SENATE EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS COMMITTEE

INQUIRY INTO THE FAIR WORK BILL 2008

SUBMISSION OF COCHLEAR LTD

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1 Summary

The powers of Fair Work Australia under the *Fair Work Bill* 2008 (Cth) (the "**Bill**") considerably exceed what the Government had indicated in its Forward with Fairness policy documentation. Cochlear Ltd ("**Cochlear**"), as one of the few employers specifically named in the Explanatory Memorandum to the Bill and ostensibly whose industrial situation is stated to be a catalyst for certain provisions of the Bill, considers that this extension of powers is unwarranted and ultimately not conducive to effective employee relations nor to good faith bargaining.

Cochlear's view is that the provisions relating to bargaining related workplace determinations set out in Chapter 2, Part 2-5, Division 4 be removed from the Bill

2 Background

2.1 Cochlear is the global leader in innovative, implantable hearing solutions.

2.2 Cochlear employs over 1850 employees worldwide. At its Lane Cove facility in NSW, Cochlear employs approximately 850 permanent employees with 318 employees in its manufacturing area.

2.3 From 1998 to 2007, the terms and conditions of Cochlear's manufacturing and production employees had been governed by Enterprise Partnership Agreements ("**EPAs**"), being collective agreements negotiated and entered into in accordance with the *Industrial Relations Act 1996* (NSW) (the **"IR Act"**). The most recent EPA was the *Cochlear Limited Enterprise Partnership Agreement 2005* (**"2005 EPA"**)..Following the Work Choices reforms, the 2005 EPA became a Preserved State Agreement under the *Workplace Relations Act 1996* (Cth).

2.4 Cochlear has always discussed and agreed the terms and conditions of the EPAs directly with its employees, believing that a direct relationship provides the best outcome for its employees in terms of remuneration, rewards, and work and career satisfaction. The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union (the "**AMWU**") was not generally involved in these negotiations, although it had been a nominal party to some of the EPAs as a result of the IR Act's provisions.

2.5 The 2005 EPA was a two-year agreement that nominally expired on 30 June 2007, at which time Cochlear decided to terminate the EPA (given provisions in the IR Act that gave a collective agreement life after its nominal expiry date unless a party to the agreement sought to terminate that agreement). Cochlear wrote to the AMWU giving it three months' notice of termination, which was the process required to effect termination under the IR Act. The AMWU disputed that Cochlear effected a valid termination of the 2005 EPA given the transitional provisions of Work Choices that had been introduced just prior to the EPA's nominal expiry date. The AMWU considered that Cochlear should have applied to the Australian Industrial Relations Commission (the "**AIRC**") to terminate the 2005 EPA and that the AIRC should determine whether or not it would be against the public interest for the 2005 EPA to be terminated. Cochlear made the application to the AIRC so that its employees would be in no doubt that the EPA no longer had relevance.

2.6 Commissioner Cargill of the AIRC determined at first instance that there were no positive public interest effects arising from termination of the 2005 EPA and so declined to terminate the EPA. Cochlear has appealed Commissioner Cargill's decision and, as at the date of making this submission, is awaiting the decision of the Full Bench of the AIRC.

2.7 Cochlear has, since August 2007, considered that regardless of what industrial instrument may underpin the terms and conditions of its production employees (be that an award or the EPA), the actual instrument of relevance is the individual common law contract of employment issued to each production employee at that time.

2.8 The contracts of employment provide terms and conditions far superior to those contained in the 2005 EPA (including a new classification structure which has allowed all Manufacturing employees to receive wage increases ranging from **8**% (being two 4% increases paid in July 1 2007 and 2008 to 13% (over 150 employees have been promoted within the new classification structure) in the 17 months that the contracts have been in place.

2.9 Cochlear has not yielded to pressure from the AMWU to enter into a union collective agreement since the EPA expired. The AMWU has, as a result, subjected Cochlear to a campaign of intended humiliation both domestically and overseas and has, in Cochlear's view, deliberately sought to damage the reputation of Cochlear and its brand. Some examples of the AMWU's conduct over the last three years include:

(a) falsely alleging publicly that Cochlear had imposed a requirement that all its employees must speak English in the workplace and that, in so doing, it had breached the provisions of the *Anti-Discrimination Act* 1977 (NSW) to the point of filing a claim with the Anti-Discrimination Board of NSW on behalf of one of its members only to withdraw the complaint within a few months;

(b) writing to industrial organisations overseas encouraging them to take action in all clinics distributing Cochlear devices to exert pressure on Cochlear;

(c) encouraging Cochlear employees who are delegates of the AMWU to breach their contractual obligations to Cochlear by speaking to the media; and

(d) distributing anti-Cochlear materials in November 2007 at an international convention the Asia Pacific Symposium on Cochlear Implants and Related Sciences held in Darling Harbour.

