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## Latest News

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### ▶▶ FWA issues bargaining orders against Cochlear

03 August 2012 4:56pm

In an important development in the Cochlear battle, Fair Work Australia today found the company breached the Fair Work Act's good faith bargaining requirements during its protracted negotiations with the AMWU, and issued bargaining orders against it.

Commissioner Helen Cargill held that the Sydney-based manufacturer breached s228(1)(d) of the legislation by not responding to the AMWU's proposal for an agreement in a timely manner; and s228(1)(e) by refusing the union access to the lunchroom to conduct meetings.

She issued three out of the seven orders sought by the AMWU - that:

- The bargaining representatives meet within seven days to determine a schedule of five bargaining meetings, with the first to be held within three weeks and the rest no more than 14 days apart;
- Cochlear refrain from imposing the condition that any bargaining meetings be under the previously agreed "bargaining protocols"; and
- Cochlear give AMWU officials access to the production employees' main lunch room to hold bargaining meetings during meal breaks.

She rejected the company's application for orders that the union bargain according to the previously agreed protocols, accepting the AMWU's argument that they had become an impediment to bargaining.

The AiG is representing the company and its IR director, Steve Smith, in a statement this afternoon said Cochlear was considering the terms of the orders and whether or not to appeal.

He said that FWA had found that "during the very lengthy bargaining process on few specific issues either the company or the union or both have not met all the good faith bargaining requirements of the Act at all times. However, the Tribunal has found that generally the parties have legitimately pursued their bargaining strategies."

The union's NSW secretary Tim Ayres welcomed the decision, and said it "validates the efforts of Cochlear workers over many years to reach a collective agreement with their employer".

However, he continued that it "doesn't guarantee an outcome in bargaining, it doesn't compel Cochlear to come to the negotiating table in the spirit of reaching a deal".

Yesterday's Fair Work review made no recommendations on last resort arbitration, and Ayres today urged the Federal Government to "look at this case very closely as they consider their response to the Fair Work review, and consider whether the Fair Work Act is delivering for the hundreds of workers at Cochlear".

### Cochlear has fought hard: FWA

Commissioner Cargill in her decision noted the protracted nature of the negotiations (the AMWU won a majority support determination in August 2009) but said that while Cochlear had "fought hard and has taken every procedural point" it had not, with one exception, "engaged in a course of conduct which offends the good faith bargaining requirements".

That exception was its failure to respond to the union's proposal for an agreement in a timely manner, between December 2010 and July/August 2011.

She said there was nothing in Cochlear's eventual response "that could not have been put much earlier in 2011".

"Dragging out the process by refusing to put its response until after the EBRs [employee bargaining representatives] had formally filled out the bargaining issues table just because that

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had been agreed was simply a case of putting process ahead of substance."

She said that while it was more than a year since the conduct occurred and "things have moved on", with the company, for example, providing its April 2012 response, that had not in effect 'wiped the slate clean'.

"I am satisfied that by this conduct Cochlear has not met the good faith bargaining requirements, in particular, that set out in section s228(1)(d)," she said.

Commissioner Cargill continued that both Cochlear and the AMWU had refused to meet since November 2011, with each indicating it was prepared to do so, but only on their own terms - with the company insisting that any meetings take place under the earlier agreed protocols and the AMWU wanting them held under the Act.

"Both parties have provided good reasons for their separate positions and I am satisfied that those positions are genuinely held," she said.

"In a technical sense, both parties are at fault in refusing to meet and consequently each has contravened the good faith bargaining requirements in section 228(1)(a)."

While the AMWU argued that Cochlear acted unfairly in refusing to agree to requests for paid meetings, and sought orders that it do so, Commissioner Cargill disagreed.

She also said she did not consider that the EBRs had "interacted with employees in a manner which could be held to be meetings which give rise to unfair conduct".

She accepted that, on occasions, the EBRs "may have held some discussions about bargaining with other employees", but that was no different to the discussions which the AMWU delegates had or could have had with employees.

Commissioner Cargill also rejected the AMWU's assertion that the company manipulated the number and identities of the bargaining representatives. "Clearly [one of the EBRs] had a preference for a smaller rather than a larger number however there is insufficient evidence that this preference was used by the company to prevent other employees from being nominated," she said.

She said the only area where she considered that Cochlear may have "crossed the line" with the EBRs was if it provided them with briefing points, which would "go beyond providing administrative assistance and would amount to unfair and capricious conduct which undermines collective bargaining".

However, as the Cochlear bargaining representative wasn't questioned on this, she said she was not prepared to make such a finding.

Commissioner Cargill went on to find that Cochlear's refusal of access to the lunchroom to hold meetings was unfair conduct, in breach of s228(1)(e).

But she rejected the union's assertion the company's refusal to seek DEEWR's advice about a proposed dispute settlement procedure also breached the Act. "However frustrating this may be it is not unfair or capricious conduct," she said.

[s229 applications for bargaining orders AMWU v Cochlear; David Hargraves v AMWU \[2012\] FWA 5374 \(3 August 2012\)](#)

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