

# CONSOL SERVICE AGREEMENT TERMS & CONDITIONS

## 1.0 INTERPRETATION

**1.1 Definitions:** In this Agreement, unless the context otherwise requires:

**Additional Work** means any Work of the nature described in clause 2.2;

**Agent** means an authorised dealer or other approved repair and maintenance service provider as appointed by the Company;

**Agreement** includes the Schedule, the General Terms and the Appendices of this Agreement;

**Annual Hours** means the hours specified as such in the Schedule under the heading Operational Details or, if not so specified, 2,000 hours;

**Appendix and Appendices** means an appendix or the appendices of this Agreement (as the case may be);

**Commencement Date** means the commencement date specified in the Schedule under the heading Commencement Date and Charges;

**Company** means CablePrice (NZ) Limited, a duly incorporated company with registered company number 811263, whose registered office is at 41 – 51 Bell Road South, Gracefield, Wellington;

**ConSite** means Hitachi's proprietary telematics system as fitted to some (but not all) machines.

**Contract Period** means the contract period specified in the Schedule under the heading Contract Terms and Period;

**Excess Charges** means the charges specified in the Schedule under the heading Excess Charges and as calculated and payable in accordance with clause 7;

**Excluded Items** means the items listed in clause 2.4 of this Agreement;

**General Terms** means the section of this Agreement headed General Terms;

**GST** means goods and services tax within the meaning of the Goods and Services Tax Act 1985;

**Law** means those laws, statutes, rules and regulations affecting the Machine or affecting the rights or obligations to be performed by the parties to this Agreement and Law Change shall mean any Law which comes into force after the Commencement Date;

**Machine** means the machine or equipment described in the Schedule under the heading Operational Details;

**Machine Location** means the machine location set out in the Schedule under the heading Operational Details;

**Maintenance Programme** means the Manufacturer maintenance programme from time to time in force for the Machine to be carried out at the service intervals set out in Appendix 3 or such other service intervals as may be notified by the Company to the Operator from time to time;

**Manufacturer** means the manufacturer of the Machine or its agent;

**Monthly Charges** has the meaning in clause 6.2;

**Operator** means the Operator named in the Schedule and includes its officers, employees and agents;

**Routine Maintenance** means all work or adjustments (not being Excluded Items) recommended to be carried out under the Maintenance Programme or otherwise to maintain the Machine in a sound and operational condition including where appropriate the replacement of any parts or components to the Machine deemed by the Company in its absolute discretion to be reasonably necessary whether the same be defective or not;

**Schedule** means the Schedule to this Agreement;

**Termination Date** means the earlier of:

a. if the Contract Period is specified in years, the date which is the number of years so specified after the Commencement Date;

b. if the Contract Period is specified in hours, the date on which the total number of hours travelled by the Machine exceeds the number of hours so specified (as shown on the Machine's hourmeter);

c. the date this Agreement otherwise terminates in accordance with clause 9;

**Work** includes maintenance (including Routine Maintenance), repair or replacement of any Excluded Items, adjustments, inspections and test inspections to the Machine and all incidental time and attendances;

**Work Premises** means the premises specified in Appendix 1 to this Agreement as may be amended by the Company from time to time.

**1.2 Construction of certain references:** In this Agreement unless the context otherwise requires, any reference to:

A "person" includes any individual natural person, company, corporation, partnership, firm, joint venture, association (whether corporate or unincorporated), trust, organisation, Government department, Minister of the Crown, state or agency of a state (in each case, whether or not having separate legal personality), and includes, in each case, a person's executors, administrators, successors and permitted assigns;

A "working day" means a day (other than Saturday or Sunday) on which registered banks are open for general banking business in the location closest to the Machine Location but excludes any day in the period from 24 December in any year to 5 January in the following year (both inclusive).

**1.3 General Construction:** In interpreting this Agreement the following rules must be applied unless the context otherwise requires:

a. **Headings:** clause and other headings are for reference only and are not an aid in interpretation;

b. **Statutes:** references to statutory provisions will include references to all regulations, orders, rules or notices made under that statute and references to a statute or regulation will be construed as references to those statutes or regulations as they may be amended or re-enacted or as their application is modified by other provisions from time to time;

c. **Currency:** references to currency and a reference to "\$" or "dollar" are, unless otherwise stated, to New Zealand currency;

d. **Parties:** references to a party are to a party to this Agreement and include that party's executors, administrators, successors in title and permitted assigns;

e. **Number and Gender:** words importing the plural include the singular and vice versa and words importing gender include all genders;

f. **Joint Obligations:** all warranties, representations, indemnities, covenants, agreements and obligations given or entered into by more than one person will be deemed to have been given or entered into jointly and severally.

