment, the Customer must quote relevant reference numbers and the invoice number.

4.4.5 A payment will be deemed to have been made when it has been paid into the Supplier's nominated account in clear funds

4.5 Variation to scope of Services

4.5.1 Any change to the scope of Services shall be agreed in writing between the Supplier and the Customer. The parties acknowledge and agree that the events which entitle the Supplier to any surcharges and/or additional charges under clause 4.2 and clause 4.3 do not constitute a change to the scope of the Services for the purpose of this clause.

4.6 Failure to pay

4.6.1 If the Customer does not make a payment by the date stated in an invoice or as otherwise provided for in the agreement, the Supplier is entitled to do any or all of the following:

4.6.2 charge interest on the outstanding amount at the rate of 10% per year above the base lending rate of Common-wealth Bank of Australia, accruing daily;

4.6.3 require the Customer to pay, in advance, for any Services (or any part of the Services) which have not yet been per-formed; and

4.6.4 not perform any further Services (or any part of the Services).

4.7 Disputed invoices

4.7.1 If the Customer disputes the whole or any portion of the amount claimed in an invoice submitted by the Supplier, the Customer must:

4.7.2 pay the portion of the amount stated in the invoice which is not in dispute in accordance with the terms of payment set out in this Agreement; and

4.7.3 notify the Supplier in writing (within 5 days of receipt of the invoice) of the reasons for disputing the remainder of the invoice.

5. Customer's obligations

5.1 General

In relation to the Services, the Customer will:

5.1.1 cooperate with the Supplier as the Supplier reasonably requires;

5.1.2 if not provided prior to or at the time of the Quotation, provide the information and documentation that the Supplier reasonably requires including:

(I) clearance and structural gauge, wheel profile, track gauge, minimum track radius, a detailed description of the Track, its condition and any other relevant information;

(II) identification of any local or national regulations relevant to the Supplier conducting the Services on the Track including fire prevention regulations or speed limits on the access routes to the Track;

5.1.2 make available to the Supplier and its personnel such Facilities as the Supplier reasonably requires including road-side access; and

5.1.3 ensure that the Customer's staff and agents cooperate with and assist the Supplier.

5.2 Track access

The Customer shall, at its cost, ensure that the Supplier's employees, agents or contractors are given exclusive and uninterrupted access to the Track in connection with the performance of the Customer's obligations under this Agreement.

5.3 Changes in anticipated conditions

In the event access or Track conditions are different to those which the:

5.3.1 Customer notified the Supplier under clause 5.1.2; or

5.3.2 Supplier could have reasonably anticipated as at the date of the Quotation or did anticipate at the time of any pre-quotation inspection (if carried out):

(I) the parties may agree an appropriate amendment to this Agreement; or

(II) if the parties fail to reach agreement on an appropriate amendment to this Agreement, the Supplier may:

(III) delay performance of the Agreement until such time as reasonable access is available to the Supplier in which case the Customer shall be entitled to adjust Fee for any extra time and materials incurred, including reasonable profit margin; or

(IV) without prejudice to its rights, terminate this Agreement.

5.4 Health and Safety warranty

The Customer warrants that it has advised, and shall at all times keep advised, the Supplier of any conditions or matters which are known or which ought reasonably be known to the Customer, to exist at the Track which may pose a hazard or risk to the health and safety of the Supplier's employees, agents or contractors.

5.5 Other obligations

The Customer shall, at its cost, do the following things in relation to the Track in order to permit the Supplier to perform the Services:

5.5.1 organise access routes to the Track for the Supplier and the Supplier's Equipment;

5.5.2 organise, operate and provide suitable Traction Vehicle for the Equipment, if specified in the Quotation;

5.5.3 appoint a representative with sufficient expertise and authority to make decisions on behalf of the Customer;

5.5.4 organise and provide all necessary induction information the Supplier's Personnel in relation to the Track and any other buildings or areas;

5.5.5 provide qualified safety staff during the period which the Services are provided;

5.5.6 ensure the Supplier has at all times exclusive, uninterrupted and unlimited access to the Track;

5.5.7 schedule and organise all operational plans and track closures including;

(I) correctly securing the track section to the machine against hazards caused by third parties or resulting from external circumstances;

(II) provide the necessary electricity and water connections specified in the Quotation or as requested by the Supplier;

(III) provide the Facilities for the Supplier's Equipment. If the Customer does not provide the Facilities that the Supplier reasonably requires (and within the time period) to perform the Services, then any additional costs and expenses which are reasonably incurred by the Supplier will be paid by the Customer.

