

Deed of Covenant and Assurance¹

Date: ² 20 March 2010

WARNING FOR COVENANTORS

This is an important document

By signing it the Covenantor becomes responsible for payment of what could be a significant amount of money if:

- (a) the winding up of the Licensee, being a company, begins under the *Corporations Law*; or
- (b) the Licensee, being a natural person becomes bankrupt under the *Bankruptcy Act*; and
- (c) the Covenantor receives a written demand by the Licensee to pay the Defined Amount to the Licensee.

The Covenantor **MUST** receive legal advice before signing this document.

The Covenantor should:

- (a) consider seeking, and if it thinks fit, obtain independent financial advice before signing this document; and
- (b) make, and continue to make, its own enquiries about the credit worthiness, financial position and honesty of the Licensee.

WARNING FOR LICENSEES

This is an important document

It is in the best interest of the Licensee to receive legal advice before signing this document. If the Licensee chooses not to obtain legal advice, they must indicate this by completing the item at Clause 13.

PRIVACY NOTICE

BSA is collecting the information on this form to ascertain whether the applicant for a licence or licence renewal benefiting from this Deed satisfies the financial requirements of the Queensland Building Services Board for a contractor's licence under the *Queensland Building Services Authority Act 1991*. BSA may provide all or some of the information you have provided to a financial specialist engaged by BSA to provide expert advice as to financial matters relevant to your ability to satisfy the financial requirements for a licence. The information you have provided may also be disclosed by BSA to another party with your consent or as Authorised or required by law. For further information visit the BSA website at www.bsa.qld.gov.au.

Effective from 1 July 2009

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DEED made at (city where executed) Brisbane ³

on (date) ...20 March 2010...⁴

BETWEEN: Smith Builders Pty Ltd ⁵

of (address): 215 Carnarvon Rd, Eagle Farm ⁶
("Licensee")

AND: Wayne John Smith and Judith Ann Smith ⁷

of (address): 46 Kelly Rd, Wilston ⁸
("Covenantor")

AND: The Queensland Building Services Authority ⁹

of: 299 Montague Road, West End in the
State of Queensland ("the Authority")

RECITALS:

- A. The Licensee is a licensee under the provisions of the *Queensland Building Services Authority Act 1991* (Qld) ("the Act") or is the applicant for such a licence ("the Licence").
- B. The licence authorises the Licensee to conduct the business of carrying out or supervising building work of a class or classes specified in the licence.
- C. As a condition of the grant, renewal or upon compliance audit commenced by the Authority of a licence, the Licensee must comply with the Queensland Building Services Board policy "Financial Requirements for Licensing" in relation to, among other things, a prescribed level or amount of net tangible assets. The Financial Requirements for Licensing relating to the Licensee's financial circumstances are referred to in the Act and are to be made or issued under the Act by the Queensland Building Services Board ("Financial Requirements for Licensing").
- D. The Authority is responsible for the administration of the Act and, among other things, compliance by Licensees under the Act with the Financial Requirements for Licensing.
- E. The Covenantor has requested the Licensee to apply for the licence or comply with the provisions of the Act to enable it to continue to hold the licence. The Licensee has agreed to do so in consideration of, and conditional upon, the execution of this Deed by the Covenantor.
- F. This Deed is entered into to give effect to the agreement between the Licensee and the Covenantor referred to in recital E and also for the purpose of enabling the Licensee to comply with the Financial Requirements for Licensing.

THIS DEED PROVIDES

1. DEFINITIONS AND INTERPRETATIONS

1.1 Definitions

In this Deed, in addition to the definitions set out above:

“Covenantor” means:

- (a) the entity named as such in this Deed; and
- (b) any entity joined as such to this Deed by the execution of an additional Deeds, so that references in this Deed to “Covenantor” and obligations cast upon the “Covenantor” by this Deed, shall refer to and oblige those entities jointly and severally.

“Deed” means this Deed as varied from time to time.

“Defined Amount” ¹⁰ means the amount determined pursuant to the Financial Requirements for Licensing, as being the amount assured by the Covenantor to the Licensee by Deed of Covenant and Assurance, as stated in the Independent Review Report or Audit Report provided to the Authority from time to time. The amount is the difference between the Net Tangible Assets held by the Licensee and the Net Tangible Assets required for the Licensee’s Allowable Annual Turnover.

