

Guide to Award Modernisation and super

POSSIBLE EFFECTS ON YOUR EMPLOYER SUPERANNUATION OBLIGATIONS

Guide to Award Modernisation and super

Possible effects on your employer superannuation obligations

ANZ is providing this guide to assist you, as an employer client, to identify and meet your superannuation obligations during the upcoming changes introduced by Award Modernisation. While there are other implications of Award Modernisation, this guide deals specifically with the superannuation aspects. Further information can be obtained from the websites listed in Section 8.

Contents

Section	Page
1. What is Award Modernisation?	1
2. Am I affected by a Modern Award?	2
3. Does a Modern Award apply to my employees?	3
• Identify your current award, agreement or industrial instrument	4
• Accessing your Modern Award/s	6
• Employees excluded from a Modern Award	6
4. What are my Modern Award super obligations?	7
5. Can my ANZ employer super plan continue?	8
6. Can my employees continue to contribute to ANZ?	8
7. Penalties	9
8. Where can I get further help?	9
9. Key dates	9

ING Custodians Pty Limited, the issuer of this booklet, is a subsidiary of Australia and New Zealand Banking Group Limited (ANZ). ANZ is an authorised deposit taking institution (ADI) under the Banking Act 1959. The issuer is not an ADI and an investment in the fund is neither a deposit nor liability of ANZ or any member of the ANZ Group, other than ING Life Limited ABN 33 009 657 176 for any insurance product it issues or ANZ in relation to any ANZ bank account. Neither ANZ nor any member of the ANZ Group stands behind or guarantees the issuer or the capital or performance of any securities issued to, or assets held by, you. Your investment is subject to investment risk, including possible delays in repayment and loss of income and principal invested. ANZ recommends that you read the ANZ Financial Services Guide and the relevant Product Disclosure for further information about its association with the issuer, any benefits that it may receive and other important information before deciding whether to acquire or hold this product.

This information is current as at December 2009 but may be subject to change. This information is intended to only provide you with general information and, while the sources for the material are considered reliable, no responsibility is accepted for any inaccuracies, errors or omissions. Before making a decision based on this information, you must consider its appropriateness having regard to your individual objectives, financial situation and needs. Before acquiring any employer super or other financial product you should read the relevant Product Disclosure Statement. You should also consider engaging lawyers for legal advice about your specific Award Modernisation circumstances.

1. What is Award Modernisation?



Award Modernisation is a key part of the Federal Government's rationalisation of industrial relations in Australia. From 1 January 2010, many employers and employees will be covered by a Modern Award. The goal is to have around 150 or so Modern Awards rather than thousands of federal and state awards (currently known as Notional Agreements Preserving State Awards or NAPSAs), so that the system is simpler to understand and easier to apply. Nevertheless, the upcoming period of change may present challenges for some employers.

A Modern Award is a legal instrument made under the new Fair Work Act. Modern Awards set a minimum safety net for wages and terms and conditions of employment (such as types of employment, hours of work and leave) for employees, primarily in an industry or sector in which the Modern Award applies. Some Modern Awards will also set a minimum safety net for particular occupations – for example, clerks. A Miscellaneous Modern Award will also cover employees and employers not otherwise covered by a Modern Award.

What's changing for super?

Each Modern Award specifies the superannuation funds which an employer in that industry can use as their default fund. These are referred to as 'Prescribed Super Funds'.

Of course, individual employees entitled to a choice of fund are still able to choose another fund under the 'Choice of Fund' rules. An employee's choice will mean that the Modern Award provisions regarding default funds do not apply.

Basic obligations regarding universal superannuation

Under the Superannuation Guarantee (Administration) Act 1992, you must generally contribute a certain level of superannuation for each eligible employee or incur the superannuation guarantee (SG) charge.

'Choice of Fund' rules allow eligible employees to choose which superannuation fund you pay their SG contribution into, however you must also have a default fund to receive the SG contributions for employees who do not nominate their own choice.

Can we use the super fund we've always used?

Yes, in many cases you can. However, in some cases you may not be able to.

Please read this guide for information to help you determine whether you are covered by a Modern Award and how you may be affected.

