

**UNDERTAKING TO THE
EXECUTIVE DIRECTOR, OPERATIONS,
NSW FAIR TRADING**

GIVEN BY

Andrew Peter Barclay

**FOR THE PURPOSES OF SECTION 218 OF THE
AUSTRALIAN CONSUMER LAW (NSW)**

PERSON GIVING THIS UNDERTAKING

1. This Undertaking is given to the Executive Director, Operations, NSW Fair Trading, Department of Customer Service by the following:
 - a. Mr Andrew Peter Barclay, born [REDACTED] 1978 ("**Mr Barclay**");
2. Where this Undertaking is given by an individual, it is given in that individual's personal capacity.

INTERPRETATION AND DEFINITION

3. In this undertaking, unless the context otherwise indicates:
 - a. "**ACL**" means the *Australian Consumer Law (NSW)*;
 - b. "**Commissioner**" means the Commissioner for New South Wales Fair Trading;
 - c. "**Consumer**" has the same meaning as section 3 of the ACL;
 - d. "**Executive Director**" means the executive Director, Operations, for New South Wales Fair Trading;
 - e. "**NSWFT**" means New South Wales Fair Trading;
 - f. "**Services**" have the same meaning as section 2 of the ACL;
 - g. "**Supply**" has the same meaning as in section 2 of the ACL.
 - h. "**The Act**" means the *Fair Trading Act 1987 (NSW)*.

BACKGROUND

4. The Commissioner, the Executive Director and NSWFT perform functions pursuant to section 9 of the Act, including the receipt and investigation of complaints and securing compliance with the provisions of the Act, the ACL and any other legislation administered by the Minister for Customer Service from time to time.
5. Todo Travel Pty Ltd ACN 166 782 654 ("**Todo**") is an Australian registered corporation first registered on 14 November 2013.

6. Mr Barclay was the sole Director of Todo between 14 November 2013 and 29 November 2018.
7. On 18 January 2017 and 29 September 2017, Todo became the registrant of the business names Big Top Events and Shark Island Wine & Music Festival respectively.
8. Todo engaged in trade or commerce within Australia using the names Shark Island Wine & Music Festival and Big Top Events as an organiser of entertainment events and public festivals.
9. Todo held the following bank accounts with the Commonwealth Bank and Mr Barclay was a signatory to those accounts together with two other persons:
 - a. Business Transaction Account [REDACTED]
 - b. Business Transaction Account [REDACTED]
 - c. Business Online Saver Account [REDACTED]
10. In addition, Mr Barclay held the following accounts with the Commonwealth Bank:
 - a. [REDACTED]
 - b. [REDACTED]
 - c. [REDACTED]
 - d. [REDACTED]
11. On or about 20 April 2017, Mr Barclay using the business name Big Top Events made an application ("**the Application**") to the NSW Office of Environment and Heritage ("**OEH**") to hold the Shark Island Wine & Music Festival ("**the Festival**") on Shark Island in Sydney NSW. The application was approved on the condition that Mr Barclay provided OEH with additional documentation, including plans and specifications, and paid the applicable fee.
12. Following the conditional approval of that application, OEH and Mr Barclay entered into an agreement on 19 September 2017 for the Festival to be held between 2 February 2018 to 4 February 2018 inclusive however these dates were later changed to between 9 February 2018 to 11 February 2018 inclusive.
13. On or about 28 September 2017, Todo began to advertise the Festival and to sell tickets to the Festival. Tickets were initially sold via the online ticketing agency Eventbrite but

were later only sold via the Festival website <www.sharkwine.com.au> ("the Website"), the Ticket Fairy website and the Scoopon website.

14. Monies relating to tickets purchased through the Website and the Ticket Fairy website were received by online credit card merchant platform Stripe Payments Australia Pty Ltd ("**Stripe**") and ultimately paid into bank accounts held by either Todo or Mr Barclay.
15. In total, Stripe paid \$7,574.06 into an account held by Mr Barclay and \$24,291.59 into accounts held by Todo for tickets sold between 29 September 2017 and 17 January 2018.
16. On or about 5 January 2018, OEH revoked the conditional approval given to Mr Barclay on the basis that Mr Barclay had not provided the additional documentation or paid the applicable fee.
17. On or about 5 February 2018, Todo emailed ticket holders informing them that the Festival was being postponed to the Spring of 2018 however, the Festival ultimately did not go ahead.
18. After the Festival was postponed, the Ticket Fairy, Eventbrite and Scoopon issued refunds to consumers who purchased tickets through their websites however, consumers who had purchased tickets through the Website did not receive refunds.
19. Between 25 January 2018 and 31 March 2019 NSWFT received 20 complaints from consumers who had purchased tickets to the Festival via the Website and who had not received a refund.
20. On or about 10 April 2018 NSWFT, commenced an investigation into the activities of Mr Barclay and Todo. As a result of that investigation, the following alleged contraventions of the ACL were identified: sections 18, 36(3), 36(4), 158(5) and 158(7).

MISLEADING, DECEPTIVE AND OTHERWISE UNLAWFUL CONDUCT

21. It is alleged by NSWFT, and Mr Barclay accepts that Mr Barclay and Todo contravened sections 18, 36(3), 36(4), 158(5) and 158(7) of the ACL.

