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The Cochlear dispute – unions back at the table under the *Fair Work Act 2009* (Cth)

While under Work Choices unions could be excluded from agreement-making, the *Fair Work Act 2009* (Cth) (FW Act) requires companies to bargain with bargaining representatives - including unions - if their employees wish them to do so.

In July 2007 unions at the Cochlear implant factory in Sydney reported that the company was insisting on non-union agreements despite employees overwhelmingly endorsing union representation in the agreement-making process.

During a hearing on the matter, the Cochlear plant's legal representatives told the NSW IRC that the company was "philosophically opposed" to negotiating a union deal.

However, the 300 employees at the site - the majority of whom were women from non-English speaking backgrounds - had overwhelmingly supported union collective bargaining and had voted down two non-union offers (183 to 77 in a July 2007 ballot).

Work Choices permitted the company to continue to pursue a non-union agreement for employees despite the result of the vote.

The first non-union deal employees voted down had removed award entitlements including redundancy. The union stated that the second one was an improvement on the first, but was voted down by employees over their lack of control over shifts/rosters and the fact it was a non-union deal.

The company had in the past been covered by collective agreements under the state system.

The union began a community campaign to try to get Cochlear to change its mind, which continued into and through the 2007 federal election, when the union ran a television advertisement in Mandarin in which workers asked why the company was moving them onto common law individual contracts and not allowing the AMWU to represent them. Generally, the union movement used Cochlear as an example to support their case for majority bargaining.

On August 5 the company gave 90 days notice of terminating the NSW-registered agreement that regulated employment at the Lane Cove site. On that basis the deal would expire on November 5 and employees would move onto individual common law contracts that reflected the terms of the rejected agreements, apart from



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providing two more days of leave and a performance matrix that gave workers the chance to make more money. The common law arrangements also provided a lesser role for the union.

Cochlear loses application

However, on 6 August 2008 Cochlear lost its application to have its expired agreement terminated, with the AIRC finding it was not in the public interest to do so despite accepting the individual contracts Cochlear put to its workforce were "generally superior" to the certified deal.

In determining whether terminating the deal was in the public interest, Commissioner Helen Cargill arranged for a survey to be sent to 316 of the site's employees at their home address, to be returned on an anonymous basis.

The questions included the employees' preferred choice of agreement, and whether they wanted the Commission to terminate the 2005 agreement.

Of the 193 completed forms returned, 181 workers indicated a preference for a union agreement, eight for an employee collective agreement, and three for a common law contract.

On whether they wanted the deal terminated, 178 employees answered "no" and three "don't know".

Commissioner Cargill went on to find there were some "negative public interest considerations which would flow" if the agreement was terminated, as it would weaken the safety net for Cochlear's largely non-English speaking workforce. It was also relevant that the agreement - an expired NAPSA made under the NSW IR Act - required the consent of the AMWU before it could be terminated, consent the union had declined to give.

Cochlear loses appeal

In January 2009 the AIRC full bench rejected an appeal by Cochlear against the Commission's decision.

The full bench accepted the union's evidence that it had deliberately sought to ensure the agreement could only be terminated with consent so Cochlear workers would not be left unprotected when Work Choices was introduced.

Cochlear argued that its workers would be prejudiced if the agreement was not terminated because they would be denied the opportunity to choose from the full range of industrial instruments available to them.

The full bench said the argument was "unsustainable," however, because maintaining the agreement simply meant workers had a higher base to bargain from than they otherwise would.

Cochlear Ltd v AMWU - New South Wales Branch [2009] AIRCFB 27 (23 January 2009)



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Action under FW Act - union applies to compel Cochlear to bargain

In July 2009 the AMWU applied to Fair Work Australia for a majority support determination under s 236 of the FW Act to have Cochlear return to the bargaining table. This was an important test of the Government's new IR laws.

The union argued the company failed to start negotiations for a new agreement, despite repeated requests from the union and clear support among a majority of workers for bargaining to commence.

The union's case rested on a succession of five ballots or surveys conducted over the past two years in which a majority of workers either rejected non-union deals offered by the company or endorsed proposals for a union-negotiated agreement.

August 2009 – FWA uses its wide discretion to inform itself about dispute

In August 2009, Fair Work Australia ordered a ballot to resolve whether the AMWU has majority support among workers at Cochlear, which had suggested that up to 10 of the 171 employee survey forms the union was relying on in its majority support application could be fraudulent.

Commissioner Greg Harrison said that because of the nature of the workforce and the controversy associated with the matter, the best way to determine whether there was majority support was to hold a postal ballot of employees, to enable FWA to be certain about the relevant considerations under the s237 provisions governing when it must make a determination.

He said the AMWU's employee survey was a "positive initiative", a legitimate way to find out the views of employees and that he had no reason to doubt the integrity or genuine intent of those involved.

However, he wasn't fully satisfied the survey would withstand the scrutiny required to underpin a determination, adding that the matter had the potential to become "mired" in legal proceedings.

FWA had a "wide discretion" to inform itself of the views of employees and each application had its own facts and circumstances.

Decision – FWA finds that majority wants bargaining

Cochlear workers back bargaining

20 August 2009 1:00pm

On 21 August 2009 FWA found that the AMWU had succeeded in its bid for a majority support determination at Cochlear after a majority of production employees voted "yes" to collective bargaining in the ballot, the first of its kind under the Fair Work Act.



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Out of 321 employees eligible to participate in the ballot, 185 voted yes and 120 no to the question: "Do you want to bargain for an enterprise agreement with your employer?"

AMWU NSW branch assistant secretary Tim Ayres welcomed the result, which he said was achieved despite an "intense campaign of opposition" by the company.

The company had strongly advocated a no vote in recent weeks, with chief executive Chris Roberts telling employees in a letter that opening the door to AMWU involvement "could put your current pay and conditions at risk".

Fair Work Australia made the determination on 21 August 2009 after receiving confirmation of the result from the AEC, although the process is somewhat unclear given that the ballot was the first conducted under the Fair Work Act's majority support provisions. <http://www.fwa.gov.au/decisionssigned/html/2009fwa125.htm>

The union has said it was looking forward to commencing negotiations towards a new agreement and called on the company to genuinely engage in bargaining, which they are required to do in good faith.

Once the determination is in place the union has reported that it will start a fresh round of consultation with employees, with issues including wages and rostering likely to be key issues.

Cochlear's CEO said while the company was still considering the ramifications of the result, the fact that only 58% of all eligible employees voted "yes" suggested the employee group was divided on the issue.

This is a decisive step towards ending the industrial struggle between Cochlear and the AMWU that commenced when the company chose, despite an employee vote supporting one, not to negotiate a union-collective agreement, following the nominal expiry date of the NAPSA in early 2007.

The case is a prime example of one of the major changes that the Fair Work IR regime has effected to the IR landscape which existed under Work Choices.



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