2. Am I affected by a Modern Award?

As a general rule, Modern Awards can only cover national system employers and employees. A national system employer includes:

- a constitutional corporation
- an employer incorporated in a territory (The ACT, NT, Norfolk Island, Ashmore and Cartier Islands, Australian Antarctic Territory, Christmas Island, Cocos (Keeling) Islands, Coral Sea Islands, Jervis Bay Territory, Heard Island and McDonald Islands)
- any non-corporate employer which operates in a territory (see list above). This category includes businesses that operate as sole traders or partnerships
- any employer in a state which has referred its industrial relations powers to the Commonwealth.

This means that employers that operate outside the territories, and which are not incorporated, will not be national system employers in the absence of a referral of industrial relations powers by the state in which they operate. This category includes businesses that operate as sole traders or partnerships.

A Modern Award must include coverage terms setting out the persons or bodies that are covered by the Award. Unlike Federal Awards in the past, Modern Awards do not have lists of respondents.

As a general rule, under the new industrial relations system, all national system employers and employees are covered by standards called the National Employment Standards (NES) which deal with matters such as weekly hours of work, leave, notice of termination and redundancy pay. The NES will apply from 1 January 2010. The NES don't deal with superannuation rights.



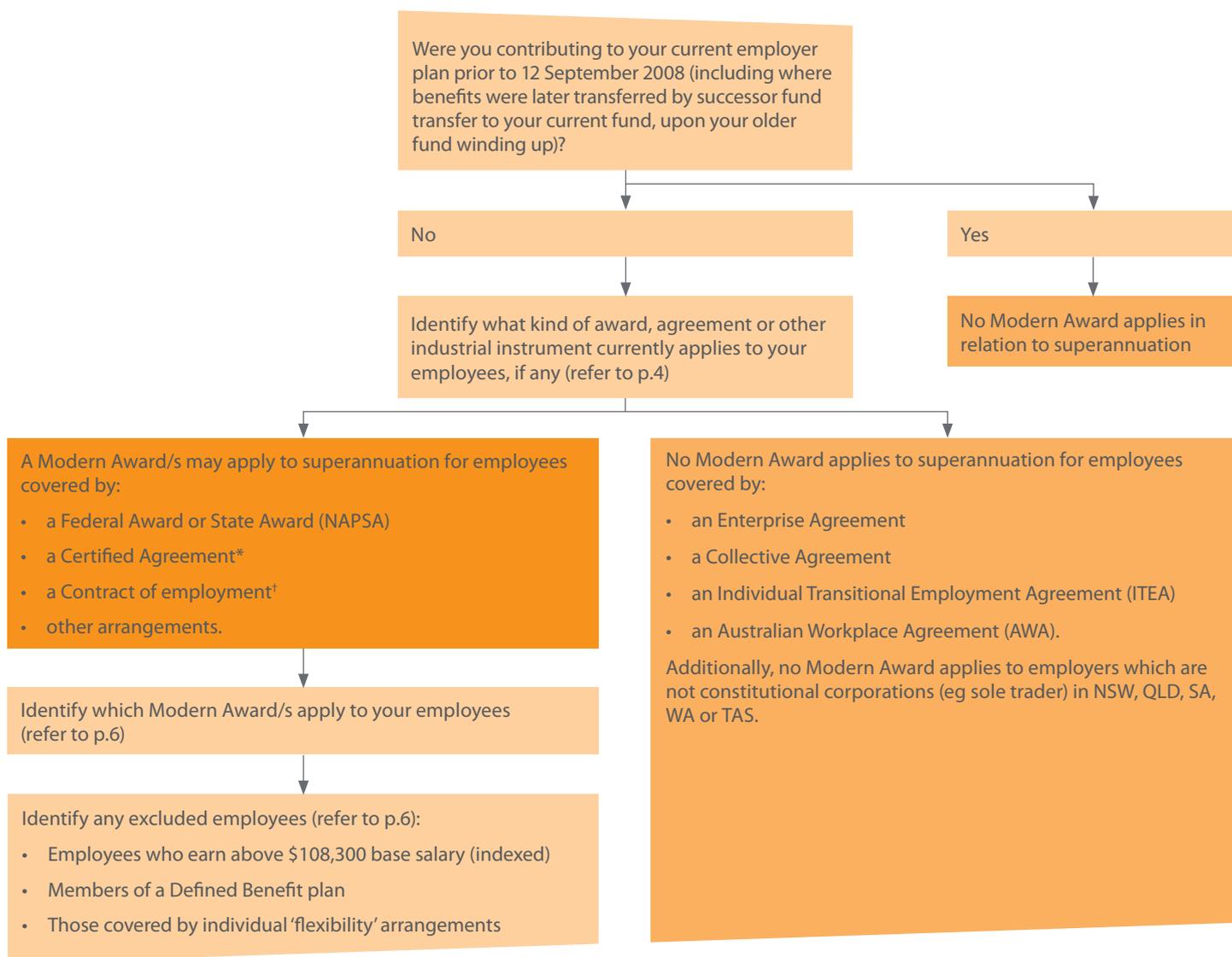
Exclusions

- Are you a Sole Trader or part of a Partnership in NSW, QLD, SA, WA or TAS? You won't be an employer covered by a Modern Award until your state refers its industrial relations powers to the Commonwealth. However, it is important to note that Tasmania and SA have agreed to do so, but are yet to enact the necessary legislation. Once TAS or SA enacts the necessary legislation you may be covered by a Modern Award if you operate in that state. QLD, NSW and WA are still considering whether they will also refer their industrial relations powers to the Commonwealth. (Currently you're not exempt if you're a VIC, ACT or NT sole trader or partnership.)
- Do you have employees who earn over \$108,300 p.a. base salary (the high income threshold as at 1 July 2009 for full time employees, subject to periodic indexation)? You may not be covered by a Modern Award in respect of these particular employees, but you should read on.

3. Does a Modern Award apply to my employees?

First, you must be clear on which award or industrial instrument currently applies, if any. Then you can work out which Modern Award will apply, if any.

Refer to the chart below to see if the superannuation arrangements for your employees are affected by a Modern Award. You may find that more than one industrial instrument applies to your employees and your business may require a combination of Modern Award/s or other industrial instruments. If you are at all unsure, consider seeking legal or industrial relations advice (refer to p9).



