

CONFIDENTIAL

**BURDETT SAND SOIL & STONE PTY LTD
BURDETT SANDS PTY LTD**

Application for Credit
Terms and Conditions of Trade
Guarantee and Indemnity

615 McClelland Drive, Langwarrin, Victoria
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Burdett Sand Soil & Stone Pty Ltd
ACN 005 298 546
Burdett Sands Pty Ltd
ACN 081 498 802
www.burdetts.com.au

Please read all documents carefully

- Part 1: Credit Application
- Part 2: Terms and Conditions of Trade
- Part 3: Personal Guarantee and Indemnity
- Part 4: Privacy Acknowledgement and Consent

IMPORTANT: *If you do not understand any part, you should seek legal advice.*

Part 1. Credit Application

- Complete sections 1, 2, 6, 7 and 8;
- If you are applying for yourself, complete section 3;
- If you are applying for your company, complete section 4;
- If you are applying as a trustee (corporate or individual), complete section 5;
- Read section 9 carefully; and
- Sign as indicated below in section 11:
 - If you are a sole trader, you must sign;
 - If you are applying as a partnership, all partners must sign;
 - If you are applying for your company, all directors must sign;
 - If you are applying as an individual trustee, all individual trustees must sign; or
 - If you are applying for a company trustee, all directors must sign.

IMPORTANT: *By signing, you are agreeing to be bound by the Terms and Conditions of Trade.*

Part 2. Terms and Conditions of Trade

- Read carefully and if you do not understand any part, you should seek legal advice.

Part 3. Personal Guarantee

- If you are a sole trader or partnership, you need not sign this form;
- If you are applying for your company, all **directors** and the **directors' spouses** must sign;
- If you are applying as an individual or joint trustee, all trustees must sign;
- Each guarantor must sign a separate copy of the form;
- Each signature must be witnessed by an independent person.

IMPORTANT: *All parties who sign the guarantee may become personally responsible, instead of, or as well as, the Applicant to pay all amounts which the Applicant owes Burdett Sand Soil & Stone Pty Ltd as well as Burdett Sand Soil & Stone Pty Ltd's costs and expenses in enforcing the guarantee and interest.*

If the Applicant does not pay you must pay. This could mean you lose everything you own. Before signing, each guarantor should:

- *obtain independent legal advice;*
- *consider obtaining independent financial advice;*
- *make his or her own enquires about the credit worthiness, financial position and honesty of the Applicant.*

Part 4. Privacy Acknowledgement and Consent

(A) Individual Acknowledgement and Consent

- If you are a sole trader, you must sign this form;
- If you are a partnership, all partners must sign this form;
- If you are applying for your company, all directors must sign;
- If you are applying as individual trustees, all individual trustees must sign;
- If you are applying for a company trustee, all directors must sign;
- Each person must sign a separate copy of the form.

(B) Guarantor Acknowledgement and Consent

- If you are a guarantor, you must sign this form;

When finished

- When all parts have been signed, please return all parts to the person who sent them to you.
- For any queries relating to this application, please contact Burdett's Credit Manager at the numbers shown above.

BURDETT SAND SOIL & STONE PTY LTD /BURDETT SANDS PTY LTD

PART 1: CREDIT APPLICATION

1. Applicant

Applicant Name:.....
ACN:..... ABN:.....
Trading Name (if different from applicant):
Date Business Commenced:
Principal Business Address:
Suburb:..... State:Postcode:
Delivery Address (if different from Principal business address):
Suburb:..... State:Postcode:
Contact Name:
Position: Email:.....
Telephone: Facsimile:

Application for credit with (tick appropriate box/es):

Burdett Sand Soil & Stone Pty Ltd []
Burdett Sands Pty Ltd []

2. Operating Structure

tick appropriate box

[] Pty Ltd [] Sole Trader [] Corporation as Trustee
[] Public Company [] Partnership [] Individual(s) as Trustee

If an individual / sole trader, please complete section 3

3. Individual / Sole Trader Details

Full Name:.....
Date of Birth: Drivers Licence Number:.....
[] Copy of Drivers Licence Attached

If a company or partnership, please complete section 4

4. Directors, Partner and Individual Trustee Details

provide details of all directors (for company or corporate trustee), partners or individual trustees

Name:..... Address:
Name:..... Address:
Name:..... Address:

If more than 3, please attach details

If a trustee, please complete section 5

5. Trust Details

Name of Trust: ABN:

tick appropriate box

Type of Trust: [] Family / Discretionary [] Unit [] Other (Details:)

If a unit trust, provide details of all unitholders

Name:..... Address:
Name:..... Address:
Name:..... Address:

If more than 3, please attach details

6. Applicant's Financial Details

Estimated Monthly Purchases: \$

Monthly Credit Limit required: \$

Bank: Branch/Address:

Contact: Telephone:

Business Premises: [] Owned [] Leased

If leased, from whom:

Details of security (eg. General Security Agreements)

Type of security:..... provided to:.....

