



STATEMENT

Fair Work Act 2009

s.156— 4 yearly review of modern awards

4 yearly review of modern awards – plain language project – annual leave loading terms – ambiguity (AM2016/15)

JUSTICE ROSS, PRESIDENT

MELBOURNE, 13 DECEMBER 2019

4 yearly review of modern awards – plain language project – terminology of rates – annual leave loading terms – ambiguity – conference convened

Introduction

[1] This Statement concerns the following 11 awards in Tranche 1 that contain an ambiguity that may arise from the interaction between terms in modern awards that deal with annual leave loading and terms that provide for shift and weekend rates:

- Animal Care and Veterinary Services Award
- Banking, Finance and Insurance Award
- Car Parking Award
- Cement, Lime and Quarrying Award
- Coal Export Terminals Award
- Electrical Power Industry Award
- Legal Services Award
- Medical Practitioners Award
- Pharmacy Industry Award¹
- Premixed Concrete Award
- Seafood Processing Award

[2] A conference in respect of these awards has been convened for **9:15 am on Thursday 19 December 2019**.

Background

[3] Some 56 of the 112 modern awards that make provision for annual leave loading contain a reference to an employee being paid the higher of the annual leave loading or a shift “loading”, “allowance” or “penalty rate”. These 56 awards are set out at **Attachment A**. Some of these provisions may be ambiguous because the annual leave loading clause refers to a shift allowance or penalty rate and compares it to annual leave loading. As the redrafted penalty rates

¹ This award is subject to issues raised by the PGA regarding the Plain Language draft and is outstanding from Tranche 1, see Decision [2019] FWCFB 7854 at [2].

clauses no longer identify the loading component of the shiftwork penalty separately, the annual leave loading clause may not be comparing like with like.²

[4] In the course of the review proceedings Ai Group has contended that the manner in which shift premiums are expressed in exposure drafts, for example, that a shift worker is to be paid 130% of the relevant rate, rather than a 30% loading, has implications for the calculation of other award entitlements which still refer to loadings such as annual leave payments.

[5] Ai Group submit that a reference to an employee being paid the higher of either an annual leave loading or a shift penalty rate in exposure drafts could be interpreted as an employee on annual leave being paid their minimum or ordinary hourly rate plus the higher of 17.5% or a shift penalty rate of, for example 130%. Ai Group stated that this could lead to some shiftworkers being paid 230% while on annual leave.

[6] In a decision issued in August 2019³ the Commission put forward a proposed solution (based on the *Clerks – Private Sector Award 2010* PLED) as follows:

- (c) For an employee who would have worked on day work only had they not been on leave, the additional payment is the greater of:
 - (i) 17.5% of the employee’s minimum hourly rate for the employee’s ordinary hours of work in the period; or
 - (ii) The minimum hourly rate for the employee’s ordinary hours of work in the period inclusive of weekend penalty rates as specified in clause 21— Penalty rates (employees other than shiftworkers). **For the purposes of this clause, the relevant weekend penalty does not include the minimum hourly rate for the employee’s ordinary hours of work.**
- (d) For an employee who would have worked on shiftwork had they not been on leave, the additional payment is the greater of:
 - (i) 17.5% of the employee’s minimum hourly rate for the employee’s ordinary hours of work in the period; or
 - (ii) The minimum hourly rate for the employee’s ordinary hours of work in the period inclusive of shift and weekend penalty rates for shiftwork as specified in clause 28—Penalty rates for shiftwork. **For the purposes of this clause, the relevant penalty rates for shiftwork do not include the minimum hourly rate for the employee’s ordinary hours of work.**⁴

[7] As we noted in the *August 2019 Decision*, the proposed solution appeared relatively straightforward in terms of drafting; however, it requires the reader to deduct the minimum rate from the penalty rates clause and then compare the remainder to the annual leave loading, which may make the award more complex and difficult for users to apply.