## 1.4 Conditions:

a. This Agreement is conditional in all respects upon the Company conducting such credit and other checks on the Operator as the Company may require and the Company being satisfied with the results of such checks.

b. The Company's obligations under this Agreement are conditional upon the Company receiving from the Operator such signed and completed automatic payment or direct debit forms as may be required at or about the time of entry into this Agreement and such forms being accepted and processed by the Operator's bank.

## 2 OBLIGATIONS OF COMPANY

**2.1 Routine Maintenance:** The Company agrees to:

a. carry out Routine Maintenance and inspections on the Machine at the intervals and in the manner prescribed in the Maintenance Programme.

b. following completion of any Routine Maintenance:

i. leave a copy of the Company's report of Work carried out on the Machine at the Machine Location; and

ii. place a Company label on the Machine in a prominent place stating the nature of the next type of Routine

Maintenance required and recording the hourmeter reading.

**2.2 Additional Work:** If the Operator requests the Company to carry out any Work other than Routine Maintenance (for example, Work in connection with any Excluded Item) then the Company may, in its sole discretion, carry out the requested Work and such Work shall be charged at the Company's then current time and expense rate or, if agreed, on a quoted fixed fee basis. All such additional Work shall be carried out subject to the Company's ordinary terms of trade.

**2.3 Genuine Parts:** The Company shall use Manufacturer approved genuine parts and components and factory approved lubricants except where any such parts, components or lubricants are not readily available, or not available at a reasonable price (as determined by the Company), in which case the Company may use such other parts, components or lubricants which are of a similar quality (as determined by the Company, acting reasonably) provided that the use of such parts, components or lubricants will not cause any current Manufacturer's warranty in respect of the Machine to be voided or voidable.

**2.4 Excluded Items:** Except as otherwise agreed by the Company, the Work carried out by the Company does not include any Work in connection with any of the following:

a. All Machine Repairs

b. Daily checks and any servicing carried out in between the recommended 500 hour Services.

c. Work associated with normal wear and tear, including but not limited to brake or clutch linings/pads, drive belts and fuel injection nozzles;

d. parts and components not purchased from the Company, parts other than the Manufacturer's approved genuine parts or parts fitted in accordance with clause 2.3, obsolete genuine parts, service exchange units or to defects caused by such parts or components;

e. oils and lubricants (top ups) used between services;

f. any Work on or in connection with any lubrication system fitted to the Machine, unless such lubrication system is noted in the Schedule under the heading "Machine Details" as being fitted to the Machine as at the date of this Agreement;

g. the repair, replacement or service of any lubrication pails, regardless of whether any lubrication system is noted in the Schedule under the heading "Machine Details" as being fitted to the Machine as at the date of this Agreement;

h. any Work on or in connection with Cummins, Detroit Diesel, and Hino Engines;

i. any Work on the Machine's body;

j. plant, equipment or accessories fitted on the Machine;

k. unscheduled filter and lubricant changes due to contamination;

l. fuel;

m. repair of damage resulting from faults in, or incorrect fitting of, the body or any other ancillary or additional equipment;

n. the fitment, service or repair of any additional equipment that becomes a requirement under any Law or as a result of a Law Change;

o. any Work necessary as a result of any breach of any of the Operator's obligations under this Agreement;

p. any Work necessary as a result of use of the Machine otherwise than in accordance with the Manufacturer's operational recommendations;

q. any structural Work to the chassis necessary as a result of misuse, overloading, chemical contamination;

r. repair of damage due to the Machine being subject to accident, fire, flood, theft, explosion or natural disaster;

s. repair of damage due to use of poor, substandard or contaminated fuel or other additive, coolant or lubricant;

t. any part or component which has been stolen or been removed without authorisation from the Machine;

u. any Work which in the Company's reasonable opinion has become necessary due to inadequate or substandard work or testing or inspection carried out by any third party or the Operator;

v. fees or charges in connection with a replacement Machine;

w. any Work covered by insurance held by or for the benefit of the Operator;

x. furnishing consumable supplies or accessories, painting or refurbishing the Machine or making specification changes;

y. any Work which is rendered impractical due to any modifications or alterations made to the Machine without the Company's prior written consent;

z. the repair of any damage, defect or malfunction which in the Company's reasonable opinion has become necessary as a result of any one or more of the following:

i. any electrical work external to the Machine or part thereof; ii. any transportation or relocation of the Machine not performed by an Agent or authorised by the Company;

iii. any error or omission relating to the use or operation of the Machine;

iv. any modification, adjustment or repair to the Machine or any part thereof which is made by any person without the prior written consent of the Company;

v. the Operator allowing the Machine or any part thereof to be subjected to unusual physical, electrical or mechanical stress;

vi. the neglect or misuse of the Machine or wilful default or omission in relation to the Machine, by the Operator or any third party;

vii. any failure or fluctuation of electrical power, fuel supply or other environmental controls;

viii. seals or other settings made by the Agent, the Company or its suppliers being broken,

aa. any Work which but for a Law Change would have been Work excluded under this clause 2.4.

### 3 OBLIGATIONS OF THE OPERATOR

**3.1 Scheduling Routine Maintenance:** The Operator shall be responsible for the scheduling of Routine Maintenance and inspections on the Machine at the intervals and in the manner prescribed by the Company or the Agent or at such intervals as may be required by Law. The Operator shall notify the Company in writing at least five (5) working days prior to the anticipated due date for any Routine Maintenance and such notice shall state the hourmeter reading and the Machine's serial number. In addition, the Operator will notify the Company of any changes in its inspection interval and should the number of inspections during the Contract Period increase the Operator shall bear the consequential costs. The Operator shall ensure that Routine Maintenance and inspections are arranged with and carried out by the Company or an Agent. Failure to make the Machine available and readily accessible for Routine Maintenance could result in termination of this Agreement.

#### 3.2 Availability of the Machine for the Routine Maintenance at the Machine Location:

a. The Operator shall make the Machine available and readily accessible so that the Routine Maintenance can be carried out

unimpeded at the Machine Location at a time mutually agreed with the Company. If the Operator fails to make the Machine available and readily accessible at the agreed time for the Routine Maintenance or the Machine is not available at the Machine Location, the Company or the Agent may charge, and the Operator must pay, additional charges for travel and waiting time at the Company's usual rates and charges.

b. If, at the time any Work is carried out, the Machine is at a location in respect of which the distance by road from the nearest Work Premises (as determined by the Company in its discretion acting reasonably) exceeds the distance specified in the Schedule under the heading "Distance from Machine Location to Branch", then the Company may charge for such excess distance, and the Operator must pay in accordance with clause 6.5, an additional per kilometre fee based on the Company's usual surcharge for excess kilometres.

**3.3 Condition of Machine:** The Operator shall ensure that the Machine is, at the time of carrying out any Work in a condition that does not impede the carrying out of such Work, including ensuring the Machine has been thoroughly cleaned prior to that time. If the Machine requires cleaning by the Company or the Agent, the Company or the Agent may charge, and the Operator must pay, additional costs at the Company's usual charges and rates.

**3.4 Defect Reporting:** The Operator shall comply with any reasonable reporting procedure in relation to the Machine which may be introduced either by the Company or by any Law made under any Law Change.

**3.5 Machine Checks:** The Operator shall carry out all the Manufacturer's recommended or required Operator checks, lubrication and adjustments to the Machine including those set out in Appendix 2.

**3.6 Change of Use:** The Machine shall be used in accordance with the Manufacturer's recommendations and as is specified in the Schedule. The Operator shall notify the Company of any change of use or operation which could affect the Machine's normal operating environment or Routine Maintenance requirements. The Company reserves the right on receipt of such notification to amend the charges or terminate this Agreement in accordance with clause 9.2.

**3.7 Operators:** The Operator shall ensure that the Machine is operated only by authorised, qualified and competent personnel.

#### 3.8 Hourmeters:

a. The Operator will inform the Company immediately of any changes made to the hourmeters, and will allow (if requested) periodic examinations of the equipment and data and testing and calibration of the equipment, by the Company or the Agent.

b. In the event of the Machine's hourmeter failing to function properly, the Operator shall immediately inform the Company in writing specifying the date of such failure and the estimated distance or hours (as appropriate) that the Machine has travelled for the period elapsed since the last reading notified to or taken by the Company or the Agent (the "reading date"). If a new hourmeter is fitted as a consequence of failure it is the responsibility of the Operator to instruct the repairer to wind on the reading of the new component to the estimated hours since the last reading date.

c. Where installed, the operator agrees that the Company may utilize ConSite to determine actual machine usage. This date will then be used to ensure accurate monthly billing.

