



# Terms of Sale

Excel Concrete Pty Ltd

01 December 2016

These Terms of Sale of Excel Concrete Pty Ltd (ABN 74 010 891 773) will be effective from 1 December 2016 and will replace those which came into effect on 1 July 2015. A soft copy of them can be accessed via the legal link on the web site, [www.excelconcrete.com.au](http://www.excelconcrete.com.au)

## TERMS OF SALE

### Payment terms

1. Unless otherwise agreed, the terms of payment are “Net 30 days” (i.e. all purchases made during the month are to be paid in full on or before the last business day of the following month). Excel Concrete Pty Ltd ABN 74 010 891 773 and its related bodies corporate (as that term is defined in the Corporations Act 2001) (**Supplier**) may, at any time, unilaterally vary the terms of trade for future orders by giving notice to the Applicant. Notice may be given by email or otherwise in writing or by notice posted on the Supplier’s website. The Applicant should read these terms carefully each time it places an order. The Supplier will not change any terms for an existing order that has been accepted by it.
2. Should the Applicant not pay for the goods (**Goods**) or services supplied by the Supplier in accordance with the credit terms as provided in this agreement, or as agreed in writing by the Supplier from time to time, the Supplier may charge the Customer interest on overdue amounts at the Reserve Bank of Australia’s large business variable indicator rate (Reserve Bank Rate). The effective Reserve Bank Rate will be changed twice yearly as follows:
  - a) Reserve Bank Rate effective 1 April to 30 September: Reserve Bank Rate published for previous February;
  - b) Reserve Bank Rate effective 1 October to 31 March: Reserve Bank Rate published for previous August.Where interest is charged, it will be calculated monthly on amounts outstanding from the date on which they were due and payable, until the Supplier receives full payment of the outstanding amounts.
3. Unless the Goods are supplied on credit:
  - a) payment is due in full before delivery;
  - b) where there is more than one load of Goods to be delivered to the Applicant, full payment must be made prior to the unloading of the first delivery vehicle; and
  - c) payment for service fees must be made at the time they are incurred.
4. Acceptance by the Supplier of any late payment by the Applicant or the Applicant exceeding the credit limit set by the Supplier shall not amount to a waiver by the Supplier of its right to payment “Net 30 days”, nor is it an agreement to provide credit other than in accordance with this agreement.

5. The Applicant is not entitled to withhold any payment by way of retention unless the terms and conditions of the retention are agreed to in writing by the Supplier prior to the supply of the Goods.

#### **Delivery and Service Fees**

6. Unless otherwise quoted, all prices are for supply, delivery and/or installation, **(Work)** undertaken during the Supplier's business hours, Monday to Friday. Any Work undertaken by the Supplier outside these hours may incur a service fee and the Applicant will be responsible for payment of this service fee.
7. A variety of additional service fees may be payable by the Applicant. Details of some of the services fees are available on our website and in addition the Applicant should contact its local Supplier sales office for details and rates of all service fees.
8. The Applicant will be charged for delivery unless the quoted price includes an amount for delivery.
9. The Supplier may:
  - a) charge waiting time or an hourly hire where a delivery vehicle is unable to unload promptly and without delay on arrival at the delivery site; and/ or
  - b) charge a minimum load service fee for delivery of loads smaller than the minimum load size for each particular type of Goods.
10. Goods will be delivered to the roadside adjacent to the delivery site unless otherwise agreed in advance between Supplier and Applicant.
11. If, at the Applicant's request, the delivery vehicle leaves the road and enters the delivery site to unload, the Applicant is responsible for providing suitable and safe access for the Supplier delivery vehicle and the Suppliers' agents and contractors. In addition, the Applicant indemnifies the Supplier and its agents and contractors for all damage and injury to any person and to any public or private property which may result including any costs associated with enabling the delivery vehicle to leave the site, and the cost of any returned product as a result of the Applicant failing to provide suitable and safe access to the delivery site.
12. The Applicant or an authorised representative of the Applicant must be present at the delivery site and must:
  - a) sign the Supplier delivery docket;
  - b) by signing the delivery docket acknowledge that the products and quantities described on the delivery docket have been delivered and comply with the Applicant's order; and
  - c) accept any applicable delivery service fees.
13. The Applicant or its authorised representative agrees that where the Applicant does not sign or is not available to sign the delivery docket, the signature of the driver on the delivery docket shall be prima facie evidence of:
  - a) delivery of the Goods to the Applicant;
  - b) that the Goods described on the delivery docket are the actual Goods delivered;
  - c) that the Applicant is responsible for payment of any service fee.
14. If the Goods are delivered on pallets, the pallets remain the property of the Supplier. The Applicant may be charged for the use of such pallets but, in that case, the Supplier will give a credit to the Applicant when the pallets are returned in good condition.