² [2017] FWCFB 5536 at [586]

³ [2019] FWCFB 5409

⁴ [2019] FWCFB 1255 at [67] to [70]

[8] Interested parties were invited to make submissions in relation to this proposal. Submissions were received from the following parties:

- [ABI](#);⁵
- [Ai Group](#); ⁶
- [AWU](#); ⁷
- [AMWU](#); ⁸
- [CFMMEU \(MD\)](#); ⁹
- [CFMMEU \(C&G\)](#); ¹⁰
- [CFMMEU \(M&E\)](#); ¹¹
- [CPSU](#); ¹²
- [CEPU](#); ¹³
- [HIA](#); ¹⁴ and
- [UV](#); ¹⁵

[9] Reply submissions were received from [Ai Group](#)¹⁶ and [CFMMEU \(C&G Division\)](#).¹⁷

[10] No party supported the proposal. Submissions outline a number of key concerns, including the following:

- that adopting the wording of the proposed clause would lower the rate of pay for employees who have ordinary hourly pay inclusive of all-purpose allowances;
- the proposed clause may cause confusion or uncertainty, and
- the issue needs to be addressed on an award specific basis.

[11] A number of other parties proposed alternative forms of the annual leave loading clause proposal advanced by Ai Group.

⁵ ABI, submission, 1 April 2019 at [5.1]-[5.3]

⁶ Ai Group submission, 22 March 2019 at [13]-[24]

⁷ AWU submission, 25 March 2019 at [3]-[8]

⁸ AMWU submission, 27 March 2019 at [8]-[11]

⁹ CFMMEU – MD submission, 8 April 2019 at [5]-[7]

¹⁰ CFMMEU – C&G submission, 2 April 2019 at [12]-[14]

¹¹ CFMMEU – M&E submission, 22 March 2019 at [5]-[7]

¹² CPSU submission, 29 March 2019 at [2]- [4]

¹³ CEPU submission, 29 March 2019 at [3]-[5]

¹⁴ HIA submission, 22 March 2019 at [4.1.1]-[4.1.8]

¹⁵ United Voice, submission, 4 April 2019 at [3]-[4]

¹⁶ Ai Group [submission in reply](#), 18 April 2019 at [7]-[24]

¹⁷ CFMMEU – C&G [submission in reply](#), 17 April 2019 at [12]-[14]

Ai Group Proposal

[12] Ai Group propose a revised leave loading clause to be incorporated into the *Clerks – Private Sector Award 2010*:

32.3 Annual leave loading

- (c) For an employee who would have worked on day work only had they not been on leave, the additional payment is the greater of:
 - (i) 17.5% of the employee’s minimum hourly rate for the employee’s ordinary hours of work in the period; or
 - (ii) Relevant weekend penalties specified in clause 21—Penalty rates (employees other than shiftworkers) (excluding public holiday penalty rates) for the employee’s ordinary hours of work in the period. For the purposes of this clause, the relevant weekend penalty does not include the minimum hourly rate for the employee’s ordinary hours of work.
- (d) For an employee who would have worked on shiftwork had they not been on leave, the additional payment is the greater of:
 - (i) 17.5% of the employee’s minimum hourly rate for the employee’s ordinary hours of work in the period; or
 - (ii) Relevant penalty rates for shiftwork (excluding public holiday penalty rates) as specified in clause 28—Penalty rates for shiftwork for the employee’s ordinary hours of work in the period. For the purposes of this clause, the relevant penalty rates for shiftwork do not include the minimum hourly rate for the employee’s ordinary hours of work.’

[13] Ai Group also submit that there is currently a level of diversity in the manner in which awards regulate payment for annual leave and annual leave loading more specifically and therefore award specific tailoring will be required.

[14] There are at least two other alternative options.

ABI Proposal

[15] ABI proposed the following based on clause 32.3 of the *Clerks – Private Sector Award 2010* PLED:

32.3 Annual leave loading

- (a) During a period of paid annual leave an employer must pay an employee an additional payment **calculated** in accordance with clause 16—Minimum rates for the employee’s ordinary hours of work in the period.
- (b) The additional payment is payable on leave accrued.