6. No partnership or employment relationship

6.1 Nothing in this Agreement constitutes the relationship of employer and employee between the Customer and the Supplier or between the Customer and the Supplier's Personnel.

6.2 It is the express intention of the Parties that any such relationships are denied.

7. Use of subcontractors

7.1 The Supplier is permitted to use other persons to provide some or all of the Services.

7.2 The Supplier is responsible for the work of any of the Supplier's subcontractors.

8. Intellectual Property Rights

8.1 Ownership of Background IP

The Parties agree that, other than as expressly provided in this clause, nothing in this Agreement transfers or grants to any party any right, title or interest in or to any Intellectual Property in any Background IP. The Supplier grants to the Customer a worldwide, royalty free, perpetual, irrevocable, transferable, non-exclusive licence to use the Background IP to the extent necessary for the Customer to derive full benefit from its acquisition of the Deliverables.

8.2 Ownership of Contract IP

The Customer acknowledges that ownership of the Contract IP remains vested in the Supplier. The Supplier grants to the Customer an exclusive, perpetual, fully paid-up, irrevocable, worldwide licence to use the Contract IP for the sole purpose of enabling the Customer to derive full benefit from its acquisition of the Deliverables.

8.3 IP Indemnity

The Supplier agrees to indemnify the Customer fully against all liabilities, costs and expenses which the Customer may incur if the Contract IP or Background IP infringes the rights of a third party, save that the Supplier will have no indemnity obligation if any infringement, suspected infringement or alleged infringement of the Contract IP or Background IP arises from:

8.3.1 use of the Deliverables in combination by any means and in any form with other goods not specifically approved by the Supplier;

8.3.2 use of the Deliverables in a manner or for a purpose not reasonably contemplated or not authorised by the Supplier;

8.3.3 modification or alteration of the Deliverables without prior consent in writing of the Supplier; or

8.3.4 any transaction entered into by the Supplier relating to the Deliverables without the Supplier's prior consent in writing.

8.4 Licence to use Customer Furnished Information

Intellectual Property of the Customer contained in CFI shall remain under the ownership of the Customer. The Customer grants to the Supplier a royalty-free, non-exclusive and perpetual licence to use, copy, modify and reproduce the Customer's IP in order for the Supplier to perform its obligations under the Agreement.

8.5 Survival

The obligations accepted by the Parties under this clause 8 survive termination or expiry of this Agreement.

9. Confidentiality

9.1 A Party which receives Confidential Information (Recipient) from the other Party (Discloser) must keep the Discloser's Confidential Information confidential and not deal with it in any way that might prejudice its confidentiality.

9.2 The Recipient's obligations in relation to the Confidential Information will continue for as long as the Confidential Information is maintained on a confidential basis by the Discloser.

9.3 At the Termination Date, or when earlier directed by the Discloser:

(I) all Confidential Information must be returned to the Discloser, including all copies of the Confidential Information or any extracts or summaries of the Confidential Information that the Recipient makes and any software that the Recipient creates based on the Confidential Information; and

(II) the Recipient must erase and destroy any copies of any software containing or comprising the Confidential Information in the Recipient's possession or under the Recipient's control or that may have been loaded onto a computer possessed or controlled by the Recipient.

9.4 The Confidential Information does not include information which:

(I) is generally available in the public domain otherwise than as a result of a breach of clause 9.1 by the Supplier; or

(II) was known by the Recipient prior to the Discloser disclosing the information to the Supplier.

9.5 The Recipient agrees that the Discloser may require any of the Recipient's personnel to sign a confidentiality agreement in a form that the Discloser approves, as a condition of the Discloser's acceptance of any of the Recipient's personnel.

9.6 The Recipient agrees to indemnify the Discloser fully against all liabilities, costs and expenses which the Discloser may incur as a result of any breach of this clause 9 by the Recipient.

9.7 The Recipient acknowledges that damages may be an inadequate remedy for breach of this clause 9 and that the Discloser may obtain injunctive relief against the Recipient for any breach of this clause 9.

9.8 The obligations accepted by the Recipient under this clause 9 survive termination or expiry of this Agreement.

10. Authorisations

10.1 The Supplier must use reasonable endeavours to apply for any required licences for the operation of the Equipment from the relevant authorities.

