



# BUILDER AGREEMENT

THIS BUILDER AGREEMENT DATED: ..... / ..... / 20.....

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## PARTIES:

1. **Building Ethics Australia Pty Ltd ACN 005 057 125**  
of Unit 1, 1<sup>st</sup> Floor, 100A Douglas Parade, Williamstown VIC 3016  
("BEA")
2. **The Builder named in the execution provisions**

## BACKGROUND

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- A. BEA has, in conjunction with an insurer, developed a risk management and quality assurance Program to enable Home Warranty/Indemnity insurance to be obtained by Builders in respect of their domestic building work, without the need for a personal guarantee.
- B. BEA has agreed to allow the Builder to participate in and become accredited as a Builder under the Program, and to grant the Builder authority to use BEA's trademark associated with the Program.
- C. By signing this Agreement, the Builder agrees to be bound by these terms and conditions.

## OPERATIVE PROVISIONS

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### 1. Definitions

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- 1.1 The following words shall have the corresponding meaning:
  - "**Affiliate**" means a related entity to the Builder as defined in the Corporations Act or entity of which the Builder can significantly influence decisions
  - "**BEA Certificate of Registration**" means a certificate issued by BEA to a Builder granting the Builder accreditation as a participant in the Program
  - "**BEA Contract Addenda**" means BEA's standard pre-conditions relating to the payment of instalments under a Contract, which are to be included in any Contract that is registered or required to be registered with BEA, as specified in the Builder Manual or otherwise notified by BEA to the Builder from time to time.
  - "**Builder**" means the party specified as such in the execution provisions of this Agreement
  - "**Builder Manual**" means the procedures Builder Manual developed by BEA for the Program, as amended by any changes or updates of which BEA has given at least 60 days notice to the Builder
  - "**Contract**" means a Contract to carry out or to arrange or manage the carrying out of:
    - if the State is **Victoria** – "domestic building work" as defined under the provisions of the *Domestic Building Contracts Act 1995 (Victoria)*,
    - if the State is **New South Wales** – "residential building work" as defined under the provisions of the *Home Building Act 1989 (New South Wales)*

- if the State is **Western Australia** – “home building work” as defined under the provisions of the *Home Building Contracts Act 1991 (Western Australia)* but excludes Contracts outside of those States, and Contracts which have a value (inclusive of GST) of less than the amount requiring Home Warranty/Indemnity Insurance relevant to the States legislation applicable at the date of the Contract.
- “**Client**” means any party with whom a Builder enters into a Contract
- “**GST**” means the Goods and Services Tax as imposed by the GST Law together with any related interest, penalties, fines or other charges
- “**GST Amount**” means in relation to a Taxable Supply the amount of GST payable in respect of that Taxable Supply
- “**GST Group**” has the meaning given to that term by the GST Law
- “**GST Law**” has the meaning given to that term in A New Tax System (Goods and Services Tax) Act 1999, or, if that Act does not exist for any reason means any Act imposing or relating to the imposition or administration of a goods and services tax in Australia and any regulations made under that Act
- “**Input Tax Credit**” has the meaning given to that term by the GST Law
- “**Late Rate**” means a rate of 10% per annum higher than the rate from time to time specified as the Cash Rate Target by the Reserve Bank of Australia
- “**Mark**” means a name or logo which BEA or an associated entity registers or is entitled to register as a trademark and designates as being available for use by a Builder on signage or stationery
- “**Program**” means the Program conducted by BEA to supervise work carried out pursuant to a Contract by any Builder registered with it and to authorise payment by Clients of those Builders
- “**State**” means the State of Australia in which the relevant building work has been or is to be carried out.
- “**Taxable Supply**” has the meaning given to that term by the GST Law
- “**Tax Invoice**” has the meaning given to that term by the GST Law

1.2 In the interpretation of this Agreement, unless the context otherwise requires:-

- (a) Words importing the singular shall include the plural and vice versa.
- (b) Words importing any gender shall include every gender.
- (c) References to persons include natural persons, corporations, Governments, Government authorities, local authorities, associations and all other entities at law.
- (d) References to writing includes printing, typing, fax and all other means of reproducing words and/or figures in a visible permanent form, where such words are substantially in the English language.
- (e) Headings in this Agreement are for reference only and are not to be used in construction or interpretation of this Agreement.
- (f) Where any word or phrase is given a defined meaning any other grammatical form of that word or phrase or part of speech shall have a corresponding meaning.
- (g) In this Agreement a reference to a right or obligation of any two or more persons who comprise a party confers that right, or imposes that obligation, as the case may be, jointly and severally and a reference to that party includes a reference to any one or more of those persons.

