

**From:** [Cassie Botha](#)  
**To:** s47F  
**Bcc:** [LEGAL Buyout and Band 1 Review 2020 20130021 Emails](#)  
**Subject:** RE: Confidential [SEC=OFFICIAL] [ABC-PAL.FID37968]  
**Date:** Wednesday, 1 September 2021 9:32:20 AM  
**Attachments:** [ABC Letter to FWO - 31 August 2021.pdf](#)  
[image001.png](#)  
[image003.png](#)  
[image004.png](#)  
[ABC Annexures.zip](#)  
[image002.png](#)

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Hi s47F

Of course, no problem and sorry for the inconvenience.

I have attached the letter and a zip file of all the other attachments that don't require a password.

Please let me know if you have any other issues.

Thanks,  
Cassie



**Cassie Botha**  
Employment Counsel  
People & Culture  
P: 02 8333 4354  
M: 0409 833 564

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**From:** s47F  
**Sent:** Wednesday, 1 September 2021 9:07 AM  
**To:** Cassie Botha <xxxxx.xxxxx@xxx.xxx.xx>  
**Subject:** RE: Confidential [ABC-PAL.FID37968] [SEC=OFFICIAL]

**OFFICIAL**

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Thanks for your email. Unfortunately our IT automatically blocks all emails with password protected attachments. It will be sorted in a day or two but in the meantime I was hoping you could provide a copy of the 'ABC letter to FWO 31 Aug 2021'?

Thanks



s47F

Enforcement

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s47F

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**From:** Cassie Botha <[xxxxx.xxxxxx@xxx.xxx.xx](mailto:xxxxx.xxxxxx@xxx.xxx.xx)>

**Sent:** Tuesday, 31 August 2021 2:52 PM

**To:** s47F

**Subject:** Confidential [ABC-PAL.FID37968]

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Hi s47F

Password is: s47(1)(b)

Kind regards,

Cassie

ABC



**Cassie Botha**  
Employment Counsel  
People & Culture  
P: 02 8333 4354  
M: 0409 833 564

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31 August 2021

s47F

Fair Work Ombudsman

s47F

Delivered by email

Dear Ms s47F

## **Response to request for further information with regards to ABC Review into Buyouts and Band 1 Classifications (the Review)**

Thank you for your letter of 5 August 2021. We respond below to the request for further information in relation to questions 1 – 6 in the letter.

### **1. Further information regarding the 'Buyout' arrangements**

#### ***Request for a full description of the cohort of impacted employees on 'Buyout' arrangements***

Please find enclosed with this letter a table summary of the employees included in the buyout review (**Annexure A**).

#### ***Factors contributing to historic underpayments, and clauses contravened***

The use of buyouts is a longstanding practice at the ABC that is provided for in Part F of the *ABC Enterprise Agreement 2019 – 2022* ("ABC Enterprise Agreement"), and predecessor agreements.

A buyout amount (loading) is agreed as a percentage of an employee's annual base rate and forms part of the employee's total remuneration package. Under clause 21.2 of the ABC Enterprise Agreement, a buyout can be paid in lieu of one or more of a range of elements including hours of work, rosters and changes to rosters, special rates, shift penalties, overtime and/or allowances. The appropriate loading is determined according to the elements the buyout is intended to cover, and the hours the employee is expected to work.

Historically the terms of a buyout have been negotiated between hiring managers and the relevant employees and forwarded to Payroll for processing once agreement has been reached.

The ABC's review has highlighted that unfortunately there have been insufficient checks in place to ensure that the buyout met the "better off overall test". While many employees have been paid in excess of their entitlements under the ABC Enterprise Agreement, others have not. The ABC has identified that some employees have had their buyout arrangements 'rolled over' for a number of years without a reconciliation having been performed to confirm the buyout was adequate. Others have been offered a buyout of a standard amount (depending on the area, this

may be, for example, 25%) without a calculation having been performed to determine whether this amount was sufficient.

The decision to extend the scope of the review period to include buyouts for the 2020-21 financial year will remediate any underpayments identified up to 20 June 2021.

Additionally, the ABC has implemented a number of measures since the commencement of the review to ensure ongoing compliance with the requirements of the ABC Enterprise Agreement in relation to buyouts. Those measures include:

- Publication of a fact sheet (**Annexure B**) on the ABC intranet in relation to buyouts, to improve general awareness and understanding of these arrangements
- Introduction of a requirement that hiring managers must consult with the ABC's People & Culture Helpdesk if they require assistance in calculating a new buyout;
- Numerous briefings to hiring managers, including the importance of accurately calculating a buyout prior to entering into the buyout arrangement;
- The ABC's myRequests system – being the system by which a hiring manager requests an employment contract – is currently being modified to capture information necessary for employees to receive a copy of their estimated entitlements at the same time as their new contract;
- From 1 February 2021 all rostered employees on buyouts have been required to record their hours of work to ensure that the ABC has sufficient records to assess whether the better off overall test for each buyout arrangement is met;
- As outlined further in the ABC's response to question 5, there is a further measure under active consideration, which is targeted at increasing the automation of the calculations of the better off overall assessment for buyout arrangements.