#### **Jurisdiction**

15. The Applicant acknowledges and agrees that this agreement will be governed by the laws of state of Queensland and the laws of the Commonwealth of Australia which are in force in that state.
16. The parties to this agreement submit to the non-exclusive jurisdiction of the courts of the state of Queensland and the relevant federal courts and courts competent to hear appeals from those courts.

**Formation of contract**

17. Placement of an order by the Applicant, either verbally or in writing, with the Supplier will constitute acceptance of the Supplier's offer and of these terms and conditions.
18. All quotations provided by the Supplier are open for acceptance by the Applicant for 30 days from the date of the quotation.
19. All prices quoted are net of all discounts.

**Risk**

20. The Applicant will become responsible for loss of or damage to the Goods, except where the Supplier is at fault, immediately upon delivery of the Goods to the nominated delivery site or the roadside adjacent to the delivery site or to a carrier nominated by the Applicant.

**Retention of title**

21. Title in the Goods does not pass to the Applicant until the Applicant has made payment in full for the Goods.
22. Until the Applicant has paid for the Goods in full, the Applicant agrees that property and title in the Goods will not pass to the Applicant and the Supplier retains title in the Goods not yet sold.
23. Where reasonably practicable, until payment for the Goods has been made in full to the Supplier, the Applicant will hold the Goods in such a manner that they can be identified as the property of the Supplier, and will not mix the Goods with other similar goods.
24. The Applicant will be entitled to sell the Goods in the ordinary course of its business, but until full payment for the Goods has been made to the Supplier, the Applicant will sell as agent for the Supplier provided that such sales will not give rise to any obligations on the part of the Supplier.
25. The Applicant agrees that whilst property and title in the Goods remains with the Supplier, the Supplier has the right, with or without prior notice to the Applicant, to enter upon any premises occupied by the Applicant (or any receiver, receiver and manager, administrator, liquidator or trustee in bankruptcy of the Applicant) to inspect the Goods and to the extent that it is practicable to do so, to repossess the Goods which may be in the Applicant's possession, custody or control when payment is overdue. Without limiting the Supplier's rights under this clause, the Applicant irrevocably grants to the Supplier the right to enter upon the Applicant's property or premises, without notice, and without being liable to the Applicant for any damage caused to tangible property, if the Supplier has cause to exercise any of its rights under sections 123 and/or 128 of the PPSA.
26. The Applicant will be responsible for the Supplier's costs and expenses in exercising its rights under clause 25. Where the Supplier exercises any power to enter the premises, that entry will not give rise to any action of trespass or similar action on the part of the Applicant against the Supplier, its employees, servants or agents.
27. The Applicant agrees that where the Goods have been retaken into the possession of the Supplier, the Supplier has the right to sell or deal with the Goods.
28. For the avoidance of doubt, the Supplier's interest constitutes a 'purchase money security interest' pursuant to the PPSA.

**Costs**

29. The Applicant must pay for its own legal, accounting and business costs and all costs incurred by the Supplier relating to any default by the Applicant. The Applicant must also pay for all stamp duty and other taxes payable on this agreement (if any).
30. The Applicant will pay the Supplier's costs and disbursements incurred in pursuing any recovery action, or any other claim or remedy, against the Applicant, including collection costs, debt recovery fees and legal costs on an indemnity basis. Such costs and disbursements will be due and payable by the Applicant to the Supplier irrespective of whether pursuit of the recovery action, claim or remedy is successful.

