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**Subject:** 4 yearly review of modern awards - AM2014/276 Live Performance Award 2010

Dear Justice Ross

In accordance with the Full Bench Decision dated 27 April 2020 ([2020] FWCFB 2124), please find attached a TOIL term to be inserted into the award.

The TOIL clause has been agreed between LPA and the Media Entertainment and Arts Alliance (MEAA) and is submitted for your consideration.

Should have any questions with regard to this matter, please contact the writer.

Yours sincerely

**David Hamilton,**  
Director, Workplace Relations



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## **Attachment X— Proposed template agreement for Time off in lieu of overtime**

### **A.1 Who this clause applies to**

(a) A full time or part time employee engaged by the one employer for a period of at least 12 months.

### **A.2 Who this clause does not apply to**

(a) A performer or company dancer who is engaged for the run of a play/production or for a specific period or task; and

(b) A musician who is engaged for the run of a play/production or for a specific period or task; and

(c) A production and support staff who is engaged on a particular play/production for the duration of that play/production; and

(d) A production and support staff who is engaged for a specific period or task; and

(e) A casual employee.

### **A.3 Time off instead of payment for overtime**

(a) An employee and employer may agree in writing to the employee taking time off instead of being paid for a particular amount of overtime that has been worked by the employee.

(b) Any amount of overtime that has been worked by an employee in a particular pay period and that is to be taken as time off instead of the employee being paid for it must be the subject of a separate agreement under clause A.3(a).

(c) An agreement must state each of the following:

(i) the number of overtime hours to which it applies and when those hours were worked;

(ii) that the employer and employee agree that the employee may take time off instead of being paid for the overtime;

**(iii)** that, if the employee requests at any time, the employer must pay the employee, for overtime covered by the agreement but not taken as time off, at the overtime rate applicable to the overtime when worked;

**(iv)** that any payment mentioned in subparagraph (iii) must be made in the next pay period following the request.

Note: An example of the type of agreement required by this clause is set out at Schedule [x]. There is no requirement to use the form of agreement set out at Schedule [x]. An agreement under clause A.1 can also be made by an exchange of emails between the employee and employer, or by other electronic means.

**(d)** The period of time off that an employee is entitled to take is the same as the number of overtime hours worked.

**EXAMPLE:** By making an agreement under clause A.3 an employee who worked 2 overtime hours is entitled to 2 hours' time off.

**(e)** Time off must be taken:

**(i)** within the period of 6 months after the overtime is worked; and

**(ii)** at a time or times within that period of 6 months agreed by the employee and employer.

**(f)** If the employee requests at any time to be paid for overtime covered by an agreement under clause A.3 but not taken as time off, the employer must pay the employee for the overtime, in the next pay period following the request, at the overtime rate applicable to the overtime when worked.

**(g)** If time off for overtime that has been worked is not taken within the period of 6 months mentioned in paragraph (e), the employer must pay the employee for the overtime, in the next pay period following those 6 months, at the overtime rate applicable to the overtime when worked.

**(h)** The employer must keep a copy of any agreement under clause A.3 as an employee record.

**(i)** An employer must not exert undue influence or undue pressure on an employee in relation to a decision by the employee to make, or not make, an agreement to take time off instead of payment for overtime.

(j) An employee may, under section 65 of the Act, request to take time off, at a time or times specified in the request or to be subsequently agreed by the employer and the employee, instead of being paid for overtime worked by the employee. If the employer agrees to the request then clause A.1 will apply, including the requirement for separate written agreements under paragraph (b) for overtime that has been worked.

Note: If an employee makes a request under section 65 of the Act for a change in working arrangements, the employer may only refuse that request on reasonable business grounds (see section 65(5) of the Act).

(k) If, on the termination of the employee's employment, time off for overtime worked by the employee to which clause A.3 applies has not been taken, the employer must pay the employee for the overtime at the overtime rate applicable to the overtime when worked.

Note: Under section 345(1) of the Act, a person must not knowingly or recklessly make a false or misleading representation about the workplace rights of another person under clause A.1.

## **AGREEMENT FOR TIME OFF INSTEAD OF PAYMENT FOR OVERTIME**

Name of employee: \_\_\_\_\_

Name of employer: \_\_\_\_\_

**The employer and employee agree that the employee may take time off instead of being paid for the following amount of overtime that has been worked by the employee:**

Date and time overtime started: \_\_\_/\_\_\_/20\_\_\_ am/pm

Date and time overtime ended: \_\_\_/\_\_\_/20\_\_\_ am/pm

Amount of overtime worked: \_\_\_\_\_ hours and \_\_\_\_\_ minutes

**The employer and employee further agree that, if requested by the employee at any time, the employer must pay the employee for overtime covered by this agreement but not taken as time off. Payment must be made at the overtime rate applying to the overtime when worked and must be made in the next pay period following the request.**

Signature of employee: \_\_\_\_\_

Date signed: \_\_\_/\_\_\_/20\_\_\_

Name of employer  
representative: \_\_\_\_\_

Signature of employer  
representative: \_\_\_\_\_

Date signed: \_\_\_/\_\_\_/20\_\_\_