“Excluded Property” means the Property of a Covenantor, an agreement to create a charge over which must be registered under a statute to avoid contravening that or another statute.

“GST” means any tax imposed by or through the GST Act on supply (without regard to any input tax credit).

“GST Act” means the *A New Tax System (Goods and Services Tax) Act 1999* and any related tax imposition act (whether imposing tax as a duty of customs excise or otherwise) and includes any legislation which is enacted to validate, recapture or recoup the tax imposed by any of such Acts.

“Licensee’s Contribution” means the worth of the net tangible assets of the Licensee which, as at the time of the most recent grant, renewal of the licence, or compliance audit commenced by the Authority has been assessed as being the extent to which the Licensee has itself complied (ie: without reliance on this Deed or the covenants this Deed contains) with the Financial Requirements for Licensing.

“Property” means all the assets and undertaking of a Covenantor, present or future, and includes any interest or estate in such property.

“Subject Property” means all the Property of a Covenantor other than Excluded Property.

“Supply” means any supply within the meaning which it bears in the GST Act.

1.2 Interpretation

In this Deed:

- (a) headings are for convenience only and do not affect interpretation;
- (b) the expression "entity" includes a natural person, corporation, unincorporated association, partnership, trust and any entity having a legal personality;
- (c) a reference to any statute or to any statutory provision includes any statutory modification or re-enactment of it or any statutory provision substituted for it and all ordinances, by laws, regulations, rules and other statutory instruments (however described) issued under it;
- (d) words importing the singular include the plural (and vice versa) and words denoting a given gender include all other genders;
- (e) a reference to any document or agreement (including this Deed) is to that document or agreement as amended, novated, varied or replaced from time to time;
- (f) a reference to a provision or clause of this Deed includes any modification or variation to such provision or clause from time to time made under the provisions of this Deed;
- (g) a reference to a party to this Deed includes that party's successors and assigns, but does not include anyone who purports to be an assignee under an assignment prohibited by this Deed;
- (h) a reference to the term "in writing" or "written" includes any communications sent by letter, facsimile, email or other mode of transmission capable of producing or reproducing any words in visible and legible form; and
- (i) where the Covenantor consists of more than one entity, covenants on the part of the Covenantor will bind those entities jointly and severally.

2. COVENANTS BY COVENANTOR

The Covenantor:

- (a) covenants that if:
 - (i) the winding up of the Licensee, being a company, begins under the *Corporations Law*; or
 - (ii) the Licensee, being a natural person, becomes a bankrupt under the *Bankruptcy Act 1966 (Cth)*,the Covenantor shall, upon a written demand by the Licensee, pay the Defined Amount to the Licensee;
- (b) acknowledges, if the Licensee is a natural person, that the benefit of the covenants in this Deed in favour of the Licensee will vest in, and be enforceable by, the Licensee's trustee in bankruptcy in accordance with the *Bankruptcy Act 1966 (Cth)*;

- (c) covenants not to assign or vary the burden of any covenant or obligation (present or contingent) existing upon it under this Deed;
- (d) covenants not to prove in a liquidation or bankruptcy (as the case may be) of the Licensee for the Defined Amount;
- (e) covenants that, upon demand under subclause (a) hereof being made upon it, its Subject Property shall be charged with, and secure, payment of the Defined Amount; and
- (f) covenants that this Deed is in the same terms as the gazetted pro forma for this Deed. [11](#)

3. COVENANTS BY LICENSEE

The Licensee covenants that:

- (a) it will account to the Covenantor for any part of the Defined Amount which has been paid to it which remains as a surplus after the payment in full of all of its unsecured creditors;
- (b) it will provide to the Authority such information as the Authority may from time to time require in relation to satisfaction or otherwise by the Licensee of the Financial Requirements for Licensing;
- (c) it will not consent to the Covenantor assigning or varying the burden of any covenant or obligation (present or contingent) which it may bear under this Deed;
- (d) it will not assign the benefit of any covenant made in its favour in this Deed;
- (e) it will, as and when required by the Covenantor, inform the Covenantor of the worth of the Licensee's Contribution at that time; and
- (f) this Deed is in the same terms as the gazetted pro forma for this Deed. [12](#)

4. REVOCATION OR RELEASE [13](#)

4.1 *Prohibition*

This Deed may not be revoked or released ("revoked") and is not capable of being so revoked except as expressly permitted by this Deed.