The ABC is working through the individual remediation outcomes with PwC but has identified that for the review period, salary packaging and buyout arrangements have, in relation to some employees, resulted in insufficient payments to meet the requirement for the employees to be better off overall than they would otherwise have been under the terms and conditions of the EAs.

In relation to the *better off overall requirement*, the following clauses of the EAs have been contravened:

- 2019 – 2022 EA - Clauses 21.1.4, 21.2.1b, and 21.4e
- 2016 – 2019 EA – Clauses 21.1.4, 21.2.1b, and 21.4e
- 2013 – 2019 EA – Clauses 21.1.4 and 21.2.1b

In relation to the requirement to *provide employees with an estimate of the payments they would have been entitled to for the prospective year*, the following clauses of the EAs have been contravened:

- 2019 – 2022 EA - Clause 21.2.3
- 2016 – 2019 EA – Clause 21.2.3
- 2013 – 2016 EA – Clause 21.2.3

## ***Request for samples of documentation relevant to buyout arrangements***

Please find enclosed with this letter, two example employment contracts, one containing a market allowance provision in addition to a buyout (**Annexure C**), and one containing only a buyout (**Annexure D**).

For each of the example contracts referenced above, please find enclosed with this letter a copy of the corresponding Employment Engagement, Extension, or Variation form (“EV form”) that details the basis on which the buyout has been offered (**Annexures E and F**).

The ABC has to date been unable to locate written records of subsequent communications with the relevant employees in respect of these buyout arrangements.

## **2. Clarification in respect of the Band 1 employees**

### ***Request for a full description of the cohort of employees impacted by the Band 1 misclassification***

Please find enclosed with this letter a summary table of the cohort of employees included in the ABC’s review (**Annexure G**). Please note that this table includes employees who were properly classified at Band 1, as well as those who have been found to have been incorrectly classified at Band 1.

### ***Details of how each category of the affected employees were and are classified***

At the point of their engagement, these employees were classified as either a Content Maker or Administrative/Professional, and assigned to the level of Band 1 under the ABC’s Work Level Standards. The Work Level Standards are the means by which the ABC values work, and they are referred to in the ABC Enterprise Agreement.

Under the ABC’s Work Level Standards, Band 1 is generally the most appropriate classification for an entry level employee with no prior media or relevant experience. The duties they are assigned are basic routine tasks and they work under close direction while they perform the role. Examples of roles which may be properly classified at Band 1 include Mailroom Assistant, Green Room Assistant, Stagehand and Rigger.

A hiring manager makes a determination as to the appropriate classification and level, in conjunction with People & Culture. The employees’ classification as a Content Maker or Administrative/Professional was reflected in their contract of employment.

For the purpose of the review, in order to determine whether the employees had been correctly assigned to Band 1, the ABC firstly identified all period/s since 1 July 2014 when the employees had been engaged at Band 1. The ABC then reviewed the employment contracts and position descriptions relevant to those periods of engagement.

Advice was also sought from relevant managers in the business areas to confirm the role and duties that were performed during each period the employees was engaged at Band 1. Managers were asked to review the employee’s file (containing a copy of the employment contract and corresponding position description) and, using their own knowledge of the employee’s work, to

make an assessment of the correct band level for the duties performed, having regard to the Work Level Standards. This required two key inputs from the managers – firstly, confirming whether Band 1 was the correct classification, and secondly, if not correct what the correct classification should have been. Finally, a member of the ABC’s People & Culture team then conducted an overall check of all the assessments made by the managers to ensure they were correct and consistent.

### ***An explanation as to how the affected employees were inaccurately classified as Band 1***

For employees in the review whose Band 1 classification was incorrect, there appear to be two main reasons for this:

- the employee was incorrectly engaged at Band 1 while the relevant business area assessed their suitability and capabilities (for example, during a one month training period). If, following the initial period, a decision was reached to continue engaging the employee, the employee was reclassified at a higher band appropriate for the role they were required for going forward; however, an underpayment had already occurred due to the period for which they were incorrectly classified as Band 1;
- the employee was correctly engaged at Band 1 in an entry-level role but the duties and accountabilities of the role subsequently evolved to those commensurate with a higher band. Although a promotion can occur under the ABC’s annual performance appraisal process in the ABC Enterprise Agreement (and there are in fact also 7 pay points within Band 1 through which an employee can progress), for certain very junior roles the ABC has adopted an employee-favourable approach that the employee should have been reclassified sooner.