Type of security:..... provided to:.....

7. Business History

For all directors, partners, trustees or sole trader

Have any been declared bankrupt? Yes No If, yes, details:

Have any been involved in a business that has failed or been liquidated? Yes No

If yes, details:

Names of related or subsidiary companies or partnerships:

8. Trade / Business References

3 trade or business references must be provided from current major suppliers that are providers of commercial credit

Business Name:..... Contact:

Telephone:..... Facsimile:

Business Name:..... Contact:

Telephone:..... Facsimile:

Business Name:..... Contact:

Telephone:..... Facsimile:

9. Terms of Credit

Credit will not be provided until Burdett Sand Soil & Stone Pty Ltd and/or Burdett Sands Pty Ltd (**Burdett's**) accepts this application and has provided written confirmation to the Applicant.

If Burdett's accepts this application, the provision of Goods and credit facilities to the Applicant are subject to the Terms and Conditions of Trade, attached.

10. Privacy Statement

The personal information submitted about the Applicant and about any guarantor/s will be used for purposes associated with assessing the Applicant's commercial credit application and administering the commercial credit account.

Burdett's Privacy Policy details why Burdett's collects this personal information, who Burdett's may disclose it to, and the main consequences (if any) if Burdett's does not collect it. Burdett's Privacy Policy also contains information about how affected persons may seek access to, or correction of, the personal information held about them, and Burdett's complaint resolution procedures.

Burdett's Privacy Policy is available by request to Burdett's Privacy Officer on privacy@burdetts.com.au and (03) 9789 8266.

11. Execution

By signing this application for credit, the Applicant:

- acknowledges having been provided with Terms and Conditions of Trade and having read and understood them;
- acknowledges that it has been advised to seek legal and financial advice prior to signing this application;
- agrees that the Terms and Conditions of Trade apply to the provision of Goods and Services to it by Burdett's .

If company or corporate trustee - sign for and on behalf of the Applicant

Name of authorised person:..... Position:.....

Signature:..... Date:

If sole trader, partnership or individual(s) as trustee

If partnership or individual(s) as trustee - all partners and individuals must sign

Name:..... Signature:..... Date:.....

Name:..... Signature:..... Date:.....

Name:..... Signature:..... Date:.....

If more than three directors or individuals, please have additional directors or individuals sign a copy of this page.

BURDETT SAND SOIL & STONE PTY LTD
PART 2: TERMS AND CONDITIONS OF TRADE

1. Definitions

In these Terms:

ACL means the Australian Consumer Law Schedule of the *Competition and Consumer Act 2010* (Cth) and its associated Regulations as amended;

Agreement means any agreement for the provision of Goods and Services by Burdett's to the Customer;

Base means, the location where Burdett's prepares, stores and/or mixes the Goods;

Burdett's means, in relation to an Agreement, whichever of Burdett Sand Soil & Stone Pty Ltd ACN 005 298 546 and Burdett Sands Pty Ltd ACN 081 498 802 agrees to supply the Goods or Services;

Cartage Charges means costs incurred by Burdett's in delivering the Goods, including but not limited to fuel, loading and unloading Goods, disposal costs cleaning of vehicles and employee time, and in the case of Unsuccessful Delivery, all such costs and travel time returning from Site, unloading Goods and fuel;

Concrete or concrete products means, unless otherwise stated, Ready-mixed concrete that has not set intended for use and/or installation by the Customer on constructions projects, including private domestic construction projects;

consumer is as defined in the ACL and in determining if the Customer is a consumer, the determination is made if Customer is a consumer under the Agreement;

Customer means the person, jointly and severally if more than one, acquiring Goods and Services from the Supplier;

Goods means Goods supplied by Burdett's to the Customer;

GST means the Goods and Services tax as defined in *A New Tax System (Goods and Services Tax) Act 1999* (Cth) and its associated Regulations as amended;

Notice means communication by written or electronic means including online posts and publication at Burdett's website, SMS message and email, telephone call;

Ready-mixed concrete means concrete that is batched or mixed by Burdett's at their mixing location before delivery to the job site for placement;

Services means the services provided by Burdett's in relation to the Goods, including delivery, unloading, redirection and disposal;

Site means the site or sites specified by the Customer where the Goods are to be delivered;

Terms means these Terms and Conditions of Trade; and

Unsuccessful Delivery means the failure to complete a delivery where Burdett's has been unable to deposit the Goods at the Site due to any act or omission of the Customer or because of strike, lockout, unsafe, unsuitable or impractical means of access to the Site or unloading the Goods.

