



DECISION

Fair Work Act 2009

s.236 - Application for a majority support determination

Australian Municipal, Administrative, Clerical and Services Union

v

Virgin Australia Airlines Pty Ltd

(B2019/287)

COMMISSIONER SPENCER

BRISBANE, 21 NOVEMBER 2019

Virgin Australia Airlines Pty Ltd employees in all Network Operations Departments in Virgin Australia's Operations Control Centre.

[1] An application pursuant to s.236 of the *Fair Work Act 2009* (the Act) was made by the Australian Municipal, Administrative, Clerical and Services Union (the Applicant/the ASU/the Union) for a Majority Support Determination (MSD) to undertake bargaining for an Agreement proposed to cover employees engaged by Virgin Australia Airlines Pty Ltd (the Respondent/Virgin/VAA) who perform work in all Network Operations Departments in Virgin Australia's Operations Control Centre (OCC) in Brisbane. The Applicant referred to this as an organisationally distinct group, and argued it was defined by Virgin Australia as listed in Table 0.1 of the Group Operations Manual Volume A23: Network Operations Policy Manual and included:

1. Customer Disruption Services
2. Operations Control
3. Crew Control
4. Duty Manager
5. Flight Dispatch
6. Load Control
7. Slot Control

[2] The Applicant noted on their application the Agreements negotiation for parts of the Virgin Workforce.

[3] The Respondent raised an objection to the application on a number of grounds pursuant to s.237(2) of the Act. The Respondent objected on the basis of s.237(2)(a), that a majority of employees did not want to bargain, and that they were uncertain of the scope. The Respondent also objected pursuant to s.237(2)(b) on the basis that while the Respondent has not yet agreed to bargain, it had not yet refused to bargain, (this was later confirmed, as a refusal). Lastly, the Respondent objected on the basis of s.237(2)(c) and s.237(3A) that the group of employees to be covered by the proposed Agreement was not fairly chosen.

[4] Directions were set for the filing of material and the matter was heard in Brisbane. The Applicant was represented by Mr M. Thomas, Industrial Officer and Mr C. Bolton of the ASU, with the Respondent being represented by Mr M. Minucci of counsel, instructed by Clayton Utz. The matter was heard over two days with both parties provided written closing submissions following the Hearing.

[5] Whilst not all of the submissions and evidence are referred to in this decision, all of such have been considered.

RELEVANT LEGISLATION

[6] Section 236 of the Act relates to applications for majority support determinations:

“236 Majority support determinations

(1) A bargaining representative of an employee who will be covered by a proposed single-enterprise agreement may apply to the FWC for a determination (a **majority support determination**) that a majority of the employees who will be covered by the agreement want to bargain with the employer, or employers, that will be covered by the agreement.

(2) The application must specify:

- (a) the employer, or employers, that will be covered by the agreement; and
- (b) the employees who will be covered by the agreement.”

[7] Pursuant to s.237 of the Act:

“237 When the FWC must make a majority support determination

Majority support determination

(1) The FWC must make a majority support determination in relation to a proposed single-enterprise agreement if:

- (a) an application for the determination has been made; and
- (b) the FWC is satisfied of the matters set out in subsection (2) in relation to the agreement.

Matters of which the FWC must be satisfied before making a majority support determination

(2) The FWC must be satisfied that:

- (a) a majority of the employees:

- (i) who are employed by the employer or employers at a time determined by the FWC; and
 - (ii) who will be covered by the agreement;
want to bargain; and
 - (b) the employer, or employers, that will be covered by the agreement have not yet agreed to bargain, or initiated bargaining, for the agreement; and
 - (c) that the group of employees who will be covered by the agreement was fairly chosen; and
 - (d) it is reasonable in all the circumstances to make the determination.
- (3) For the purposes of paragraph (2)(a), the FWC may work out whether a majority of employees want to bargain using any method the FWC considers appropriate.

(3A) If the agreement will not cover all of the employees of the employer or employers covered by the agreement, the FWC must, in deciding for the purposes of paragraph (2)(c) whether the group of employees who will be covered was fairly chosen, take into account whether the group is geographically, operationally or organisationally distinct.

Operation of determination

- (4) The determination comes into operation on the day on which it is made.”

SUMMARY OF THE APPLICANT’S SUBMISSIONS AND EVIDENCE

[7] The Applicant submitted that the only matter of relevance in relation to whether a majority of employees want to bargain is whether the Commission is satisfied of the matters set out in s.237(2)(a) of the Act. Citing a range of case law, it was contended by the Applicant that a petition is an appropriate way of establishing whether a majority of employees want to bargain.

[8] The Applicant submitted that the petition, which was provided to the Commission only as an annexure to the affidavit of Mr Bill Colless dated 16 April 2019, contained the details and organisation location of the Network Operations employees working within the Operation’s Control Centre (OCC) that have indicated they wish to commence bargaining.

[9] In support of the validity of its petition, the Applicant set out, by the evidence of Mr Bill Colless (Organiser, ASU Together), the method that was used to petition employees. The Applicant submitted that it utilised an electronic online pledge to allow members of a closed Facebook Messenger group containing Virgin Australia employees within the OCC department to indicate their desire to commence bargaining.

[10] Mr Colless gave evidence that the online pledge was launched on 15 February 2019 and distributed to those who had indicated a willingness to sign in support of bargaining and those staff within OCC who had been identified by workplace mapping. It was submitted that

the data from the online pledge remained in control of the ASU and that Mr Colless maintained and updated a Pledge Central Master List to ensure its accuracy at all times.

[11] Evidence was also provided by Mr Colless that staff who did not wish to be on the pledge list were communicated with through Union delegates and a message to the closed Facebook Messenger group ensuring they were provided an opportunity to have themselves removed from the list. Employees were able to contact Mr Colless by email, Facebook Messenger or directly to be removed from the Pledge Central Master List. Mr Colless gave evidence that five employees approached him and had their names removed from the pledge list.

[12] The Applicant submitted that because of the method in which the petition was undertaken, the Commission can be satisfied that it is both accurate and current. As such, the Applicant contended that the petition was an appropriate and compelling method of determining that a majority of employees of Network Operations within the OCC wanted to bargain.

Section 237(2)(b) the employer, or employers, that will be covered by the agreement have not yet agreed to bargain, or initiated bargaining, for the agreement; and

[13] The Applicant contended that the letter of Mr Chris Newman (Manager, Workplace Relations – Virgin Australia) dated 20 March 2019 shows that the Respondent had not agreed to bargain. Particular reference was made of Mr Newman’s statement that “Virgin Australia cannot at this stage, agree to negotiate an Enterprise Agreement (EA) for the OCC, as requested by the ASU/Together Queensland (ASU).”

[14] In further support of its contention that the Respondent had not yet agreed to bargain, the Applicant also relied upon the evidence of Mr Matthew Pomeroy, of Virgin, in Flight Planning Services, and in particular an email from the Virgin Australia General Manager Network Operations attached to Mr Pomeroy’s affidavit. The Applicant submitted that the email in which it is stated that the Respondent “...informed the ASU’s representatives that Virgin Australia cannot at this stage, agree to negotiate an EA for the OCC”.

[15] The Applicant submitted that the instances of the ASU seeking to initiate bargaining had yielded clear indications from the Respondent that it did not agree to bargain. As such, the Applicant contended that the Commission could be satisfied with respect to the matter set out in Section 237(2)(b) of the Act. The position of Virgin not wanting to bargain with the Applicant’s selected ‘group’ of employees was also made clear at the Hearing.

Section 237(2)(c) that the group of employees who will be covered by the agreement was fairly chosen; and

[16] As the proposed Agreement would not cover all of the Respondent’s employees, the Applicant recognised that the Commission was therefore required to be satisfied that the group of employees to be covered is fairly chosen, by taking into account whether the group is geographically, operationally or organisationally distinct.

[17] The Applicant submitted that principles to be considered in assessing whether the group of employees to be covered is fairly chosen are articulated in the decision of *Cimeco*

*Pty Ltd v CFMEU & Ors*¹ and that those principles are the same for Agreement approval and MSDs.

[18] The Applicant submitted that the Network Operations OCC group who are to be covered by the proposed agreement are objectively both organisationally and operationally distinct and that the selection of the group has not been made on arbitrary or discriminatory grounds.

Organisationally distinct

[19] Relying on the evidence of Mr Pomeroy, Flight Planning Services, the Applicant contended that the Respondent organisationally separates Network Operations departments in the OCC from the other key stakeholders across the business. It is said by the Applicant that the table of OCC Stakeholders/Functional Departments attached to the affidavit of Mr Pomeroy sets out “that while the stakeholders and functional departments work collaboratively with the OCC, organisationally they do not fall under the same corporate organisational line of responsibility”.

Operationally distinct

[20] The Applicant also submitted that the evidence of Mr Pomeroy demonstrated that the group to be covered by the proposed Agreement is operationally distinct. This submission was based on the fact that Network Operations OCC employees are all 12-hour shift workers on a 24/7, 365 roster dealing with ‘Day of Operations’ operational matters. This is compared with other groups of employees within the Network Operations Division who are generally Monday to Friday day workers, working in a support role to the operational departments.

[21] In relation to the non-Network Operations Teams within the OCC, the Applicant submitted that the evidence of Mr Colless identified those employees as operationally distinct as their work is generally more peripheral in nature than Network Operations OCC staff, who deal with crewing of aircraft, schedule protection or the provision of Flight Plans and Load and Trim Paperwork.

