

## ENFORCEABLE UNDERTAKING

Superannuation Industry (Supervision) Act 1993

Section 262A

THESE UNDERTAKINGS ARE GIVEN BY:

**GAVEX PTY LTD** ACN 010 660 312 (Gavex) c/- Allen Arthur Robinson, Riverside Centre, 12 Eagle Street, Brisbane QLD 4000

and

**RODNEY JAMES MCCAFFERTY** (Rodney McCafferty) c/- Allens Arthur Robinson, Riverside Centre, 123 Eagle Street, Brisbane QLD 4000

and

**KENNETH AUBREY MCCAFFERTY** (Kenneth McCafferty) c/- Allens Arthur Robinson, Riverside Centre, 123 Eagle Street, Brisbane QLD 4000

(the *Promisors*)

IN RELATION TO:

**SEVENTH FLOOR SUPERANNUATION FUND** SFN 512 095 065 (the Fund)

AND ARE ACCEPTED BY:

**AUSTRALIAN PRUDENTIAL REGULATION AUTHORITY** of Level 26, 400 George Street, Sydney NSW 2000 (APRA)

under section 262A of the *Superannuation Industry (Supervision) Act 1993* (the **SIS Act**). A copy of section 262A is enclosed in Schedule 1.

### Part I

#### BACKGROUND

- A. Gavex is an Australian proprietary company registered under section 118 of the *Corporations Act 2001*.
- B. The Fund is a registrable superannuation entity within the meaning of section 10 of the *SIS Act*. Gavex is the trustee of the Fund, and it has acted in this role continuously from 8 May 2000 until now.
- C. Rodney McCafferty and Kenneth McCafferty are directors of Gavex, and they have held those roles continuously from 10 September 1986 until now. John Tony McCafferty (Tony McCafferty) was a director of Gavex from 10 September 1986 until 15 June 2004. Rodney McCafferty, Kenneth McCafferty and Tony McCafferty are the only members of the Fund.
- D. The Fund was established on 8 May 2000 as a self managed superannuation fund (SMSF), within the meaning of section 17A of the *SIS Act*.
- E. From 16 June 2004, the Fund ceased to satisfy the basic conditions for a SMSF under sub paragraph 17A(1)(d)(ii) of the Act because Tony McCafferty was a member of the Fund but

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he was no longer a director of Gavex. By operation of subsection 17A(4) of the Act, the Fund ceased to be an SMSF from 15 December 2004 and, with immediate effect, APRA became the regulator for the Fund under the SIS Act.

- F. Between October and December 2006, APRA received information from Allens Arthur Robinson, acting on behalf of the Promisors, in relation to payments made from the Fund's bank account. The information disclosed that, from 15 December 2004 to 30 September 2005, inclusive, Gavex made payments (the Payments) totalling \$187,541.87 from the Fund's bank account.
- G. Based on the information available, APRA is concerned that:
- the Payments did not satisfy the conditions of release of benefits under the payment standards set out in Part 6 of the SIS Regulations;
  - the Payments were made by Gavex without the knowledge and consent of Rodney McCafferty or Kenneth McCafferty, who each became aware of the Payments in or after October 2005; and
  - prior to October 2005, Rodney McCafferty and Kenneth McCafferty were not directly involved in the management of the Fund.
- H. After 1 July 2006:
- Section 29J of the *SIS Act* required the trustee of a registrable superannuation entity to hold an RSE Licence, as defined in section 10 of the Act; and
  - Regulation 7.03A of the *Superannuation Industry (Supervision) Regulations 1994* (the SIS Regulations) prohibited the trustee of a registrable superannuation entity from accepting contributions into the fund if the fund was not registered under Part 2B of the *SIS Act*; and
  - Section 29L of the *SIS Act* provided that only a trustee that held an RSE licence could register a fund.
- I. APRA is concerned that Gavex does not hold, and does not propose to apply for, an RSE Licence.
- J. In response to APRA's concerns, the Promisors have offered to give these Undertakings to APRA in the terms set out below.

## Part 2

### ACKNOWLEDGEMENTS

1. The Promisors each acknowledge that:
  - (a) These Undertakings are given by the Promisors and are accepted by APRA pursuant to section 262A of the *SIS Act*;
  - (b) As the trustee of the Fund, Gavex had a duty to ensure that the Fund was maintained solely for the purposes set out in subsection 62(1) of the *SIS Act*;
  - (c) As the trustee of the Fund, Gavex also had a duty to comply with the payment standards set out in Part 6 of the SIS Regulations;

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- (d) Gavex should not have made the Payments because they contravened the payment standards set out in Part 6 of the SIS Regulations, and subsection 62(1) of the *SIS Act*;
  - (e) As trustee directors, Rodney McCafferty and Kenneth McCafferty each had a duty to ensure that Gavex complied with the *SIS Act* and the SIS Regulations;
  - (f) Rodney McCafferty and Kenneth McCafferty should have exercised reasonable care and diligence to ensure that payments were not made from the Fund except for the purposes set out in the *SIS Act* and the SIS Regulations;
  - (g) The Promisors have voluntarily agreed to give these Undertakings;
  - (h) The Promisors have obtained legal advice before executing these Undertakings;
  - (i) The Background to these Undertakings form part of the Undertakings;
  - (j) APRA may issue a media release on execution of these Undertakings, being a media release which fairly reflects the terms of these Undertakings and the concerns of APRA which led to their execution, and may;
    - (i) from time to time publicly refer to these Undertakings; and
    - (ii) make these Undertakings available for public inspection;
  - (k) APRA may enforce these Undertakings regardless of the publicity this enforcement action may cause;
  - (l) APRA may monitor the Promisors' compliance with the Undertakings by, inter alia periodic reviews of relevant public filings and databases at its disposal; and
  - (m) In the event of the Promisors falling to comply with the terms of this undertaking, APRA may consider disqualifying them from being or acting as someone referred to in subsection 120A(3) of the Act, removing Gavex as the Trustee and appointing an acting trustee to the Fund.
2. APRA acknowledges that:
- (a) The Promisors voluntarily notified APRA about the Payments; and
  - (b) they cooperated with APRA's inquiries into the Fund and the Payments.