4.2 *Revocation by satisfaction of the Financial Requirements for Licensing*

This Deed is revoked if the Authority gives written notice to the Licensee and the Covenantor that the Licensee has satisfied the Financial Requirements for Licensing in a manner other than reliance by it on this Deed and the benefit of the covenants contained in this Deed.

4.3 *Alternatively, revocation is to be by further deed*

Revocation of this Deed, if it is not effected by notice by the Authority under subclause 4.2, may only be effected by a further deed by all of the parties to this Deed.

4.4 *Otherwise ineffective*

Any revocation other than as permitted by this clause will be ineffective.

4.5 *Continuing application of this Deed*

Even if this Deed has been validly revoked under this clause, that revocation will not apply to the Defined Amount insofar as it arises, accrues or becomes payable before such revocation.

5. FURTHER ASSURANCE

Each party to this Deed agrees to do all such acts, matters and things as may be required in order to perfect and give effect to the intent of this Deed.

6. TRUSTEE PROVISIONS

6.1 *Application*

The following provisions of this clause apply if any party to this Deed is a trustee of a trust.

6.2 *Binding in all capacities*

The party:

- (a) acknowledges and covenants that this Deed is binding upon it personally and in its capacity as trustee of the trust; and
- (b) will cause any successor of it as trustee of the trust to execute a Deed where it is required to do so.

6.3 *Representations and covenants*

The party represents and covenants in respect of the trust that:

- (a) it is the sole trustee of the trust and no action has been taken to remove or replace it;
- (b) it has power under the trust deed to execute and perform its obligations under this Deed and all necessary action has been taken to authorise the execution and performance of this Deed under the trust deed;
- (c) this Deed is executed as part of the true and proper administration of the trust;

- (d) it has a right to be fully indemnified out of the trust fund and no action has been taken to restrict or limit that right;
- (e) it is not in default under the trust deed; and
- (f) no vesting date for the trust fund has been determined,

and further warrants that each of the above warranties will remain true as long as this Deed remains in force.

6.4 Income

Subject to subclause 2(e), nothing in this Deed will prevent the party from distributing the income (but not the capital) of the trust fund in accordance with the trust deed.

6.5 Limit upon exercise of powers

None of the following powers will be exercised by the party or any other person relating to the trust whilst this Deed remains in force, unless the prior written consent of the Authority is obtained:

- (a) Any power to vary the terms of the trust.
- (b) Any power to resettle the trust property.
- (c) Any power to add any beneficiaries or class of beneficiaries to the trust.

7. PARTNERSHIP PROVISIONS

If a party is a member of a partnership or other unincorporated structure or association ("the Partnership"), the following provisions will apply:

- (a) This Deed will continue to be binding notwithstanding any changes which may, from time to time, be made in the constitution of the Partnership.
- (b) If the Partnership ceases to carry on business, this Deed will continue to bind the party.
- (c) If the party ceases to be a member of any partnership, then this Deed will continue to bind the party and will have force and effect in accordance with its terms.

8. NOTICES

If any notices are required to be given or served under this Deed they may be served in the manner described in section 39 of the *Acts Interpretation Act 1954 (Qld)*.

9. GOODS AND SERVICES TAX

In the event that:

- (a) any transaction effected by, required by or performed under this Deed gives rise to a requirement to pay GST; and
- (b) that requirement to pay GST is occasioned by, or relates to, the payment of the Defined Amount under this Deed,

the Covenantor covenants to indemnify the party, treated as the supplier in relation to that requirement to pay GST, against any loss occasioned by that need to pay GST.

10. STAMP DUTY [14](#)

The Covenantor will be liable in respect of the stamp duty payable upon this Deed and will indemnify each other party to this Deed in respect of any such liability.

11. JURISDICTION AND FORUM

This Deed will be governed by and construed in accordance with the laws of Queensland and each party to this Deed covenants to submit to the non-exclusive jurisdiction of the courts of Queensland and courts with jurisdiction to hear appeals therefrom.