* A Modern Award can apply but the Agreement prevails where the terms of the two are inconsistent (including the superannuation terms).
† Terms and conditions included in a Contract of Employment which are below those set by a Modern Award are not enforceable.

Modern Awards will operate from 1 January 2010.

Identify your current award, agreement or industrial instrument

There are a number of types of awards, agreements or other industrial instruments which could currently apply to your employees.

Enterprise Agreement

- Under the Fair Work reforms, the previous system of collective and individual workplace agreements has been replaced by a single type of agreement, an Enterprise Agreement. An Enterprise Agreement is simply a collective agreement that covers one or more national system employers (see above) and their employees specified in the Enterprise Agreement.
- Enterprise Agreements cannot take effect until they are approved by Fair Work Australia (FWA). FWA must be satisfied that, among other things, an Enterprise Agreement:
 - is not inconsistent with the NES
 - passes the better off overall test
 - does not contain any unlawful terms
 - has a nominal expiry date of not more than 4 years
 - contains a dispute settling procedure.

A Modern Award does not apply to a particular employee whenever an Enterprise Agreement applies to that employee.

Collective Agreement

- While the Work Choices reforms were in force, an employer could make a union or an employee Collective Agreement.
- Collective Agreements covered one or more employers and their employees specified in the Agreement and did not take effect until they were lodged with the Workplace Authority.
- The Work Choices reforms introduced new limitations to what could be included in Collective Agreements.
- The Fair Work reforms provide for Collective Agreements which were made under the Work Choices legislation to continue in effect (although they may be an Enterprise Agreement).

A Modern Award does not apply to a particular employee whenever a Collective Agreement applies to that employee.

Individual Transitional Employment Agreement (ITEA)

- Under the Fair Work reforms, certain employers are allowed to make Individual Transitional Employment Agreements (ITEAs) until the end of 2009.
- An ITEA is an agreement between an employer and an employee whose employment is subject to the ITEA, however it cannot have a nominal expiry date which is later than 31 December 2009.

A Modern Award does not apply to a particular employee when an ITEA applies to that employee (even if the ITEA does not deal with superannuation).

Australian Workplace Agreement (AWA)

- Prior to the Fair Work reforms, certain employers were allowed to make Australian Workplace Agreements (AWAs).
- An AWA is an individual agreement between an employer and an employee whose employment is subject to the AWA.
- Employers can no longer make AWAs. The Fair Work reforms provide for AWAs to continue in effect (although they may be terminated or replaced by an Enterprise Agreement).

