MEDIA ARTS LAWYERS

31 May 2013

Dr Richard Chadwick
The General Manager
Adjudication Branch
Australian Competition and Consumer Commission
GPO Box 3131
CANBERRA ACT 2601

By Email: adjudication@accc.gov.au

Dear Sir,

RE: Australasian Performing Right Association Ltd (APRA) application for revocation of authorisations A91187-A91194 & A91211 and substitution of new authorisations A91367-A91375 – interested party consultation
Submission by Totem Onelove Group Pty Ltd

We act on behalf of Totem Onelove Group Pty Ltd (**TOL**).

We have been instructed by TOL, as an interested party, to file a submission with the Australian Competition and Consumer Commission (the **ACCC**) in relation to the application for re-authorisation (application for revocation and substitution) received from the Australasian Performing Right Association Ltd (**APRA**) on 30 April 2013 (**APRA Application**).

We note that any such submission was to be provided to the ACCC by 24 May 2013. However, we advise that given we only received instructions immediately prior to the deadline, we sought an extension of time in which to provide TOL's submission to the ACCC. On 23 May 2013 we sent an email to Ms Tess Macrae from the ACCC seeking an extension of time until 31 May 2013 in which to provide any submission to the ACCC. By way of return email on 23 May 2013, Ms Tess Macrae confirmed that TOL would be provided with an extension of time in which to file its submission until 31 May 2013.

Accordingly, please find **enclosed** our client's submission in relation to the APRA Application. We also **enclose** a redacted version of the submission removing any confidential and commercially sensitive information of our client. We request that the ACCC only publish the redacted version of the submission.

Yours faithfully,

Marcus Walkom
Media Arts Lawyers

SUBMISSION

TO: **THE AUSTRALIAN COMPETITION AND CONSUMER COMMISSION (ACCC)**

BY: **TOTEM ONELOVE GROUP PTY LTD (TOL)**

RE: **AUSTRALASIAN PERFORMING RIGHT ASSOCIATION LTD (APRA) APPLICATION FOR REVOCATION OF AUTHORISATIONS A91187-A91194 & A91211 AND SUBSTITUTION OF NEW AUTHORISATIONS A91367-A91375**

DATED: **31 MAY 2013**

INTRODUCTION

1. This submission is made by Totem Onelove Group Pty Ltd (**TOL**).

2. This submission is made in response to the Australian Competition and Consumer Commission's (the **ACCC**) consultation process for an application for re-authorisation (application for revocation and substitution) received by the ACCC from the Australasian Performing Right Association Ltd (**APRA**) on 30 April 2013 (**APRA Application**). TOL has been provided with a copy of the letter from the ACCC dated 3 May 2013 where the ACCC invited potentially interested parties to comment on the APRA Application.

3. TOL, as an interested party, seeks to file this submission with the ACCC in relation to the APRA Application and TOL asks that the ACCC, in accordance with section 90 of the CCA, consider this submission in making its determination on the APRA Application.

4. Accordingly, TOL endeavours to address the following points in its submission:

    (a) The general experience of TOL in the previous authorisation period of APRA's standard 'output' arrangements for the acquisition and licensing of performing rights in its music repertoire (**APRA Arrangements**);

    (b) The public detriment and effect on competition that has resulted from the APRA Arrangements during the previous authorisation period; and

    (c) The likely public benefits and public detriments associated with APRA's re-authorisation application.

5. In preparing the submission, consideration was given to the ACCC's primary responsibility of ensuring that individuals and businesses comply with Australian competition, fair trading, and consumer protection laws - in particular the *Competition and Consumer Act 2010 (Cth)* (**CCA**) – and it is noted that the ACCC's focus during the consultation will be on assessing the impact that the APRA re-authorisation may have on both competition and fair trade between industry and consumers.

TOTEM ONELOVE GROUP PTY LTD (TOL)

6. TOL is one of Australia's largest and most successful promoters, festival operators and leading innovators in the festival and dance music scene. Formed following the merger of Totem Industries and Onelove Music in 2007, TOL events have attracted on average over 300,000 people a year throughout Australia with the flagship festivals being 'Stereosonic' and 'Creamfields'.

7. Since 2010, TOL have made payments to APRA in [redacted] in license fees for various TOL events. As such, TOL are to be considered a significant client of APRA.