12. WARRANTIES BY THE COVENANTOR AS TO LEGAL ADVICE [15](#)

The Covenantor represents and warrants to the Authority that the Covenantor:

- (a) has obtained legal advice from its solicitors in respect of this Deed (as is evidenced by those solicitors having made the statements set out in the schedule hereto);
- (b) has read and understood the contents of this Deed; and
- (c) acknowledges that the execution of this Deed was not brought about in any way by collateral representations of any of the parties, their servants or agents or persons connected thereto or by any third party other than specified in this Deed.

13. WARRANTIES BY THE LICENSEE AS TO LEGAL ADVICE¹⁶

The Licensee represents and warrants to the Authority that the Licensee it has obtained legal advice from its solicitors in respect of this Deed, unless indicated otherwise by completion of the Statement of Licensee as to legal advice, and;

- (a) has read and understood the contents of this Deed; and
- (b) acknowledges that the execution of this Deed was not brought about in any way by collateral representations of any of the parties, their servants or agents or persons connected thereto or by any third party other than specified in this Deed.

Statement of Licensee as to legal advice:

The Licensee has elected of its own free will not to receive legal advice in respect of this Deed.¹⁷

[please tick if applicable]

SCHEDULE A – STATEMENT BY COVENANTOR’S SOLICITOR¹⁸

I, Fredrick Phillips¹⁹, of 50 Adelaide Street, Brisbane²⁰, solicitor, hereby state as follows:

1. I have explained to the Covenantor (or, if the Covenantor is a company, the Covenantor’s director/s) the contents and effect of this Deed and the provisions it contains.
2. I have asked the Covenantor (or, if the Covenantor is a company, the Covenantor’s director/s) whether the Covenantor is executing this Deed of the Covenantor’s own free will. He/she/they has/have assured me that the Covenantor is.
3. I have made enquiries of the Covenantor (or, if the Covenantor is a company, the Covenantor’s director/s) from which I have formed the opinion that the Covenantor understands the obligations created by this Deed.
4. After giving the explanation and making the enquiries to which I have referred above, the Covenantor executed this Deed in my presence²¹ and appeared to do so freely, voluntarily and mindful of its implications and consequences.

Dated this 21st day of April 2001²² _____

*Fredrick Phillips*²³

Signature of Covenantor’s solicitor

Notes:

- A Statement is required from the Covenantor’s solicitor.
- Cross out the parts above which are not applicable, ie: he/she/they, has/have

SIGNED SEALED AND DELIVERED by 24

.....)
(Name of Person in Full)
in the presence of:)

.....)
(Signature of Witness)

.....)
(Name of Witness in Full)

.....)
(Signature of Person)

- This form of execution is to be used for a natural person

THE COMMON SEAL 25 of

.....)
(Name of Company in Full)
was affixed in accordance with its)
Constitution in the presence of:)

.....)
(Signature of Secretary/ First Director)

.....)
(Name of Secretary/ First Director in Full)

.....)
(Signature of Second Director)

.....)
(Name of Second Director in Full)

- This form of execution is to be used for a Company with two or more directors

SIGNED SEALED AND DELIVERED)
FOR AND ON BEHALF OF 26)

(Name of Company in Full)

by.....)

(Sole Director) in accordance with the)
authority given to him/her by that)
company in the presence of:)

.....)
(Signature of Witness)

.....)
(Name of Witness in Full)

.....)
(Signature of Sole Director)

- This form of execution is to be used for a Company with only one director

THE COMMON SEAL of the)
Queensland Building Services Authority [27](#))
was affixed by)
)
.....)
(Name of authorised officer))
a duly authorised officer of the)
Queensland Building Services Authority).....
In the presence of:)(Signature of authorised officer)
)
.....)
(Signature of Witness))
)
.....)
(Name of Witness in Full))

ANNOTATIONS TO THE DEED OF COVENANT AND ASSURANCE – EFFECTIVE 1 JULY 2006

WARNING ONE – THE DEED OF COVENANT AND ASSURANCE – EFFECTIVE 1 JULY 2006 IS PART OF THE FINANCIAL REQUIREMENTS FOR LICENSING POLICY – EFFECTIVE 1 JULY 2006.