10.2 If despite using reasonable endeavours, the Supplier:

(I) has not procured any required licences within 30 days of the date of the Commencement Date,

(II) has procured relevant licences but the terms and conditions of those licences will, in the Supplier's absolute discretion, adversely affect the performance of its Services,

this Agreement shall be terminated and the Supplier shall return any monies paid to the Customer in respect of the Services.

11. Warranties, liability and indemnities

11.1 Exclusions

Subject to the other terms of this clause 11, the Supplier excludes all rights, representations, guarantees, conditions, warranties, undertakings, remedies or other terms that are not expressly set out in this Agreement to the maximum extent permitted by law.

11.2 Warranties

11.2.1 The Supplier warrants that the Services will be provided with due care and skill.

11.2.2 The Supplier warrants that the Services will on completion, and any product resulting from them, be fit for purpose specified in the Agreement.

11.2.3 If a Shift is not provided in compliance with this Agreement, then, if notified by the Customer, the Supplier will re-perform the relevant Shift, subject to clauses 11.7, 11.8.1 and 11.8.3 below.

11.2.4 The Customer's notification referred to in clause 11.1.2 must be made within 30 days of the date of completion of the relevant Shift or termination of this Agreement.

11.3 Insurances

11.3.1 If the Quotation specifies that the Customer is responsible for provision and operation of the Traction Vehicle, the Customer must take out and maintain the following insurances:

(I) a general liability policy covering damage to third party property and bodily injury to third parties for a minimum amount of \$20,000,000 (twenty million) per occurrence; and

(II) an insurance policy covering damage to the Equipment caused by towing, unloading or loading by the Customer, its employees, agents, or subcontractors for the Equipment's replacement value being \$1,500,000 (one and a half million dollars).

11.3.2 The Supplier must take out the following insurance:

(I) worker's compensation insurance as prescribed by law for the Supplier's Personnel; and

(II) public liability insurance for a minimum amount of \$20,000,000 (twenty million) per occurrence.

11.3.3 A party which is required to effect and maintain insurance under this Agreement must provide the other party with evidence of such insurance (a certificate of currency shall suffice) as soon as possible after receipt of a request from the other party.

11.4 Disclaimer

11.4.1 The Supplier shall not be liable to the Customer for any damage, loss or expense arising from non-completion of Services due to the reasons beyond the control of the Supplier including loss or damage to Equipment, no or limited Track availability.

11.4.2 The Supplier's obligation to provide the Service is limited to the use of one quantity of the Equipment (ie one machine) with the specified grinding capacity from the agreed machine category during the specified service period in order to achieve the desired depth of material removal on the track section to be machined. In particular, weather conditions, safety considerations, the actual condition of the rails or the quality of the preceding work may hinder or affect the provision of the service.

11.5 Supplier indemnity

The Supplier indemnifies the Customer for all Loss arising directly from:

11.5.1 death or personal injury;

11.5.2 damage to third party property,

caused by its negligence or wilful misconduct or that of its employees as applicable.

11.6 Compliance with all laws

Throughout this Agreement the Supplier must comply at the Supplier's own cost and expense with all acts, ordinances, rules, regulations, other delegated legislation, codes and the requirements of any Commonwealth, state and local government departments, bodies, and public authorities or other authority. This requirement applies to the Supplier or to the Services. The Supplier must indemnify the Customer from and against all actions, costs, charges, claims and demands in respect of such action, cost, charge, claim and demand.

11.7 Resupply of Services

The Customer acknowledges and agrees that in the event of a defective supply of Services, it may not be possible for the Supplier to resupply those Services or further Services immediately after provision of notice of the defective Services:

11.7.1 as the relevant Track section may no longer be closed; and/or

11.7.2 it may not be possible to close the affected Track section; and/or

11.7.3 the Supplier may have relocated the Equipment.

11.8 Limitation on liability

11.8.1 Nothing in this Agreement limits or excludes the Supplier's liability:

(I) for death or personal injury caused by its negligence or wilful misconduct or that of its employees as applicable;

(II) for fraud or fraudulent misrepresentation by it or its employees as applicable;

(III) for misleading or deceptive conduct under section 18 of the ACL;

(IV) where liability cannot be limited or excluded by applicable law;

(V) for repudiation or abandonment of this Agreement;

(VI) for infringement of a third party's intellectual property rights.

11.8.2 Subject to clause 11.8.1, the liability of the Supplier under or in connection with this Agreement whether arising in contract, tort, negligence, breach of statutory duty or otherwise shall not exceed the Fees paid or payable by the Customer to the Supplier under this Agreement.