**3.9 Delivery/Collection:** If the Operator is required to make the Machine available at the Work Premises, it shall be the responsibility of the Operator to ensure that it delivers the Machine to the Work Premises, where appropriate prior to expiry of the relevant service interval, and collects it from the Work Premises and shall make the appropriate arrangements with the Company or the Agent for such Work to be carried out.

**3.10 Use:** The Operator shall not make any alterations or modifications to the Machine and shall not use the Machine in any other way than that for which it was originally designed. The Operator shall take proper care of the Machine and shall use all reasonable endeavours to keep the Machine in good working condition.

**3.11 Location:** The Operator shall not change the Machine Location without the Company's prior written consent (not to be unreasonably withheld or delayed).

#### 3.12 Access to Machine and Records:

a. The Operator will provide the Company and the Agent with full and unimpeded access to the Machine and any records relating to the Machine as the Company or the Agent may reasonably request to permit the Company or the Agent to carry out any Work.

b. The Operator shall supply the Company and the Agent with such information concerning the Machine, its use, its precise location and environment as the Company or the Agent may reasonably request in connection with any Work to be performed by the Company or the Agent.

c. The Operator shall inform the Company immediately of any sale, lease, transfer or other disposition, theft, accident, damage or total loss of the Machine.

## 4 TERM

**4.1 Term of Agreement:** This Agreement shall commence on the Commencement Date and continue until the Termination Date unless terminated earlier in accordance with this Agreement.

**4.2 Territorial Scope of Agreement:** The Company's obligations under this Agreement shall only extend to a Machine within New Zealand.

**4.3 Where Routine Maintenance to be Carried Out:** All Routine Maintenance shall be carried out at the Machine Location or at such other location as the Company or the Agent deems expedient. The Company may add or remove Work Premises specified in Appendix 1 by notice in writing to the Operator or by notice posted on the Company's website provided that all Work Premises must be in New Zealand. The Company reserves the right not to carry out Routine Maintenance if the Machine is not readily accessible at the Machine Location or not delivered to the Work Premises (as the case may be).

**4.4 When Work is to be Done:** All Work will be carried out during normal working hours on working days unless otherwise agreed with the Company or the Agent. Neither the Company nor the Agent is required to give any priority to the Operator in respect of any Work or to undertake any Work outside of normal working hours or on a non-working day but if the Company or the Agent does agree at the Operator's request to undertake any Work on an urgent basis or outside normal working hours or on a non-working day, then the Company or the Agent may charge, and the Operator must pay, an additional fee based on the Company's or the Agent's usual surcharge for such Work.

## 5 INDEMNITY AND EXCLUSIONS

**5.1** The Operator shall indemnify the Company against all claims, damages and liabilities arising from any failure by the Operator to instruct the Company or an Agent to carry out any Work (whether or not the same falls within the terms of this Agreement) recommended by the Company as a result of any defect caused by or resulting from accident damage, negligence of the Operator, any third party or any of the Excluded Items.

**5.2** The Operator shall be responsible for and shall indemnify the Company against any claims, expenses, liabilities, or costs, including legal costs, which the Company may suffer or incur as a result of any failure by the Operator to comply with the terms of this Agreement.

## 6 PAYMENT SCHEME

**6.1** The Operator shall promptly pay all fees and other amounts invoiced by the Company from time to time in accordance with this Agreement and in any event within the period required by this Agreement or as otherwise agreed in writing between the Company and the Operator.

**6.2** The Operator shall pay in such manner as the Company may reasonably require, the monthly payments as specified in the Schedule under the heading Commencement Date and Charges as may be adjusted during the Contract Period under clause 8 of this Agreement ("Monthly Charges"). The first payment shall be due on the date specified in the Schedule with subsequent payments due monthly thereafter. If the due date for any payment is not a working day, the payment must be made on the following working day. The Monthly Charges are in addition to any other payments or other service charges or fees due from time to time under this Agreement.

6.3 All parts and components:

- a. which are used to carry out Routine Maintenance shall be covered by the Monthly Charges and shall not be separately invoiced to the Operator;
- b. which are used to carry out any Additional Work requested by the Operator shall be invoiced to the Operator at the Company's list price as calculated by the Company.