## **2. Grant of Rights**

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2.1 BEA hereby grants to the Builder for the term of this Agreement, subject to the terms and conditions in this Agreement, the right to:

- (a) participate in the Program from the date that BEA issues the Builder with a BEA Certificate of Registration, granting the Builder accreditation as a participant in the Program until accreditation expires or is suspended or terminated;
- (b) receive a copy of the Builder Manual; and other documents as deemed necessary
- (c) use the Mark in the manner permitted in the Builder Manual.

2.2 This Agreement commences on the date it is signed by both parties and continues until terminated by law, by mutual Agreement or in accordance with this Agreement.

### **3. Builder's Obligations**

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- 3.1 The Builder must at all times comply fully with the Builder Manual in every respect.
- 3.2 The Builder must pay all of the fees set out in the Builder Manual, or as otherwise notified in writing by BEA from time to time, at the times and in the manner specified by BEA.
- 3.3 If the Builder is more than 30 days late in payment of any amounts payable under this Agreement, then the Builder must also pay interest at the Late Rate calculated on a daily basis on all of the fees then outstanding from the date on which the fee first became due and payable. BEA may waive this obligation on a case by case basis by written notice to the Builder.
- 3.4 The Builder **must**:
- (a) register with BEA every Contract entered into by the Builder during the term of this Agreement.
  - (b) not commence any works under such Contract prior to registration of the Contract.
- 3.5 When registering the Contract, the Builder must specify any information that BEA requests or which is otherwise required under the Builder Manual.
- 3.6 The Builder must:
- (a) include the BEA Contract Addenda in every Contract which is registered or required to be registered under this Agreement,
  - (b) make every Client specifically aware of the BEA Contract Addenda and
  - (c) require every Client to sign each page of the BEA Contract Addenda to indicate the Client's acceptance of it.
- 3.7 Where BEA receives a complaint about any of the Builder's domestic building work and refers the complaint to the Builder, the Builder must immediately investigate the complaint and follow the complaint procedure set out in the Builder Manual.
- 3.8 The Builder must carry out all building work in conformity with the warranty standards set out in the Builder Manual, and any approved building standards and other standards established by BEA from time to time.
- 3.9 The Builder must submit all works carried out under all Contracts entered into by the Builder which are (or are required to be) registered with BEA to inspections by an inspector approved by BEA as and when required at BEA's absolute discretion, and to pay all fees associated with such inspections.
- 3.10 The Builder must remedy any defects notified to BEA by the inspector appointed by BEA within the time and to the standard specified by BEA.

### **4. BEA's Obligations**

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- 4.1 BEA must:
- (a) comply with procedures contained in the Builder Manual
  - (b) take such measures as BEA considers appropriate to continue to maintain, improve, develop and market the Program
  - (c) review and update the Builder Manual, and provide the Builder with a copy of updates, as often as BEA considers appropriate
  - (d) at the Builder's cost, cause inspections of works carried out under Contracts registered by the Builder with BEA to be conducted at the times and in the manner specified in the Builder Manual.

## **5. Accreditation and Re-screening**

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- 5.1 The Builder becomes accredited under the Program from the date that BEA issues the Builder with a BEA Certificate of Registration.
- 5.2 The Builder must continue to comply with any requirements imposed on the Builder by BEA as a condition for accrediting the Builder, and must immediately notify BEA if the Builder ceases to comply with such condition or believes it may no longer be able to comply.
- 5.3 BEA may re-screen the Builder's accreditation annually or at such other times as BEA may choose in its absolute discretion.
- 5.4 If BEA notifies the Builder that BEA intends to re-screen the Builder, the Builder must provide BEA with all documentation and information (including documentation and information concerning any Affiliate of the Builder) requested by BEA promptly after request. BEA may suspend the Builder's accreditation until requested documentation and information is received.
- 5.5 The Builder acknowledges that BEA may notify insurers associated with the Program if the Builder ceases to be accredited under the Program.
- 5.6 BEA may suspend the Builder's accreditation under this Agreement if BEA believes that the Builder has or may intend to commit any breach of this Agreement.