31. The Applicant acknowledges and agrees that payments by the Applicant will be applied by the Supplier as follows.
  - a) Firstly, in payment of any and all collection costs and legal costs in accordance with clauses 26 and 30.
  - b) Secondly, in payment of any interest incurred in accordance with clause 2.
  - c) Thirdly, in payment of the outstanding invoice(s).
32. In circumstances where the Supplier seeks to enforce a purchase money security interest under the PPSA over collateral or proceeds (these terms being consistent with the terms defined in the PPSA), payments received from the Applicant will be allocated in a manner at the Suppliers sole discretion, so as to attribute, to the greatest extent possible, the unpaid balance of the debt to the purchase money obligation in respect of the collateral and/or proceeds over which the Supplier seeks to enforce its purchase money security interest.
33. To the extent that payments have been allocated to invoices by the Supplier in its business records, the Supplier may, at its discretion, allocate and/or retrospectively reallocate payments in any manner whatsoever at any time at the Supplier's absolute discretion at any time, including in a manner inconsistent with clause 30 in this agreement.
34. Payments allocated (and/or reallocated) under clause 30 and/or 31 will be treated as though they were allocated (and/or reallocated) in the manner determined by the Supplier on the date of receipt of payment.

**Waiver**

35. A waiver of any provision or breach of this agreement by the Supplier must be made by an authorised officer of the Supplier in writing. A waiver of any provision or breach of this agreement by the Applicant must be made by the Applicant's authorised officer in writing.
36. Until ownership of the Goods passes to the Applicant, the Applicant waives its rights it would otherwise have under the PPSA:
  - a) under section 95 to receive notice of intention to remove an accession;
  - b) under section 118 to receive notice that the Supplier intends to enforce its security interest in accordance with land law;
  - c) under section 121(4) to receive a notice of enforcement action against liquid assets;
  - d) under section 129 to receive a notice of disposal of Goods by the Supplier purchasing the Goods;
  - e) under section 130 to receive a notice to dispose of Goods;
  - f) under section 132(2) to receive a statement of account following disposal of Goods;
  - g) under section 132(4) to receive a statement of account if no disposal of Goods for each 6 month period;
  - h) under section 135 to receive notice of any proposal of the Supplier to retain Goods;
  - i) under section 137(2) to object to any proposal of the Supplier to retain or dispose of Goods;
  - j) under section 142 to redeem the Goods;
  - k) under section 143 to reinstate the security agreement; and
  - l) under section 157(1) and 157(3) to receive a notice of any verification statement.

**Consent to register**

37. The Applicant hereby consents to the Supplier recording the details of this Agreement on the Personal Property Securities Register and agrees to do all things necessary and reasonably required by the Supplier to effect such registration.
38. The Applicant waives any right or entitlement to receive notice of the registration of any security interest(s) created by this instrument on the Personal Property Securities Register.

**GST**

39. The Applicant must pay GST on any taxable supply made by the Supplier to the Applicant under this agreement. The payment of GST is in addition to any other consideration payable by the Applicant for a taxable supply.

**Set-off**

40. All payments required to be made by the Applicant under this agreement will be made free of any set-off, or counterclaim and without deduction or withholding.
41. Any amount due to the Supplier from time to time may be deducted from any monies which may be or may become payable to the Applicant by the Supplier.

**Installation**

42. The Applicant agrees to indemnify the Supplier against any liability the Supplier may incur as a result of the failure of the Applicant to follow generally accepted good practice, or due to a lack of ability, expertise, or skill with the particular type of Goods when they are being installed.

**Dispute**

43. If the Applicant believes that the Goods and/or services supplied do not conform with the order placed or that the price charged does not conform with the quotation given by the Supplier, the Applicant shall notify the Supplier in writing as soon as possible and, in any event, within 7 days, detailing the way in which the Goods or price do not conform.
44. Failure to give such notification within 7 days of the date of supply or date of invoice (as applicable) the Applicant will be deemed to accept the Goods and that they are in accordance with the order and quotation.
45. The Applicant shall be deemed to have accepted the Goods as supplied if it fails to keep the Goods in the condition they were in when supplied or declines a reasonable request from the Supplier to inspect the Goods.