Approximately 18 months ago, the ABC implemented an additional check where a manager was proposing to classify an employee at Band 1. All requests to engage an employee at Band 1 are reviewed by the Head, People Services. The ABC currently only has s47E(c) employees engaged at Band 1.

### **3. Access to PwC’s full calculation methodology and approach to the Review**

#### ***Request for an updated version of the ‘current status’ tables in the s47(1)(b), 47G’ document prepared by PwC***

Please find enclosed with this letter an updated version of ‘current status’ tables in the s47(1)(b), 47G document provided to the FWO on 21 July 2021. (**Annexure H**)

#### ***Request for methods applied to address missing or potentially inaccurate time and attendance data for employees on ‘Buyout’ arrangements***

The ABC has ascertained (with the assistance of PwC) that approximately 75% of the existing employee time and attendance data for employees on buyout arrangements is accurate. The remaining 25% is missing or has been deemed unreliable, that is, it may not be reflective of the actual hours worked by affected employees during the review period.

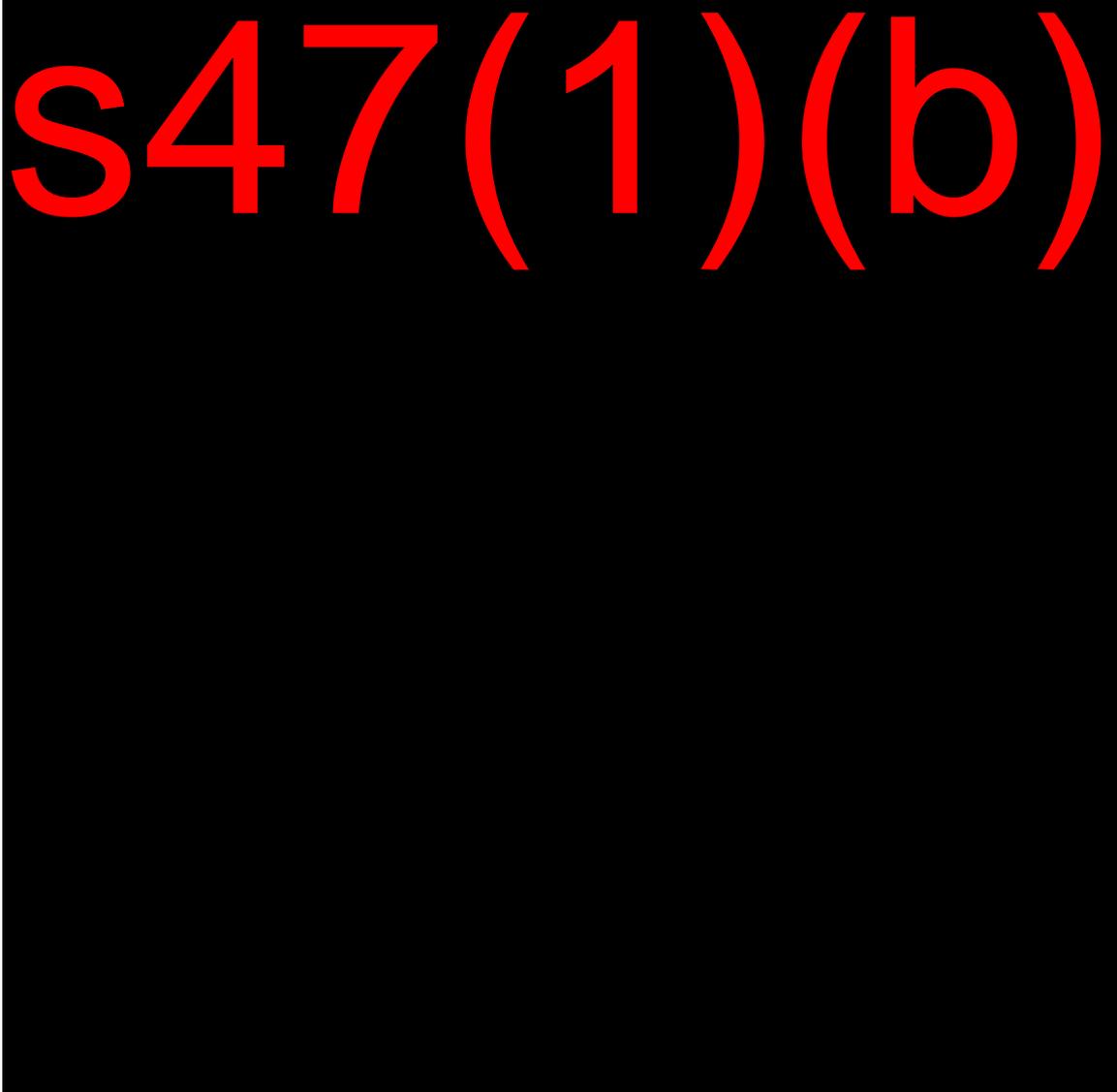
s47(1)(b)

s47(1)(b)