[22] The Applicant submitted that the fact that other teams working within the OCC have not been included in the group of employees selected is immaterial as those groups have been excluded, as those employees are not part of a group of employees that is clearly distinguishable organisationally and operationally. Further, it submitted that the exclusion of other teams is not a reason for resisting a MSD as the fact that those employees have not been included in this application does not preclude them from later inclusion as part of the bargaining process. Further detail on the Applicant’s arguments is set out in the summary of the Applicant’s reply submissions.

SUMMARY OF THE RESPONDENTS SUBMISSIONS AND EVIDENCE

[23] The Respondent submitted that the Commission could not be satisfied that the group of employees to be covered by the proposed agreement was fairly chosen, that a majority of employees want to bargain or that it is reasonable in all the circumstances.

¹ [2012] FWAFB 2206.

Section 237(2)(c) that the group of employees who will be covered by the agreement was fairly chosen; and

[24] The Respondent submitted that the group of employees identified in the application is not geographically, operationally or organisationally distinct and taking that into consideration, the Commission should not be satisfied that the group is fairly chosen.

[25] The Respondent submitted that those to be covered by the proposed agreement are a part of the OCC. The OCC is overseen and run by the Network Operations Division and that the level of integration between all aspects of the OCC and the Network Operations Division is of such significance that it is difficult to summarise. The Network Operations Division is responsible for flight and cabin crew roster management and the ‘day of operations’ management.

[26] The evidence of Mr Andrew Lillyman, General Manager – Network Operations, stated that on the ‘day of operations’ employees of the OCC, regardless of their corporate organisational line of responsibility, are supervised by the OCC Duty Manager on issues relevant to ‘day of operations’. Mr Lillyman’s evidence described the ‘day of operations’ as the current 24 hour period commencing from midnight.

[27] The Respondent submitted that the OCC is comprised of a number of departments or groups comprised by reference to functions performed. These included:

- a) Customer Disruption Services;
- b) Operations Control;
- c) Crew Control;
- d) Duty Manager;
- e) Flight Dispatch;
- f) Load Control;
- g) Slot Control;
- h) Flight Planning Services – Duty Leader;
- i) Maintenance Watch;
- j) Aviation Meteorologist;
- k) Cabin Crew Operational Support;
- l) ‘The Club’ – Executive Services;
- m) Duty Pilot;
- n) Catering;
- o) Social Media; and
- p) Cargo.

[28] The Respondent stated that the first 8 of these departments or functions are from, or performed by, employees within the Network Operations Division. The others form part of, or are delivered by, other divisions of the Respondent’s organisation or by contractors.

[29] The Respondent drew a distinction between the performance of a different role, task, skill or function and being ‘operationally distinct’. It contended that while the OCC and Network Operations Divisions are comprised of employees performing different, discrete tasks, they are performed as part of a whole in the course of delivering the Respondent’s domestic and international flight services. The Respondent submitted that it was “clear that all employees of the OCC and the Network Operations Division worked together as part of a

single operation to ensure that VAA's domestic and international flights on the 'day of operations' run smoothly".

[30] It was submitted by the Respondent that in accordance with *QGC Pty Ltd v Australian Workers' Union*² the term 'operational' refers to an industrial or productive activity. As such, it was said that for the Applicant to succeed in the application it must establish that the employees within the proposed coverage are conducting industrial or productive activities that are distinct from the employees that the Respondent says have been arbitrarily excluded.

[31] The Respondent submitted that the difficulty faced by the Applicant in establishing an operational distinction is that the groups of employees located in the OCC are working towards the same goal – ensuring the Respondent's vital services on 'day of operations' are delivered safely and efficiently. Further, the Respondent submitted that all persons in the OCC on a particular day, regardless of separate lines of responsibility for particular groups in the OCC, ultimately report to the Duty Manager, whose job it is to supervise employee activities on the 'day of operations'.

[32] In relation to the consideration of whether the group of employees to be covered by the proposed Agreement are organisationally distinct, the Respondent submitted that the term 'organisation' refers to the manner in which the employer has organised its enterprise. Further, it contended that the performance of particular tasks does not mean employees are organisationally distinct.

[33] In relation to the employees in the OCC and the Network Operations Division more broadly, the Respondent submitted that they have been organised in a single reporting structure. Mr Lillyman stated in his evidence that he was unable to determine any distinctness between:

- 1) The Network Operations persons within the OCC and other staff within the OCC;
or
- 2) Airline Operations staff within the OCC and Airline Operations staff that are outside the OCC; or
- 3) The OCC as a whole and other parts of Network Operations that work in conjunction with the OCC.

[34] The Respondent submitted that it is clear that the organisation is structured as an indivisible whole to ensure the complex delivery of services by all employees in the OCC and Network Operations divisions work collectively.

[35] The Respondent submitted that any suggestion that the employees identified as those to be covered by the proposed agreement are geographically distinct should be rejected. The Respondent contended that the relevant employees had been artificially separated from the rest of the Network Operations Division for the purpose of the application. The Respondent submitted that all Network Operations Division employees work on a single floor of the same building and in the event of a MSD, employees that would be covered by the proposed agreement would be working metres from employees not covered.

Section 237 (2) (a) Majority Support

² [2017] FWCFB 1165.

[36] The Respondent submitted that there is no clear evidence of a true and current majority of employees who wish to bargain that could satisfy the Commission to the relevant standard in order to make the MSD.

[37] The Respondent noted the Applicant relied on the majority support pledge that held employee signatures. However, the Respondent emphasised that the Applicant's scope of the proposed Agreement had varied.

[38] Relying on its submissions in relation to the structure of the organisation and the lack of geographical, operational and organisational distinctness, the Respondent contended that as the Commission is unable to determine the appropriate group of employees, it cannot determine whether a majority of those employees wish to bargain.

[39] While the Respondent acknowledged that pursuant to s.237(3) of the Act, the Commission may assess whether a majority exists using any method appropriate, and acknowledged that a petition could be an appropriate method for determining a majority, it submitted that if signatures were obtained by coercion or there was a lack of appropriate procedures in the management of the petition the Commission cannot be satisfied as to a majority.

[40] The Respondent pointed to concerns held by it in relation to ongoing discussions between the parties at the time of the petition and the fact that those discussions between the Applicant and Respondent included canvassing the possible inclusion of Tactical Operations and Flight Planning Services Support (who are not part of the OCC) in the proposed Agreement. The Respondent submitted that, the fact that at the time discussions were being held for the inclusion of employees outside the OCC the pledges remained open and available, is concerning. As is the fact that the evidence of Mr Colless is silent on whether pledges include Duty Leaders or not.

[41] The Respondent further submitted that according to the evidence of Mr Lillyman, some employees of the Respondent held concerns that their names may have been added to the pledges without their knowledge and employees had difficulty removing their name from the pledges. The Respondent considered the method for an employee to have their name removed from the pledge list (by contacting the Applicant's Organiser) as problematic and criticised the inconsistency in Mr Colless' evidence, as to the way in which persons were able to remove their name from the pledge list.

Section 237(2)(d) it is reasonable in all the circumstances to make the determination

[42] The Respondent submitted that the factors raised weigh against the making of a MSD such that the granting of the application would not be reasonable in the circumstances.

[43] In support of its contention that the MSD would not be reasonable, the Respondent submitted that:

- a) The cohort of employees has not been fairly chosen and making the Determination would result in some employees who work in the OCC being covered by an Enterprise Agreement but not others.

- b) A MSD would create two disparate groups working alongside each other in one physical location;
- c) The group of employees subject to the MSD would be entitled to take protected industrial action which is significant as the group as presently defined is unclear. The lack of clarity would impact the Respondent's ability to manage protected industrial action as it does and cannot know who is entitled to take protected industrial action. The likelihood of disruption caused by protected industrial action is of concern, as the area of relevance is an intense, safety critical environment.

[44] The Respondent objected to the proposed group as follows:

- a) Work geographically, operationally and organisationally with the Proposed Group (that is, those employees within the OCC who are excluded from the Proposed Group);
- b) Are within the Respondent's Network Operations Division but do not work in the OCC who are not within the Proposed Group and are not geographically, operationally or organisationally distinct from the Proposed Group; and
- c) Are within the Respondent's Network Operations Division and perform similar work to that performed by the Proposed Group and demonstrate no geographic or operational distinctiveness.

SUMMARY OF THE APPLICANT'S FINAL SUBMISSIONS

s.237(3) A majority of the employees of the employer who will be covered by the agreement want to bargain - Accuracy of the Pledge

[45] The Applicant submitted that significant case law exists to support an employee petition or use of a secret ballot as a legitimate method to ascertain whether a majority of the group of employees want to bargain, as is required under s.237(3) of the Act.

[46] The Applicant made reference to the passage by Commissioner Booth in *Veolia Water Operations* where she held at [38] that stated "it is for the Applicant to establish how this particular petition came into existence and why it can be relied on in deciding whether a majority want to bargain."³ Commissioner Booth further held at [44] that "to establish the requisite satisfaction it is necessary to establish, on the evidence before the Commission, in this case that the petitions were at all times under the custody and control of responsible persons whether they be organisers or delegates."

[47] Mr Colless, gave evidence as to the process that he employed to obtain the "Pledge" of relevant signatures to provide satisfactory evidence of the employees within the proposed group that want to bargain. The process adopted by Mr Colless, as outlined in his affidavit, was as follows:

- Members within the OCC of Virgin Australia indicated to Mr Colless on 15 February 2019 that they believed enough employee members wanted to bargain;

³ *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union 5 known as the Australian Manufacturing Workers' Union (AMWU) v Veolia Water Operations Pty Ltd* [2015] FWC 2561 at [38].