**Closing of account**

46. Credit accounts may be closed without notice if not used for a period of 12 months.

**Duty of disclosure**

47. The Applicant declares that the information given in this application is true and correct. The Applicant is not aware of any information, notice or court proceedings that may lead to bankruptcy, appointment of an administrator or managing controller, receiver manager or liquidator.
48. The Applicant has not entered into and does not intend to enter into any scheme of arrangement with any creditors either formally through a court or otherwise.
49. None of the Applicant, directors, partners or proprietors has any outstanding liability to the Australian Taxation Office.
50. None of the directors, partners or proprietors has been a director of a company placed into liquidation or has been declared bankrupt or has entered into an arrangement under the Bankruptcy Act 1966 (as amended).
51. If the Applicant is a company, the company is solvent and able to pay its debts.

**Warranties**

52. The Supplier warrants that the Goods delivered are those specified in the delivery docket and the Goods delivered are owned by the Supplier, are free from third party claims, undisclosed securities and are of acceptable quality as defined in the Australian Consumer Law.
53. To the maximum extent permitted by law, all terms, conditions or warranties that would have been implied into this agreement or in connection with the supply of any Goods and/or services by the Supplier under law, statute or custom are excluded.
54. Nothing in this agreement shall be read or applied so as to purport to exclude, restrict or modify or have the effect of excluding, restricting or modifying the application in relation to the supply of any goods and/or services pursuant to this agreement of all or any of the

provisions the Competition and Consumer Act 2010 or any relevant State or Federal Legislation which by law cannot be excluded, restricted or modified.

#### **Limitation of Liability**

55. Pursuant to sections 64A and 276A of the Australian Consumer Law, the following clause 56 applies in respect of any of the Goods and/or services supplied under this agreement which are not of a kind ordinarily acquired for personal, domestic or household use or consumption, provided that this clause will not apply if the Applicant establishes that reliance on it would not be fair and reasonable.
56. The Supplier's liability in respect of breaches of expressed or implied terms and conditions, warranties and guarantees (other than the guarantees under section 51 (title), section 52 (undisturbed possession) and section 53 (undisclosed securities) of the Australian Consumer Law) is limited to:
- a) where the Applicant is a consumer (as defined in the Australian Consumer Law – "consumer") and the Supplier has supplied Goods to the Applicant, any one of the following as determined by the Supplier: the replacement of the Goods or the supply of equivalent goods; or the repair of the Goods; or the payment of the cost of replacing the Goods or of acquiring equivalent goods; or the payment of the cost of having the Goods repaired; or
  - b) where the Applicant has supplied the Goods to a consumer: an amount equal to the lowest of the costs of the actions in paragraph (a); or
  - c) where the Applicant is a consumer and the Supplier has supplied services to the Applicant, either of the following as determined by the Supplier, the supply of the services again or the payment of the cost of having the services supplied again.
- The limitations of the Supplier's liability in respect of breaches of express or implied terms or conditions and warranties and guarantees as expressed in this clause will be varied to the extent required to limit the Supplier's liability to the extent permitted by relevant state and territory legislation covering sale of goods and consumer protection.
57. Where the Applicant is not a consumer and has not supplied the Goods to a consumer, Supplier's total aggregate liability in respect of breaches of expressed or implied terms and conditions, warranties and guarantees is limited to the GST exclusive aggregate price paid by the Applicant for the specific Goods and/or services that gave rise to the Applicant's claim for breach.
58. The Supplier will not be liable for any damages arising out of or in connection with loss of revenue, loss of profits, loss of anticipated savings or business, loss of opportunity or loss of reputation, special, consequential or indirect loss, damage, cost, expense, harm or injury suffered or incurred as a result of such breach unless such liability is mandatorily imposed on the Supplier by statute, notably the Australian Consumer Law.

#### **Termination and Suspension**

59. If the Supplier is not satisfied as to the Applicant's ability to pay for the Goods and/or services, it may suspend or terminate supply and shall not be liable for any claim, damage, loss, expense or cost arising therefrom and all monies then outstanding by the Applicant shall immediately become due and payable.