The “at risk” cohorts were then investigated by ABC People & Culture personnel, which involved detailed inquiries into the record-keeping practices in the affected areas. Discussions with managers, production coordinators and rostering coordinators identified that in some areas there had been no systematic time entry for employees on buyouts or, alternatively, that timesheets had been auto-populated with standard hours. These practices appear to have arisen in part due to an erroneous assumption that for employees on buyouts there was no need to record actual hours worked due to the employee receiving an average payment for each pay period.<sup>1</sup> In other areas, proper time entry had in fact been occurring; the employees had simply been working fairly standard hours, creating an impression of auto-populated time sheets.

s47(1)(b)

<sup>1</sup> From January 2021, the ABC has engaged in a significant education campaign to emphasise the importance of correct time entry for all rostered employees, and this is expected to be further enhanced by the implementation of the new record-keeping system in 2022. A copy of an ABC Frequently Asked Questions document on ‘Employee Time Recording’ was forwarded with the ABC’s letter to the FWO on 31 May 2021.



***Availability and use of building access records to supplement incomplete time and attendance data***

The ABC has undertaken thorough inquiries to determine whether building access data could supplement incomplete time and attendance data.

Building access data is available for ABC offices; however, records date no further back than mid-late 2020 for most locations, and for the Ultimo office back to late 2019.

The available data is limited; **s47E(c), 47G**

Further, many buyout employees regularly work offsite, particularly during the COVID-19 pandemic.

Retrieval of the data is also problematic; the ABC's security team has estimated that it would take a dedicated resource up to one month to obtain all available building access data, having significant cost implications.

Due to limitations of the building access data that have been outlined above, the ABC does not propose to utilise building access data to supplement inaccurate or missing data.

#### **4. Clarification regarding the Review's approach to set-off**

##### ***Request for clarification on the use of market allowances***

Please find enclosed with this letter an explanation of the ABC's position on the use of market allowances to offset against underpayments for employees in receipt of buyouts (**Annexure I**).

##### ***Request for further clarification regarding the reviews and assessments for employees on buyout arrangements***

It is the ABC's position that for annual buyouts the most appropriate assessment date will be 12 months from the date on which the buyout agreement was entered into ("buyout anniversary date"), subject to two exceptions: short-term distant assignments/special events, or an "intervening event" occurring.

This approach is supported by the words of the ABC Enterprise Agreement - clause 21.2.3 refers to the "prospective year" on which the buyout calculation is to be based and clause 21.2.5 provides inter alia that "the buyout agreement will last for a period of 12 months". While clause 21.2 contemplates circumstances in which a buyout can be reviewed, renegotiated, or terminated prior to its anniversary date, it is clear that annual buyouts are intended to be annual arrangements. Indeed, the heading of the relevant clause (21.2) is "Annual Buyout of Penalties, Allowances and/or Overtime".

Accordingly, the ABC's approach is that where an annual buyout arrangement applies, the buyout anniversary date changes (or "resets") within 12 months only if there has been an intervening event. An intervening event may be 1) a change in the employee's buyout loading, 2) a change of position, or 3) where an employee has moved to a new classification and salary point during the period of the annual buyout arrangement. A change to the buyout anniversary date triggers the need for a reconciliation to occur for the preceding period, in order to determine whether the employee was "better off" during that period. For employees whose annual buyout arrangement ceased prior to reaching the 12 month anniversary period, a reconciliation is performed in relation to the period of time the employee was on a buyout.

In relation to short term distant assignments or special events under clause 21.3 of the ABC Enterprise Agreement (together, "short-term buyouts"), a 12 month anniversary period is clearly not appropriate. There is no prescribed duration for short-term buyouts, however, an arrangement will be considered a "short-term buyout" if its duration is less than 90 consecutive days and there is a loading of 50% of base salary or more, which is an employee-favourable approach. The "anniversary period" for these employees will be the duration of the short-term buyout.

For the purpose of the better of overall test (**BOOT**), the ABC has instructed PwC to use each buyout anniversary period to perform a reconciliation of the payments received under the employee's total salary against the entitlements the employee would have been paid in the absence of the buyout, according to the hours worked during the anniversary period.

Where the BOOT has not been met and an underpayment for an anniversary period has been identified, it has been “quarantined” from any under or overpayments identified for subsequent anniversary periods. An employee’s total underpayment is the sum of all underpayments with respect to all anniversary periods in the review.