11.8.3 Neither Party is liable to the other Party in contract, tort, negligence, breach of statutory duty or otherwise for any loss, damage, costs or expenses of any nature whatsoever incurred or suffered by that other Party of an indirect or consequential nature including any Indirect Loss.

11.8.4 Nothing in this Agreement is intended to have the effect of excluding, restricting or modifying the application of all or any of the provisions of Part 5-4 of the ACL, or the exercise of a right conferred by such a provision, or any liability of the Supplier in relation to a failure to comply with a guarantee that applies under Division 1 of Part 3-2 of the ACL to a supply of goods or services. If the Customer has the benefit of a Consumer Guarantee, the Supplier's liability for failure to comply with a Consumer Guarantee is limited to:

(I) in the case of goods supplied to the Customer, the replacement of the goods or the supply of equivalent goods (or the payment of the cost to the Customer of the replacement or supply), or the repair of the goods (or the payment of the cost to the Customer of the repair); and

(II) in the case of services supplied to the Customer, the supply of the services again or the payment of the cost to the Customer of having the Services supplied again.

11.9 Customer recovery

11.9.1 Where the Customer is or may be entitled to recover from a third party any sum in respect of any matter or event that could give rise to a claim under this agreement, the Customer must:

(I) use its best endeavours to recover that sum before making the claim;

(II) keep the Supplier at all times fully and promptly informed of the conduct of such recovery; and

(III) reduce the amount of the claim to the extent that sums are recovered.

11.9.2 If the recovery is delayed until after the claim has been paid by the Supplier to the Customer, the recovered sum must be paid to the Supplier (up to the amount of the claim paid by it).

11.9.3 If the Customer recovers any amount under an insurance policy in respect of a claim under or in relation to or arising out of this Agreement and that amount is less than the loss or damage incurred by the Customer, the amount of the shortfall will be the amount of the Customer's loss for the purposes of this Agreement.

11.10 No reliance

Each of the Parties acknowledges that, in entering into this Agreement, it does not do so in reliance on any representation, warranty or other provision except as expressly provided in this Agreement. Any conditions, warranties or other terms implied by statute or common law are excluded from this Agreement to the fullest extent permitted by law.

11.11 Survival of obligations

The obligations accepted by the Supplier and the Customer under this clause 11 survive termination or expiry of this Agreement.

12. Termination

12.1 The Supplier may terminate this Agreement by notice in writing to Customer if:

(I) the Customer fails to observe any material term of this Agreement including its obligations under clause 5; and

(II) fails to rectify this breach, to the satisfaction of the Supplier, following the expiration of 7 days' notice of the breach being given in writing by the Supplier to the Customer.

12.2 A Party may terminate this Agreement immediately upon the happening of any of the following events:

(I) If the other Party enters into a deed of arrangement or an order is made for it to be wound up;

(II) if an administrator, receiver or receiver/manager or a liquidator is appointed to the other Party pursuant to the Corporations Act; or

(III) if the other Party would be presumed to be insolvent by a court in any of the circumstances referred to in the Corporations Act.

12.3 Upon termination of this Agreement any fees, expenses or reimbursements payable by the Customer to the Supplier in respect of any period prior to the Termination Date must be paid by the Customer within 7 days after the Termination Date.

13. Other

13.1 Force Majeure

13.1.1 Neither Party has any liability under or may be deemed to be in breach of this Agreement for any delays or failures in performance of this Agreement which result from a Force Majeure Event.

13.1.2 The Party affected by these circumstances must promptly notify the other Party in writing when such circumstances cause a delay or failure in performance and when they cease to do so.

13.1.3 If such circumstances continue for a continuous period of more than 30 days, either Party may terminate this Agreement by written notice to the other Party.

13.2 Amendment

This agreement may only be amended in writing signed by duly authorised representatives of the Parties.

13.3 Assignment

Neither Party may assign, delegate, subcontract, mortgage, charge or otherwise transfer any or all of its rights and obligations under this Agreement without the prior written agreement of the other Party.

13.4 Waiver

13.4.1 No failure or delay by the Supplier in exercising any right, power or privilege under this Agreement will impair the same or operate as a waiver of the same nor may any single or partial exercise of any right, power or privilege preclude any further exercise of the same or the exercise of any other right, power or privilege.