2.10 It can only be assumed that this campaign has also extended to the AMWU making contact with members of the Parliament. This would explain the references to Cochlear contained in the Explanatory Memorandum to the Bill. The Explanatory Memorandum states in the section dealing with "Current Arrangements":

> r117: The current system allows for multiple streams of agreement making, including Individual Transitional Employment Agreements (ITEAS), introduced in the Transition Act to replace the use of Australian Workplace Agreements (AWAs) during the transition to the proposed framework), union collective agreements, employee collective agreements, union greenfields agreements, employee collective greenfields agreements and multi-employer agreements. The existence of multiple streams of agreement making has the capacity to create disputes over which industrial instrument to use.
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> r118: The occurrence of such disputes is quite common. **For example, the Cochlear company has been involved in a protracted industrial dispute due to the company's desire to create a non-union collective agreement.** Similarly, Boeing was involved in a dispute for over 9 months, including over 70 days of strike action, because the company refused to negotiate a union collective agreement against the preference of its aircraft maintenance engineers.
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> (**Emphasis** added)

2.11 While Cochlear is in no position to comment on what may have transpired at Boeing, it can unequivocally say that:

(a) Cochlear is completely satisfied with the individual contracts that it has in place and has no desire at present to enter into another collective agreement with its employees;

(b) Cochlear has never utilised any AWAs, ITEAs, Greenfield agreements or multi-employer agreements to regulate the terms and conditions of employment of its employees. Cochlear employees did not demonstrate interest in an employee collective agreement.

(c) It is Cochlear's rejection of a very specific type of industrial instrument, namely a collective agreement between it and the AMWU, that has led to the AMWU's dispute with Cochlear.

2.12 The Explanatory Memorandum goes on to say at r136 that

> Without the capacity to determine whether majority support exists for collective bargaining, employers can simply refuse to negotiate with employees, often resulting in protracted disputes. Examples of these disputes include those at Boeing and Cochlear.

2.13 In Cochlear's case, it is its refusal to negotiate with the AMWU that has led to AMWU's dispute with Cochlear and not any dispute between Cochlear and its employees. Further, the concept of negotiation with employees, as Cochlear has demonstrated, should allow for forms of direct communication (such as through consultative committees) rather than merely being an opportunity for third parties to involve themselves in the relationship between employer and employee.

2.14 Australian industrial relations legislation, regardless of which political party has been in government, has for many years allowed parties wishing to enter into an agreement the opportunity to engage in protected industrial action. While views may differ on the benefits of industrial action, there are many agreements that only come about when such industrial action takes place and it is trite to observe that those workforces that take industrial action (that involve a loss of pay) speak through that action of their desire for an agreement (or for particular terms and conditions in an agreement). The absence of any such industrial action even being threatened by Cochlear's workforce suggests that it is the AMWU, and not Cochlear's employees, that is driving the dispute agenda at Cochlear.

2.15 Cochlear has not at any time refused to negotiate with its employees. Cochlear gave comprehensive regard to the views of its employees in the preparation of individual employment contracts and made numerous efforts to consult with its employees on the terms and conditions of their employment. These efforts include both individual and collective negotiations, with Cochlear also proposing that collective negotiations could be conducted through the AMWU as a bargaining agent. Cochlear sought input from its workforce as to their views in relation to the Cochlear workplace and organised meetings with employees to discuss the new individual employment contracts. Cochlear also consulted with its Employee Communication Committee. Again, the AMWU simply refused to accept any form of agreement for Cochlear's employees other than a union collective agreement.

2.16 Cochlear is greatly concerned that misrepresentations by the AMWU to the public (including to the Parliament) regarding Cochlear's industrial situation appear to have been a catalyst for certain provisions of the legislation. Cochlear feels compelled, in the public interest, to bring these misrepresentations to the Committee's attention.

2.17 Cochlear is also concerned that the proposed legislation appears to have deviated significantly from the framework that was originally proposed by the Government (in the manner outlined at 3 below). This deviation has the capacity to undermine effective workplace relations both at Cochlear and in many other Australian workplaces.

3 The Role of Fair Work Australia ("FWA")

3.1 Prior to the release of the Bill, the Government was emphatic that compulsory arbitration would not be a feature of its good faith bargaining regime.