A Modern Award does not apply to a particular employee whenever an AWA applies to that employee (even if the AWA does not deal with superannuation).

Certified Agreement

- Prior to the Work Choices reforms, an employer could make a collective agreement which was called a Certified Agreement.
- Certified Agreements could be made by constitutional corporations (or employers located in Victoria or a territory), or by employers in settlement of industrial disputes. Certified Agreements could be made with one or more unions, or a group of employees. To have effect, Certified Agreements had to be approved by the Australian Industrial Relations Commission.
- The Work Choices and Fair Work reforms provide for Certified Agreements to continue in effect (although they may be terminated, replaced by an Enterprise Agreement and may be subject to rules setting a termination date).

A Modern Award may apply except where a Certified Agreement which stipulates superannuation terms applies to that employee (the Agreement prevails over the Modern Award to the extent of any inconsistency in the terms).

Federal Award

- Federal Awards are legally binding instruments which regulate the terms and conditions under which employees may be employed.
- While some enterprise awards apply to a single employer, the majority of employees covered by Federal Awards are covered by multi-employer or industry awards.
- An employer is bound by a Federal Award only where the employer:
 - is named as a party to the Award
 - is a member of an employer organisation named as a party to the Award
 - has been transferred the business of another employer who was bound by the Award.

A Modern Award will probably apply. Generally, Federal Awards will cease to apply to an employee as soon as a Modern Award that covers an employee comes into operation.

Notional Agreement Preserving a State Award (NAPSA) or State Award

- As a result of the Work Choices reforms, any State Award became a Notional Agreement Preserving a State Award (NAPSA).
- The Fair Work reforms provide for NAPSAs to continue in effect as an 'award based transition instrument' (although they may be replaced by an Enterprise Agreement and may be subject to rules setting a termination date).
- If a Modern Award (other than the Miscellaneous Modern Award that covers an employee) comes into operation, then the NAPSA ceases to cover the employee.

If a Modern Award (other than the Miscellaneous Modern Award) covering an employee comes into operation, the Modern Award will apply. (While a NAPSA covers an employee, the Miscellaneous Modern Award does not apply to the employee.)

Contract of Employment

- Contracts of Employment can set terms and conditions which are better than those set by a Modern Award (eg over award payments or benefits) or deal with matters which are not addressed by a Modern Award (eg an employer's confidential information).

Terms and conditions included in a Contract of Employment which are below those set by a Modern Award are not enforceable.

It should be noted that:

- Rules have been fixed for some industrial instruments meaning they will then terminate at nominated dates.
- There may be other types of industrial instruments which apply to your employees. These include old Industrial Relations Agreements, Workplace Determinations, Preserved Collective State Agreements and Section 170MX Awards. If any of your employees are covered by such instruments, it would be prudent to obtain advice about the interaction of the instrument with any Modern Award.
- If you are involved in any transfer of business, you may wish to obtain advice about how any agreements or awards which apply to your employees might change after the transfer.
- If your employer super fund was established with another provider prior to 12 September 2008 but moved to ANZ through a successor fund transfer since then, it too is not impacted by the Modern Award superannuation requirements, and may continue to receive Superannuation Guarantee (SG) contributions for your current and future employees.

Accessing your Modern Award/s

If you determine that a Modern Award does apply, you will need to confirm which award/s apply to your employees and obtain further information.

Modern Awards are grouped by industry or occupation. A list of Modern Awards is published at: <http://www.airc.gov.au/awardmod/fullbench/awards.htm>. The coverage clause located near the beginning of each award explains which employees that particular Modern Award covers.

It is important that you know which Modern Award or other industrial instrument binds you for more than just your superannuation operations. If you can't say with certainty, we suggest you seek industry or legal advice. See Section 8 for contacts.

The Superannuation clause is standardised in Modern Awards. In each Modern Award the super funds you are allowed to use for your default employer super plan are prescribed. This means the standard superannuation clause will affect you almost identically no matter which Modern Award covers you. The only difference is that the Prescribed Super Funds differ from industry to industry.