- (c) For an employee who would have worked on day work only had they not been on leave, the additional payment is the greater of:
- (i) 17.5% of the minimum hourly rate for the employee's ordinary hours of work in the period; or
 - (ii) The **difference between the** minimum hourly rate for the employee's ordinary hours of work in the period inclusive of weekend penalty rates as specified in clause 21— Penalty rates (employees other than shiftworkers) **and the minimum hourly rate payable to the employee in accordance with clause 16—Minimum rates for the employee's ordinary hours of work in the period.**
- (d) For an employee who would have worked on shiftwork had they not been on leave, the additional payment is the greater of:
- (i) 17.5% of the minimum hourly rate for the employee's ordinary hours of work in the period; or
 - (ii) The **difference between the** minimum hourly rate for the employee's ordinary hours of work in the period inclusive of shift and weekend penalty rates for shiftwork as specified in clause 28—Penalty rates for shiftwork **and the minimum hourly rate payable to the employee in accordance with clause 16—Minimum rates for the employee's ordinary hours of work in the period.**

Alternative option

[16] An alternative option would be to express the leave loading at 117.5% of the minimum hourly rate so that it is consistent with the way rates are expressed in the exposure drafts generally as shown below:

32.3 Payment for Annual leave

- (a) During a period of paid annual leave an employer must pay an employee at the annual leave rate for the employee's ordinary hours of work in the period.
- (b) The annual leave rate is payable for leave accrued.
- (c) The **annual leave rate** is calculated as follows:
 - (i) for an employee who would have worked on day work only had they not been on leave, the annual leave rate is the greater of:
 - **117.5%** of the minimum hourly rate for the employee's ordinary hours of work in the period; or
 - The minimum hourly rate for the employee's ordinary hours of work in the period including any weekend penalty

rate as specified in clause 21—Penalty rates (employees other than shiftworkers).

- (ii) For an employee who would have worked on shiftwork had they not been on leave, the annual leave rate is the greater of:
- 117.5% of the minimum hourly rate for the employee’s ordinary hours of work in the period; or
 - The minimum hourly rate for the employee’s ordinary hours of work in the period including any penalty rates for shiftwork for the employee’s ordinary hours of work as specified in clause 28—Penalty rates for shiftwork.

Conference

[17] The potential ambiguity arises in 12 of the awards which are in Tranche 1 of the final stage proceedings (AM2019/17). Two of these awards have been amalgamated.

[18] **Attachment B** sets out potential solutions to the resolution of any ambiguity in the 11 awards. The proposed amendments are based on the Tranche 1 variation determinations issued on 25 November¹⁸ and the most recent Pharmacy Plain Language Exposure Draft.

[19] A conference will be convened at **9:15 am on Thursday 19 December 2019** in Sydney to seek the views of interested parties in relation to the redrafting of the annual leave loading clauses at Attachment B and to consider any other proposals. A Notice of Listing will be issued shortly.

PRESIDENT

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¹⁸ See [\[2019\] FWCFB 7854](#)

ATTACHMENT A

56 awards containing reference to an employee being paid the higher of the annual leave loading or a shift 'loading or 'allowance'

No.	56 Awards identified with a provision for annual leave loading	Tranche stage the award falls under in the AM2019/17 final stage proceedings
Tranche 1		
1.	Animal Care and Veterinary Services Award 2010	1
2.	Banking, Finance and Insurance Award 2010	1
3.	Car Parking Award 2010	1
4.	Cement and Lime Award 2010	1* dealt together with the Quarrying Award 2010
5.	Coal Export Terminals Award 2010	1
6.	Electrical Power Industry Award 2010	1
7.	Legal Services Award 2010	1
8.	Medical Practitioners Award 2010	1
9.	Pharmacy Industry Award 2010	1* this award is subject to issues raised by the PGA regarding the Plain Language draft and is outstanding from Tranche 1 – therefore no future award has been publicised, see Decision [2019] FWCFB 7854 at [2]
10.	Premixed Concrete Award 2010	1
11.	Quarrying Award 2010	1* dealt together with the Cement and Lime Award 2010
12.	Seafood Processing Award 2010	1
Tranche 2		
1.	Aboriginal Community Controlled Health Services Award 2010	2
2.	Airport Employees Award 2010	2
3.	Asphalt Industry Award 2010	2
4.	Cleaning Services Award 2010	2
5.	Clerks - Private Sector Award 2010	2
6.	Concrete Products Award 2010	2
7.	Contract Call Centres Award 2010	2
8.	Dry Cleaning and Laundry Industry Award 2010	2
9.	Educational Services (Post-Secondary Education) Award 2010	2
10.	Educational Services (Schools) General Staff Award 2010	2
11.	Gas Industry Award 2010	2
12.	Higher Education Industry-General Staff-Award 2010	2