3.2 This position was first stated in the Forward with Fairness policy documentation (released in April 2007), which suggested that parties would not be forced to agree to terms and that FWA would only determine matters if both parties jointly requested such (at page 16):

> **Labor's good faith bargaining rules will not require an employer or employees to sign up to agreement where they do not agree to the terms.** Therefore there will be times when bargaining participants cannot reach agreement.
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> Where agreement cannot be reached, bargaining participants will have a range of options:
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> - they can agree to walk away, in which case the industrial arrangements already in place would remain in force;
> - they can jointly request Fair Work Australia help them reach agreement or **jointly request Fair Work Australia determine particular matter**; or
> - they can, in certain circumstances, take protected action.
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> (**Emphasis** added)

3.3 The position was confirmed in a number of speeches made by the Minister for Workplace Relations prior to the passing of the Bill, in which she declared compulsory arbitration would not be one of its features. The relevant statements are as follows:

(a) GILLARD, 30 MAY 2007, SPEECH TO NATIONAL PRESS CLUB: The fourth untruth is that Labor's new body, Fair Work Australia, will re-empower 'union bosses' and reintroduce both 'compulsory arbitration' and 'centralized wage fixation'. **Under Labor's policy there is no automatic arbitration of collective agreements. Our policy clearly states that no one will be forced to sign up to an agreement where they do not agree to the terms.**

(b) GILLARD, 3 SEPTEMBER 2007, DOORSTOP INTERVIEW: As we've said in our policy, that there are a very limited number of circumstances where you need the industrial umpire to step in and resolve a dispute. It's the sort of safety valve that has always been in our industrial relations system. If you have got a dispute that is threatening safety or health or the national economy, an intractable dispute that is causing significant hard, they are they kind of circumstances in which the industrial umpire would be able to resolve the dispute. But in the ordinary course people who are collectively bargaining at their enterprise level, **all of that bargaining will happen at the enterprise level, they will either strike an agreement or not strike an agreement**.

(c) GILLARD, 17 SEPTEMBER 2008, SPEECH TO NATIONAL PRESS CLUB: **Compulsory arbitration will not be a feature of good faith bargaining**. Arbitration will be limited to exceptional circumstances only – where industrial action is causing a threat to safety or health, a threat to the economy, or significant harm to the parties.

(**Emphasis** added)

3.4 A fact sheet released by the Government in September 2008 (titled *Bargaining in Good Faith*) similarly reiterated that:

> Good faith bargaining will not require parties to make concessions or sign up to an agreement where they do not agree to the terms … Compulsory arbitration will not be a feature of good faith bargaining.

3.5 However, the Government has not adhered to this policy commitment. Under section 269 of the Bill, FWA is, in certain circumstances, required to make a "bargaining related workplace determination" setting out the terms and conditions of employment that will apply in the relevant workplace. Significantly, the making of such a determination is not at the parties' request and does not require their consent.

3.6 Cochlear has no difficulty with bargaining in good faith if required to do so either at law or at the instigation of its employees. However, it is one thing to compulsorily bargain, and another to have a third party impose an outcome on the bargaining parties. Although the Bill sets out a number of preconditions that need to be met prior to an outcome being imposed, the fact remains that – contrary to the Government's clear promises – compulsory arbitration is a feature of the new workplace relations regime.

4 Conclusion and Recommendation

4.1 Having been specifically referred to in the Explanatory Memorandum and having been an apparent catalyst for legislative change, Cochlear feels obliged to expose the factual inaccuracies which have been publicly circulated regarding its industrial situation. It has sought, through this Submission, to bring those inaccuracies to light.

4.2 Cochlear has also sought to express its concerns regarding the provisions relating to the making of bargaining related workplace determinations, which were never contemplated or articulated in the Forward with Fairness policy documentation. Indeed, the Government was unequivocally opposed to parties being forced into arrangements without their consent.

4.3 Under these provisions, FWA will have the power to impose on individual employers (and for that matter, at least in theory, on employees) terms and conditions to which they have not agreed.

4.4 Cochlear, like many other employers, will therefore be forced to bargain very much under the spectre that, even though on paper they do not have to agree to the demands of an industrial organisation, a failure to do so will likely see FWA making a workplace determination that will create for all intents and purposes an enterprise agreement.

4.5 If negotiating parties are unable to reach agreement, they should be able to refer the matter to FWA for arbitration *so long as they both genuinely agree to such.* That is, in accordance with Labor's policy statement, FWA should not make a determination unless jointly requested by the negotiating parties to do so.

4.6 Cochlear's view is that the provisions relating to bargaining related workplace determinations set out in Chapter 2, Part 2-5, Division 4 be removed from the Bill.

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