PART 1 - THE GENERAL EXPERIENCE OF TOL IN THE PREVIOUS THREE-YEAR AUTHORISATION PERIOD

8. During the previous authorisation period, TOL has approached APRA directly on at least eleven (11) separate occasions in order to obtain a license to perform in public various works controlled by APRA at TOL events. On seven (7) of those occasions, TOL has had cause to dispute the license scheme applied by APRA on the basis that:

    (a) APRA has improperly categorised the event; and

    (b) APRA has treated TOL prejudicially to many of its competitors in the music festival arena.

9. On each of those occasions referred to above, TOL has had to engage the services of its lawyers Media Arts Lawyers in order to assist in the resolution of the disputes with APRA. During these disputes, APRA has also engaged the services of its external lawyers. As a result, TOL has incurred significant legal costs to date in seeking to resolve such disputes.

10. The primary issue TOL has with the APRA Arrangements is the difficulty APRA has in appropriately categorising license schemes for particular events and APRA's subsequent inequitable use of its monopolistic power to settle license terms in its favour. APRA itself has acknowledged in prior correspondence with TOL, the difficulty it has in classifying an event for the appropriate license scheme, in particular because of the changing nature of the music that is performed at festival events and the continual evolution of music events. TOL's events focus their attention on electronic music, and as such it is submitted that APRA has, during the previous authorisation period, improperly categorised these events as being a "dance party" and therefore subject to the Dance Party license scheme.

11. Pursuant to the APRA Dance Party license scheme, a "dance party" is defined as "any one-off or occasional event charging an entry fee and playing APRA Works for *dancing as the primary form of entertainment* at the event" (emphasis added)[1]. In addition, APRA has stated that the most influential factor in determining when an event is to be licensed under the Dance Party license scheme is whether the music played at such event is recorded music for dancing. TOL advises that the following events of TOL have been improperly categorised by APRA as a "dance party" during the previous authorisation period:

    Stereosonic 2010
    Creamfields 2010
    Stereosonic 2011
    Creamfields 2011
    Above and Beyond 2011
    Stereosonic 2012
    Creamfields 2012

12. The events listed above are those seven occasions referred to herein where TOL has had cause to dispute the license scheme applied by APRA.

13. As previously advised to APRA, dancing is not the primary form of entertainment at 'Stereosonic' or 'Creamfields' any more than it is at other major music events such as the 'Big Day Out', 'Splendour In The Grass' and 'Falls Festival' (which our investigations reveal are categorised under the Featured Music Event license scheme). It is submitted that 'Stereosonic' and 'Creamfields' are daytime events that are universally classified by

[1] APRA Application, Attachment 7.

the broader music and legislative community as “music festivals” and are equivalent and substitute events to the ‘Big Day Out’, ‘Splendour In The Grass’ and ‘Falls Festival’.

14. Whilst some patrons at ‘Stereosonic’ and ‘Creamfields’ dance, the primary form of entertainment is listening to new international and national music and performers and both events contain a mixture of live bands (comprising close to half the musical line-up), electronic music DJ’s, food, bars, stalls, side shows, performers and other entertainment. No other authority (including the police, councils and other licensing bodies) categorise either ‘Stereosonic’ or ‘Creamfields’ as a dance party – they have in all other instances been classified as a live music event.

15. Furthermore, it is submitted that APRA’s classification of TOL events as primarily containing “non-live” performances of recorded music for dancing and therefore a “dance party”, does not adequately take into consideration the constantly evolving musical and technological environment. It should be noted in the current musical environment there is a significantly blurred distinction between “live” and “non-live/DJ” performers. Such failure by APRA to appropriately deal with the changing musical and technological environment is evidenced in correspondence from [redacted] of APRA to TOL regarding the “live” vs “non-live” classification method applied. [redacted] has stated:

    ‘...for a performance to be considered “Live”, it must contain a) Live vocals and/or b) Live instrumentation. Under APRA’s current definition, a performer that mixes or mashes up pre-recorded sounds cannot be considered “Live”. A performer whose set-up contained only turntables and a laptop computers (sic) would not be considered “Live”.’

16. It should be noted that there are a large number of “live” artists whose music features significant portions of pre-recorded elements and whose fans attend with the primary intention of dancing. Similarly, there are a large number of performers who only use a laptop (with or without a separate controller) who generate, reconstruct and manipulate sound via oscillators and editing software and as such should be deemed as “live” artists. It is submitted that in the current music environment, particularly in relation to electronic music, the majority of artists who previously may have been referred to as “DJ’ing” are now in fact performing “live” through their use of technology; irrespective of their lack of live vocals or live instrumentation.