#### **Miscellaneous**

60. The Applicant agrees to accept service of any document required to be served, including any notice under this agreement or the PPSA or any originating process, by prepaid post at any address nominated in this application or any other address later notified to the Supplier by the Applicant or the Applicant's authorised representative.
61. The Applicant further agrees that where the Supplier has rights in addition to those under part 4 of the PPSA, those rights will continue to apply.
62. Unless otherwise stated in the quotation, penalties or charges for time delays by the Supplier will not apply. In the event that there is failure to deliver or any time delay in

delivery, commencement of site works or completion of site works due to weather, fire, labour dispute, strike or other cause whatsoever beyond the Supplier's control or due to the inability of the Supplier to obtain raw materials from the source expected by the Supplier "delay events":

- a) The Supplier will not be liable for any loss or damage sustained by the Applicant or by any other person by reason of any such delay or failure, and
- b) The Supplier will be entitled to suspend deliveries for the duration of the delay events and shall not be liable for any loss or damage sustained by the Applicant or by any other person by reason of such suspension.

**Special Terms applying to the sale and delivery of Pre-mixed Concrete**

63. Unless otherwise stated in the quotation, prices are based on "Normal Class Concrete" as specified in the current issue of Australian Standard AS1379 (Specification & Supply of Concrete) and having a nominal slump not exceeding 100mm and using a nominal 20mm maximum size aggregate. If the Applicant requires a slump in excess of 100mm or aggregate with a maximum size other than 20mm, a service fee may apply.
64. The Supplier reserves the right to charge for return cartage, handling and disposal costs for:
  - a) any pre-mixed concrete ordered of which the Applicant does not accept delivery (except where non acceptance is due to the pre-mixed concrete not complying with the specification),
  - b) pre-mixed concrete which is returned from the job site due to the Applicant being unable to use the full quantity ordered,
  - c) pre-mixed concrete rejected because the time between batching and discharge is greater than the time permitted by AS1379 or the specification that covers the project being supplied, provided that the delay was not caused by the Supplier.
65. Unless otherwise agreed in writing by the Supplier and the Applicant, pre-mixed concrete will comply with AS1379. If compliance with AS1379 requires the addition of a cooling agent, a service fee to the quoted price may apply.
66. Pre-mixed concrete is sold in the plastic state and the subsequent in-situ performance when set is greatly affected by the Applicant's work practices in handling, placing and curing of the concrete. The Supplier accepts no responsibility
  - a) for the performance of pre-mixed concrete other than with respect to the criteria specified in AS1379 (when tested in strict accordance with the relevant Australian Standard by a NATA-accredited construction materials testing facility), and in particular the Supplier accepts no responsibility:
  - b) if water or any other material is added to the plastic concrete before or after discharge from the delivery vehicle, unless there is prior approval by an authorised representative of the Supplier; or
  - c) if the Applicant has specified or prescribed a pre-mixed concrete mix design other than a mix design devised by the Supplier; or
  - d) for the surface texture and colour of hardened pre-mixed concrete, including where the aggregate in the concrete has been exposed by the Applicant, and for any future colour change or oxidation of aggregates that have been exposed to the atmosphere.
67. "Production Assessment" (as described in AS1379) will be carried out by the Supplier in accordance with AS1379. Where "Project Assessment" (as described in AS1379) is requested by the Applicant, the Supplier will provide that service at the ruling price at the date of supply. If the Applicant wishes to perform independent tests at its own expense, the Supplier will only consider the results of samples and tests performed in accordance with the current issue of AS1012 (Methods of Testing Concrete) and tested in a National Association of Testing Authorities (NATA) approved laboratory.