## **6. Termination**

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- 6.1 If the Builder commits a breach of this Agreement, then BEA may by written notice to the Builder demand that the Builder remedy the breach within 14 days of the date of the notice.
- 6.2 If the Builder fails to remedy the breach within the period specified in the notice, BEA may by further written notice to the Builder do any or all of the following:
- (a) terminate this Agreement;
  - (b) suspend the Builder's accreditation under this Agreement;
  - (c) demand payment of liquidated damages resulting from the Builder's breach, which the Builder must pay within 7 days of the notice.
- 6.3 If BEA terminates this Agreement, then the Builder's accreditation under this Agreement immediately ceases, and the Builder must immediately:
- (a) return the Builder Manual and all documents or signs displaying the Mark to BEA,
  - (b) return all property of BEA to BEA;
  - (c) cease using the Mark and any other intellectual property owned or controlled by BEA,
  - (d) cease representing himself to be an accredited Builder under the Program;
  - (e) notify any party to any Contract of the Builder in respect of which works have not commenced that the accreditation of the Builder has ceased;
  - (f) pay all monies owing to BEA as at the time of termination.
- 6.4 BEA or the Builder may terminate this Agreement by giving 30 days notice in writing to the other, for any reason.
- 6.5 The Builder's obligations under this Agreement do not merge on termination and, without limitation, shall continue in respect of:
- (a) any monies which remain due and owing by the Builder to BEA;
  - (b) any Contracts registered under the Agreement;
  - (c) any indemnities given by the Builder to BEA.
  - (d) the obligation to submit works to inspection.

## **7. Liquidated Damages**

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- 7.1 If the Builder commits any breach of this Agreement, BEA may issue a notice to the Builder specifying the damages incurred by BEA as a result of the Builder's breach.
- 7.2 The amount must be paid by the Builder within the time specified in the notice or if none is specified within 7 days of the date of the notice.
- 7.3 The amount specified in any such notice must not exceed 5% of the Contract value for the relevant Contract (except in the case where the notice is issued after the Builder has terminated or purported to terminate this Agreement, in which case the amount is 10%).

## **8. Disclaimer and Indemnity**

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- 8.1 The Builder acknowledges that inspections carried out by or on behalf of BEA are not a certification that building works comply with applicable building codes, and must not be relied on by the Builder in any way.
- 8.2 The Builder hereby releases BEA and its officers, directors, employees, agents and contractors from and indemnifies them against all liability arising in relation to any loss or damage suffered directly or indirectly by any person in connection with this Agreement or any service provided or activity carried out by or on behalf of BEA under this Agreement.

## **9. Privacy**

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- 9.1 The Builder authorises BEA to pass personal, business or other information about the Builder and its Affiliates to parties who are professional advisers of BEA or who are connected with the Program such as legal practitioners, finance advisers, accountants, insurers, insurance brokers and claim investigators, or to government departments and agencies, or as required by law. BEA will otherwise endeavour to keep such information confidential.

## **10. GST**

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- (a) Unless a payment under this Agreement is specifically and expressly stated to be inclusive of GST, all payments to be made under or in connection with this Agreement have been calculated without regard to GST;
- (b) If the whole or any part of any payment is the consideration for a Taxable Supply, the payer must pay the payee an additional amount equal to the GST payable on that Taxable Supply;
- (c) Unless otherwise agreed in writing, such additional amount is to be paid either when the relevant payment is made or, if earlier, on the due date for the making of that payment;
- (d) Any reference to a cost or expense in this Agreement excludes any amount in respect of GST forming part of the relevant cost or expense when incurred by the relevant party for which that party (or another member of a GST Group of which that party is a member) can claim an Input Tax Credit;
- (e) The payee must provide to the payer a valid Tax Invoice in accordance with the GST Law; and
- (f) This clause will continue to apply after expiration or termination of this Agreement.

