

## ENFORCEABLE UNDERTAKING

*Australian Securities and Investments Commission Act 2001*

### Section 93AA

The commitments in this undertaking are offered to the Australian Securities and Investments Commission (ASIC) by:

Barakah Properties Pty Ltd

ACN 127 976 658

45 Harvest Home Road

EPPING Victoria 3076

### 1. DEFINITIONS

In addition to terms defined elsewhere in this undertaking, the following definitions are used:

**AFSL** means Australian financial services licence;

**ASIC Act** means the *Australian Securities and Investments Commission Act 2001* (Cth);

**ASX** means Australian Securities Exchange Limited;

**Barakah** means Barakah Properties Pty Ltd (ACN 127 976 658);

**Corporations Act** means the *Corporations Act 2001* (Cth); and

**Corporations Regulations** means the Corporations Regulations 2001 (Cth); and

**EU** means this Enforceable Undertaking.

## **2. BACKGROUND**

### **ASIC's role**

- 2.1 Under section 1 of the ASIC Act, ASIC is charged with a statutory responsibility to perform its functions and to exercise its powers so as to promote the confident and informed participation of investors and consumers in the financial system.

### **Barakah**

- 2.2 Barakah was registered on 12 October 2007 in Victoria.
- 2.3 Barakah is, and has been at all times, an Australian proprietary company limited by shares.
- 2.4 Barakah's sole activity is the construction of educational and related facilities which are leased to Al Siraat College, Melbourne.

### **Capital Raising**

- 2.5 To raise capital for use in constructing and expanding facilities for the Al Siraat College and to give local interested parties the opportunity to invest, Barakah has sought investment by issuing shares in the company to members of the Islamic community.
- 2.6 The company explained its investment options on its website in the following way:

*"We offer the opportunity to invest in the building of quality infrastructure for the ummah whilst providing investment returns.*

*We have two main operations: Securing investments for our project (Al Siraat College); and Site development and construction.*

*Investments are made in Barakah Properties through simple share purchases. The funds received through this equity based model are used for acquiring land and undertaking building projects.*

*We currently have one active project, with the site being leased to Al Siraat College located in Epping.*

*Investment returns (which are shariah compliant) are achieved through our leasing operation and an increase in the value of the land asset.*

*Barakah Properties is an Islamic organisation based on developing and building the community by investing in an Ummah building asset."*

- 2.7 Barakah raised funds by issuing shares to investors between 2009 and 2015.
- 2.8 In its 2014 Annual Report, Barakah stated that the value of investor monies invested in its shares totalled \$10,475,689.
- 2.9 Barakah has not provided disclosure to investors under Part 6D.2 of the Corporations Act in connection with any offers of securities that it has made.

### **Repurchase of Shares**

- 2.10 In each instance where investors sought the return of their investment with Barakah, the company returned the investment by purchasing the shares back from the investor.
- 2.11 Barakah did not comply with any of the share buyback procedures specified by Division 2 of Part 2J of the Corporations Act in connection with the repurchase of investor shares.

### **Financial Advice**

- 2.12 Barakah or its representatives, employees, directors or officers have, in various ways between 2009 and 2015, suggested to some potential investors that Self-Managed Superannuation Funds (SMSF) could be used as a vehicle for their investment in the company. For example a PowerPoint presentation was used at information sessions held by the Barakah in 2013 and 2014 and made available on the company's website that stated that investors:
- (a) Should set up an SMSF,
  - (b) Change their existing fund with their employer, and
  - (c) Rollover their existing balance before purchasing shares in Barakah.
- 2.13 At no relevant time has Barakah or any of its representatives, employees, directors or officers held an AFSL or been authorised representatives of an AFSL holder.

### **3. ASIC'S ENQUIRIES**

- 3.1 In late 2015, ASIC contacted Barakah and requested details of the company's activities and various company records.
- 3.2 ASIC reviewed the material provided and on 21 December 2015 wrote to Barakah outlining its concerns.

## ASIC'S CONCERNS

- 3.3 As a result of its enquiries, and by reason of the matters outlined in paragraphs 2.5 to 2.13 above, ASIC is concerned that, at various times since 2009:
- (a) Barakah has offered securities to investors without disclosure under Part 6D.2 of the Corporations Act in contravention of s727(1) and (4) of the Corporations Act;
  - (b) Barakah advertised offers of securities that required a disclosure document on its website in contravention of s734(2) of the Corporations Act;
  - (c) In giving financial product advice by suggesting that investors set up a SMSF to purchase Barakah shares, Barakah and/or its representatives, employees, directors or officers provided financial services to Barakah investors. The provision of such financial services constituted the conduct of a financial services business within the meaning of the Corporations Act, such business being conducted in circumstances where Barakah and its representatives, employees, directors or officers did not hold an AFSL and were not authorised representatives of an AFSL holder, in breach of s 911A of the Corporations Act;
  - (d) Barakah, a proprietary company, has more non-employee shareholders than the maximum (50) permitted, in contravention of s113 of the Corporations Act; and
  - (e) Barakah has bought back its own shares without complying with the relevant share buyback provisions of the Corporations Act, in particular s257A.