- It was determined that an electronic online Pledge was the best method to be used, as delegates believed that Virgin Australia were not supportive of them being part of a union and this method would provide greater anonymity;
- The Pledge was launched electronically on 15 February 2019 and stated “We the undersigned staff at Virgin Operations and Customer Control (OCC) affirm that we want to commence bargaining for a Collective Agreement and nominated ASU Together Negotiated on our behalf;
- Staff in the OCC were further informed about their ability to sign the Pledge by speaking with Mr Colless or Together ASU workplace delegates;
- To further communicate with staff about the online Pledge, Mr Colless emailed staff who he had already spoken to, who had already signed the electronic Pledge, or who were identified by workplace mapping. This enabled a staff member to approach Mr Colless on 1 March 2019 and request their name be removed from the Pledge, such that their name was removed from the Pledge Central Master List by Mr Colless.
- To ensure integrity and accuracy of the Pledge, Mr Colless then held discussions with delegates to make clear that staff could remove themselves from the Pledge by email, Facebook messenger or by contacting him directly. Further, on 14 April 2019 by closed Facebook Messenger group, Mr Colless advised that “The pledge for an agreement closes soon, so please make sure you have added your name. If you want to remove your name the only way to do so is by emailing me.”. This direction to email Mr Colless directly was provided in response to Mr Lillyman’s email dated 11 April 2019, which erroneously advised staff to contact Virgin Australia directly if they wanted to be removed from the Pledge. Mr Colless sent this direction as he knew that only he had custody and control of the Pledge Central Master List, which meant only he was able to remove names from the Pledge Central Master List and he was responsible for ensuring the accuracy and integrity of the Pledge Central Master List at all times.
- Union delegates and members within the OCC who wanted to bargain with Virgin Australia were subsequently able to voluntarily sign the Pledge, which closed on 16 April 2019. Prior to being submitted to the FWC, Mr Colless cross-checked the Pledge Central Master List with his own Pledge Working List, double checked that all staff who had indicated that they wanted to be removed from the Pledge were removed and removed any duplicated entries by staff within the OCC who had signed the online Pledge more than once. Mr Colless provided in his affidavit that at no time did any staff outside the OCC group sign the online Pledge.

[48] In order to ensure the accuracy and integrity of the Pledge Central Master List, Mr Colless had his own Pledge Working List which he used while on the road and when visiting delegates and members. Mr Colless would always update the Pledge Central Master List, which was stored on the Applicant’s secure webserver, when he returned to the office to ensure it was “up to date and accurate at all times”.

[49] At all times, only Mr Colless and the Communications team at Together ASU were able to amend or edit the Pledge Central Master List, as Delegates and members did not have that level of access or permission.

[50] The Applicant submitted that the Commission can therefore be satisfied that the Pledge submitted to the Commission as per the Orders was accurate and had integrity as:

- At all times only Mr Colless and the communications team at the Together ASU Brisbane Office had custody and control of the Pledge Central Master List to update or amend;
- Mr Colless and delegates kept in communication with OCC staff and informed them that they were able to seek to have their name added or removed from the Pledge at any time while the Pledge was still open;
- Mr Colless would consistently update the Pledge Central Master List from his Pledge Working List, or from communication received from staff to remove their name from the Pledge, such that the Pledge Central Master List was always up to date and accurate;
- Mr Colless double checked that the Pledge Central Master List was accurate as to the names of the persons that wanted to bargain were included, the names of those who did not want to bargain were not included and only one entry per staff member was included.
- At no time did any staff who worked outside the OCC sign the Pledge.

[51] In cross-examination, the Respondent questioned the accuracy and integrity of the Pledge, which is addressed below by the Applicant.

[52] Mr Colless provided that although employees outside the OCC were able to access the Pledge and record their names, at no time did this occur.⁴ Further, Mr Colless stated in his affidavit,⁵ that the List (referred to as the Pledge Central Master List above) was stored in a secure data server with the Communications Team so that it could not be altered or edited by anyone but Mr Colless or the Communications Team. It is clear from Mr Colless' affidavit that the process he used was to update the List from his Pledge Working List, such that he could check and verify the names for accuracy as he did so.

[53] Mr Colless provided in re-examination that at no time did any staff within the OCC, raise any concerns that their name had been put on the List by someone else.⁶ Mr Colless provided in cross-examination that he emailed the members at the OCC whose names were on the Pledge to let them know if they wanted their name removed from the Pledge. Further, Mr Colless provided that at numerous workplace meetings he made clear that this process was always voluntary, and the member could remove themselves from the Pledge. Mr Colless also provided that he instructed and trained workplace Delegates to do the same during

⁴ PN 793 to PN705; paragraph [17] of affidavit of Mr Colless.

⁵ PN783 of Transcript; paragraphs [5] and [6].

⁶ PN786.

conversations around this matter.⁷ Mr Colless followed these processes to ensure that names only remained on the Pledge, if they had been put there freely and voluntarily.

[54] Andrew Lillyman, further confirmed in cross-examination regarding the extract of comments as to alleged pressure on employees to complete the pledge that he had no reason to believe that any name was added to the Pledge by someone other than the staff member themselves,⁸ nor did he contact the ASU with concerns about persons being added to Pledge without their knowledge.⁹

[55] It was submitted by the Applicant that as only three responses were given to Mr Lillyman out of 180 employees he emailed, being a small response, with little substance to the responses to establish that pressure was applied by ASU to suggest that the Pledge was anything other than voluntary.¹⁰

s.237(3A) The group of employees who will be covered by the agreement was fairly chosen

[56] The Respondent provided in its opening submissions that that the law with respect to “fairly chosen” is summarised in *QGC Pty Ltd v the Australian Worker’s Union (QGC)*.¹¹ The case provided that to “perform a different role, task or function to that performed by other operators is not of itself a sufficient basis upon which a finding of operational or organisational distinctiveness can be made in the circumstances of the present case.” Further, the term operational was found to refer “to an industrial or productive activity”, while the term organisation was found to refer “to the manner in which the employer has organised its enterprise in order to conduct those operations.”

[57] The Applicant submitted that the matter at hand can be distinguished from QGC as the facts are clearly different. The groups of employees listed in the Application, that is, employees working in Network Operations within the OCC, are not a group of workers undertaking a single function that have been singled out, as the Gas Plant Operators and Gas Plant Lead Operators were in QGC. The Application lists at clause 1.2.2 Customer Disruption Services, Operations Control, Crew Control, Duty Manager, Flight Dispatch (which has been shown includes Duty Pilots), Load Control and Slot Control. These groups of employees do not perform a single role, task or function, but work together in order to ensure the day of operations runs smoothly. Subsequently, the group of employees the subject of the Application has not been arbitrarily selected, but form a distinct operational group within the Respondent.

[58] The Applicant has not argued that the Network Operations Team within the OCC are geographically distinct but submitted that the group of employees is operationally and organisationally distinct.

Operational Distinctiveness

⁷ PN714.

⁸ Paragraph [113] of his affidavit.

⁹ PN1274 to PN1281.

¹⁰ PN1292 to PN1296.

¹¹ [2017] FWCFB 1165 at [43] to [46] per Full Bench decision.

[59] The Affidavit of Mr Sean Michael Silvester, an employee of the Respondent, sworn 7 May 2019 provides at paragraph [60] how the Respondent separated its operations, “*VAA has chosen to structure the Network Operations Division on the basis of 3 core timeframes. That is:*

- *28 days from the date of flying*
- *28 days to T-1 (approximately 24 hours prior to flight departures); and*
- *Day of operations.*”

[60] It is submitted that the groups of employees the subject of the application, that is the Network Operations Division of the OCC, all work towards the operational goal of the day of operations and groups of employees outside the Network Operations Division of the OCC work toward different operational timeframes. Subsequently, the Applicant considered on this basis that Virgin Australia operationally distinguishes the group of employees the subject of the Application.

[61] Mr Silvester confirmed in cross-examination that ‘day of operations’ is described as a rolling 24 hours, where the day shift focusses on that day ahead and the night shift will start to look ahead to the next day.¹² He also confirmed that within his area of Flight Planning Services, there were no employees within the OCC of Network Operations who worked in a different timeframe to the day of operations. Although in limited circumstances Flight Planning Services did look ahead when planning charter flights, Mr Silvester agreed that the core function of OCC of Network Operations Division was the day of operations.¹³

[62] Mr Andrew Lillyman conceded in cross-examination that the Network Operations Division of the OCC as outlined in Table 1.1 to 1.7 of the Manual primarily focused on the day of operations.¹⁴ He also provided that non-OCC Network Operations Division employees (0.1-2 of the Manual) work beyond the day of operations, however may need to be involved on the day of operations as well, however conceded that the non-OCC and OCC groups of employees working with the Network Operations Division are distinct enough to be distinguished from an operational and organisational perspective.¹⁵

[63] Further, it was confirmed in cross-examination of Mr Chris Newman¹⁶ and Mr Daniel Norman,¹⁷ Airline Operations Manager, that employees working in the Network Operations Division of the OCC are all shift workers on a 24/7, 365-day roster dealing with the “Day of Operations” operational matters, and groups of employees outside the Network Operations Division of the OCC are not 24/7, 365 day per year rostered shift workers.

[64] Mr Norman provided in his affidavit, that “While Airline Operations support work regular office hours, the tactical operations team engages shift work and are rostered on weekends and public holidays, the same as Airline Operations teams within the OCC.”