6.4 Where the Operator requests any Work to be carried out by the Company:

- a. on an urgent basis and that request is, at the sole discretion of the Company, accommodated, then the Operator will pay a separate charge over and above the Monthly Charges of an amount which the Company determines is reasonable to compensate the Company for the impact on its business or operations (or those of the Agent);
- b. and the Operator fails to keep an appointment or fails to make the Machine available at the Machine Location or Work Premises (as applicable), then the Operator shall be liable for any costs incurred by the Company or the Agent as a result of such failure;
- c. at a time or times which would result in the Company or the Agent being liable to pay overtime or penalty rates to any staff or contractors carrying out such Work, then the Operator shall pay the Company a separate charge over and above the Monthly Charges of an amount which the Company determines is reasonable to compensate the Company for the overtime or penalty rates so incurred.

6.5 Subject to clause 6.2, the Operator shall pay all fees and charges payable under this Agreement within 28 days of the date of the relevant invoice (other than the Monthly Charge, which shall be payable in the manner set out in clause 6.2). If an invoiced amount is disputed by the Operator, such invoiced amount shall nevertheless be paid in full by the Operator and the parties will use their best endeavours to resolve the dispute through representatives responsible for invoicing and payment.

6.6 In the event that the Operator requests a change to this Agreement, for example in regard to the Annual Hours, operation, use, additions or any other change, the Company reserves the right to raise an administration charge for dealing with each such request and that charge shall be paid for by the Operator within the period specified in clause 6.5.

6.7 Interest will be charged on any amount, fee, charge or any other amount outstanding from 7 days after the date the same becomes due until the date of payment at the rate of 2% per annum above the overdraft rate offered to the Company by its bank from time to time, and such interest shall be due and recoverable from the Operator.

6.8 Except where specifically stated otherwise, all the costs and charges set out in this Agreement exclude GST which will be charged at the applicable rate.

6.9 Any existing or past discounts offered to the Operator shall not apply to this agreement.

## 7 EXCESS HOURS

7.1 On the Commencement Date the Operator shall provide to the Company the Machine's hourmeter reading as at that date, which reading shall be recorded as the initial hourmeter reading for the purposes of this Agreement.

7.2 Excess Charges: (Only valid on fixed billing agreements)

- a. If in any consecutive 12-month period from the Commencement Date the Machine exceeds the Annual Hours, the Operator will notify the Company forthwith and pay to the Company, in accordance with clause 6.5, the Excess Charges according to the number of hours of operation in excess of the Annual Hours.
- b. If at any time the Machine exceeds the Annual Hours by more than 20% then the Company, in addition to its right to raise an Excess Charge, may in its absolute discretion either terminate this Agreement under clause 9.2 or amend its charges.

7.3 In the event the Machine's hourmeter failing to function, the Operator shall comply with its obligations under clause 3.8(b). If the Operator fails to do so then the Company may for the purposes of this clause estimate the hours of operation of the Machine.

## 8 ADJUSTMENT OF MONTHLY CHARGES

8.1 The Monthly Charges and the Excess Charges shall be increased annually with effect from the expiry of each calendar year to reflect any increase over and above 5%, during the year, in the Consumer Price Index (All Groups) as published by Statistics New Zealand (or any replacement index). The amount of such increase and the new applicable Monthly Charges and Excess Charges will be calculated by the Company in accordance with this clause 8.1 and notified in writing to the Operator as soon as practicable following the end of each calendar year. The Company's determination of any increase under this clause shall, in the absence of manifest error, be final and binding on the Operator. The new Monthly Charges and Excess Charges will apply with effect from and including the month following the month in which such notice is given.

8.2 In addition to any increases under clause 8.1, the Monthly Charges and the Excess Charges shall be subject to increase if there is an increase of 10% or more in:

- a. the labour costs incurred by the Company or the Agent in connection with the performance or conduct of Work, from the labour costs which applied on the Commencement Date or, if the Monthly Charges or Excess Charges has or have previously been adjusted under this clause 8.2, from the date of the last adjustment; or
- b. the cost of any parts, components or lubricants used by the Company or the Agent in carrying out any Work from the cost which applied on the Commencement Date or, if the Monthly Charges or Excess Charges has or have previously been adjusted under this clause 8.2, from the date of the last adjustment; or
- c. the New Zealand dollar cost of purchasing US Dollars or Japanese Yen (using the prevailing exchange rates offered by the Company's principal bank from time to time) from the cost which applied on the Commencement Date, or if the Monthly Charges or Excess Charges has or have previously been adjusted under this clause 8.2, from the date of the last adjustment, in which event the following provisions of this clause 8.2 shall apply:
  - d. the Company may increase the Monthly Charges and/or Excess Charges by such amount as is reasonably necessary to off-set the increased costs to the Company or the Agent of carrying out Work as a result of the occurrence of the relevant circumstance(s) described above (after taking into account any increases in the Monthly Charges and Excess Charges under clause 8.1);
  - e. such increase shall be effected by the Company giving written notice to the Operator specifying the relevant circumstance(s) as described above, the new Monthly Charges and Excess Charges (which shall apply with effect from and including the month following the month in which such notice is given) and details of the effect of the relevant circumstance(s) on the Company's costs of carrying out Work;
  - f. the Company's notice under clause 8.2e. shall, in the absence of manifest error, be final and binding on the Operator;
  - g. if, following a notice under clause 8.2e., the difference between the new Monthly Charges or Excess Charges and the Monthly Charges or Excess Charges which applied at the latter of the Commencement Date or the last increase under any of clauses 8.1 to 8.3 would be greater than 15% of the latter, then either party may require the parties' representatives to meet within 30 days of the notice and use their good faith best endeavours to find a mutually acceptable solution to address the impact of the increase of costs affecting the Company or the Agent. If, despite using their good faith best endeavours, the parties are unable to find a mutually acceptable solution, then either party may terminate this Agreement on 60 days' written notice.

8.3 If in the reasonable opinion of the Company the cost to provide Routine Maintenance has been

materially increased by any Law Change then the Company may give written notice to the Operator of that state of affairs and provide the Operator with background information relating to its increased costs, the relevant change and a suggested new Monthly Charges and Excess Charges. The parties' representatives will meet within 30 days of the notice and will use their good faith best endeavours to find a mutually acceptable solution to address the impact of the increase of costs affecting the Company or the Agent. If despite using their good faith best endeavours the parties are unable to find a mutually acceptable solution, then either party may terminate this Agreement on 60 days' written notice. For the purposes of this clause 8.3 only, a material increase in costs means an increase which would, in the reasonable opinion of the Company, have the effect of increasing the costs of the Company or the Agent carrying out Routine Maintenance by 10% or more. Where any new Monthly Charges and/or Excess Charges are agreed under this clause 8.3, the new Monthly Charges and/or Excess Charges shall operate and be effective from the month following the month in which the parties agree any adjustment to the Monthly Charges and/or Excess Charges under this clause 8.3.

## 9 TERMINATION

9.1 If:

- a. the Machine becomes a total loss either through failure, damage or theft; or
- b. the Operator goes into liquidation; or
- c. a receiver or administrator is appointed in respect of all or substantially all of the assets of the Operator; or
- d. the Operator ceases to become able to pay its debts as they fall due, or is deemed to be so unable to pay its debts; or
- e. the Operator enters into any arrangement or composition with its creditors generally, then this Agreement shall forthwith and without any notice terminate.

9.2 If the Operator:

- a. fails to punctually make payment of any fee, charge or other amount which may from time to time become due to the Company whether under this Agreement or otherwise and whether or not demand has been made by the Company and such failure continues for more than 10 Business Days; or
- b. exceeds the Annual Hours by more than 20%; or
- c. fails to comply with any other term of this Agreement and either such failure is not capable of remedy (as determined by the Company in its sole discretion) or, if such failure is capable of remedy (as determined by the Company in its sole discretion), the Operator fails to remedy such failure within 30 days of written notice of such failure being given to the Operator by the Company, the Company may forthwith terminate this Agreement by giving notice in writing to the Operator.

9.3 Either party may terminate this Agreement by written notice in the limited circumstances specified in clause 8.2 or 8.3 or 13.3.

9.4 The Company shall be under no obligation or responsibility to continue to carry out any Work once this Agreement terminates or expires. In that event, the Company shall, at its sole discretion, be entitled to determine whether or not to suspend or cease carrying out Work and upon what terms.

9.5 Any termination under clause 9.1, 9.2, 9.3 or 13.3 or as a result of the expiry of the term of this Agreement shall be without prejudice to the Company's right to invoice the Operator for Excess Charges under clause 7 and shall be without prejudice to any claim which the Company may have against the Operator for any amount payable under this Agreement or damages for breach of this Agreement, including any claim for interest.

9.6 On any termination of this Agreement (other than as a result of the expiry of the term of this Agreement), the Operator shall pay to the Company:

- a. all arrears of Monthly Charges and Excess Charges and fees, charges and other amounts outstanding under this Agreement, including interest in respect of such arrears; and

- b. such other sums as may be due and payable under this Agreement together with interest; and
- c. any difference between total Contract Cost, Cost of Services and income if terminated early; and
- d. such other sums as may be due and payable under this Agreement together with interest.