17. TOL has previously made the point to APRA that if you go to see Daft Punk (a primarily electronic artist) play a concert it is deemed by APRA as a live music event but if you see them at a TOL event such as ‘Stereosonic’ it is deemed as a dance event. More recently however, APRA classified an event by Swedish House Mafia as “live” music event and as such licensed the event under the Featured Music Event license scheme. Swedish House Mafia is comprised of internationally renowned artists and is universally classified by the broader community as an “electronic dance music trio” consisting of three DJ’s and producers[2].

18. The categorisation of TOL’s events such as ‘Stereosonic’ and ‘Creamfields’ as “dance parties” whilst categorising those clearly equivalent and substitute events like the ‘Big Day Out’ – which also feature prominent electronic music artists and ‘dancing’ orientated stages such as the Boiler Room – as Featured Music Events, is clearly prejudicial towards TOL. TOL fundamentally disagrees with the differing categorisation methods applied by APRA and with the different rates that are currently being applied to dance music compared to non-dance music in relation to the APRA Arrangements.

[2] http://en.wikipedia.org/wiki/Swedish_House_Mafia.

19. It is submitted that the contradictory and prejudicial categorisation by APRA during the previous authorisation period demonstrates the ability of APRA to take advantage of its market power when categorising license schemes for events. As noted by the ACCC in its Determination to grant the existing authorisations (Public Register no.: C2009/1688) dated 16 April 2010 (**ACCC Determination**), APRA has a "virtual monopoly in respect of performance-rights licenses in Australia" and APRA is able to set prices for access to its repertoire without being subject to competitive constraints. It is submitted that this position has not changed in the previous authorisation period and results in an inequitable use of its monopolistic power.

20. Furthermore, it is submitted that the improper categorisation by APRA could be considered as price discrimination between classes of users according to willingness to pay.

21. We agree with the prior findings of the ACCC in the ACCC Determination that "APRA has the ability and incentive to price discriminate across license schemes and so has the widespread opportunity to extract 'consumer surplus'". This has the added effect of potentially pricing users out of the market, as any such users unwilling to pay the license fees set by APRA will be forced to alter (or perhaps cease entirely) their performance in public of various works controlled by APRA. Ultimately, this may result in a lesser amount of music performed in public by users and subsequently have a detrimental effect on those music owners who APRA represents.

22. Of paramount concern to TOL is the following:

    (a) The certainty of the license classification and therefore the fee payable to APRA by TOL for each of TOL's events; and

    (b) The parity of any such fees with other comparable music festivals held throughout Australia.

23. TOL understands the inherent value of music compositions at its events and is not seeking to avoid its obligations towards APRA, but rather seeks to make sure that its events are licensed in the most appropriate manner and in a manner that is fair and equitable and not as a result of APRA engaging in anti-competitive behaviour. TOL is continually frustrated by the need to have classification discussions with APRA in relation to each event that they stage.

24. TOL is desirous to have a process in place whereby, in each instance, it can stage an event, deliver the relevant setlists to APRA and pay all applicable license fees within fourteen days of conclusion of the event. Such process is of course reliant on APRA providing both certainty of the license classification and parity with those fees charged to other comparable music festivals held throughout Australia.

PART 2 - THE PUBLIC DETRIMENT AND EFFECT ON COMPETITION THAT HAS RESULTED FROM THE APRA ARRANGEMENTS DURING THE PREVIOUS AUTHORISATION PERIOD

25. In each of the disputes between TOL and APRA during the previous authorisation period, the parties have ultimately reached a commercial resolution without the enactment of APRA's ADR procedure.

26. The settlements reached by APRA and TOL were the subject of without prejudice discussions and as such are subject to privilege and cannot be disclosed to the ACCC without the consent of APRA. However, TOL can advise that during each dispute APRA has invited TOL to refer the matter to APRA's Expert Determination service or mediation in accordance with APRA's ADR policy, or to refer the matter to the Copyright Tribunal of Australia.

27. It is submitted that the alternatives to commercial resolution offered by APRA are prohibitive to licensees and as such does not provide a sufficient avenue for aggrieved licensees to challenge the monopolistic power and anti-competitive behaviour of APRA.

28. APRA has submitted that during the period 1 April 2012 to 31 March 2013, it has been involved in four commercial disputes where a licensee has requested that the matter be referred to alternative dispute resolution[3]. TOL notes that of these four commercial disputes, two were resolved by Expert Determination and two were settled as a result of commercial negotiations in the lead up to the Expert Determination hearing.