Employees excluded from a Modern Award

a) Executive exclusion

A Modern Award will not apply to your full time employees who earn above \$108,300 base salary (indexing with CPI annually) (for part time employees, a pro rata high income threshold is calculated) supported by a written 'guarantee of annual earnings'. You must provide a formal guarantee of earnings in the manner prescribed by the legislation:

- The guarantee must be for a period of at least 12 months, unless the employee is engaged for a shorter period.
- The guarantee must be given, and accepted, before the period in question commences and provided within 14 days of the employment or a variation of the terms of employment.
- You must notify the employee of the Modern Award from which the employee is being excluded.
- No Enterprise Agreement must apply to the employee at the start of the period.
- Your employee must accept the formal guarantee.

This guarantee will be enforceable under the Fair Work Act.

The annual earnings do not include:

- payments that can't be determined in advance (eg bonuses, commissions and overtime which is not guaranteed)
- compulsory superannuation
- reimbursements.

b) Defined Benefit plan members' exclusion

It is clear that the standard superannuation clause in Modern Awards applies where employees covered by the Modern Award are entitled to choice of fund under superannuation legislation, but have not made a choice. In this case, employers must contribute to a Prescribed Super Fund.

However, it is not clear whether the clause applies where employees are not entitled to choose a fund.

Many employees who are entitled to defined benefits do not have the right to choose their own fund. In this case, a legal argument can be made that their employer can continue to contribute to the fund providing the defined benefits. However, this position is not without doubt and further clarification is being sought from the Government.

A Modern Award does will not apply to your employees where you have been contributing to the defined benefit plan prior to 12 September 2008.

c) Individual flexibility arrangements

Modern Awards must include a 'flexibility provision', which allows an employee and their employer to agree on an individual flexibility arrangement that varies from the Modern Award to meet their genuine needs.

If the flexibility provision in the Modern Award covering your business specifies superannuation as a provision that may be varied by an individual flexibility arrangement (note that none do at the date of publication), an individual flexibility arrangement may be used to amend the list of Prescribed Superannuation Funds. The Employer Sponsor would have to establish that the employee is better off overall under the individual flexibility arrangement than they would otherwise have been under the Modern Award, which may be a difficult requirement to satisfy.

4. What are my Modern Award super obligations?



The Superannuation Guarantee (Administration) Act still requires you to:

- contribute for eligible employees (at the rate of 9% of ordinary time earnings, subject to the cap), or incur the Superannuation Guarantee charge
- pay those contributions into your default fund for employees who have not chosen a fund.

However, if your employees are covered by a Modern Award you now must also comply with the standard superannuation clause in the Modern Award, for example:

'Unless the employee has exercised his/her choice under the Choice of Fund legislation, the employer must pay the Superannuation Guarantee contributions and any amount authorised as a voluntary, post-tax employee contribution to:

- one of the Prescribed Superannuation Funds appearing in a list in this Modern Award, or
- any eligible choice superannuation fund to which the employer was making superannuation contributions for the benefit of its employees before 12 September 2008 (including a successor fund of that fund if the previous fund wound up).'

ANZ Super Advantage and ANZ Super Savings Account are both eligible choice funds.

Your obligations:

Continuing with ANZ as your default fund:

- If your current fund is not a Prescribed Super Fund, but you were contributing to it for your employees before 12 September 2008, the transition provision in Modern Awards allows you to continue to contribute to that fund.
- If your current fund is not a Prescribed Super Fund, and you were contributing for your employees to a different fund before 12 September 2008, but your employees and their benefits were later transferred by successor fund transfer to your current fund, because the previous fund wound up, you can continue to contribute to your current fund.
- If you were paying contributions before 12 September 2008 to an ANZ personal super or employer super product for some employees who had nominated ANZ as their chosen fund, then you would have been making contributions to our overall 'MasterFund'. Although an ANZ employer super plan was not your default fund at that time, you will be able to set up an ANZ employer super plan as your default plan in the future because our employer super plans are also within the 'MasterFund', and you were contributing to the MasterFund before 12 September 2008.
- Super contributions for new employees hired since 12 September 2008 can still be paid into your existing ANZ employer super plan so long as you were contributing to that plan for other employees before 12 September 2008 or it is a successor fund to the fund you contributed to before that date, because the previous fund wound up.