***Request for further clarification regarding buyout arrangements and transitional meal allowances***

The ABC’s position is that salary amounts paid to an employee will displace or cover the entitlement to meal allowance compensation, to the extent this entitlement is applicable to an employee.

Schedule D of the ABC Enterprise Agreement provides that employees who had a buyout as at 5 November 2013 but would have otherwise received meal allowance compensation will not have their buyout amount reduced on account of the changes to meal allowance, and that if their buyout is terminated, they will receive meal allowance compensation from that date.

There are 1262 employees who are included in the buyout review and who have also at some stage been entitled to meal allowance compensation. PwC is still performing calculations to ascertain which employees on buyouts have been underpaid.

**5. Confirmation of remedial measures to ensure ongoing compliance**

The ABC considers there are three main opportunities to check a buyout’s compliance with the BOOT: prior to the arrangement commencing (“buyout calculation”), during the arrangement (“buyout monitoring”), and at the end of the anniversary period (“buyout reconciliation”).

In relation to the buyout calculation, as noted above in section 1, the ABC has already implemented certain remedial measures to ensure ongoing compliance. There is a further measure under active consideration, which is targeted at automating the calculation through the building of a “calculator”, however, there are some complexities and costs associated with this that are still being worked through. In the interim, the People & Culture Helpdesk are supporting hiring managers with confirming prospective rosters and calculations prior to buyout arrangements commencing.

Buyout monitoring is also still under consideration; the ABC believes it would be prudent to conduct a check *during* the 12-month anniversary period in order to determine whether the buyout was at risk of being insufficient. The ABC is currently investigating utilising an external accounting firm to perform the checks until such time (approximately 18-24 months) as the ABC is able to perform the checks internally, utilising the ABC’s new record keeping system (People Hub Workforce). Buyout monitoring will enable ABC People & Culture to have oversight of employees on buyouts, and provide support to managers and employees as needed, if a buyout is at risk of being insufficient.

In relation to the buyout reconciliation, the ABC is intending to utilise the same or a similar process for the reconciliation as per the buyout monitoring, that is, an external firm with the aim of undertaking these reconciliations internally within the next 18-24 months. Additional points of consideration are whether an “intervening event” can be flagged in the ABC’s record-keeping

system, triggering a requirement to perform a reconciliation, and the time period in which the ABC must then perform the reconciliation, for instance, 28 days.

## **6. Clarification and assurances regarding the employee consultation process**

During the consultation period of the Review all employees will have the opportunity to ask questions and raise any potential concerns regarding their individual outcomes. Employees' outcome letters will be accompanied by a Frequently Asked Questions document that will, among other information, include an explanation of the ways the ABC has resolved time and attendance data limitations for affected employees. If an employee wishes to obtain further details about the hours of work on which their individual outcome has been calculated, a member of the Review project team will provide further clarification regarding what data was relied upon.

Throughout the course of the Review, the ABC has been meeting regularly with the CPSU and the MEAA and has been updating them on the various steps taken to resolve the time and attendance data limitations. The unions are aware of the two approaches that have been developed and have not raised any concerns with the ABC regarding the assumptions upon which these approaches are based. The ABC has confirmed to the unions that it will consider any relevant evidence of hours worked or entitlements owed that is provided by employees who have been affected by missing or inaccurate time and attendance data.

The ABC is confident that it will be able to resolve any disputes during the consultation process, but in the event that there are outstanding issues in dispute between the parties, the ABC will engage with the dispute resolution procedures under the ABC Enterprise Agreement.

I trust that the information in this letter satisfies the FWO's request for further information about the Review. If you have any questions about the information provided with this letter, please do not hesitate to contact Vanessa MacBean, Head of Employee Relations on 0408 253 570 or [macbean.vanessa@abc.net.au](mailto:macbean.vanessa@abc.net.au).

Yours sincerely,



Monica Vagg  
a/Chief People Officer  
Australian Broadcasting Corporation

# ABC PEOPLE & CULTURE FACT SHEET

## ABC ENTERPRISE AGREEMENT - BUYOUTS

### Buyouts

Buyouts may be used for employees on Band 4 or above. A buyout is where an employee is paid a fixed loading (the 'buyout') instead of payment for hours of work (including arrangement of hours and free days), rosters and changes to rosters, special rates, shift penalties, overtime and/or allowances they would have received under the ABC Enterprise Agreement (EA) for hours worked.

Accurate details of actual start and finish times and details of meal breaks must be recorded for all rostered employees, including for employees who are on buyouts.

### Types of Buyouts

There are two types of buyouts under the ABC EA: 1) annual buyouts; and 2) buyouts for short term distant assignments or special events.