2. Basis of Agreement

2.1. Unless otherwise agreed by Burdett's in writing, the Terms apply exclusively to every Agreement and cannot be varied or replaced by any other terms, including the Customer's terms and conditions of purchase (if any).

2.2. Any quotation provided by Burdett's to the Customer for the proposed supply of Goods and Services is:

- (a) valid for 30 days;
- (b) an invitation to treat only; and
- (c) only valid if in writing.
- (d) For the supply of product at specified price only

2.3. The Terms may include additional terms in Burdett's quotation if any), which are not inconsistent with the Terms.

2.4. Burdett's are not estimators and do not have laboratory facilities. All testing carried out is by independent sources prior to supply and we will not accept any claims on material tested after delivery. Acceptance of Quotation implies consent to these terms and conditions.

2.5. Unless otherwise agreed in writing, Burdett's when providing any Quotation or supplying any Quarry materials shall not be taken to have approved any specification as given by the customer, or as representing that any quarry materials ordered or purchased are or will be suitable for any particular purpose and shall not be liable for any loss, delay (or any associated costs therewith) directly or indirectly resulting from any defects in, or unsuitability of, any specification or quarry material supplied by Burdett's.

2.6. Where Quarry materials are sold on a volumetric basis, the volume will be determined by the loose uncompacted volume as measured on the delivery vehicle at the time of loading at the Quarry.

2.7. The Customer acknowledges and agrees that Quarry materials supplied as described on the delivery docket, are natural products and as such vary in the uniformity of grading of material in relation to size, shape, moisture content and colour and Burdett's expressly disclaims any liability with respect to such variations.

2.8. Acceptance of a Burdett Quotation implies consent to these Terms and Conditions and constitutes an Agreement.

2.9. An Agreement is accepted by Burdett's at the earliest of one of the following events::

- (a) Burdett's accepts in writing;
- (b) Burdett's accepts by electronic means either by SMS message, email, voice message other any other electronically recorded method;
- (c) Burdett's commences production of, mixing of, or loading of the Goods; and/or
- (d) Burdett's Delivers, or attempts to deliver, the Goods or Services.

2.10. Burdett's may refuse to accept any offer.

2.11. The Customer must provide Burdett's with its specific requirements, if any, in relation to the Goods required.

2.12. Burdett's may vary or amend these Terms by written notice, which includes publication on Burdett's website, to the Customer at any time. Any variations or amendments will apply to quotes or orders placed after the notice date.

3. Pricing

3.1. Prices quoted for the supply of Goods and provision of Services includes GST, unless otherwise stated, and any other taxes or duties imposed on or in relation to the Goods.

3.2. If the Customer requests any variation to the Agreement, Burdett's may increase the price to account for the variation.

3.3. Where there is any change in the costs - including but not limited to, additional fuel costs, labour costs, and equipment costs - incurred by Burdett's in relation to Goods or Services, Burdett's may vary its price to take account of any such change. Where possible, and without prejudice to any other rights that Burdett's enjoys under the Agreement, Burdett's will endeavour to provide Notice to the Customer prior to incurring the additional costs.