13.	Manufacturing and Associated Industries and Occupations Award 2010	2
14.	Meat Industry Award 2010	2
15.	Pastoral Award 2010	2
16.	Pharmaceutical Industry Award 2010	2
17.	Poultry Processing Award 2010	2
18.	Road Transport and Distribution Award 2010	2
19.	Storage Services and Wholesale Award 2010	2
20.	Vehicle Manufacturing, Repair, Services and Retail Award 2010	2
21.	Waste Management Award 2010	2
Tranche 3		
1.	Black Coal Mining Industry Award 2010	3
2.	Building and Construction General On-site Award 2010	3
3.	Business Equipment Award 2010	3* initially Tranche 1 but moved to Tranche 3, see Statement [2019] FWCFB 6562
4.	Educational Services (Teachers) Award 2010	3
5.	Electrical, Electronic and Communications Contracting Award 2010	3
6.	Food, Beverage and Tobacco Manufacturing Award 2010	3
7.	General Retail Industry Award 2010	3
8.	Graphic Arts, Printing and Publishing Award 2010	3* initially Tranche 1 but moved to Tranche 3, see Statement [2019] FWCFB 6562
9.	Health Professionals and Support Services Award 2010	3
10.	Joinery and Building Trades Award 2010	3
11.	Miscellaneous Award 2010	3
12.	Mobile Crane Hiring Award 2010	3
13.	Nurses Award 2010	3
14.	Pest Control Industry Award 2010	3
15.	Sugar Industry Award 2010	3
16.	Telecommunications Services Award 2010	3* initially Tranche 1 but moved to Tranche 3, see Statement [2019] FWCFB 6562
17.	Textile, Clothing, Footwear and Associated Industries Award 2010	3
18.	Timber Industry Award 2010	3
19.	Wine Industry Award 2010	3
Not dealt with in final stage proceedings - plain language re-drafting process		
1.	Aged Care Award 2010	Will be the subject of the plain language re-drafting process, see Decision [2019] FWCFB 6861

2.	Fast Food Industry Award 2010	Will be the subject of the plain language re-drafting process, see Decision [2019] FWCFB 6861
3.	Hair and Beauty Industry Award 2010	Will be the subject of the plain language re-drafting process, see Decision [2019] FWCFB 6861
4.	Social, Community, Home Care and Disability Services Industry Award 2010	Will be the subject of the plain language re-drafting process, see Decision [2019] FWCFB 6861

ATTACHMENT B

11 awards (and their respective relevant clauses) in the Tranche 1 final stage proceedings which contain reference to an employee being paid the higher of the annual leave loading or a shift 'loading or 'allowance'

Animal Care and Veterinary Services Award 2020

22.3 Payment for Annual leave loading

(a) During a period of annual leave **an employer must pay** an employee ~~will receive their minimum hourly rate plus a loading calculated on the rate of wage prescribed in clause 15~~ **Minimum rate** at the annual leave rate. The ~~Annual leave rate~~ **loading** is payable on leave accrued.

(b) The **annual leave rate** is calculated as follows:

(i) **Day work**

For an employees who would have worked on day work only had they not been on leave, **the annual leave rate is the greater of:**

- **117.5%** of the minimum hourly rate for the employee's ordinary hours of work in the period; or
- The minimum hourly rate for the employee's ordinary hours of work in the period including any weekend penalty rate as specified in clause 21.1.