¹² PN1050.

¹³ PN1045 to PN1062.

¹⁴ PN1208 to PN1211.

¹⁵ PN1215 to PN1218.

¹⁶ PN865 to PN866.

¹⁷ PN1109 to PN1112.

However, Mr Norman conceded that this is not correct and that tactical operations are not 24/7 continuous shift workers.¹⁸ This reinforces the distinctiveness of the operational function of the employees the subject of the Application, as only these groups of employee's work 24/7, 365 days per year.

[65] It was submitted that if the Respondent has structured its operations into these three distinct groupings, that is a telling factor that employees working on the 'day of operations' are operationally distinct. Further, employees within Network Operations of the OCC are operationally distinguishable from other groups of employees within the Network Operations Division but are non-OCC who are not continuous shift workers and who are generally Monday to Friday day workers who work in a support role to the operational departments. Further, it is submitted that being continuous shift workers over a 7-day, 365 day period means that this group of employees already has certain terms and conditions of employment that are distinct from non-shift workers as to hours of work, shift penalties and Sunday work.

Organisational Distinctiveness

[66] In relation to the Respondent's reliance on the reporting structure to demonstrate a lack of organisational distinctiveness, Mr Newman agreed in cross-examination that the proposed group reports to Mr Lillyman who is the General Manager of the Network Operations Division. He then conceded that employees working in the Non-Network Operations teams within the OCC do not report directly to Mr Lillyman but to the Duty Manager.¹⁹

[67] Regarding concerns raised in his affidavit, about teams not included in the proposed group, Mr Newman in cross-examination confirmed that outside the Network Operations of the OCC, that is, non-network operations and non-OCC employees, every group is part of a different division. It is submitted that it is difficult to show organisational distinctiveness for those groups of employees who are outside the proposed group who are scattered across different divisions, while the Applicant argued organisational distinctiveness for groups of employees the subject of the Application by virtue of 1.1 to 1.7 of table 01-2 Manual, was conceded in cross-examination.

[68] Mr Norman, Airline Operations Manager for the Respondent, questioned why teams outside of Airlines Operations are excluded from the proposed group, despite synergies that exist between each unit within Airline Operations. Mr Norman then listed other key stakeholders which form part of the OCC but are excluded from the proposed group. However, in cross-examination Mr Norman confirmed that all these groups listed in paragraph [26] of his affidavit are part of Non-Network Operations teams within the OCC, operationally sit within different divisions throughout Virgin and have different reporting lines to the group the subject of the Application. The Applicant argued that this rebutted the argument that the reporting lines are structured in such a way that the groups of employees are indivisible, as clearly there are separate reporting lines for groups outside those the subject of the Application.

[69] Mr Norman provided that he could not see a great level of distinctiveness between customer disruption services, crew control and operations control in the OCC when compared

¹⁸ PN1135 to PN1138.

¹⁹ PN900 to PN904.

to the functional and operational role of tactical operations outside the OCC. However, he conceded in cross-examination that customer disruption services, crew control and operations control are focusing on the day of operations and tactical operations are focusing beyond the day of operations such that he could see a level of operational distinctiveness.

[70] In cross-examination, Mr Silvester, Manager Flight Planning Services, and Mr Norman both confirmed that if duty leaders were properly listed in the manual, this table would set out an organisational distinction between the Network Operations departments in the OCC and the Non- Network Operations departments. It is therefore submitted that the Respondent has distinctly structured the Network Operations Division within the OCC as per Table 0.1-2 in the Manual titled organisation and structure, as the Respondent witnesses have agreed is made clear once they understood that duty leaders were included under Flight Planning Services.

[71] In summary, it was submitted that the employees working in Network Operations within OCC are clearly held out to be organisationally distinct by the Respondent for the following reasons:

- As the Respondent's own Manual organisationally separates Network Operations departments in the OCC from the other key stakeholders from across the business.
- Table 0.1-1 OCC Stakeholders/Functional Departments shows that while the stakeholders and functional departments work collaboratively within the OCC, organisationally they do not all fall under the same corporate organisational line of responsibility.
- The Table is separated into the "Network Operations OCC Departments" (the subject of the application) and the "Non-Network Operations Teams in the OCC".
- According to the table, the Network Operations OCC Departments all form part of the "Network Operations" Division, while the other, Non-Network Operations Teams in the OCC come from various other divisions including Virgin Australia Engineering, Virgin Australia Cabin Crew and Service Experience Divisions, among others.
- The Applicant submits that all teams listed by the Respondent in the list they provided in their outline of objections are themselves organisationally distinct and not part of, the Network Operations Division, as they sit within the Non-Network Operations Teams in the OCC.

[72] It is therefore submitted by the Applicant that the group in question is both organisationally and operationally distinct which, in *QGC*, "is a factor telling in favour of a finding that the group is fairly chosen."²⁰

Section 237(2)(d) It is reasonable in all the circumstances to make the determination.

²⁰ *QGC Pty Ltd v The Australian Workers' Union* [2017] FWCFB 1165 at [42].

[73] The Applicant submitted that it is reasonable in all the circumstances to make the majority support determination, provided a majority of employees working in the Network Operations Division of the OCC have provided signatures are in favour of bargaining.

[74] It was submitted that, subject to the Commission's assessment of the Pledge list against the employee list, the required elements of s.237 the Act have been met. The positions of the Applicant's employees, on the pledge and as to the scope of the Agreement required scrutiny.

SUMMARY OF THE RESPONDENT'S CLOSING SUBMISSIONS

Section 237(2)(c) that the group of employees who will be covered by the agreement was fairly chosen; and

[75] The Respondent submitted that the Applicant had conceded that there is no geographical distinctiveness between the proposed group and the remaining employees housed on the A1 level of VAA's "village" complex at 56 Emdonstone Road, Bowen Hills (the Village). The concession is significant, and weighed against the suggestion that the proposed group was "fairly chosen". In light of this concession the Respondent submitted the entirety of the Applicant's case in relation to the issue of "fairly chosen" rests on the following two points:

- A single table referred to as Table 0.1-1 within VAA's A23 manual (table 10.1-1); and
- The fact that a number of employees within the OCC are rostered to perform continuous, that is 24/7, shift work.

[76] The chosen group is made up of a portion of the total employees performing work as part of the Respondent's Operational Control Centre (OCC). Therefore the Applicant must satisfy the Commission that, in spite of its concession that the proposed group is not geographically distinct, the proposed group is either organisationally distinct or operationally distinct. The Respondent submitted that the evidence does not demonstrate that the proposed group is either.

Operational distinction

[77] The OCC is overseen and run by the Network Operations Division. The OCC is described variously as a coordination hub, an organism, a concept and a multidisciplinary team. It is not a distinct or separate operational group, but rather the coordination hub for the daily operations of the Respondent. The OCC's remit is to ensure the delivery of the Respondent's most vital services in a manner that is safe and efficient on the "day of operations". It is made up of a number of stakeholders and functional departments that are drawn from across the Respondent's business and not all employees are from the Network Operations Division.

[78] It is the 'day of operations' that is critical to the OCC's function. As Mr Pomeroy accepted the OCC's "sole function of activity is to ensure that on the day of operations all Virgin domestic and international flights depart and arrive safely". It was argued that it is by reference to the 'day of operations' therefore, that the entirety of the application must be considered.

[79] When questioned as to the practical workings of the OCC, the ASU's only operational witness, Mr Pomeroy, gave a number of answers that demonstrated the OCC's workings went far beyond the matters identified in Table 0.1-1.

[80] The operational and organisational structure of the OCC, on the "day of operations", is properly characterised by the diagram in exhibit ASL-1 to the Lillyman affidavit.

[81] All of the employees in the OCC report to the Duty Manager on the "day of operations". The employees in the OCC that report to the Duty Manager "effectively run the day of operations". There is no operational distinctiveness on the "day of operations" between any part of the OCC. Even Mr Pomeroy, admitted that everyone in the OCC runs the "day of operations". He drew no distinction in his evidence between the Network Operations and non-Network Operations persons in the OCC. He stated that they all "run the day of operations". Mr Pomeroy's evidence as to the persons that run the "day of operations" is consistent with that given by Mr Lillyman, Mr Norman, Mr Silvester and Mr Newman. In addition, the whole Network Operations Division is similarly indivisible.

[82] The Respondent submitted that the OCC is one indivisible whole on the "day of operations", and any suggestion that it is comprised of two operationally separate groups as set out in Table 0.1-1 should be rejected. Table 0.1-1 identified groups or kinds of employees. It does not identify the relevant organisational or operational structure on the "day of operation".

[83] The work of flight crew (pilots) was referred to by way of example. Mr Newman gave evidence that in the pilot example, some of the work is distinct, even between pilots working for the very same airline performing ostensibly the same role, that two different enterprise agreements are necessary for those pilots that fly "narrow body" aircraft and those that fly "wide body" aircraft. That level of refinement or distinction is not present in the proposed group.

[84] In terms of Network Operations Division employees outside of the OCC, Mr Newman in cross-examination gave evidence that indicated that the work of pilots, cabin crew and airport workers is "much more different" to what it is that non-OCC, Network Operations Division employees do. Network Operations Division employees outside of the OCC are distinct from pilots, cabin crew and airport workers. However, those employees are similar to those Network Operations employees in the OCC. The performance of a different role, task, skill or function does not mean a group of employees is "operationally distinct". The OCC and the Network Operations Division are plainly comprised of employees performing discrete tasks, however this is done as part of a whole in the course of delivering VAA's domestic and international flight services. This integration is paramount to VAA's service delivery and to ensuring the safety of the flying public.