13.4.2 The rights and remedies provided in this Agreement are cumulative and not exclusive of any rights and remedies provided by law.

13.5 Agency, partnership etc

13.5.1 This agreement will not constitute or imply any partnership, joint venture, agency, fiduciary relationship or other relationship between the Parties other than the contractual relationship expressly provided for in this Agreement.

13.5.2 Neither Party will have, nor represent that it has, any authority to make any commitments on the other Party's behalf.

13.6 Further assurance

Each Party to this Agreement must at the request and expense of the other do all things reasonably necessary to carry out the provisions of this Agreement or to make it easier to enforce.

13.7 Severance

If any provision of this Agreement is prohibited by law or judged by a court to be unlawful, void or unenforceable, the provision will, to the extent required, be severed from this Agreement and rendered ineffective as far as possible without modifying the remaining provisions of this Agreement, and will not in any way affect any other circumstances of or the validity or enforcement of this Agreement.

13.8 Announcements

13.8.1 Subject to clause 13.8.2, no Party may issue or make any public announcement or disclose any information regarding this Agreement unless prior to such public announcement or disclosure it furnishes the other Party with a copy of such announcement or information and obtains the approval of the other Party to its terms.

13.8.2 No Party will be prohibited from issuing or making any such public announcement or disclosing such information if it is necessary to do so to comply with any applicable law or the regulations of a recognised stock exchange.

13.8.3 For the purpose of this clause, the term "public announcement" includes posts or comments on any social media platforms.

13.9 Notices

A notice or other communication connected with this Agreement has no legal effect unless it is in writing. In addition to any other method of service provided by law, the notice may be sent by pre-paid post to the address of the addressee as set out in this Agreement, or sent by email to the email address of the addressee.

13.10 Law and jurisdiction

This Agreement is governed by the laws of the state in which performance of the Services takes or is contemplated to take place.

14. Dispute Resolution

- 14.1** A party to this contract claiming that a dispute has arisen from or in connection with this Agreement (Dispute), must not commence court arising from or relating to the Dispute, other than a claim for urgent interlocutory relief, unless that party has participated in a mediation in accordance with clause 14.3.
- 14.2** Compliance with this clause is a condition precedent to the right of any party to commence litigation or arbitration arising from, or in connection with, the Dispute.
- 14.3** A party to this Agreement claiming that the Dispute has arisen must give a written notice to the other party or parties to this contract by email in accordance with the service of notice provisions of this Agreement, specifying the nature of the Dispute (Notice). The parties must then participate in mediation in accordance with this clause 14.
- 14.4** If, within seven days of receipt of the Notice (or such longer period as may mutually be agreed by them) the parties do not agree on the following:
- (I) the identity of the mediator;
 - (II) the mediator's fees; and/or
 - (III) the process to be followed for the mediation,
- then:
- (IV) the Australian Disputes Centre (ADC) will appoint an accredited mediator to mediate the Dispute and the parties will pay the mediator's fees equally; and/or
 - (V) the terms of the ADC Guidelines for Commercial Mediation operating at the time the matter is referred to ADC will apply and the Dispute will be mediated in accordance with them.
- 14.5** The parties must participate in the mediation in good faith. The obligation to participate in the mediation in good faith includes, but is not limited to:
- (I) adopting an honest and genuine approach to resolving the Dispute by discussion;
 - (II) taking steps to clarify or resolve outstanding matters in the Dispute;
 - (III) considering such options for the resolution of the Dispute as may be propounded by the opposing party or mediator;
 - (IV) putting forward options for the resolution of the Dispute; and
 - (V) complying with any directions given by the mediator.
- 14.6** If clause 14.5 is or becomes invalid or unenforceable under the law of any jurisdiction, it is severed in that jurisdiction to the extent that it is invalid or unenforceable and whether it is in severable terms or not.
- 14.7** If a party refuses to participate in a mediation of the Dispute under this clause 14, that party must:
- (I) not take any steps to recover its costs in any proceedings arising from or in connection with the Dispute;
 - (II) consent to orders by the court in which the proceedings are commenced that the proceedings be referred to mediation to be conducted by:
 - (A) a mediator agreed between the parties; or
 - (B) if the parties cannot agree with seven days of the order being made, a Registrar of the court; and/or
 - (III) consent to an order of a court of competent jurisdiction that it will specifically perform and carry out its obligations under clause 14.1.
- 14.8** This clause 14 will survive termination or expiry of this agreement together with any other term which by its nature is intended to do so.