Employees on annual buyouts must still be rostered for four free days per fortnight, and they must be better off on the buyout than they would be if they were paid penalties, overtime, allowances, or other entitlements under the EA, calculated over a 12-month period.

Employees involved in short term distant assignments, or on the coverage of special events, may for a specified period, also be paid a buyout. The calculation period, for the purposes of determining if the buyout is sufficient, is the specified period of time for the distant assignment or special event.

### Use of Buyouts

An annual buyout can be used to provide the ABC with rostering and resourcing flexibility in relation to an employee who experiences large fluctuations in the hours they work throughout the year. The employee benefits by receiving a consistent salary throughout the year.

However, buyouts can create issues from a compliance perspective if they are set too low or if an employee's pattern of work changes and the buyout arrangement is not reviewed.

When in doubt as to whether it is appropriate to offer a buyout, seek advice from People & Culture first.



#### Quick Fact

Employees must be 'better off overall' on a buyout. Review buyouts annually, when the employee starts a new role, or when their pattern of ordinary hours of work changes to ensure the buyout amount is still sufficient.

### How to calculate a Buyout

A buyout calculation should be performed for each employee based on an estimate of what the employee would have been entitled to for the relevant period based, as far as possible, on the pattern of hours they will be expected to work.

The calculation must indicate that the employee will be better off on the buyout than they would be if they were paid penalties, overtime, allowances, etc under the EA. If it does not, the employee should not be offered a buyout.

Buyouts must be reviewed regularly to make sure they are sufficient.



#### Quick Fact

Buyout arrangements must be mutually agreed to in writing.

Employees must be advised of the estimate of what they would have been entitled to for the relevant period based, as far as possible, on the pattern of hours they will be expected to work.

# ABC PEOPLE & CULTURE FACT SHEET

## ABC ENTERPRISE AGREEMENT - BUYOUTS

### Minimum requirements when offering a Buyout

You must ensure that:

- The employee is at least a Band 4.
- The employee is rostered for at least four free days per fortnight.
- The buyout will result in the employee being 'better off overall' than if they were paid EA entitlements.
- The agreement is mutually agreed to in writing and you have advised the employee of the estimate of what they would have been entitled to for the relevant period based, as far as possible, on the pattern of hours they will be expected to work.
- Accurate details of actual start and finish times are recorded for all rostered employees, including employees on buyouts.
- Buyouts must be reviewed at least annually or if the employee's pattern of ordinary hours of work changes.
- The employee knows that they can be represented in negotiating the buyout agreement.

### Terminating or changing Buyouts

Buyouts must be reviewed at least annually to make sure they are sufficient.

If the employee's pattern of ordinary hours of work changes during the period of the agreement, the loading is found to be wrongly calculated or extraordinary events have intervened, the level of loading may be reviewed and the rate changed by agreement to reflect the new circumstances.

Employees are not entitled to receive buyouts indefinitely if they are not working the hours to justify them.



### Quick Fact

Buyouts can be renegotiated or terminated by the ABC or the employee two weeks before the next roster cycle.

### Market Allowances

A market allowance is an amount paid in recognition of an employee's performance and duties in a specific role. The market allowance is a payment in excess of minimum EA rates except where it is expressed to form part of a rate (i.e. overtime for below salary paypoint 31). A market allowance is not the same as a buyout as it is not expressed to compensate the employee for a specific wage entitlement.

Where a market allowance is offered, there should be a clear mechanism for review so if the employee stops performing the particular role that attracts the market allowance, the market allowance can be reduced or ceased.

### Buyouts and Superannuation

Buyouts are regarded as salary for superannuation purposes in accordance with relevant legislation.

### Salary Packages

Salary packages are similar to annual buyouts and offer increased flexibility in how employees are rostered and paid. The key differences include:

- In addition to the components that may be included in a buyout, salary packages may also include additional annual leave and/or non-cash benefits.
- Salary packages can be offered for a defined period, rather than on an ongoing basis, where the EA does not provide sufficient flexibility.
- The calculation period for the purposes of determining if the salary package is sufficient, is the defined period of the salary package arrangement.

# ABC PEOPLE & CULTURE FACT SHEET

## ABC ENTERPRISE AGREEMENT - BUYOUTS



### Quick Fact

Accurate details of actual start and finish times and details of meal breaks must be recorded for all rostered employees, including for employees on buyouts.

### Buyouts and Leave

#### Personal leave

Buyouts are not paid for periods of personal leave greater than 20 days in a 12 month period (pro-rata for part time employees). If the employee exceeds this amount of personal leave then the buyout will no longer be paid when they are on personal leave within that 12 month period.