[85] The case of *Jenkins v Captain Cook Cruises*,²¹ was referred to where the Commission concluded that a "Marine Crew" were not geographically, operationally or organisationally distinct on the basis that all employees worked on the vessel; the Respondent's focus in on hospitality and customer service; all the Vessel Crew are dependent on each other to provide a

²¹ [2014] FWC 6321.

‘holistic’ customer/tourism experience; and such a focus is not a secondary function but as plain from the position descriptions... are a primary function of all Vessel Crew.

[86] It was argued that the reasoning in *Jenkins* can be readily applied to the present circumstances. The OCC employees all work on the same floor; they are focused on delivering VAA’s domestic and international flight services and managing the “day of operations”; the OCC employees including those outside the Network Operations Division are clearly dependant on each other to realise this common focus; and this common focus is the primary function of the OCC.

[87] The Commission in *Jenkins* also considered the nature of the working relationship between the various groups of employees, and observed:

“Secondly given the evidence (which I accept) of the close working relationship between the ‘Marine Crew’ and the hospitality staff in order to provide a ‘holistic’ tourist experience, it seems to me that the possible division of the workforce and the flow on effects of possibly having two significantly different sets of wages and conditions may have the potential for workplace and industrial discontent, even conflict. That is not a prospect I am prepared to risk.”

[88] The Respondent emphasised that a similar relationship exists here between all those employees working in the OCC, including those outside the Network Operations Division, who collectively have the same focus of delivering VAA’s domestic and international flight services on the “day of operations”.

[89] Any notion that the absence of shift work, a different shift pattern, or a lack of “continuous” shift work could somehow represent an element of operational distinctiveness should be rejected. The term *operational* refers to an industrial or productive activity. If the group of employees is to be defined in the manner set out in the application, the Applicant must satisfy the Commission that those individual employees are conducting industrial or productive activities performed by the employees that have been arbitrarily excluded from the coverage of the proposed agreement. The problem for the Applicant is that the employees located in the OCC are all working towards the same operational goal, that is, ensuring that the Respondent’s most vital services on the “day of operations” are delivered safely and efficiently.

[90] It is not clear what the discrete, identifiable industrial or productive activity actually is within the Proposed Group. The failure of the Applicant to define precisely what that activity is fatal to their argument that the proposed group is operationally distinct. If the industrial activity is focussed on ensuring the day of operations runs smoothly, the proposed group for the purposes of a majority support determination must include the whole OCC. If it is in fact the broader focus of the Network Operations Division to prepare crew rosters, manage aircraft and crew and day of operations management of the flying program for domestic and international operations, then any proposed group must include the entire Network Operations Division, and potentially the non-Network Operations Division employees in the OCC.

[91] The Applicant has submitted that the group of employees outside the Network Operations Division of the OCC work toward different operational timeframes. Every person in the OCC on a particular “day of operations” reports into the OCC Duty Manager; and every person reporting to the OCC Duty Manager on the “day of operations”.

[92] As to the Applicant purported reliance on different rostering patterns to make out its case of operational distinctiveness, the Respondent notes the following:

- Mr Newman’s unchallenged evidence was that different shift patterns are common in enterprise agreements;
- If a distinction is to be drawn on the basis of 24/7 continuous shift workers for the purposes of the Proposed Group, then the Proposed Group should also include those within the OCC that work that shift pattern and are not part of the Network Operations Division. The fact that Network Operations Division employees and Non-Network Operations Division employees within the OCC have a different reporting structure for the purposes of performance management is not sufficient to justify a distinction between employees that work the same shift patterns, in the same place and report to and provide services to the Respondent via the same “day of operations” manager; and
- If a distinction between employees for the purposes of the Proposed Group is to be drawn between shift workers within the Network Operations Division and non-shift workers within the Network Operations Division, the Proposed Group must include at a minimum, the Tactical Operations team within Airline Operations, and the Network Operations Division. Furthermore, to the extent those employees are part of the Network Operations Division, they are part of a Division with employees seated on the same floor of the village, all performing the same industrial activities, namely the publication of flight and cabin crew rosters, tactical management of aircraft crew and the management of the Respondent’s flight program both domestically and internationally.

Lack of Organisational Distinction

[93] The term organisational refers to the manner in which the employer has organised its enterprise. The performance of particular tasks does not mean employees are “organisationally distinct”. In fact, the employees in the OCC, and the Network Operations Division more broadly, have been organised under a single reporting structure. That is, on the “day of operations” the reporting structure is as identified in exhibit ASL-1 to the Lillyman affidavit.

[94] It is clear that the Respondent has structured its enterprise in such a way to ensure that all employees in the OCC and the Network Operations Division work collectively. They are structured as part of an indivisible whole to ensure the complex delivery of services for which the Respondent is responsible.

[95] Each person in the OCC and the Network Operations Division is working together and towards one goal, ensuring the smooth running of the airline so as to get planes up into the air and down at their destination, safely. The Respondent also relied on integration between the OCC and the non-OCC Network Operations Division to conduct its operations of getting planes from A to B safely. This goes to the “organisational” character of the Respondent. The fact that the Respondent’s employees in the OCC perform a different role, task or function to that performed by the employees in the Network Operations Division is not, of itself, a sufficient basis for finding organisational distinctiveness.

[96] The Commission noted in *Jenkins* that “relying on an organisational chart to demonstrate the case you wish to prove, does not necessarily reflect the reality of the reporting lines.” To that end, and in light of exhibit ASL-1, Table 0.1-1 does not reflect the reporting lines actually in existence at VAA in relation to the OCC on the “day of operations”. The evidence of, in particular, Mr Lillyman and Mr Newman helps explain that the OCC works as a collaborative “hub” for stakeholders within VAA, rather than as standalone “distinctive” groups within a single or consistent reporting structure.

[97] The Applicant relies on Table 0.1-1 to establish organisational distinctiveness; however Table 0.1-1 does not identify any organisational structure. By reference to Table 0.1-1, there are a number of different ways that organisational distinctions could theoretically be drawn. These include:

- On the day of operations, including all persons who report to the Duty Manager;
- Via corporate reporting lines as distinguishable by Division, including all persons in the Network Operations Division who report to Mr Lillyman; and/or
- Via corporate reporting lines within the Network Operations Division to either Mr Norman for those in Airlines Operations or Mr Silvester for those in Flight Planning Services.

[98] None of these potential organisational distinctions represent the arbitrary group selected for the purposes of the application. Moreover, the Applicant does not attempt to engage in any way with ASL-1 and the current organisational structure on the “day of operations”.

[99] Even if the Commission accepted that Table 0.1-1 identifies some kind of organisational distinction, the balance of the evidence demonstrates that this organisational structure does not exist on the “day of operations”, and that the proposed group is also not operationally or geographically distinct, such that it could not be considered “fairly chosen”.

Lack of Geographical Distinction

[100] The concept of geographical distinction is concerned with the geographical separateness of an employer’s various worksites or work locations, not a separation of a few hundred metres within the same work site, let alone a distance of mere metres. In any event the Applicant conceded that there is no basis for the Commission to accept that the proposed group is geographically distinct.

The Proposed Group is not Fairly Chosen

[101] The Respondent submitted that Table 0.1-1 does not represent the organisational structure on the “day of operations”. There is no operational distinction for the proposed group. The existence of a different shift pattern, in circumstances where the proposed group excludes employees in the OCC who work the exact same shift patterns, does not substantiate any finding of operational distinctiveness. The Applicant had conceded there is no geographical distinction.

[102] If the Commission is not satisfied that the group of employees to be covered by the proposed enterprise agreement is geographically, operationally or organisationally distinct, then there must be further evidence to which the Applicant can point to justify the group of employees as being fairly chosen. The Respondent submitted that there is no evidence to support this.

Majority Support

[103] The Respondent submitted in addition to the above that the Commission cannot be satisfied that the application has majority support. The Applicant suggests that the affidavit of Mr Colless (dated 30 April 2019) “clearly provides how the ‘pledge’ of relevant signatures was obtained. The Respondent is not satisfied that this evidence was persuasive.

[104] There is no evidence from the Union that specifically identifies the information provided to employees about how the pledge could be accessed. Employees of the Respondent who were not employed in the OCC could access the pledge. It was problematic that other employees could have entered names onto the pledge. The evidence was that he was “not a hundred percent” sure that people had not entered other people’s names into the pledge. This is an issue, because the process followed did not guard against other individuals adding names to the pledge to inflate the numbers. A concession was made, that there might be a number of reasons why individuals were unable, or unwilling, to approach the Applicant to have their names removed.

[105] When questioned about the anonymous note the Respondent received suggesting that employees were being pressured to sign the pledge. A concession was made on behalf of the Applicant that there might be a number of reasons why the Applicant did not receive information from individuals about removing their names, including union intimidation, is further reason for concern. The further recent communication dated 19 August 2019 that suggested further signatures may be needed to establish a majority and encouraging members to obtain them also undermined the pledge.

Other matters

[106] Employees employed in the position of Duty Leaders have not been included as part of the proposed group. It was submitted it is not for the Respondent to define or appropriately define the proposed group. If the Applicant wanted to include employees engaged as Duty Leaders as part of the application, it should have done so. However, it did not include those employees. It was submitted that this goes not only to the lack of clarity in the application, but also to the arbitrariness of the proposed group. There is no basis for excluding the Duty Leaders from any proposed agreement.