## 10 LIABILITY OF THE COMPANY

10.1 So long as the Operator is complying with its obligations under this Agreement, if any Routine Maintenance carried out by the Company or the Agent is not performed in accordance with this Agreement, the Company shall promptly cause such Routine Maintenance to be carried out again at no extra charge to the Operator.

10.2 Subject to clauses 10.3 and 10.4, the total liability of the Company for any loss of the Operator arising in any year of this Agreement shall not exceed the total of the Monthly Charges payable for that year. In this clause, "loss" includes any loss, damages, costs or other compensation and expenses incurred by the Operator as a result of any act or omission of the Company or the Agent.

10.3 In no circumstances will the Company be liable for:

- a. any loss of profit or other consequential loss;
- b. any direct or indirect costs incurred by the Operator through its failure to make the Machine readily accessible and available at the required location for the Company to carry out the Work or as a result of a request that any Work be done urgently, on a non-working day or outside ordinary business hours;
- c. direct or indirect costs incurred by the Operator as a result of the unavailability of the Machine while undergoing any Routine Maintenance or other Work which the Company has been requested to carry out, including Work as a result of a Machine recall.

10.4 If the Operator becomes aware of any default in the performance of this Agreement by the Company, it shall firstly notify the Company of the default and give the Company a reasonable opportunity to remedy the default. If the Company remedies the default, the operator shall not have any claim against the Company for the consequences of the default.

10.5 The Operator is entering into this Agreement for business purposes and accordingly the Consumer Guarantees Act 1993 will not apply.

## 11 IMPLIED TERMS

11.1 Where conditions, warranties or other rights for the benefit of the Operator are implied or given in respect of this Agreement by the Sale of Goods Act 1908, the Fair Trading Act 1986 or other laws and it is not lawful or possible to exclude the same, then such conditions, warranties or other rights shall (but only to the extent required by Law) apply to this Agreement but, save as aforesaid, all such implied conditions, warranties and rights are hereby excluded.

11.2 To the extent that under any such Laws the Company may limit its liability for breach of implied conditions and warranties, the Company's liability for any breach of any such condition or warranty shall be so limited. Without limiting the generality of the foregoing, subject to the qualifications in the Fair Trading Act 1986 and Sale of Goods Act 1908 (if any) or in such other Laws, the Company's liability for any breach of any such implied condition or warranty shall be limited:

- a. in the case of goods supplied, to any one or more of the following (as the Company may determine):
  - i. the replacement of the goods or the supply of equivalent goods;
  - ii. the repair of the goods;
  - iii. the payment of the costs of replacing the goods or of acquiring or hiring equivalent goods; or
  - iv. the payment of the costs of having the goods repaired; and
- b. in the case of services supplied, to one of the following (as the Company may determine):
  - i. the supplying of the services again; or

- ii. the payment of the costs of having the services supplied again,

and nothing in the Consumer Guarantees Act 1993 will apply to the supply of those goods or those services.

## 12 NOTICES

12.1 Except as expressly provided otherwise, any demand, notice or communication to be served pursuant to this Agreement shall be in writing and must be served by personal delivery, post or e-mail and shall be addressed to the recipient at its registered office or its address stated in this Agreement (or such other address or e-mail address as may be notified from time to time in writing).

12.2 Any demand, notice or communication shall be deemed to have been fully served:

- a. if delivered by hand, when left at the proper address for service;
- b. if made by prepaid post, 2 working days after being posted;
- c. if made by e-mail on the date sent,

provided that where delivery by hand or transmission by fax occurs after 4.00pm on a working day or on a day other than a working day service shall be deemed to occur at 10.00am on the next following working day.

## 13 SUSPENSION OF OBLIGATIONS

13.1 The obligations of either party under this Agreement (other than the Operator's obligation to fees, charges and other amounts due under this Agreement) shall be suspended to the extent that the party is hindered or prevented from complying with them due to an inability to obtain necessary parts, components, tools or lubricants from overseas (otherwise than as a result of any default by the Company) or because of labour disturbances, earthquakes, fire, storms or other acts of God, accidents, riot, war, civil commotion, terrorism, government regulation, loss of franchise or any other cause whatsoever not within the reasonable control of such party.

13.2 Where any of the situations in clause 13.1 applies, the parties shall use all reasonable endeavours to resume performance of the relevant obligations at the earliest practicable time.

13.3 If the Company's obligations under this Schedule have become impractical due to an event specified in clause 13.1 and such impracticality due to such event continues for a period in excess of 3 months, then either party may terminate this Agreement by giving written notice to the other.