- 3.4. Where there is any change to the price under clause 2.2, and written notice is provided by Burdett's to the Customer, the Customer may:
- agree to the change in price and proceed under the Agreement; or
 - cancel the order insofar as it relates to Goods and Services the subject of the proposed price change.
- 3.5. Nothing in this Clause 3 shall prejudice or waive any other rights that Burdett's enjoys under the Agreement.
- 4. Mixing and Testing**
- 4.1. Some Goods require mixing prior to sale, including but not limited to aggregate, concrete and sand (**Mixed Goods**).
- 4.2. Mixed Goods will be mixed to comply with the Customer's Specifications. Where the Customer's Specifications do not comply with relevant Australian standards, or any way diverge from any relevant standards, the Mixed Goods shall be mixed in accordance with the Specifications unless Burdett's is otherwise directed by the Customer in writing.
- 4.3. Where the Customer's instructions are unclear, Burdett's will nominate to either mix the Mixed Goods in accordance with the Customer's Specifications, the relevant Standards, based on Burdett's Recipes or as Burdett's sees fit or most convenient in its sole discretion.
- 4.4. Mixed Goods may, from time to time, be tested for compliance with the Customer Specifications or the relevant standards as appropriate.
- 4.5. Where Burdett's makes a nomination in accordance with Clause 4.3 of this Agreement, the goods may be tested for compliance with either the Customer's Specifications of the relevant Standards in accordance with Burdett's nomination.
- 4.6. Acceptance of the goods by the Customer, whether or not Burdett's has provided the Customer any test results, will be treated as acceptance of the Goods as meeting relevant industry standards and/or the Customer's Specifications.
- 4.7. The Customer acknowledges that notwithstanding the testing for compliance (where testing is conducted); there will be some variation across any given volume of Mixed Goods and that this variation will be within the industry acceptable range.
- 4.8. To the extent permitted by law and without limiting any other indemnities provided to Burdett's by the Customer, the Customer indemnifies Burdett's against any direct or indirect loss suffered by the Customer, its agents or any other related or third party in relation to the provisions detailed in this Clause 4 of this Agreement.
- 5. Ready-Mixed Concrete**
- 5.1. Clause 5 applies only to the sale of Ready-Mixed Concrete Goods.
- 5.2. Unless agreed in writing between Burdett's and the Customer, all Concrete products including Ready-Mixed Concrete will comply with AS1379.
- 5.3. Unless otherwise specified, all orders for Ready-Mix Concrete are taken to be orders for Normal Class Concrete (**Normal Class Concrete**) as defined in AS1379.
- 5.4. Normal Class Concrete will have a nominal slump not exceeding 80mm and using a nominal 20mm maximum size aggregate.
- 5.5. If a slump other than 80mm or aggregate with a maximum size greater than 20mm is required by the Customer, this must be agreed to in writing by the Customer and Burdett's and the Terms continue to apply.
- 5.6. The Customer acknowledges that:
- some Ready-Mixed Concrete includes additives which are either included by Burdett's or requested by the Customer;
 - those additives may significantly change the properties of the Ready-Mixed Concrete;
 - the properties of the Ready-Mixed Concrete may become unpredictable due to any number of factors including but not limited to, weather, amount of water added, and distance from Base to the site;
 - the Customer may be required to take receipt of the Ready-Mixed Product within significantly reduced time-frames;
 - the Customer must provide Burdett's clear access, and without delay, to the site prior to the time for delivery; and
 - Where the Customer fails to take Receipt in accordance with the abovementioned provisions, Burdett's may nominate to discard or destroy the Ready-Mixed Concrete at its full discretion, including for the purpose of protecting its assets; and
 - The order is an Unsuccessful Delivery in accordance with this Agreement.
- 5.7. Burdett's shall charge Cartage and other costs, in accordance with this Agreement, where the Customer returns, rejects or does not take receipt of the Concrete within the shortest time period of any timeframe identified under the relevant standard, including but not limited to AS1379, or any other timeframe stated by Burdett's from time to time, or where the Customer delays calling for the balance of a batch, and the time delay is not due to an act or omission by Burdett's.
- 5.8. Burdett's will not be liable for:
- any loss arising from the effect of any weather conditions or temperature which affects the condition of the Concrete prior to or on delivery; or
 - any loss associated with either structural or non-structural defects including but not limited to discolouration, cracking, curling or warping.
- 6. Payment**
- 6.1. Unless otherwise agreed in writing:
- Subject to 6.1(b), full payment for the Goods must be made within 30 days of the date of Burdett's invoice.
 - Burdett's reserves the right to require payment in full or part prior to delivery of Goods or provision of Services.
- 6.2. Payment by cheque is not deemed made until the proceeds of the cheque have cleared.
- 6.3. Payment by credit card will incur a fee not exceeding what it costs Burdett's to accept the payment.
- 6.4. Payment terms may be revoked or amended at Burdett's sole discretion immediately upon giving the Customer written notice.
- 6.5. The time for payment is of the essence.
- 7. Payment Default**
- 7.1. If the Customer defaults in payment by the due date of any amount payable to Burdett's, then all money which would become payable by the Customer to Burdett's at a later date on any account, becomes immediately due and payable without the requirement of any notice to the Customer, and Burdett's may, without prejudice to any of its other accrued or contingent rights:
- charge the Customer interest on any sum due at the prevailing rate pursuant to the *Penalty Interest Rates Act 1983 (Vic)* plus 2% for the period from the due date until the date of payment in full;