[107] The Respondent also submitted that a MSD could lead to confusion and conflict amongst the workforce, given isolated groups of employees within a complex and multi-faceted structure would be subject to an agreement whilst others would not. This is an entirely undesirable outcome, given the safety-critical nature of the Respondent’s enterprise.

SUMMARY OF THE APPLICANT’S SUBMISSIONS IN REPLY OF THE RESPONDENT’S CLOSING SUBMISSIONS

Fairly chosen

[108] The Applicant submitted that the Respondent relied on an incorrect application of law in asserting that the Applicant’s concession that there is no geographical distinction was “significant, and weighs against any suggestion that the proposed group is fairly chosen”.

[109] The reasoning in *Cimeco*, adopted by the Full Bench in *QGC Pty Ltd v The Australian Workers’ Union* in the context of section 237(2)(c) of the Act, found:

“For the Commission to reach a state of satisfaction necessary to make a majority support determination, it must be satisfied that the group was fairly chosen and in considering whether the group was fairly chosen, it must take into account, by virtue of s. 237(3A), whether the group is geographically, operationally or organisationally distinct. Distinctiveness is not absolute and can be a matter of degree. Distinctiveness on one of those bases is a factor telling in favour of a finding that the group is fairly chosen.”

[110] The Applicant submitted that the case law and relevant legislation does not require the Applicant to prove all three grounds of distinctiveness, rather they only need to establish that there is geographical, organisational or operational distinctiveness. Accordingly the Applicant need only prove at least one of these grounds to foreground a factor in favour of finding that the group was fairly chosen. If neither one of these three factors can be shown to the satisfaction of the Commission, then that is a factor telling against finding that the group is fairly chosen. The Applicant is only contending that there is organisational and operational distinctiveness, it is irrelevant that it has conceded there is no geographic distinction.

The group is operationally distinct

[111] The Respondent has submitted that the application must be considered by reference to the entirety of the day of operations and this means all of the Operational Control Centre (OCC) of the Respondent. The Applicant rejects this narrow interpretation of what “must be considered” for the Proposed Group, as case law provides that:

“There is no requirement to decide what would be the fairer or the fairest group. There may be a number of alternative groups which could be fairly chosen.”²²

[112] And:

“a decision by a Commission Member as to whether that Member is satisfied that the group of employees covered by an agreement was “fairly chosen” involves a degree of subjectivity and the exercise of a very broad judgment or value judgment, and in a broad sense may be characterised as a discretionary decision.”²³

[113] The Commission is therefore able to determine whether a proposed group, which is not made in reference to the “day of operations” in its entirety, is fairly chosen either geographically, organisationally or operationally.

²² *NUW v Cotton On* [2014] FWC 6601 [2014] FWC 6601 at [18].

²³ *Construction, Forestry, Maritime, Mining and Energy Union; The Australian Workers’ Union v LS Precast Pty Ltd* [2019] FWCFB 1431 at [35] which followed *Aerocare Flight Support Pty Ltd v Transport Workers’ Union of Australia* [2018] FCAFC 74.

[114] The Respondent referenced *QGC* and made the submission that, “It is not clear what the discrete, identifiable industrial or productive activity actually is within the Proposed Group.” The Applicant disagrees with the Respondent’s narrow interpretation of the *QGC*.

[115] In *QGC* it was found that to “perform a different role, task or function to that performed by other operators is not of itself a sufficient basis upon which a finding of operational or organisational distinctiveness can be made in the circumstances of the present case.” The Applicant submits, therefore, that although undertaking a different role, task or function is not of itself a sufficient basis for finding operational or organisational distinctiveness, in the present case, there is an accumulation of distinctions between the Proposed Group and those who are not included in the Proposed Group which go beyond merely having a different role, task or function, such as:

- Rostering patterns. The Proposed Group all work 24/7 continuous shift work.²⁴ This is a matter telling in favour of finding that the Proposed Group is distinct, as the way they are required to operationally perform their work on the day of operations is different to the way other employees outside the Proposed Group are required to perform their work.
- It is those groups of employees running Airline Operations and Flight Planning Services only who are subject to this majority support determination, that is, those who work within Network Operations of the Operational Control Centre, or put another way, only those day of operations activities managed by Network Operations.
- In ASL-2 at page 0.1-2 of VAA’s Manual titled “0-ORGANISATION AND STRUCTURE” provides a diagram which outlines the “Network Operations – Business Model” and divides the Network Operations into 28 days +, 28 days – 24 hours and Day of Operation. It is this Day of Operation within the Network Operations – Business Model which is the subject of this application, listed as the Disruption Management, Crew Control, Network Control, Flight Dispatch, Load Control and Customer Disruption Services.

[116] In response to the application of *Jenkins v Captain Cook Cruises* to the present matter by the Respondent, the Applicant strongly contended that the factual scenario is markedly different for the following reasons:

- The employees the subject of the majority support determination in *Jenkins* were already part of an existing enterprise agreement providing leisure services, site seeing, hospitality, education and transport activities on Sydney’s waterways. The employees the subject of this determination are not covered by an enterprise agreement, but by awards or contracts and these employees want the opportunity to collectively bargain with VAA.
- The application sought for Marine Crew in *Jenkins* to be separated from the existing collective agreement in order to have their own enterprise agreement. Again, in this application, there has never been a collective agreement for this class of employee who want to bargain.

²⁴ Confirmed by Mr Lillyman at PN1184.

- There was no history of Marine Crew and hospitality staff having separate agreements in *Jenkins*.
- The organisational chart that was relied upon by the applicant as to reporting lines was inaccurate and did “not necessarily reflect the reality of the reporting lines which are plainly disclosed by the tendered positions descriptions.”⁹ Table 01-1 used to define the Proposed Group in this application does not hide or skew reporting lines. Further, there is more than “a single table” which supports the operational and organisational distinctiveness of the Proposed Group, as ASL-2 the “Network Operations – Business Model” breaks up the Proposed Group under the Day of Operation, which is operationally distinct, also supporting operational distinctiveness.
- The Commissioner did not want to risk conflict by separating out these employee’s agreements and therefore some employees be disadvantaged by not being included in the Marine Crew agreement.¹⁰ It is to be noted that they were all working closely together on vessels. In this scenario, the Proposed Group of employees have been chosen as the Applicant has determined that it is the most operationally and organisationally distinct group, and does not seek to specifically disadvantage a group of employees who will not be covered. Further, these employees do not work in such close quarters on a boat for conflict to be as concentrated. Further, the argument of conflict between groups of employees is difficult to raise as there are already different groups of employees such as VAMet contractors and Duty Pilot agreement covered employees being managed and there has been no evidence provided that this has put safety at risk.

[117] The Respondent’s Submissions also sought to propose different groupings other than that chosen. We note again Commissioner Roe’s statement that, “*there is no requirement to decide what would be the fairer or the fairest group. There may be a number of alternative groups which could be fairly chosen.*”

[118] The Applicant observed that:

- It is not in contention that it is common for different shift patterns to cover employees of enterprise agreements, but that misconceives the basis of the submissions. What the Applicant is submitting is that the 24/7 continuous shift roster for this specific group of employees only means that the Proposed Group perform their work in a way which is operationally different from employees outside the Proposed Group, which is a factor telling toward operational distinctiveness of the Proposed Group.
- While there Maintenance Watch and Cabin Crew Operations Services may work continuous shift work rosters they are from different Divisions and are not part of Network Operations.
- In response to the Respondent’s Closing Submissions regarding the Tactical operations Team:

- Mr Lillyman confirmed in cross-examination that while tactical operations work shift work, they only day and afternoon shifts. On that basis they are not continuous shift workers.²⁵
- Network Operations employees outside the OCC have not been included in the Proposed Group as their work is focussed on different timeframes from the day of operations (refer ASL-2 Network Operations -Business Model diagram at 0.1-2).
- These groups of employees are not all performing the same industrial activity, as publication of rosters, tactical management of aircraft and crew and flight programs are different industrial activities.

The group of employees are organisationally distinct

[119] The Applicant rejected the Respondent's Closing Submissions that "VAA has structured its enterprise in such a way to ensure that all employees in the OCC and the Network Operations Division work collectively...as part of an indivisible whole to ensure the complex delivery of services for which VAA is responsible." It is conceded that the OCC has the same reporting structure on the day of operations, however, it is clear that Network and Non-Network Operations teams outside the OCC do not have the same reporting structure as these sit under different organisational divisions (refer table 01-1) as conceded by Mr Norman in cross-examination.²⁶

[120] The Respondent's Closing Submissions also provided that Table 01-1 of the Manual does not identify any organisational structure. However, this is rejected, as this table sits within the Respondent's own Manual within the section entitled "0-ORGANISATION AND STRUCTURE." It is only too convenient, then, that the Respondent seek to dismiss this table because it does show a level of organisational distinctiveness as conceded in cross-examination by:

- Mr Lillyman that the non-OCC and OCC groups of employees working with the Network Operations Division are distinct enough to be distinguished from an operational and organisational perspective.²⁷
- Mr Silvester and Mr Norman both confirmed that if duty leaders were properly listed in the manual, this table would set out an organisational distinction between the Network Operations departments in the OCC and the Non- Network Operations departments.²⁸

[121] It is therefore clear that that VAA has distinctly structured the Network Operations Division within the OCC as per Table 0.1-2 in the Manual under "0-ORGANISATION AND STRUCTURE", as the Respondent witnesses have agreed is made clear once they understood that duty leaders were included under Flight Planning Services. The balance of the evidence favours that the Proposed Group is organisationally distinct.