## **11. Mediation**

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- 11.1 If a dispute arises out of or relating to this Agreement neither party may commence any court proceedings unless it has complied with this clause, except where the party seeks urgent interlocutory relief:-
- (a) the party claiming that a dispute has arisen under or in relation to this Agreement must give written notice to the other party specifying the nature of the dispute;
- (b) on receipt of that notice by the other party, the parties to this Agreement must endeavour in good faith to resolve the dispute expeditiously using mediation;

- (c) the parties must jointly appoint a mediator located in the capital city of the State and agree on the mediator's remuneration. If the parties fail to agree on the appointment and remuneration within five (5) days of service of the notice either party may apply to the president of the Law Institute or Law Society of the State (as the case may be) or his or her nominee to appoint a mediator and determine the mediator's remuneration;
  - (d) the parties must observe the instructions of the mediator about the conduct of the mediation;
  - (e) if the dispute is not resolved within thirty (30) days after the mediator is appointed or any other time that the parties agree to in writing the mediation ceases;
  - (f) the mediation must be conducted in Melbourne unless both parties agree otherwise.
- 11.2 Each party must pay an equal share of the costs of the mediation and if requested by the mediator must each indemnify him or her against liability in respect of the mediation.
- 11.3 If the dispute is resolved, each party must sign the terms of settlement which terms are binding on the parties. If there is any inconsistency the terms of settlement prevail over this Agreement.
- 11.4 The mediation procedure is confidential and:-
- (a) written statements prepared for the mediator or for a party; and
  - (b) any discussion between the parties and between the parties and the mediator before or during the mediation procedure;
- cannot be used in any legal proceedings.
- 11.5 If a party does not comply with any executed terms of settlement the other party may either commence proceedings enforcing the settlement, or accept the other party's repudiation of the terms of settlement and commence any other proceedings it considers appropriate without further mediation in accordance with this Clause.

## **12. Notices**

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Any notice or other communication in connection with this Agreement shall be deemed to have been duly given or made when delivered in writing or sent by post or fax to the party to which such notice or communication is intended to be given or made, at the following address, or at any other address notified in writing by a party for that purpose:-

**BEA:**

Building Ethics Australia Pty Ltd  
 Unit 1, 1<sup>st</sup> Floor, 100A Douglas Parade  
 Williamstown, Victoria 3016  
 Phone: 03 9397 4166  
 Facsimile: 03 9397 4188

**Builder:**

the address specified in the execution provisions

Any notice or other communication sent by post shall be deemed to have been served at the expiration of two (2) business days after the date of posting. If sent by fax it shall be deemed to have been received upon completion of an apparently successful transmission to the recipient. If a fax is not transmitted during usual business hours at the location of the recipient it shall be deemed to have been received at the commencement of business on the next business day.

## **13. Waiver**

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Failure by any party to require performance by any other party of any term of this Agreement shall not affect the right of that party to subsequently enforce that term. The waiver by any party of any breach by another party of any term of this Agreement shall not be construed as a waiver by that party of any subsequent breach of that term.

**14. Costs**

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Each party must bear its own costs with respect to the negotiation and preparation of this Agreement.

**15. Governing Law**

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This Agreement shall be governed by and construed in all respects in accordance with the laws of the State. The parties submit to the jurisdiction of the Courts of the State.

**16. Counterparts**

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This Agreement may be executed in any number of counterparts. All counterparts together will be taken to constitute one instrument.

**17. Variation**

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No variation to this Agreement is effective unless it is in writing and executed by each of the parties.

**18. Entire Agreement**

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This Agreement contains the entire Agreement between the parties with respect to its subject matter. It sets out the only conduct relied on by the parties and supersedes all earlier conduct and prior Agreements and understandings between the parties in connection with its subject matter.

**19. Nature of Relationship**

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The Builder acknowledges that it is an independent contractor from BEA, and that nothing in this Agreement creates the relationship of principal and agent between the parties. The Builder has no power to pledge the credit of BEA or to otherwise commit BEA to any contractual or other liability.

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**EXECUTED AS AN AGREEMENT:**

**EXECUTED** by **BUILDING ETHICS AUSTRALIA PTY LTD ACN 005 057 125** by being signed by an authorised representative for the company:

BEA authorised representative Signature: .....

BEA authorised representative Full Name: .....

**SIGNED** by the **BUILDER**

Builder Signature: ..... Date: .....

Builder Full Name: .....

Builder ABN: .....

Builder Address: .....