- (b) charge the Customer for, and the Customer must indemnify Burdett's from, all costs and expenses (including without limitation all legal costs and expenses) incurred by it resulting from the default or in taking action to enforce compliance with the Agreement or to recover any Goods;
 - (c) cease or suspend supply of any further Goods and Services to the Customer;
 - (d) by written notice to the Customer, terminate any uncompleted Agreement with the Customer.
- 7.2. Subject to any statutory stay of proceedings, clauses 7.1(c) and 7.1(d) may also be relied upon, at Burdett's option:
- (a) where the Customer is a natural person and becomes bankrupt or enters into any scheme of arrangement or any assignment or composition with or for the benefit of his or her creditors or any class of his or her creditors generally; or
 - (b) where the Customer is a corporation and, it enters into any scheme of arrangement or any assignment or composition with or for the benefit of its creditors or any class of its creditors generally, or has a liquidator, administrator, receiver or manager or similar functionary appointed in respect of its assets, or any action is taken for, or with the view to, the liquidation (including provisional liquidation), winding up or dissolution without winding up of the Customer.
- 8. Passing of Property**
- 8.1. Until Burdett's receives full payment in cleared funds for all Goods and Services supplied by it to the Customer, as well as all other amounts owing to Burdett's by the Customer:
- (a) title and property in all Goods remains vested in Burdett's and does not pass to the Customer;
 - (b) the Customer must hold the Goods as fiduciary bailee and agent for Burdett's;
 - (c) the Customer must keep the Goods separate from its Goods in a manner that will enable Burdett's to identify them as Burdett's Goods;
 - (d) if on-sold, the Customer must hold the proceeds of sale of the Goods on trust for Burdett's in a separate account with a bank to whom the Customer has not given security however failure to do so will not affect the Customer's obligation as trustee;
 - (e) in addition to its rights under the PPSA, Burdett's may without notice, enter any premises where it suspects the Goods are and remove them, notwithstanding that they may have been attached to other Goods not the property of Burdett's, and for this purpose the Customer irrevocably licences Burdett's to enter such premises and also, to the extent permitted by law, indemnifies Burdett's from and against all costs, claims, demands or actions by any party arising from such action.
- 9. Personal Property Securities Act**
- 9.1. Notwithstanding anything to the contrary contained in these Terms, the PPSA applies to these Terms.
- 9.2. For the purposes of the PPSA:
- (a) terms used in clause 9 that are defined in the PPSA have the same meaning as in the PPSA;
 - (b) these Terms are a security agreement and Burdett's has a Purchase Money Security Interest in all present and future Goods supplied by Burdett's to the Customer and the proceeds of the Goods;
- (c) the security interest is a continuing interest irrespective of whether there are monies or obligations owing by the Customer at any particular time; and
 - (d) the Customer must do whatever is necessary in order to give a valid security interest over the Goods which is able to be registered by Burdett's on the Personal Property Securities Register.
- 9.3. The security interest arising under this clause 9 attaches to the Goods when the Goods are collected or dispatched from Burdett's premises and not at any later time.
- 9.4. Where permitted by the PPSA, the Customer waives any rights to receive the notifications, verifications, disclosures or other documentation specified under sections 95, 118, 121(4), 130, 132(3)(d), 132(4), 135 and 157 of the PPSA.
- 9.5. Burdett's and the Customer agree to contract out of and nothing in the provisions of sections 96, 125, 129, 142 and 143 of the PPSA will apply to these Terms.
- 9.6. To the extent permitted by the PPSA, the Customer agrees that:
- (a) the provisions of Chapter 4 of the PPSA which are for the benefit of the Customer or which place obligations on Burdett's will apply only to the extent that they are mandatory or Burdett's agrees to their application in writing; and
 - (b) where Burdett's has rights in addition to those in Chapter 4 of the PPSA, those rights will continue to apply.
- 9.7. The Customer must immediately upon Burdett's request:
- (a) do all things and execute all documents necessary to give effect to the security interest created under this Agreement; and
 - (b) procure from any person considered by Burdett's to be relevant to its security position such agreements and waivers (including as equivalent to those above) as Burdett's may at any time require.
- 9.8. Burdett's may allocate amounts received from the Customer in any manner Burdett's determines, including in any manner required to preserve any Purchase Money Security Interest it has in Goods supplied by Burdett's.
- 9.9. For the purposes of section 275(6) of the PPSA, the parties agree and undertake that these Terms and any information pertaining to the sale of Goods and details of the Goods shall be kept confidential at all times. Neither party may disclose any information pertaining to these Terms or the sale of the Goods, except as otherwise required by law or that is already in the public domain.
- 10. Risk and Insurance**
- 10.1. The risk in the Goods and all insurance responsibility for theft, damage or otherwise will pass to the Customer immediately on the Goods being dispatched from Burdett's premises.
- 10.2. The Goods are sold to the Customer on the basis that the Customer has obtained all necessary licenses or permits under all relevant laws and regulations in relation to the Goods.
- 10.3. The Customer assumes all risk and liability for loss, damage or injury to persons or to property of the Customer, or third parties arising out of the use, storage or possession of any of the Goods sold by Burdett's, unless recoverable from Burdett's on the failure of any statutory guarantee under the ACL.