29. APRA submits that the limited utilisation of its ADR procedure is indicative of APRA becoming more responsive to the needs of licensees and more effective at resolving disputes and is consistent with a high general degree of satisfaction amongst users with APRA's licensing system. TOL disagree and are of the opinion that in fact the limited utilisation of the ADR procedure is indicative of limited practicality and utility of the ADR procedure.

30. The cost involved for any licensee to utilise the ADR procedure and, more importantly, the cost for any licensee to seek recourse to the Copyright Tribunal is likely to be overly prohibitive and as a result it will be more cost effective for a licensee to reach a commercial resolution with APRA prior to utilising such procedures.

31. The Copyright Tribunal was established to effectively prevent APRA from abusing its monopoly position. However, as specifically noted in the ACCC Determination there is "no economic incentive" for licensees to seek recourse to the Copyright Tribunal and as such "APRA is still able to exercise its monopoly power to set terms and conditions as it sees fit up to the point to where the cost to users is so high as to make it cost-effective to seek recourse to the Copyright Tribunal".

32. Although it is expressed by APRA as a valid alternative, TOL is not aware of any instances in the previous authorisation period where a licensee has sought recourse to the Copyright Tribunal for a determination. Indeed, APRA itself has acknowledged that since 1968, APRA has been involved in only twelve matters before the Copyright Tribunal[4]. It is interesting to note APRA's failure to recognise the prohibitive effect of its ADR procedure and APRA states at clause 4.1.12 of the APRA Application that if a licensee is not satisfied with any license applied by APRA, the licensee can simply "make its own application to the Copyright Tribunal seeking an order that APRA grant a licence on the music user's proposed terms". It is submitted that any application to the Copyright Tribunal is both a costly and lengthy process and therefore prohibitive to most licensees.

33. It is further submitted that the majority of disputes with APRA are settled by the licensees as a result of APRA's anti-competitive behaviour of putting fear into licensee's that they will close down the licensee's operation or prevent an event from taking place if there are not APRA licenses secured in advance. This fear mongering has the effect

[3] APRA Authorisation Nos A91187 – A91194 and A91211 Report Under Condition C2, 30 April 2013.
[4] APRA Application, Attachment 14.

of preventing those licensees from fully challenging any license fees or terms applied by APRA and from utilising APRA's ADR procedure. TOL is aware that APRA has, on several occasions, sent correspondence directly to various venues hosting the TOL events and threatened to prosecute such venues for not having the appropriate license in place. On all such occasions, APRA has been engaged in commercial resolution discussions with TOL regarding the applicable license for the venue and event. It is submitted that such behaviour is clearly unreasonable, anti-competitive and a further example of APRA's inappropriate use of its monopolistic power.

PART 3 - THE LIKELY PUBLIC BENEFITS AND PUBLIC DETRIMENTS ASSOCIATED WITH APRA'S RE-AUTHORISATION APPLICATION

34. Pursuant to section 91(1) of the CCA, the ACCC has the discretion to grant an authorisation for a limited period of time. APRA has, in the APRA Application, sought re-authorisation for a period of six years.

35. It is submitted that to allow APRA re-authorisation for a further six years would result in a significant public detriment outweighing any potential public benefit. Should the ACCC grant the re-authorisation of APRA, it is suggested that any such authorisation should be granted for a period not exceeding three years.

36. It cannot be accepted that merely because APRA may incur significant costs associated with any such re-authorisation application and that - as submitted by APRA - technological and related changes can now be predicted with some degree of certainty, that the authorisations should be granted for a further six year period.

37. It is submitted that the exponential change in technology and the continual changes in the market that have occurred in the previous authorisation period are likely to continue and as such cannot be predicted. Such changes are likely to impact on the ability of the current APRA licensing schemes to appropriately deal with the changes in the market and the needs of users and as such will provide APRA with greater ability to take advantage of its market power in restricting supply or increasing prices above competitive levels.

38. The specific experience of TOL in the prior three year period is indicative of the need for continual re-assessment of the APRA Arrangements and it should be noted that, prior to 2010, TOL had not had cause to dispute the license schemes as applied by APRA. It is submitted that the significant changes in technology and the market more recently have resulted in the greater level of disputes between TOL and APRA.

CONCLUSION

39. TOL submits that the current APRA Arrangement, and the proposed APRA Application do not adequately deal with TOL's concerns expressed above. As such, TOL request that the ACCC consider the APRA Application in light of TOL's submission and, should it grant the APRA Application, the ACCC implement such appropriate conditions of authorisation to alleviate the issues consistently encountered by TOL.