## 14 OWNERSHIP OF REMOVED PARTS

14.1 All the Manufacturer parts or components permanently removed from the Machine in the course of carrying out any Work, shall upon removal become the property of the Company.

## 15 GENERAL

15.1 **Confidentiality:** This Agreement and any information provided in relation to it are confidential. Neither party shall disclose any such information to an unauthorised third party.

15.2 **Entire Agreement:** This Agreement (including all the documents referred to in this Agreement) contains all of the terms, representations and warranties made between the parties and supersedes all prior understandings, discussions, correspondence and agreements (whether written or oral) covering the subject matter of this Agreement.

15.3 **Further Assurances:** Each party will, at its own expense and when requested by the other party, promptly sign and deliver, execute, procure, pass and do all such further documents, acts, matters, resolutions and things as may be necessary or desirable for effecting the transactions contemplated by this Agreement.

15.4 **Waiver:**

- a. Failure to exercise or enforce or a delay in exercising or enforcing or the partial exercise or enforcement of any right, power or remedy provided by Law or under this Agreement or under any of the documents delivered in connection with this Agreement by the Company will not in any way preclude, or operate as a waiver of, any exercise or enforcement, or further exercise or enforcement of that or any other right, power or remedy

provided by Law or under this Agreement or other document.

b. Any waiver or consent given by the Company under this Agreement will only be effective and binding on the Company if it is given or confirmed in writing by the Company.

c. No waiver of a breach of any term of this Agreement will operate as a waiver of any subsequent breach of that term or of a breach of any other term of this Agreement.

15.5 **Non-Merger:** The agreements, obligations, indemnities and warranties contained in this Agreement will, notwithstanding any rule to the contrary, not merge on completion of the transactions contemplated by it but will remain in full force until satisfied.

15.6 **Assignment:** The Operator may not assign or be relieved of its rights or obligations under this Agreement without the prior written consent of the Company. The Company may assign its rights and interest under this Agreement without the consent of the Operator.

15.7 **Partial Invalidity:** If any provision of this Agreement or its application to any party or circumstance is or becomes invalid, or is held to be illegal or unenforceable to any extent, the remainder of this Agreement and its application will not be affected and will remain enforceable to the greatest extent permitted by Law.

15.8 **Third Parties:** Except as specifically provided, nothing in this Agreement is intended to confer a benefit upon any third party under the Contracts (Privity) Act 1982.

15.9 **Relationship of Parties:** Each of the parties hereto is an independent contractor and nothing in this Agreement shall be construed to imply that there is any relationship between the parties of partnership, or of agent, or of employer and employee, nor are the parties engaging in a joint venture and accordingly neither of the parties shall have any right or authority to act on behalf of the other nor to bind the other by contract or otherwise, unless expressly permitted by the terms of this Agreement.

15.10 **Counterparts:** This Agreement may be executed in any number of counterpart copies (including by way of facsimile) each of which will constitute an original of this Agreement, and all of which together will constitute one and the same instrument.

15.11 **Time of Essence:** Time will be of the essence in the performance by the Operator of its obligations under this Agreement.

15.12 **Rights Cumulative:** The rights of the parties under this Agreement are cumulative and are not exclusive of any other rights and remedies available to any party.

15.13 **Governing Law and Jurisdiction:** This Agreement will be construed and take effect as a contract made in New Zealand and will be governed by New Zealand Law, and the parties submit to the non-exclusive jurisdiction of the New Zealand courts.

15.14 **United Nations Convention:** If this Agreement comprises or includes a sale of goods to which the United Nations Convention on International Sale of Goods would apply, the parties acknowledge and agree that the application of the Convention will be excluded to the maximum extent permitted by Law.

15.15 **Costs:** Except as may be otherwise provided in this Agreement, each party shall bear its own costs in relation to the negotiation, preparation, execution and performance of this Agreement.

15.16 **Privacy Act:** The Operator authorises any person or company to provide the Company with such information as it may require in response to the Company's credit enquiries of the Operator. The Operator further authorises the Company to furnish to any third parties details of the Agreement and any subsequent dealings that the Operator may have with the Company following entry into the Agreement. In terms of the Privacy Act 1993 the Operator irrevocably authorises the Company to see and exchange information with any person, company or agency in regard to the Operator's credit rating.

15.17 **Variation:** No variation of any provision of this Agreement shall be effective unless it is in writing, refers specifically to this Agreement and is duly executed by or on behalf of