11. Performance of Agreement

- 11.1. Any period or date stated by Burdett's for delivery of the Goods is an estimate only and not a contractual commitment unless agreed by Burdett's and the Customer in writing.
- 11.2. Burdett's will use its reasonable endeavours to meet any estimated dates for delivery of the Goods but will not be liable for any loss or damage suffered by the Customer or any third party for failure to meet any estimated date.

12. Delivery

- 12.1. Where relevant, Burdett's will arrange for the delivery of Goods to the Customer at the Site. Unless otherwise stated, the customer will be responsible for the delivery of Goods to their site.
- 12.2. In relation to Ready-Mixed Concrete, Burdett's will arrange for the delivery of Goods to the Customer at the Site.
- 12.3. Where Burdett's is required to arrange delivery of the Goods to the Site, Burdett's may issue a Notice seeking confirmation of the order. Burdett's is not required to deliver the Goods if the Customer has not provided written Notice to Burdett's confirming the order. To the extent permitted by law and without limiting any other indemnity that the Customer provides to Burdett's in this Agreement, the Customer further indemnifies Burdett's against any loss or damage, in whatever form, directly or indirectly relating to non-delivery or late delivery any, or all, of the order.
- 12.4. Where Burdett's is required to arrange delivery of the Goods to the Site, but Burdett's does not issue a Notice seeking confirmation of the order, the Customer may still issue a notice confirming the order.
- 12.5. Where Burdett's is required to arrange delivery of the Goods to the Site, but Burdett's does not issue a Notice seeking confirmation of the order, and Burdett's prepares and/or delivers the Goods to site as per this Agreement and the details of the order, the Customer acknowledges that Burdett's will have complied with this agreement that the Customer shall be bound to this Agreement, particularly the provisions contained in Clause 12.3 above, as if the Customer has provided confirmation of the Order.
- 12.6. The Customer must provide Burdett's with safe, suitable and practical means of access to the Site prior to any agreed delivery time, where a delivery time is agreed, to enable delivery.
- 12.7. Where no delivery time is agreed, the Customer must provide Burdett's with safe, suitable and practical means of access to the Site shortly, no longer than 20 minutes, after Burdett's arrival at the Site to enable delivery.
- 12.8. The Customer is responsible for all Cartage Charges.
- 12.9. To the extent permitted by law, the Customer indemnifies Burdett's against any loss or damage suffered by Burdett's, its sub-contractors or employees as a result of delivery or Unsuccessful Delivery, except where the Customer is a consumer and Burdett's has not used due care and skill.
- 12.10. If Unsuccessful Delivery occurs, including in the scenario detailed in Clause 5.6, Burdett's will return the Goods to the Base, or any other location at Burdett's sole discretion, and charge the Customer the resulting Cartage Charges.
- 12.11. Where the Customer over orders Concrete from Burdett's, surplus Concrete may be returned in the delivery vehicle for disposal by Burdett's, disposal by others or on-sold to others. The Customer must pay an amount of \$200 plus GST per m3 for every cubic metre, or part thereof, that is returned (also meaning

not received or accepted by the Customer) by the Customer.

- 12.12. Where the Customer over orders Concrete from Burdett's, the surplus concrete shall incur and environmental disposal fee in the amount of \$200 plus GST per m3 for every cubic metre, or part thereof, that is returned (also meaning not received or accepted by the Customer) by the Customer.
- 12.13. In the event of Unsuccessful Delivery, the Customer must pay for all Concrete returned at the rates in clauses 12.11 and 12.12 in addition to all other amounts payable under this Agreement.
- 12.14. For the avoidance of doubt, where Burdett does on-sell undelivered products (sells excess concrete that is not received by the Customer to other parties), the Customer cannot setoff any amounts gained by Burdett against any amount owed by the Customer.