New 'prescribed' default fund required:

- You will not be able to use your current ANZ employer super plan as a default fund to meet your Modern Award obligations if you began contributing for your employees to your current ANZ employer super plan on or after 12 September 2008, and your plan did not come into ANZ by successor fund transfer from a fund you contributed to before 12 September 2008, but which has since ceased to exist. Your employees, however, can still nominate your current ANZ employer super plan as their choice of fund.

5. Can my ANZ employer super plan continue?

You, as an employer, can continue to have an ANZ employer super plan as your default fund:

- if you are covered by a Modern Award but you were already contributing to superannuation with ANZ for some employees before 12 September 2008
- if you are covered by a Modern Award and your ANZ employer super plan is a successor fund to the fund you were contributing to before 12 September 2008, where the previous fund has ceased to exist
- even if you are covered by a Modern Award, in respect of any employees who are not covered by that Modern Award
- if you are not covered by a Modern Award.

Of course, ANZ won't terminate your employer super plan if you are not covered by any of the situations above. However, you may be liable for penalties if you are bound by a Modern Award to use another super fund but continue to pay super contributions into your ANZ employer super plan instead. Further, ANZ may not be allowed to refund your contributions once they're in the super system.

Your employees may also be disadvantaged or inconvenienced if you must contribute to a different superannuation fund after 1 January 2010. For example, they may be subject to additional and/or higher fees, or reduced investment choice, in the new fund. Not to mention you'll be establishing another superannuation account for them meaning duplicated fees and paperwork.

To prevent this, your employees that are entitled to choice of fund can nominate your ANZ employer-sponsored plan as their chosen fund.

6. Can my employees continue to contribute to ANZ?

The 'Choice of Fund' rules allow eligible employees to choose their own superannuation funds. This entitlement remains, even where the employee is covered by a Modern Award.

In this way, employees can direct their employer (you) to pay their SG contributions into a fund that is not specified in the Modern Award. Employees will need to nominate their chosen fund in writing. You can print and photocopy the form for your employees to complete.

The ANZ Fund Nomination Form can be located at www.anz.com > Investments & advice > Products and services.

Your employees can exercise Choice of Fund to nominate your ANZ employer super plan as their chosen fund.

Ensure that both you and your employees continue to benefit from the competitive prices you have already negotiated with ANZ and the experience we have with administering your plan. Employees affected by Modern Awards can individually nominate ANZ on a Fund Nomination form.

7. Penalties

The Fair Work Act provides that a person must not contravene any terms of a Modern Award that applies to them. If there is any breach of a Modern Award, a remedy may be sought by an employee, a union or an inspector.

Proceedings regarding any breach of a Modern Award may be instituted not only against the person who breached the Award, but also against anyone else who was 'involved' in the breach.

The maximum penalty that may be imposed for each breach of a Modern Award is \$6,600 for an individual, or \$33,000 for a corporation.

If an employer breaches a Modern Award by failing to make a superannuation contribution to a fund, the employer may also be ordered to remedy the default, either by paying money into a nominated fund or by compensating the employee for the superannuation benefits they have lost as a result of the breach.

There may also be other practical consequences if there is any failure to comply with the terms of a Modern Award. These can include additional costs, adverse publicity and damage to reputation.

8. Where can I get further help?

To work out exactly what Modern Award, if any, applies to you, and what your obligations are under it, we suggest you engage lawyers or industrial relations consultants.

ANZ and its subsidiary, ING Custodians, are unable to provide legal advice.

The following contact points may assist you. ANZ and ING Custodians do not accept responsibility for any inaccuracies, errors or omissions in their service or advice.

- **Fair Work Australia**
Phone 1300 799 675
Visit www.fwa.gov.au
- **Australian Industrial Relations Commission (AIRC)**
Visit www.airc.gov.au/awardmod

9. Key dates

Below are key dates for you to be aware of if your business is affected by the new Modern Awards.

Key superannuation dates for early 2010	
1 January 2010	Commencement of Modern Awards
28 February 2010	Voluntary member superannuation contributions authorised by an employee to be deducted from after-tax wages by the employer in the previous calendar month are due, for employees covered by a Modern Award Superannuation Guarantee contributions due for the previous quarter for all eligible employees
28 March 2010	Voluntary member superannuation contributions authorised by an employee to be deducted from after-tax wages by the employer in the previous calendar month are due, for employees covered by a Modern Award
28 April 2010	Superannuation Guarantee contributions due for the previous quarter for all eligible employees