Section 18

22. Mr Barclay and Todo contravened section 18 of the ACL. The particulars of the contraventions are as follows:

- a. The terms of the conditional approval of the Application required Mr Barclay and Todo to pay to OEH an amount of \$5,000 and to submit required documentation to OEH by 25 September 2017;
- b. By that date no such payment had been made to OEH by Mr Barclay and Todo and the required documentation had not been submitted to OEH by them;
- c. Mr Barclay and Todo advertised the Festival from 28 September 2017 to 5 February 2018 on the Website and accepted payments for tickets, when Mr Barclay and Todo knew that the OEH had only conditionally approved the Application pending receipt of \$5,000 and documentation and that formal approval by OEH of the Festival had not been provided;
- d. Mr Barclay and Todo knew that in the absence of approval of the Application by OEH the Festival could not go ahead;
- e. Mr Barclay and Todo continued to advertise the Festival between 16 January 2018 and 5 February 2018 knowing that on 16 January 2018 Mr Barclay had informed OEH that the Festival was cancelled or postponed.

Section 36(3) and 36(4)

23. Mr Barclay and Todo contravened sections 36(3) and 36(4) of the ACL. The particulars of the contraventions are as follows:

- a. Between 28 September 2017 and 5 February 2018, Mr Barclay and Todo advertised the Festival on the Website and accepted payment for tickets knowing that or being reckless as to the fact that:
 - i. The OEH had not approved the Application;
 - ii. In the absence of approval by OEH, the Festival could not go ahead;
 - iii. The Festival was postponed on 16 January 2019 and subsequently cancelled;
 - iv. The services for which payment had been accepted by Mr Barclay and Todo would not be provided.
 - v. The services were ultimately not provided.

Section 158(5)

24. Mr Barclay and Todo contravened section 158(5) of the ACL. The particulars of the contraventions are as follows:

- a. Between 28 September 2017 and 5 February 2018, Mr Barclay and Todo advertised the Festival on the Website and accepted payment for tickets knowing that or being reckless as to the fact that:
 - i. The OEHL had not approved the Application;
 - ii. In the absence of approval by OEHL, the Festival could not go ahead;
 - iii. The Festival was postponed from 16 January 2019 and subsequently cancelled;
 - iv. In the circumstances Mr Barclay and Todo were reckless as to whether the services for which payment had been accepted by Mr Barclay and Todo could be provided.
 - v. The services were ultimately not provided.

Section 158(7)

25. Mr Barclay and Todo contravened section 158(7) of the ACL. The particulars of the contraventions are as follows:

- a. Between 28 September 2017 and 5 February 2018, Mr Barclay and Todo accepted payment for tickets to the Festival but failed to provide the services within the period specified at or before the time of payment or within a reasonable time.

OBLIGATIONS UNDER THE UNDERTAKING - CORRECTIVE COMPONENT

Agreement not to conduct entertainment events and festivals

26. Mr Barclay undertakes that for a period of five (5) years from the date of acceptance of this Undertaking, he will not, in trade or commerce, conduct, be engaged in or be involved in, whether or not in a personal capacity, as a sole trader, as a trustee of a trust, as a beneficiary of a trust, in partnership with, through the agency of another person or chain of persons, through an employee, through a company or the agency of a company

(whether or not that company is one of which the defendant is an officer or shareholder) supply or offer for supply, any services for the advertising, promotion, organising and conduct of any entertainment event or public festival of any kind in NSW.

27. Mr Barclay undertakes that for a period of five (5) years from the date of acceptance of this Undertaking, he will not, in trade or commerce, conduct, be engaged in or be involved in, as a trustee of a trust, as a beneficiary of a trust, in partnership with, through the agency of another person or chain of persons or another company or chain of companies, (whether or not that company is one of which the defendant is an officer or shareholder) through an employee, or the agency of an employee, contravene any provision of the Australian Consumer Law.

COMMENCEMENT OF UNDERTAKING

28. This Undertaking comes into effect when the Executive Director accepts it pursuant to section 218 of the ACL and continues for a period of five (5) years from that date.

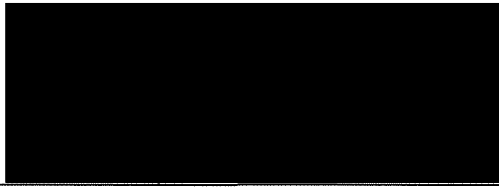
SCOPE OF UNDERTAKING

29. This Undertaking is intended to have extraterritorial application in so far as the legislative powers, conferred by section 5A of the Act permit.

ACKNOWLEDGMENTS

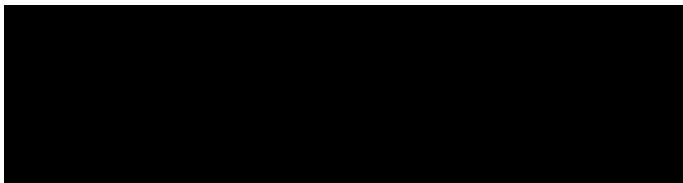
30. Mr Barclay warrants that he has obtained independent legal advice in relation to this Undertaking and that he gives this Undertaking voluntarily, without inducement and compulsion of any kind.
31. In accordance with section 218(2) of the ACL, the persons giving this Undertaking may withdraw from or vary this Undertaking only with the written consent of the Executive Director.
32. If the Executive Director considers that the person giving this Undertaking has breached any of the terms of the Undertaking, the Executive Director may apply to the Supreme Court of New South Wales for an order under section 218(4) of the ACL.
33. NSWFT will make this Undertaking, available for inspection, on the public register pursuant to section 86B of the Act.
34. This Undertaking in no way derogates from:
 - a. the power of the Commissioner or the Executive Director to take any action in respect of a contravention of the Act, the ACL, or any other legislation administered by the Minister; or
 - b. the rights and remedies available to any other person arising from the conduct the subject of this Undertaking.

EXECUTION



Signed by Mr Andrew Peter Barclay

Date: 3/2/20.



Accepted by Valerie Griswold, Executive Director Operations, NSW Fair Trading

Date: 3 Feb 2020