WARNING ONE – THE ANNOTATED DEED OF COVENANT AND ASSURANCE SHOULD BE READ IN CONJUNCTION WITH THE ANNOTATED INDEPENDENT REVIEW REPORT FOUND IN THE “FINANCIAL REQUIREMENTS FOR LICENSING – PRACTICE NOTES 1 JULY 2006”

WARNING TWO – THIS ANNOTATED DEED OF COVENANT AND ASSURANCE IS TO BE USED AS A GUIDE ONLY. IT IS NOT INTENDED TO TAKE THE PLACE OF THE COVENANTOR AND/OR THE LICENSEE OBTAINING THEIR OWN INDEPENDENT LEGAL ADVICE OR FINANCIAL ADVICE AS REQUIRED BY THE DEED. THE QUEENSLAND BUILDING SERVICES AUTHORITY DISCLAIMS ANY RESPONSIBILITY OR LIABILITY FOR ANY PERSON RELYING UPON THIS DOCUMENT.

1. *The Deed of Covenant and Assurance (“the Deed”) is a legal document and as such must be completed accurately.*

Any corrections to the document must be initialled and accepted by all parties to the Deed. BSA cannot accept Deeds that are not correctly completed or executed.

2. *Fill in the Date of the Deed.* The Deed should be dated when it is executed by both the Licensee and the Covenantor, before providing the original to BSA.
3. *Insert the name of the city* where the Deed was executed.
4. *Insert Date of the Deed*, refer to no.2 above.
5. *Insert the full legal name of the Licensee OR Applicant.* The name should be the entity’s full and complete name.

If the name differs from that of the Licensee or Applicant, the BSA may not be able to accept the Deed.

If the Licensee is a trustee, **no** reference to the trust must be made, as the BSA does not licence trusts.

6. *Insert the physical address of the Licensee.* For a corporate Licensee, insert the business address or registered office of the company.

If the Deed does not state the address of the Licensee, the Deed will not be accepted.

7. *Insert the full name(s) of each Covenantor(s) executing this Deed.*

BSA must be able to clearly identify each party to the Deed. The following will **not** be accepted:

- Mr & Mrs W & J Smith; or
- W Smith and J Smith; or
- W.J.Smith & J.A.Smith

The BSA cannot be certain that other members of the Smith family or relatives of the Smith family do not also have the same initials or a middle name that starts with the same initial. The full names of the covenantors should be used, so that it is clear on both the financial report and the Deed that the covenantors are the same people.

For a general discussion regarding Deeds of Covenant and Assurance refer to sections 2.4.5 and 2.4.6 of the Financial Requirements for Licensing – Effective 1 July 2006.

8. *Insert the physical address of all of the Covenantors.* If the Covenantors have different addresses list them separately against the respective Covenantor.

If the Deed does not state the address of each Covenantor, the Deed will not be accepted.

9. BSA is a party to the Deed. The original must be provided to the BSA so that it can be retained by the BSA, and executed by BSA if necessary.

BSA only executes the Deed in the event the Licensee is placed into Administration or Bankruptcy.

10. *There is no amount mentioned in the Deed.* The “Defined Amount” is described in clause 1.1 as:

“the amount determined pursuant to the Financial Requirements for Licensing, as being the amount assured by the Covenantor to the Licensee by Deed of Covenant and Assurance, as stated in the Independent Review Report or Audit Report provided to the Authority from time to time. The amount is the difference between the Net Tangible Assets held by the Licensee and the Net Tangible Assets required for the Licensee’s Allowable Annual Turnover.”

The value of the Deed is the value listed in the “Financial Information” table in the Independent Review Report or Audit Report in the “Defined Amount” column.

Each year the Appropriately Qualified Person completing the Independent Review Report will state the value of the Deed for the coming year.

11. *The Covenantor(s) is warranting there are no changes to the gazetted pro forma Deed of Covenant and Assurance* (a copy of which can be found at the BSA web site www.bsa.qld.gov.au).

The Deed cannot be amended in any way to the gazetted form. If the form is amended the BSA will reject the Deed.

12. *Similar to no.11 above*, the Licensee is warranting there are no changes to the gazetted pro forma Deed of Covenant and Assurance (copy of which can be found at the BSA web site www.bsa.qld.gov.au).

The Deed cannot be amended in any way to the gazetted form. If the form is amended the BSA will reject the Deed.