### Part 3

#### THE UNDERTAKINGS

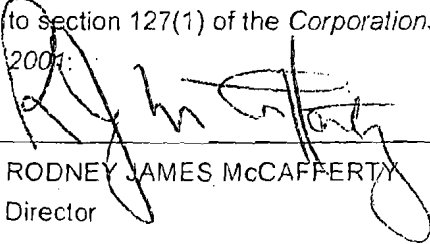
3. The Promisors undertake as follows:
- (a) The Promisors will ensure that Gavex does not make any further payments that are in contravention of the Act or the Regulations.
  - (b) The Promisors will wind-up the Fund and lodge the audited Annual Return for Wound-Up Superannuation Entities with APRA by 31 October 2007, or appoint an RSE licensee to become the trustee of the Fund.
  - (c) To facilitate the undertaking given in paragraph 2(b), the Promisors will:
    - (i) not admit new members to the Fund;


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- (ii) not accept contributions to the Fund; and
    - (iii) comply promptly with APRA's requests for information as to the Promisors' progress in complying with this Undertaking.
  - (d) The Promisors will advise APRA in writing within 3 business days of becoming aware of:
    - (i) a breach by the Promisors of a provision in the Act or the Regulations; or
    - (ii) the occurrence of an event having a significant adverse effect on the financial position of the Fund.
  - (e) The Promisors will continue to give all reasonable assistance to APRA in relation to its inquiries into any matter relating to the Payments or the Fund.
4. In addition to the above, Rodney McCafferty and Kenneth McCafferty each undertake as follows:
- (a) For a period of 10 years commencing on 1 November 2007, neither person will be, or act as:
    - (i) A trustee of a superannuation entity;
    - (ii) A responsible officer of a body corporate that is a trustee of a superannuation entity;
    - (iii) An investment manager of a superannuation entity;
    - (iv) A responsible officer of a body corporate that is an investment manager of a superannuation entity;
    - (v) A custodian of a superannuation entity; or
    - (vi) A responsible officer of a body corporate that is a custodian of a superannuation entity.

EXECUTED AS AN UNDERTAKING this

3<sup>rd</sup> day of August 2007

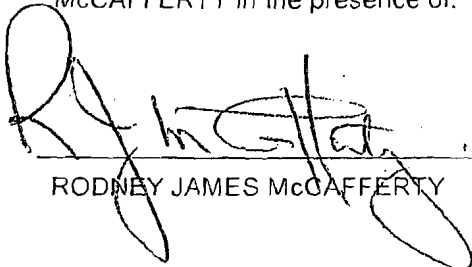
EXECUTED by GAVEX PTY LTD ACN 010  
660 312 by its authorised officers pursuant  
to section 127(1) of the Corporations Act  
2001:

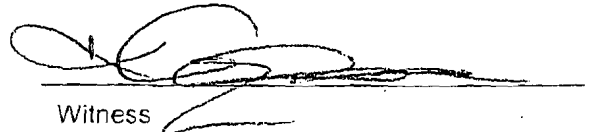
  
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RODNEY JAMES McCAFFERTY  
Director

  
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KENNETH AUBREY McCAFFERTY  
Director

EXECUTED by RODNEY JAMES  
McCAFFERTY in the presence of:

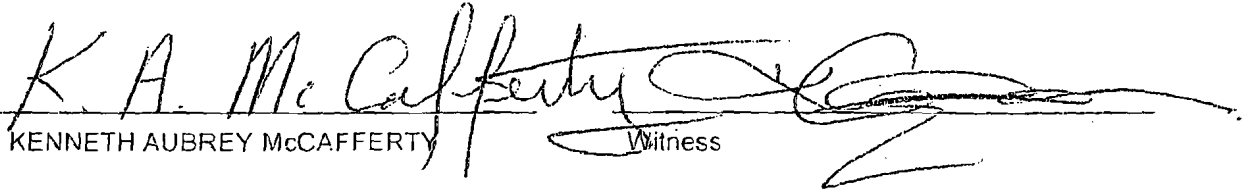
Kym Louise Cavanagh, Solicitor


  
\_\_\_\_\_  
RODNEY JAMES McCAFFERTY

  
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Witness

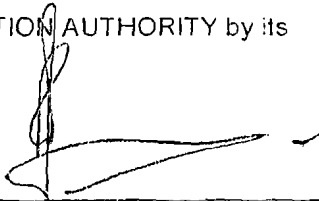
EXECUTED by KENNETH AUBREY  
McCAFFERTY in the presence of:

Kym Louise Cavanagh, Solicitor

  
\_\_\_\_\_  
KENNETH AUBREY McCAFFERTY

  
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Witness

ACCEPTED under section 262A of the  
*Superannuation Industry (Supervision) Act*  
1993 by the AUSTRALIAN PRUDENTIAL  
REGULATION AUTHORITY by its  
delegate:

  
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[Name of Delegate] ROGER HEATH CHARLES BROWN  
Delegate GENERAL MANAGER - ENFORCEMENT

16 AUGUST 2007