3.4 ASIC is concerned that as a consequence of the conduct outlined above, Barakah has not have complied with the Corporations Act in particular s113, s257A, s727, s734 (2) and s 911A.

#### **4. ACKNOWLEDGEMENT OF CONCERNS**

4.1 Barakah acknowledges:

- (a) ASIC's concerns as set out in paragraph 3.3 and 3.4 above;
- (b) that ASIC's concerns are reasonably held; and
- (c) that it must comply with the requirements of this Enforceable Undertaking (EU) in order to address ASIC's concerns as set out in paragraph 3.3 and 3.4 above.

4.2 Barakah states that its motivation for the securing of investment funds was not for any personal monetary gain, and that the funds received were applied to the school's benefit.

#### **5. UNDERTAKINGS**

5.1 Under s93AA of the ASIC Act, Barakah has offered, and ASIC has agreed to accept as an alternative to ASIC exercising its civil powers under Part 5.4A (s461(k)) and Part 9.5 (s1324), and/ or its administrative powers under Part 2B.7 (s165) of the Corporations Act, the undertakings set out below, which are effective immediately:

- (a) Barakah will not offer securities that require disclosure under Part 6D (2) of the Corporations Act without giving the disclosure required under that Part;
- (b) Barakah will remove all advertising in relation to any offer of its securities that requires a disclosure document from the company's website within one week of the date of the EU;
- (c) Barakah will not advertise (on its website or otherwise) any offers of securities except in compliance with the Corporations Act;
- (d) Barakah will not buy back its own shares without complying with the relevant share buyback provisions contained in Chapter 2J of the Corporations Act, in particular s257A;
- (e) Barakah and its representatives, employees, officers, and directors will not provide any financial advice (as defined by the Corporations Act), including by encouraging or suggesting to investors to invest in Barakah by way of a SMSF, or

recommending how to structure their investments, until such time as they hold an AFSL or become an authorised representative of an AFSL holder;

- (f) Barakah will take the necessary steps to change the company to a public company, and lodge an application with ASIC to change the company's type to a public one within two months of the date of this EU;
- (g) Barakah will, within one week of the date of the execution of this EU, send to each of Barakah's shareholders (by way of email or ordinary post) the following documents:
  - i. A copy of the letter at annexure A, signed by the Managing Director of Barakah; and
  - ii. A copy of the executed EU.
- (h) Barakah will provide a copy of the executed EU to:
  - i. All existing representative and agents, directors, officers and employees of Barakah within one week of the execution of the EU, and
  - ii. All future representatives and agents, directors, officers and employees within one week of their commencement with the company.
- (i) Barakah will, within one month of the execution of this EU, provide ASIC with an Affidavit sworn or affirmed by a director of Barakah who has personal knowledge of the company's compliance with paragraphs 5.1 (f) and (g) above that details:
  - i. Whether or not Barakah has complied paragraphs 5.1 (f) and (g) of this EU in every respect, and
  - ii. If it has not complied with paragraphs 5.1 (f) and (g) of this EU in every respect, the reason for non-compliance.
- (j) Barakah will provide the Affidavit referred to in paragraph 5.1 (h) to ASIC by sending it to Martin Taylor (ASIC Enforcement) via email: [martin.taylor@asic.gov.au](mailto:martin.taylor@asic.gov.au) , or post to GPO Box 9827 Melbourne Vic 3001.

**6. ACKNOWLEDGEMENTS**

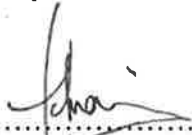
6.1 Barakah acknowledges that ASIC:

- (a) may issue a media release on execution of this EU referring to its terms and to the concerns of ASIC which led to its execution;
- (b) may from time to time publicly refer to the EU; and
- (c) will make this EU available for public inspection.

6.2 Further Barakah acknowledges that:

- (a) ASIC's acceptance of this EU does not affect ASIC's power to investigate, conduct surveillance or pursue a criminal prosecution or its power to lay charges or seek a pecuniary civil order in relation to any contravention not the subject of ASIC's concerns in this EU or arising from future conduct; and
- (b) this EU in no way derogates from the rights and remedies available to any other person or entity arising from any conduct described in this EU or arising from future conduct.

6.3 Barakah acknowledges that this EU has no operative force until accepted by ASIC, and Barakah and ASIC acknowledge that the date of the EU is the date on which it is accepted by ASIC.

  
.....Dated: 16/03/2016..

Fazeel Arain.

Accepted by the Australian Securities and Investments Commission under s93AA of the ASIC Act by its duly authorised delegate:

  
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Delegate of Australian Securities and Investments Commission

Date: 18/3/2016