13. *The Deed can only be revoked in limited circumstances.* The Deed cannot be legally revoked in any way other than prescribed in the Deed.

14. *Stamp Duty will become payable once the Deed is to be enforced.*
15. *The Covenantor must seek legal advice before the BSA will accept the Deed.*

By signing the Deed, the Covenantor becomes responsible for payment of what could be a significant amount of money if:

- The winding up of the Licensee, being a company, begins under the *Corporations Law*; or
- The Licensee, being a natural person, becomes bankrupt under the *Bankruptcy Act*; and
- The Covenantor receives written demand by the Licensee to pay the “Defined Amount” to the Licensee.

The Covenantor should:

- Consider seeking, and if it thinks fit, obtain independent financial advice before signing this document; and
- Make, and continue to make, its own enquiries about the credit worthiness, financial position and honesty of the Licensee.

16. The Licensee has the choice on whether it wants to receive legal advice on what its obligations are under the Deed.
17. *Depending on whether the Licensee wishes to take legal advice on the Deed will determine how this clause is completed.*

If the checkbox under ‘Statement of Licensee as to legal advice’ is not ticked, it is taken that the Licensee has sought its own legal advice with respect to the Deed.

If the Licensee chooses not to seek legal advice, then it MUST tick the box to indicate this.

18. *A qualified solicitor with a practicing certificate or a qualified practicing barrister must complete Schedule A.*

Schedule A cannot be amended or deleted in any way. If Schedule A is not completed or is amended or deleted the BSA will not accept the Deed.

19. *Full name the Solicitor.* Do not put the firm name. The Solicitor’s name must be inserted.
20. *Address of the Solicitor* of his or her firm.

21. *The Deed must be executed in front of the Solicitor who is executing Schedule A. If the Deed is not executed in front of the Solicitor who has completed Schedule A, BSA will not accept the Deed.*
22. *The date the Solicitor executed Schedule A.*
23. *Solicitor's signature.*
24. *This is the execution clause to be used by natural persons who are party to the Deed.*

If there is more than one natural person, an additional execution clause has been provided for the second natural person on Page 12. The second natural person must execute the Deed in the same manner described below (24a to 24d).

- 24a. *Full name the person signing this execution clause.*
- 24b. *Signature of person in 24a above.*
- 24c. *Signature of person who is witnessing the signature of the person in 24a above.*

If the person executing this clause is doing so in their capacity as Covenantor, then the witness to the person's signature should be the person's Solicitor as per Schedule A.

- 24d. *Full name of person in 24C above (witness of execution).*
25. *This is the execution clause to be used by a company that has 2 or more Directors that is legally able to execute the Deed (with or without the use of a common seal).*

If there is more than one company has 2 or more directors that is able to execute the Deed (with or without the use of a common seal), an additional execution clause has been provided for the second company on Page 12. The second company would execute the Deed in the same manner described below (25a to 25f).

- 25a. *Name of company signing this execution clause.*
- 25b. *Apply common seal of company here, if common seal is required under the company's constitution.*
- 25c. *Signature of Director of company in 25a above.*
- 25d. *Full name of Director of company signing in 25c above.*

25e. *Signature of 2nd Director or Secretary* (delete whichever is not applicable) of 25a above.

25f. Full name of 2nd Director or Secretary signing in 25e above.

26. This is the execution clause to be used by a Company that has only one (1) Director.

If there is more than one company that is a sole Director company able to execute the Deed, an additional execution clause has been provided for the second company on Page 12. The second company would execute the Deed in the same manner described below (26a to 25e).

26a. *Name of company signing this execution clause.*

26b. *Signature of Director* that is signing for and on behalf of the company in 26a above.

26c. *Full name of Director signing* in 26b above.

26d. *Signature of witness that witnessed the Director's execution*, in 26b above.

26e. *Full name of person in 24C above* (witness of execution).

If the company executing this clause is doing so in their capacity as Covenantor to the Licensee, then the witness to the Directors signature should be the company's Solicitor as per Schedule A.

27. BSA is party to the Deed and executes the Deed here. Refer to 9 above.

For any general questions regarding the Deed, please refer to the Financial Requirements for Licensing or the Frequently Asked Questions both found at the BSA website www.bsa.qld.gov.au.