#### Annual leave

Buyouts apply to annual leave days. However, annual leave loading is not payable if penalties are covered by the buyout.

#### Long service leave

Buyouts do not apply to periods of long service leave.

### Help?

If you have any further questions, contact People and Culture at:



[peopleandculture@abc.net.au](mailto:peopleandculture@abc.net.au)



## ABC's position on offsetting and market allowances

1. The FWO has requested further clarification on the ABC's approach to set-off and the process for calculating entitlements for employees on 'Buyout' arrangements; in particular the use of contractual payments such as market allowances, including how they are calculated, how ABC proposes to use them to set-off entitlements derived from the ABC Enterprise Agreements (EAs), and which entitlements the ABC proposes to set them off against.
2. The ABC's position is that it is entitled to apply the annual market allowance (or market loading) payments are above-EA payments, to offset underpayments of entitlements under the EAs. This is on the basis that the market allowance is a part of an employee's "total salary" as described in their contract and is therefore a payment which has not been attributed to a particular incident of employment so may be applied to any entitlement. Even if this were not the case, it also has a close correlation with the EA entitlements in question.

### Overview

3. Of the 1,810 employees included in the ABC's Buyout review, 824 were in receipt of a "market allowance" for some or all of the review period.
4. A "market allowance" is a payment which is expressly described, in ABC employment contracts part of an employee's "total salary". It is paid in recognition of the employee's "performance and duties" in their role. It is also in excess of their entitlements under the applicable EA.
5. Historically, market allowances have generally been paid to attract and/or retain employees to perform certain roles. The market allowance clause in ABC employment contracts states that if the employee stops performing the particular role that attracts the market allowance, the market allowance can be reduced or ceased.

### How a market allowance is calculated

6. There is no stipulated methodology for calculating a market allowance.
7. A market allowance is generally expressed in the contract of employment as a fixed annual amount based on full time equivalent hours. If an employee is contracted to work less than 76 hours per fortnight, they will receive the annual amount on a pro rata basis. For example, a full time employee whose contract states they are on a base salary of \$83,270 per annum plus a market allowance of \$10,000 per annum will receive \$10,000 over the course of 12 months, paid evenly across each pay period.

### Offsetting entitlements under the ABC Enterprise Agreements

8. The ABC maintains that market allowances may be offset against all entitlements due to an employee for performing the duties of their role.

9. It is well-established that a payment made to an employee in excess of their entitlements can be applied to offset an underpayment. This line of authority begins with the decision of Justice Sheldon's judgment in *Ray v Radano* [1967] AR (NSW) 471, continues with *Poletti v Ecob* (No.2) (1989) 31 IR 321 and includes the decision of the Full Court of the West Australian Supreme Court in *James Turner Roofing Pty Ltd v Peters* [2003] WASCA 28.

10. In *Ray v Radano* [1967] AR (NSW) 471, Justice Sheldon said

*Prima facie a weekly sum paid by an employer to his employee is an appropriation by the employer (the debtor) to the payment due for that week ...*

11. These principles were subsequently adopted by the Full Court of the Federal Court in *Poletti v Ecob* (No.2) (1989) 31 IR 321 at 333-4.

12. The principle was described in *James Turner Roofing Pty Ltd v Peters* [2003] WASCA 28 (James Turner) at [21] as follows

*... A periodic sum paid to an employee as wages is prima facie an appropriation by the employer to all of the wages due for the period whether for ordinary time, overtime, weekend penalty rates or any other monetary entitlement in respect of the time worked. The sum is not deemed to be referable only to ordinary time worked unless specifically allocated to other obligations arising within the employer/employee relationship.*

13. The ABC's contracts of employment provide that the market allowance is part of an employee's "total salary". It is not appropriated to a specific incident of employment (for example, overtime) and it is not referable to any entitlement. It is a supplement to an employee's base salary which brings an employee's total salary to the market rate.

14. Accordingly, the ABC submits that the market allowance falls within the principles from *Ray v Radano* cited above. It is a generic payment of salary which has not been allocated to ordinary time and accordingly is appropriated to all the employee's entitlements.

15. Even if this were not the case, it is accepted that a contractual amount may be applied in satisfaction of entitlements under an EA where there is a "close correlation" between the nature of the payments. See *Australia and New Zealand Banking Group Limited v Finance Sector Union of Australia* [2001] FCA 1785; (2001) 111 IR 227. It is also established that this does not require that the same label be used.

16. The ABC maintains that the market allowance does have a sufficiently close correlation to entitlements associated with working hours such as overtime, penalties and associated allowances and loadings.

17. The provision of a market allowance is expressed in ABC employment contracts as being "in recognition of your performance and duties" in the employee's role.