13. Liability

- 13.1. Except as the Terms specifically state, or as contained in any express warranty provided in relation to the Goods and Services, the Agreement does not include by implication any other term, condition or warranty in respect of the quality, merchantability, acceptability, fitness for purpose, condition, description, assembly, manufacture, design or performance, care and skill or technical knowledge of the Goods and Services or any contractual remedy for their failure.
- 13.2. If the Customer is a consumer nothing in these Terms restricts, limits or modifies the Customer's rights or remedies against Burdett's for failure of a statutory guarantee under the ACL.
- 13.3. If the Customer on-supplies the Goods to a consumer and:
 - (a) the Goods are not of a kind ordinarily acquired for personal, domestic or household use or consumption, then the amount specified in section 276A(1) of the ACL is the absolute limit of Burdett's liability to the Customer;
 - (b) the Goods are of a kind ordinarily acquired for personal, domestic or household use or consumption, payment of any amount required under section 274 of the ACL is the absolute limit of Burdett's liability to the Customer;howsoever arising under or in connection with the sale, installation, use of, storage or any other dealings with the Goods by the Customer or any third party.
- 13.4. If clause 13.2 or 13.3 do not apply, then other than as stated in the Terms or any written warranty statement Burdett's is not liable to the Customer in any way arising under or in connection with the sale, installation, use of, storage or any other dealings with including Services of the Goods by the Customer or any third party.
- 13.5. Burdett's is not liable for any indirect or consequential losses or expenses suffered by the Customer or any third party, howsoever caused, including but not limited to loss of turnover, profits, business or goodwill or any liability to any other party, except to the extent of any liability imposed by the ACL.
- 13.6. The Customer acknowledges that:
 - (a) it has not relied on any service involving skill and judgement, or on any advice, recommendation, information or assistance provided by Burdett's in relation to the Goods or Services or their use or application.
 - (b) it has not made known, either expressly or by implication, to Burdett's any purpose for which it requires the Goods or specific Services instructions, and it has the sole responsibility of satisfying itself that the Goods and Services method are suitable for the Customer.

- (c) Burdett's is not liable for any failure or defect in Goods produced to the specifications provided by the Customer or Services by particular methods specified by the Customer.
- (d) Burdett's is not liable for any incorrect or unsuitable application or use of the Goods by the Customer.
- 13.7. Nothing in the Terms is to be interpreted as excluding, restricting or modifying or having the effect of excluding, restricting or modifying the application of any State or Federal legislation applicable to the sale of Goods or the provision of Services which cannot be excluded, restricted or modified.
- 14. Cancellation**
- 14.1. Without limiting any other rights owed to Burdett's under the Agreement, the Customer shall pay Burdett's a cancellation fee where the Customer cancels the order after it has been received by Burdett's.
- 14.2. Purposes of this Agreement, an order is considered to have been cancelled by the Customer if any one or more of the following events occur:
- (a) Unsuccessful Delivery;
- (b) The customer notifies Burdett's, whether orally or in writing, that it wishes to cancel the order or part thereof;
- (c) The Customer refused to accept delivery of all of the Goods identified in the order;
- (d) The Customer refused to accept delivery of any part of the Goods identified in the order; and/or
- (e) The Customer, for whatever reason, fails to take receipt of all the Goods identified in the order.
- 14.3. No purported cancellation or suspension of an order or any part of it by the Customer is binding on Burdett's once the order has been accepted.
- 14.4. The Customer must pay to Burdett's an amount of \$2,500 excluding GST, or any other amount provided to the Customer from time to time, where the Customer cancels an order for Mixed Goods within 24 hours of the anticipated delivery of that order.
- 15. Shortages and Exchanges**
- 15.1. Subject to clause 15.2 and 15.4, Burdett's will not be liable for any shortages, damage or non-compliance with the specifications in the Agreement unless the Customer notifies Burdett's with full details and description within 5 days of Services otherwise the Customer is deemed to have accepted the Goods.
- 15.2. When any shortages, claim for damaged Goods or non-compliance with the Agreement specifications is accepted by Burdett's, Burdett's may, at its option, replace the Goods, or refund the price of the Goods and Services.
- 15.3. Subject to clause 13.4, Burdett's will not under any circumstances accept Goods for return that:
- (a) have been specifically produced, mixed, imported or acquired to fulfil the Agreement;
- (b) are discontinued Goods or no longer stocked by Burdett's;
- (c) have been altered in any way;
- (d) have been used; or
- (e) are not in their original condition as at the time of receipt or delivery.
- 15.4. If the Customer is a consumer, nothing in this clause 15 limits any remedy available for a failure of the guarantees in sections 56 and 57 of the ACL.
- 16. Force Majeure**
- 16.1. Subject to clause 16.2, neither party will be liable for any failure to perform any obligation under the Agreement to the extent that such failure is caused by events beyond its reasonable control including, without limitation, industrial disputes, strikes, lockouts, accident, breakdown, import or export restrictions, acts of God, acts or threats of terrorism or war.
- 16.2. Clause 16.1 does not excuse the Customer from any obligation under this Agreement to pay any sum to Burdett's.
- 17. Miscellaneous**
- 17.1. The law of Victoria from time to time governs the Terms. The parties agree to the non-exclusive jurisdiction of the courts of Victoria, the Federal Court of Australia, and of courts entitled to hear appeals from those Courts.
- 17.2. Burdett's failure to enforce any of these Terms shall not be construed as a waiver of any of Burdett's rights.
- 17.3. If a clause is unenforceable it must be read down to be enforceable or, if it cannot be read down, the term must be severed from the Terms, without affecting the enforceability of the remaining terms.
- 17.4. A notice must be in writing and handed personally or sent by email, facsimile or prepaid mail to the last known address of the addressee. Notices sent by prepaid post are deemed to be received upon posting. Notices sent by facsimile or email are deemed received on confirmation of successful transmission.
- 17.5. The Customer must comply with the Australian Privacy Principles in connection with any personal information supplied to it in connection with this Agreement.