(ii) **Shiftwork**

For an employee who would have worked on shiftwork had they not been on leave **the annual leave rate is the greater of:**

- **117.5%** of the minimum hourly rate for the employee's ordinary hours of work in the period; or
- The minimum hourly rate for the employee's ordinary hours of work in the period including any penalty rates for shiftwork for the employee's ordinary hours of work as specified in clauses 21.2 and 21.3.

~~or the shift loading (including relevant weekend penalty rates) whichever is the greater, but not both~~

NOTE: Where an employee is receiving over-award payments such that the employee's base rate of pay is higher than the rate specified under this award, the employee is entitled to receive the higher rate while on a period of paid annual leave (see sections 16 and 90 of the Act).

22. Annual leave

22.3 Payment for Annual leave loading

(a) During a period of annual leave an employer will pay an employee an annual leave rate will receive a loading calculated on the rate of wage prescribed in clause 15–Minimum rates.

(b) The annual leave rate loading payment is payable on leave accrued.

(c) The annual leave rate is calculated as follows:

(i) Day work

Employees who would have worked on day work only had they not been on leave must be paid the greater of either:

- 117.5% of the minimum hourly rate; or
- the relevant weekend penalty rates as prescribed in clause 27.4, whichever is the greater but not both.

(ii) Shiftwork

Employees who would have worked on shiftwork had they not been on leave must be paid the greater of either:

- 117.5% of the minimum hourly rate; or
- the shift loadings and relevant weekend shiftwork penalty rates as prescribed in clauses 13.7(d), whichever is the greater but not both.

Car Parking Award 2020

24.3 Payment for annual leave and loading

- (a)** Before the start of an employee's annual leave the employer must pay the employee: **at the annual leave rate instead of the base rate of pay referred to in section 90(1) of the Act.**

- (b)** The **annual leave rate** is the greater of either:
 - (i)(a)** **117.5%** of the minimum hourly rate for the employee's ordinary hours of work as prescribed in clause 17—Minimum rates plus first aid allowance where appropriate; ~~or instead of the base rate of pay referred to in the NES, the amount the employee would have earned for working their ordinary hours had they not been on leave; and~~

 - (ii)(b)** if they were a shiftworker prior to entering leave, their **any** shift penalty rates the employee would have received for working their ordinary hours ~~an additional loading of 17.5% of the employee's minimum rate prescribed in clause 17—Minimum rates, plus first aid allowance where appropriate or, whichever is greater.~~

Cement, Lime and Quarrying Award 2020

22.3 Payment for annual leave and loading

(a) Before the start of an employee's annual leave the employer must pay the employee at the annual leave rate instead of the base rate of pay referred to in section 90(1) of the Act. ~~in respect of a period of annual leave:~~

~~(a) — instead of the base rate of pay referred to in section 90(1) of the Act,~~

(b) The annual leave rate is calculated as follows:

(i) the amount the employee would have earned for working their normal hours, ~~exclusive of~~ excluding overtime or penalty rates ~~other penalties,~~ had they not been on leave; ~~and~~ plus an additional loading payment of 17.5% of the employee's minimum weekly rate of ~~prescribed in clause 16—Minimum rates;~~ or

(ii) where the employee is a shiftworker, the greater of either;

- the amount the employee would have earned for working their normal hours, excluding overtime or penalty rates had they not been on leave plus an additional payment of 17.5% of the employee's minimum weekly rate of pay; or
- the penalty rate the employee would have received for working their normal hours, had they not been on leave ~~their shift penalties payable in respect of the period of annual leave, whichever is greater.~~

Coal Export Terminals Award 2020

20.4 Payment for annual leave

- (a)** An employee taking annual leave must be paid the ~~greater of either~~ **annual leave rate**:
- (b)(a)** The **annual leave rate** is the greater of:
- (i)(a)** **117.5%** of the minimum hourly rate for the employee's ordinary hours of work; ~~the employee's ordinary rate of pay plus a loading of 17.5% of that rate;~~ or
 - (ii)(b)** the employee's rostered earnings for the period of annual leave, which includes all rostered overtime and rostered public holidays (paid at the rate in clause 13.6), but does not include shift **work rates and penalty rates penalties**, other than for 7 day roster employees.