²⁵ PN1221.

²⁶ PN1125 to PNP1143.

²⁷ PN1215 to PN1218.

²⁸ PN1075 and PN1142.

[122] Further, it is rejected that a table sitting within “0-ORGANISATION AND STRUCTURE” does not represent what occurs on the day of operations, and it is submitted that it, in fact, be relied upon, along with Table 0.1-2 and diagram on page 0-1.2 of the Manual to show how the Respondent organisationally structures its workforce. The Applicant is not trying to rely “on an organisational chart to demonstrate the case it wishes to prove” as occurred in *Jenkins* as the table does reflect the reality of reporting lines.

[123] Regarding the criticism of the Respondent that other teams working in the OCC have not been included in the selected group, as per paragraph [9] of these submissions; the Applicant does not need to show the fairest distinction. Further, evident from the petition, some members of those other teams are also interested in bargaining, but have been excluded from this determination simply because they are not part of the chosen group that is clearly distinguishable organisationally and operationally. The fact that other teams have not been included in this application does not prevent consideration of later inclusion as part of any bargaining negotiations, as the making of a majority support determination is not an exercise in determining the scope of any final agreement but instead determines the starting point for bargaining and the group for the notice of representational rights.²⁹

Majority Support

[124] It was submitted that the Commission can be satisfied that the Application has majority support of the Proposed Group of employees, as Mr Colless, who collected the signatures and was at all times in control of the Pledge process, provided satisfactory evidence on this matter both in his affidavit and during cross-examination. It is submitted, that merely because Mr Colless did not provide the answers which the Respondent was seeking in cross-examination, does not lead to the conclusion that his evidence was unsatisfactory. In fact, it is respectfully submitted that the Commissioner observed Mr Colless demeanour and earnestness in providing his responses in cross-examination, and his eagerness to ensure the Pledge and the process in obtaining the pledge was one that was accurate, had integrity and was voluntary.³⁰

[125] At paragraph [37] of the Respondent’s Closing Submissions it is contended that “there is no evidence from Mr Colless at all that identifies the information provided to employees about how the pledge could be accessed.” With respect, as Mr Colless had complete custody and control of the Master Pledge List, and was constantly updating this list from his Pledge Working List, it is irrelevant that other members of VAA could have entered their signature, as Mr Colless ensured only the employees within the Proposed Group were entered into the Pledge Master List as being relevant to this determination.

[126] Although, Mr Colless did concede that employees outside of the Proposed Group theoretically could have signed the Pledge, he provided evidence that this, in fact, did not occur and the Respondent has presented no evidence to the contrary.³¹ Without evidence, the Respondent cannot rely on the mere possibility that this could have occurred, as the test is a civil test to be proven beyond the balance of probabilities. The process of those signing the Pledge does not simply fall down because there was the slightest chance, perhaps, someone

²⁹ *National Union of Workers v Cotton On Group Services Pty Ltd* [2014] FWC 6601 at [19].

³⁰ PN769 to PN780.

³¹ PN693 to PN705.

else could have put their name on the Pledge when the evidence before the Commission is that this simply did not happen.

[127] Mr Colless was able to establish that safeguards were in place that ensured if someone did have their name put on the Pledge by someone else, they would have known about as VAA employees they were emailed by Mr Colless after signing the Pledge.³² Mr Colless ensured he trained his delegates to be approachable, and that he was approachable, so that removal of their names from the Pledge could occur if that is what someone wanted to do. In fact, a person did seek to remove their name from the Pledge, and was so removed, as requested.³³

[128] In addressing the Respondent's closing submission that Mr Colless was dismissive to the suggestion of employees being pressured to sign the Pledge, the Applicant disagrees. Mr Colless responded to this line of questioning by stating:

*"So it is inappropriate that that person felt that way, absolutely. But I can't assign if this person actually signed the pledge or if this person, you know – and I'm a very open organiser. I'm not, you know, someone that doesn't take criticism well. If any staff member feels that way I've always got an opportunity to have that conversation. I'd also note that Virgin management never once presented this to me and never once wanted to have a conversation around that process."*³⁴

[129] It was argued that this is not dismissive, but taking seriously that someone might have felt pressured to sign the Pledge. However, it was also submitted that there was little for Mr Colless to respond to during cross-examination when the facts are that an "anonymous note" was relied upon. And there was no further contact with the union to discuss the note or the Pledge process.³⁵

[130] In relation to communications on 19 August 2019 in relation to Mr Colless suggesting "further signatures may be needed to establish a majority and encouraging members to obtain them," this does not undermine the integrity or voluntariness of the Pledge whatsoever. Mr Colless was merely doing his due diligence in attempting to ensure that members of the Proposed Group were informed that if they wanted to bargain with their employer they would need to sign the Pledge. Further, whether there is a majority of employees of the Proposed Group who want to bargain is for the Commission only to decide, as the Commission has the full list of employees the subject of the Proposed Group and the list of employees from the Pledge Master List. Mr Colless, nor ASU, nor VAA can have certainty as to whether a majority of employees of the Proposed Group want to bargain, as they do not have access to both lists.

[131] The Respondent has subsequently in no way rebutted why the Pledge cannot be relied upon as voluntary, accurate and having integrity, as provided in detail in the Applicant's Closing Submissions.

Other matters

³² PN716.

³³ PN721.

³⁴ PN744.

³⁵ PN763, PN1252 to PN1256.

[132] At paragraph [40] of the Respondent's Closing Submissions, the Respondent raises that Duty Leaders were not included as part of the Proposed Group. However, it has already been shown through cross-examination that Duty Leaders sit within Flight Planning Services, as was conceded by Mr Newman, Mr Silvester, Mr Norman and Mr Lillyman, such that there is no uncertainty as to the group of employees to be covered.

[133] It was not "by design" that Duty Leaders were excluded from the Application, nor does it implicate that the Proposed Group is arbitrarily chosen, it simply demonstrates that Table 0.1-1 of the Respondent's own manual is deficient and requires updating. However, due to the understanding that Duty Leaders sit within Flight Planning Services, which is part of the Proposed Group of the application, it has been established that Duty Leaders were never excluded from the application.

[134] In response to the Respondents submissions, the Applicant disagrees that the level of interconnectedness of the groups of employees within and without the Proposed Group "fatally compromises the Application". As stated by Mr Pomeroy,³⁶ "everything everyone does in the airline is to move the aircraft from A to B," and this is not only contingent on the OCC. Further, this application is not attempting to carve out groups of employees for enterprise bargaining, but has selected a group of employees which is organisationally and operationally distinct in order to provide them with the ability to bargain for an enterprise agreement. Other groups of employees may be included in the bargaining process should the majority support determination be granted.

[135] Having a majority support determination is unlikely to cause confusion and conflict as the Respondent already has employees within the OCC under different terms and conditions of employment, whether they are on an enterprise agreement or under contract. This has not caused conflict or safety issues before and would unlikely cause safety issues or conflict moving forward.

CONSIDERATION

[136] The following criteria must be assessed in accordance with s.237 of the Act:

Section 237(2)(a) a majority of employees want to bargain; and section 237(3) for the purposes of paragraph (2)(a), FWC may work out whether a majority of employees want to bargain using any method FWC considers appropriate.

[137] There has been considerable discussion regarding the Pledge process to ascertain whether the proposed group of employees wanted to bargain. The Union stated employees were contacted directly and training was provided to delegates and workplace leaders to ensure that employees were aware of the voluntary nature of the Pledge. In response to this the Respondent's representative questioned Mr Colless as follows:

"MR MINUCCI: Certainly there's nothing in your statement about emailing every single person who signed the pledge to ensure they did it freely and voluntarily?--I had messaged our members and said that if you'd like to be removed from the pledge you can let us know, and I had had conversations in the workforce in regards to that,

³⁶ PN170.

that it was freely and involuntary. That's definitely how I'd also instructed out delegates to hold conversations around this matter. So if you're asking if anything was in writing, there was a message in writing saying you could remove yourself. Second of all, the conversations and the training that I provided our delegates and our workplace leaders, and at numerous workplace meetings was that this process was always voluntary and it always meant they could remove themselves from it.”³⁷

[138] Mr Colless stated he ensured that employees were aware that they could freely remove their name from the Pledge at any stage during the process. Through the use of a working list and a secure data survey, Mr Colless maintained the integrity of the pledge throughout the process:

“...The list was actually held on a secure data survey which wasn't controlled by me. I had a working list and that working list was enabling me to be able to remove people from the list whilst on the road and to utilise that to communicate with staff. And once they've sought to be removed or if there was any questions around that list from anyone, be that Virgin management or our staff or members, I would then instruct our communications team to remove people from the list or would remove them myself.”³⁸

[139] When pressed from the Respondent that potential union intimidation may have undermined the Pledge process, Mr Colless was firm in his assertion that the Pledge process was independent and voluntary:

“Right, and that in and of itself, undermines the pledge process, doesn't it, because you can't guarantee to the Commission that everybody wanted to be involved?---From the process I followed I can guarantee that the people that had signed the pledge from information I received from them, from the delegates, and a lack of information I've received from management to the contrary, that it is integral and it is okay.”³⁹

...