BURDETT SAND SOIL & STONE PTY LTD

PART 3: DEED OF GUARANTEE AND INDEMNITY

TO: Burdett Sand Soil & Stone Pty Ltd ACN 005 298 546 and Burdett Sands Pty Ltd ACN 081 498 802 of 615 McClelland Drive, Langwarrin, Victoria (jointly and severally **Burdett's**)

In consideration of Burdett's at the request of:

Name:.....

Address:

as the guarantor (**Guarantor**) agreeing to

- supply or continue to supply Goods to (**Customer**); or
- provide credit to the Customer or grant an indulgence outside Burdett's agreed credit terms.

The Guarantor hereby:

1. agrees to guarantee to Burdett's the due and punctual payment of all money presently owing and any money that may become owing by the Customer, in respect of the cost of Goods supplied by Burdett's to the Customer and any other sums payable by the Customer to Burdett's pursuant to Burdett's Terms and Conditions of Trade (**guaranteed money**);
2. agrees as a separate severable and additional covenant and obligation to indemnify and keep indemnified Burdett from and against all losses, costs, charges and expenses whatsoever (including all legal costs) that Burdett's may suffer or incur in relation to the supply of Goods to the Customer;
3. covenants, acknowledges and agrees as follows:
 - (a) the guarantee given in clause 1 is a continuing guarantee, the indemnity given in clause 2 is a continuing indemnity and neither this Deed nor the guarantee nor the indemnity will be discharged in any way or be considered or deemed to be discharged in any way by any payment to Burdett's other than the full payment to and acceptance by Burdett's of the whole of the guaranteed money;
 - (b) notwithstanding that as between the Guarantor and the Customer the position of the Guarantor is that of surety only nevertheless as between the Guarantor and Burdett's , the Guarantor is liable as a principal and as a primary debtor for the payment of the guaranteed money;
 - (c) this Deed is valid and enforceable against the Guarantor and the liability hereunder of the Guarantor continues and may be enforced by Burdett's notwithstanding:
 - (i) that no steps or proceedings have been taken against the Customer;
 - (ii) any indulgence or extension of time granted by Burdett's to the Customer;
 - (iii) the death or bankruptcy or winding up of the Customer;
 - (iv) that payment of the guaranteed money by the Customer cannot be legally enforced against the Customer;
 - (d) Burdett's taking or failing to take, or enforcing or failing to enforce, or holding any other security for the Customer's debt, or varying or surrendering any such security shall not exonerate or discharge the Guarantor or otherwise prejudice or affect the liability of the Guarantor;
- (e) the Guarantor must not compete with Burdett's for any dividend or distribution in the event of the Customer being declared bankrupt, going into liquidation or being wound up or entering any deed or scheme of arrangement or assignment or composition in respect of its affairs or its assets and liabilities;
4. acknowledges having given its consent to Burdett's to:
 - (a) disclose credit information about the Guarantor to a credit reporting body; and
 - (b) obtain credit eligibility information about the Guarantor from a credit reporting body; and
 - (c) use credit eligibility information about the Guarantor; and
 - (d) disclose credit eligibility information about the Guarantor,
 for the purposes of Burdett's :
 - (e) assessing whether to accept the Guarantor as a guarantor for credit that has been provided to or may be applied for by the Customer; and
 - (f) collecting overdue payments; and
 - (g) reporting on payment defaults and personal bankruptcy and insolvency issues;
5. acknowledges that the term "Burdett's" includes its successors and assigns and the terms "Customer" and "Guarantor" include their respective executors, administrators and successors;
6. acknowledges that if any payment made by the Customer or the Guarantor to Burdett's is avoided, set aside, ordered to be refunded, reduced or rendered unenforceable by any laws relating to bankruptcy, insolvency or liquidation (including monies tendered by Burdett's in settlement of any such undetermined claim made under those laws), that payment will be taken not to have been made, the Guarantor will not be released from liability, and Burdett's will be entitled to recover from the Guarantor the value of that payment or part thereof (this clause continues after the guarantee and indemnity is discharged)

Executed as a Deed.

Date:.....

Signed sealed and delivered)

By:.....)

in the presence of)

.....

Witness

Signature