NOTE: Where an employee is receiving over-award payments such that the employee's base rate of pay is higher than the rate specified under this award, the employee is entitled to receive the higher rate while on a period of paid annual leave (see sections 16 and 90 of the [Act](#)).

Electrical Power Industry Award 2020

21.3 Payment for annual leave~~Additional monetary entitlements~~

- (a) An employee receiving an allowance on a continuous basis will continue to receive the allowance on all annual leave, subject to, in the case of higher duties allowance in clause 15.5, the employee resuming higher duties on completion of the leave.
- (b) **During a period of paid annual leave an employer must pay an employee at the annual leave rate.**~~An employee taking leave will also be entitled to a sum equal to the greater of:~~
- (c) **The annual leave rate is the greater of:**
 - (i) **117.5%** of their weekly rate including appropriate allowances (excluding shift ~~penalties~~ and weekend penalty ~~rates~~~~payments~~); or
 - (ii) **their weekly rate and any relevant shift or weekend penalty rates specified in clause 20—Penalty rates** ~~shift allowance and/or Saturday or Sunday penalty rates~~ according to the employee's roster or projected roster.

NOTE: Where an employee is receiving over-award payments such that the employee's base rate of pay is higher than the rate specified under this award, the employee is entitled to receive the higher rate while on a period of paid annual leave (see sections 16 and 90 of the Act).

Legal Services Award

22.5 Additional payment for annual leave~~Annual leave loading~~

- (a) During a period of annual leave an employee must ~~also receive a loading~~ **an additional payment** calculated on the ~~wages~~ **rates** prescribed in clause 15—Minimum rates of this award. ~~Annual leave loading~~ **The additional** payment is payable on leave accrued.
- ~~(b) This loading must be paid as follows:~~
- ~~(i) Day Work~~
- (b) ~~Employees~~ **For employees** who would have worked on day work only had they not been on leave, **the additional payment is 17.5% of the minimum hourly rate payable to the employee in accordance with clause 15—Minimum rates.**;
- ~~(ii) Shiftwork~~
- (c) ~~Employees~~ **For employees** who would have worked on shiftwork had they not been on leave, **the additional payment is the greater of:**
- (i) **17.5%** of the minimum hourly rate payable to the employee in accordance with clause 15—Minimum rates; or
- (ii) **The difference between the shift penalty rate loading** (including relevant weekend penalty rates) **and the minimum hourly rate payable to the employee in accordance with clause 15—Minimum rates.** ~~whichever is greater but not both.~~

Medical Practitioners Award 2020

22.4 **Payment for annual leave**~~Annual leave loading~~

~~(a)~~ At the time of taking leave, a Medical Practitioner will be paid **at the annual leave rate, calculated as follows:** ~~a loading of 17.5% of the minimum weekly rate based on a maximum of 4 weeks' annual leave.~~

~~(b)~~ — A shiftworker, in addition to their ordinary pay, will be paid the higher of:

~~(i)~~ — the annual leave loading; or

(a) for employees other than shiftworkers, the annual leave rate is **117.5%** of the ordinary hourly rate for the employee's ordinary hours of work in the period; or

(b) for shiftworkers, the annual leave rate is the greater of:

(i) **117.5%** of the ordinary hourly rate for the employee's ordinary hours of work in the period ~~the annual leave loading~~; or

(ii) the **shift penalty rate** ~~weekend and shift penalties~~ the employee would have received had they not been on leave during the relevant period.

NOTE: Where an employee is receiving over-award payments such that the employee's base rate of pay is higher than the rate specified under this award, the employee is entitled to receive the higher rate while on a period of paid annual leave (see sections 16 and 90 of the Act).

Pharmacy Industry Award 2020

23.2 Payment for Annual leave loading

(a) During a period of annual leave an employer must pay an employee at the annual leave rate for the employee's ordinary hours of work in the period ~~will receive a loading calculated on the rate prescribed in clause 16—Minimum rates of this award in addition to their minimum rate of pay.~~

(b) ~~The Annual leave loading payment rate~~ is payable on leave accrued.