18. The type of roles involved are typically senior roles, which involve hours over and above ordinary hours. The market allowance compensates employees for working those hours. This is inherent in the market rate.

19. The ABC's position is that at the time the ABC and the employee entered into the contract of employment, it was understood by the parties that the total salary would be paid in satisfaction of all entitlements for performing a particular role. While a market allowance is distinct from and separate to a buyout, both are components of the total salary paid to an employee for performing that role.
20. The ABC makes the observation that if employees with market allowances whose buyouts fell short were entitled to receive additional payments for the hours worked without the market allowance being taken into account, this would result in windfalls to employees in relation to the total amounts received, particularly for those on large market allowances. Several examples below illustrate this point.

s 47F [Redacted]

[Redacted]

s 47F [Redacted]

[Redacted]

s 47F [Redacted]

[Redacted]

s 47F [Redacted]

s 47F

21. With a substantial market allowance, it would be incongruous not to acknowledge that the market allowance was intended to compensate for the incidents of performing a role that entailed working long hours. It is well above the EA minimum rate.
22. There are employees whose market allowances are lower, but the principle remains the same.
23. Accordingly, in rectifying underpayments to employees, the ABC is intending to compare the payments made (including, where applicable, a market allowance payment) to an employee while they were in receipt of a buyout and the payments that the employee was due in accordance with the EA for that same period.
24. The ABC's position is that the total amount paid to the employee must equal or exceed the entitlements under the EA. If this has not occurred, the ABC accepts that the employee is entitled to receive an additional payment for the hours worked over the buyout period and will make that payment accordingly.

## Response to the CPSU's contentions

25. The CPSU has expressed the view that market allowances cannot be used to offset underpayments of EA entitlements.
26. Their first contention is that a market allowance is a discretionary payment available to the ABC to increase an employee's salary when the EA does not provide the payment flexibility sought by the ABC or the employee.
27. The CPSU's characterisation of the market allowance as "discretionary" is not entirely correct. It is correct that the market allowance payment is not required by the EA. However, it is a contractual payment which is part of the employee's salary.
28. In this regard, the contract of employment expressly provides that a market allowance is part of an employee's "total salary" and is paid in recognition of an employee's "performance and duties" in their role. The fact that a market allowance is expressed "separately" to a buyout does not detract from the ABC's position.
29. The CPSU's reliance on the ABC's fact sheet about buyouts is misplaced.
30. The fact sheet is not part of the contract document and cannot derogate from the express terms of the contract. In this regard, reliance is placed on the High Court decision in *WorkPac Pty Ltd v Rossato* [2021] HCA 23 (4 August 2021).



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31. Furthermore, the fact sheet relied on by the CPSU was created in 2021 (well after most of the contracts in question) and was only used for a few months. It was intended in part to act as an “explainer” for the numerous managers and rosterers who are involved in negotiating salary arrangements. The ABC has been taking steps to reduce the incidences of new buyout arrangements, and to deter the use of market allowances to function as pseudo-buyouts going forward, as this results in an additional administrative burden to reconcile payments. The statement that market allowances “cannot be used to offset entitlements *in the same way that a buyout can*” was intended to highlight the fact that there are specific rules in the EA regarding which payments can be displaced by a buyout arrangement and by what amount. It did not say market allowance could not be used to offset entitlements at all – on the contrary. It was subsequently revised to avoid confusion.
  32. The CPSU has also raised the “quarantining” of employees in receipt of a market allowance (but no buyout) from the scope of the review as evidence that the market allowance has a different purpose from a buyout. In response, the ABC notes that it has no reason to believe that this cohort of employees has been underpaid, and hence they are not included in the review.
  33. The CPSU has also made various suggestions as to why market allowances may have been negotiated with certain employees. Needless to say, negotiations cannot be relied upon in interpreting a contract. In any event, the ABC has invited the CPSU to provide evidence of specific negotiations, and is yet to receive it. It has always been the ABC’s position that if an employee wishes to raise an issue in relation to their individual salary arrangements, they are welcome to do so, and the consultation process will provide opportunities for employees to approach the ABC if they have particular concerns and questions. The matters raised by the CPSU do not affect the ABC’s position in relation to offsetting, however, if specific concerns are raised in relation to individual arrangements, the ABC will of course consider and respond to them.
  34. Finally, the ABC notes that the May 2020 decision of the Full Federal Court in *Workpac v Rossato* [2020] FCAFC 84 to which the CPSU refers in support of their approach to set-off, was unanimously overturned by the High Court on 4 August 2021.
  35. The ABC relies on the established authorities and legal principles referenced above to maintain that its position on applying total salary payments in satisfaction of EA entitlements is sound and defensible having regard to the wording of relevant ABC employment contracts and to the purpose and character of the payments.