**Special Terms applying to Pre-mixed Concrete placing services including Housing Slabs**

68. Clauses 6 to 14 (inclusive) of the terms of sale are not applicable to premixed concrete placing.
69. All quotations will be in writing and will stipulate the scope of materials and work covered by the quotation.
70. The Supplier will not be obliged to perform any variations or additions to the quoted work unless the full cost of the variation has been agreed in writing by the Applicant and the Supplier.
71. The Applicant will provide access to the site where the quoted work is to be undertaken. If work by the Supplier is required to obtain access, the cost of materials and labour involved will be identified in writing as a variation to the original quotation and when agreed by the Applicant will be added to the previously quoted price. If the Applicant does not provide access or agree to pay the cost of providing access the Supplier may withdraw from the contract without liability to the Supplier.
72. Unless expressly stated in the quotation, the following are not allowed for in the price:
- a) additional, increased or more difficult work or rework resulting from any of the following: subsidence, unsatisfactory or unsuitable base work, foundations, nearby structures or redesigns; latent conditions as defined in Australian Standard AS 2124 (General Conditions of Contract); and the location of or interference by any underground drain, pipe, tank, sewer, cable, tunnel, void, service or other underground work;
  - b) work not reasonably anticipated by the Supplier due to insufficient, absent or misleading information provided to the Supplier.
73. The Applicant is responsible for:
- a) obtaining surveys and setting out and continuously maintaining survey pegs and levels necessary for the works;
  - b) obtaining all necessary permits, approvals and consents from any person or statutory authority; and
  - c) providing comprehensive and detailed location and marking on site of any underground works.
74. The Supplier will not be liable for, and the Applicant will indemnify the Supplier against, any damage or loss in connection with the work caused by:
- a) subsidence, landslip or other adverse geotechnical conditions;
  - b) unsatisfactory or unsuitable base work or foundations not constructed by the Supplier.
75. The Supplier may subcontract any portion of the works, but any subcontracting will not relieve the Supplier of any of its obligations to the Applicant under the contract.
76. If at any time the Supplier advises the Applicant against proceeding with any work on the basis that the Supplier expects inclement weather conditions to damage the work, and despite the Supplier's advice the Applicant instructs the Supplier to continue, the Supplier will not be responsible for any damage caused to the work by any inclement weather conditions which occur subsequent to the Supplier's advice to the Applicant not to proceed.
77. Materials used in the quoted works that are not manufactured by the Supplier will be sourced from reputable suppliers. To the extent permitted by law, the Applicant shall not hold the Supplier liable for any defects in these other products but rely on the warranty (if any) offered by the manufacturer of those materials.

**Severance**

78. If any provision of this agreement is not enforceable in accordance with its terms, other provisions which are self-sustaining are, and continue to be, enforceable in accordance with their terms.



79. If any part of this agreement is invalid or unenforceable, that part is deleted and the remainder of the agreement remains effective.

**Variation**

80. The Applicant agrees that these terms and conditions may be varied, added to, or amended for future orders by an authorised officer of the Supplier at any time by written notice to the Applicant.
81. Any proposed variation to these terms and conditions by the Applicant must be requested in writing. The Supplier may refuse any such request without providing reasons either orally or in writing.
82. Variations requested by the Applicant will only be binding upon the Supplier if they are accepted in writing.

**Entire agreement**

83. This agreement constitutes the entire agreement between the parties relating in to its subject matter. Subject to any rights the parties may have at law all previous negotiations, understandings, representations, warranties, memoranda or commitments about the subject matter of this agreement are merged in this agreement and are of no further effect. No oral explanation or information provided by a party to another affects the meaning or interpretation of this agreement or constitutes any collateral agreement, warranty or understanding.
84. Notwithstanding the preceding paragraph, in circumstances where there is a pre-existing written credit agreement (**Original Agreement**) between the Applicant and the Supplier, these terms and this agreement will constitute a variation of the Original Agreement whereby the terms of the Original Agreement are deleted and replaced with the terms in this agreement, unless the terms of the Original Agreement are otherwise expressly or implicitly preserved by the terms in this agreement in which case they will co-exist with the terms herein, and, to the extent of any inconsistency, these terms will prevail.

**Privacy Act**

85. The Supplier complies with the Australian Privacy Principles contained in the *Privacy Act 1988 (Cth)* in relation to the collection, use and disclosure of information about individuals. For more information about the way the Supplier manages personal information, please see the Supplier's Privacy Policy which is available on the Supplier's website: [www.excelconcrete.com.au](http://www.excelconcrete.com.au) (<http://www.excelconcrete.com.au/privacy.html>).
86. The Supplier may disclose personal information to overseas recipients in order to provide its products and for administration purposes. The Supplier's Privacy Policy contains information about the countries to which personal information may be disclosed together with information regarding: (a) the purposes for which the Supplier collects personal information; (b) how individuals may access the personal information the Supplier holds about them and seek the correction of such information; and (b) how individuals may complain about a breach of the Australian Privacy Principles and how the Supplier will deal with such a complaint.

## **Excel Offices**

1044 Lytton Rd, Murarrie, QLD 4172