(c) The loading **annual leave rate** will be **calculated** as follows:

(i) **Day work**

Employees who would have worked on day work only had they not been on leave ~~will be paid the greater of either 117.5% of their minimum hourly rate 17.5% or the relevant weekend penalty rates, whichever is the greater but not both.~~

(ii) **Shiftwork**

Employees who would have worked on shiftwork had they not been on leave ~~will be paid the greater of either 117.5% of their minimum hourly rate or the relevant penalty rate. 17.5% or the shift loading (including relevant weekend penalty rates) whichever is the greater but not both.~~

Premixed Concrete Award 2020

22.3 Payment for annual leave

- (a) Before the start of an employee's annual leave the employer must pay the employee **at the annual leave rate instead of the base rate of pay referred to in section 90(1) of the Act**.
- (b) The **annual leave rate** is calculated as follows:
- ~~(a)(i)~~ **instead of the base rate of pay referred to in section 90(1) of the Act, the amount the employee would have earned for working their normal hours, excluding exclusive of overtime or other penalties or premiums penalty rates, had they not been on leave plus an additional payment of 17.5% of the employee's minimum weekly rate prescribed in clause 16— Minimum rates; and**
- ~~(b)(ii)~~ If the employee is a shiftworker prior to taking leave, ~~whichever is the greater of:~~
- **(i) the amount the employee would have earned for working their normal hours, excluding any overtime or penalty rates, had they not been on leave plus an additional payment a loading of 17.5% of the employee's minimum weekly rate prescribed in clause 16— Minimum rates; or**
 - **(ii) the penalty rate the employee would have received for working their normal hours, had they not been on leave if the employee is a shiftworker prior to taking leave, their shift penalties.**

NOTE: Where an employee is receiving over-award payments such that the employee's base rate of pay is higher than the rate specified under this award, the employee is entitled to receive the higher rate while on a period of paid annual leave (see sections 16 and 90 of the Act).

Seafood Processing Award 2020

21.4 Payment for period of annual leave

- (a) An employee under this award, before going on annual leave, must be paid **at the rate wages**—they would have **been paid** received in respect of the ordinary hours the employee would have worked had the employee not been on leave during the relevant period. This will be paid instead of the **base rate of pay** as referred to in section 90(1) of the Act.
- (b) The **rate wages** to be paid must be worked out on the basis of what the employee would have been paid under this award for working ordinary hours during the period of annual leave, including:
 - (i) allowances, loadings and penalties paid for all purposes of the award;
 - (ii) first aid allowance; and
 - (iii) any other wages payable under the employee’s contract of employment including any over-award payment.
- (c) The employee is not entitled to annual leave payments in respect of:
 - (i) overtime;
 - (ii) special rates; or
 - (iii) any other payment which might have been payable to the employee as a reimbursement for expenses incurred.

NOTE: Where an employee is receiving over-award payments such that the employee’s base rate of pay is higher than the rate specified under this award, the employee is entitled to receive the higher rate while on a period of paid annual leave (see sections 16 and 90 of the Act).

21.5 **Payment for Annual leave loading**

~~(a)~~ During a period of annual leave **an employer must pay** an employee **at the annual leave rate calculated as follows**: ~~must also be paid a loading calculated on the wages prescribed in clause 21.4.~~

~~(b)~~ — The loading must be as follows:

(a)(i) Day work

An employee who would have worked on day work only had they not been on leave must be paid **the greater of:**

- (i) ~~a loading equal to~~ **117.5%** of the ~~wages-rate~~ prescribed in clause 21.4; or

- (ii) the relevant weekend penalty rates **prescribed in clause 20—Penalty rates**, ~~whichever is the greater but not both.~~

(b)(ii) Shiftwork

An employee who would have worked on shiftwork had they not been on leave must be paid **the greater of:**

- (i) ~~a loading equal to~~ **117.5%** of the ~~wages-rate~~ prescribed in clause 21.4;
or
- (ii) ~~the shift loading including~~ relevant weekend penalty rates **prescribed in clause 20—Penalty rates**, ~~whichever is the greater but not both.~~