MR THOMAS: Mr Colless, what process did you undertake to satisfy yourself of the integrity of the list?---The process I took was to ensure the list was being stored in a secure data server with our Communications Team and that was to make sure that we had the ability to, you know, keep the list in a central location that was secure and not able to be altered or edited from anyone else in the office apart from myself or the Communications Team. The reason I did that is because we pride ourselves on making sure we've got a system that's strong in the union office, and I'd heard conversations from our delegates in regards to paper forms not being the best process to use in this matter. So we really wanted to make sure that our members and staff who were signing the pledge did so in a way that felt supported and in a way that felt they could do that without fear of retribution.”⁴⁰

[140] I am satisfied that the Pledge (or petition) was a reasonable method for determining that a majority of the proposed group wanted to bargain. I note that the Applicant's

³⁷ PN714.

³⁸ PN717.

³⁹ PN728.

⁴⁰ PN783.

approached the method in a constructive and diligent manner to ensure its integrity. However the satisfaction to be resolved as to whether this is appropriate evidence for determination that a majority of relevant employees want to bargain is dependent on the satisfaction that the group of employees assessed for this purpose is fairly chosen. These matters as to ‘fairly chosen’ are considered below.

Section 237(2)(b) the employer, or employers, that will be covered by the agreement have not yet agreed to bargain, or initiated bargaining, for the agreement; and

[141] In respect of s.237(2)(b), I am satisfied that the Respondent has not yet agreed to bargain, or initiated bargaining, for the Agreement. The affidavits of Mr Pomeroy and Mr Colless were compelling in establishing this. Mr Pomeroy’s affidavit stated the following:

“On the 20th March 2019 Andrew Lillyman sent an email to the Network Operations group announcing that “On Tuesday 12 March 2019, we received an official request from the ASU to negotiate an Enterprise Agreement (EA) covering the OCC and asked Virgin Australia to formally respond to this request.” He informed the group that “This morning, we informed the ASU’s representatives that Virgin Australia cannot at this stage, agree to negotiate an EA for the OCC.””

[142] Further, Mr Chris Newman, Manager Workplace Relations, for the Respondent, sent an email to the Respondent’s staff on 20 March 2019 stating that:

“Virgin Australia cannot at this stage, agree to negotiate an Enterprise Agreement (EA) for the OCC, as requested by the ASU/Together Queensland (ASU)”

[143] In response to a query on this at the Hearing, as to the Respondent’s current position, he confirmed the Respondent had not agreed to bargain. Accordingly, I am satisfied in relation to s.237(2)(b) that at the time of the application, on the basis of the evidence, the Respondent had not yet agreed to bargain for the Agreement.

Section 237(2)(c) that the group of employees who will be covered by the agreement was fairly chosen; and Section 237(3A) If the agreement will not cover all of the employees of the employer or employers covered by the agreement, FWC must, in deciding for the purposes of paragraph (2)(c) whether the group of employees who will be covered was fairly chosen, take into account whether the group is geographically, operationally or organisationally distinct.

[144] In examining these matters, I accept that the relevant principles to be considered in assessing whether a proposed group of employees are fairly chosen, is articulated in *Cimeco Pty Ltd v CFMEU & Ors.*⁴¹ The reasoning in *Cimeco* was adopted by the Full Bench of the Commission in *QGC*,⁴² in the context of section 237(2)(c) of the Act, finding at para 42:

“For the Commission to reach a state of satisfaction necessary to make a majority support determination, it must be satisfied that the group was fairly chosen and in considering whether the group was fairly chosen, it must take into account, by virtue of s. 237(3A), whether the group is geographically, operationally or organisationally distinct. Distinctiveness is not absolute and can be a matter of degree. Distinctiveness

⁴¹ [2012] FWAFB 2206.

⁴² *Pty Ltd v The Australian Workers’ Union* [2017] FWCFB 1165.

on one of those bases is a factor telling in favour of a finding that the group is fairly chosen. Conversely if the group of employees is not geographically, operationally or organisationally distinct, then that is a factor telling against a finding that the group is fairly chosen. Whether or not a group is organisationally, operationally or geographically distinct is not decisive but rather is a matter to be given due weight having regard to all of the other circumstances.”

[145] Commissioner Roe noted in *National Union of Workers v Cotton On Group Services Pty Ltd* (which was upheld on appeal) the requirements in respect to fairly chosen are essentially the same for agreement approval and majority support determinations.⁴³

[146] Commissioner Roe in *NUW v Cotton On* observed that *Cimeco* outlined what the FWC requires in determining the question of fairly chosen, which is to:

“Evaluate and have regard to all the relevant factors.

Focus on objective as opposed to arbitrary or subjective factors in concluding that a group is fairly chosen. If the selection was on arbitrary or discriminatory grounds or based on criteria which undermined legislative objectives, for example, if it undermined collective bargaining, then it would be unlikely to be fair.

Consider that, where the group chosen is not the whole enterprise, if the group is geographically, operationally or organisationally distinct, this is a factor in favour of finding that the group was fairly chosen, however, it is not a decisive matter as all other relevant considerations must be evaluated.

Consider that if the group is not geographically, operationally or organisationally distinct, (and is not the whole enterprise) this is a factor against a finding that the group is fairly chosen, however, it is not a decisive matter as all other relevant considerations must be evaluated.

Consider that the interests of the employer and productivity and the interests of employees who are excluded from coverage may be relevant. That is the consequences of the choice of the group may be considered.”

[147] Commissioner Roe in *NUW v Cotton On* also noted that for the purposes of a majority support determination, “there is no requirement to decide what would be the fairer or the fairest group. There may be a number of alternative groups which could be fairly chosen.”⁴⁴

Geographically distinct

[148] I accept that there was no argument made by the Applicant suggesting that the proposed group was geographically distinct. Mr Thomas affirmed this early on during the Hearing, stating:

⁴³ [2014] FWC 6601.

⁴⁴ [2014] FWC 6601 at [18].

“MR THOMAS: Commissioner, if it assists in speeding up, at no point have we argued geographical distinctiveness or distinction, so if that's what we're going to here, we concede that they're all on the one floor.”⁴⁵

[149] It is also accepted that it is only necessary to establish that the proposed group is geographically, organisationally or operationally distinct. It is well established that an Application need only establish one of these grounds, as it is not a requirement to demonstrate all three. The Respondent emphasised that given the Applicant's concession that there was no geographic distinctiveness (between the proposed group and the remaining employees as housed on the A1 level of VAA's 'village complex' at 56 Edmonstone Road, Bowen Hills) that this weighed against a finding that the proposed group is 'fairly chosen'. It is necessary to consider the remaining factors as to whether the group is organisationally or operationally distinct.

Operationally distinct

[150] The Applicant has submitted that the proposed group is operationally distinct based upon the separation of the Respondent's operations into three core operational timeframes, that is, 28 days from the date of flying, 28 days to T-1 and day of operations. It was submitted that the proposed group, Network Operations Division within the OCC all worked towards the operational goal of the day of operations, distinguishing this group operationally.

[151] It was further submitted that employees working in the Network Operations Division within the OCC are all shift workers on a 24/7, 365 day roster dealing with 'day of operations' operational matters, and groups of employees outside of this division are not on 24/7, 365 day per year rosters.

[152] The Respondent submitted that the OCC is overseen and run by the Network Operations Division and that the OCC is one indivisible whole on the 'day of operations'. The OCC has been described as an organism and co-ordination hub by the Respondent, who argued that the interconnected complexity of the OCC prevented it from being organisationally distinct for the purposes of s.387.

[153] During cross-examination Mr Pomeroy spoke to the interconnected complexity of the OCC:

“MR MINUCCI: Employees in the OCC are involved in things like minimising disruptions, managing expectations of passengers, co-ordinating flight changes, managing delays, things like that?---Yes, that's part of it.

And the OCC could be described as an organism or as a multi-disciplinary routine?---I don't know about an organism. I wouldn't describe it as that. But it is a team of, you know, multi disciplines.

It works like a spider web, there are lots of interconnected parts?---Yes. Yes.

And I suggest that it must be fluid to operate effectively given the interaction between all parts of the OCC and all parts outside of the OCC to ensure the day of operations

⁴⁵ PN196.

runs smoothly and efficiently?---Yes. Yes, it is – it's fluid and it's not fluid. It's both, but yes. It's complex.

Sorry, you said it's complex?---It is complex, yes, I - -⁴⁶

[154] The Respondent submitted that it is clear that the organisation is structured as an indivisible whole working towards the same operational goal of ensuring the complex delivery of services by all employees in the OCC and Network Operations divisions work collectively. Mr Minucci referred to the collective reporting structure for all teams operating on the day of operations:

“...the Network Operations Divisions has a number of teams and particular corporate reporting structures. However on the day of operations there is a particular organisation structure for employees in the Network Operations Division, as well as other employees outside of that division in the OCC. There is a single organisational reporting structure which reports directly to the duty manager...”⁴⁷

[155] The complexity of the reporting structure for the Respondent was further considered by Mr Newman in his witness statement:

“Despite the fact that the proposed group will have their duties overseen by the duty manager on the day of operations, both the proposed group and non OCC network operations fall under the same organisational line of responsibility.

While this may differ from supervisory line of responsibility on the day of operations, the organisational structure ensures that there is still a line of communication between Mr Lillyman and his network ops department, both in the OCC and outside of the OCC. To this extent there is no organisational distinction between the two groups.”⁴⁸

[156] It was put to Mr Newman during cross examination that organisational distinction did exist in the reporting structure on the day of operations, however Mr Newman refuted this:

“There is an organisational distinction, is there not, because the OCC network ops divisions are listed in table 0.1-1 and the non OCC network operations departments are listed in table 0.1-2?---Well, I don't think that's an organisational structure, that's a table outlining the OCC and statement says, "To this extent", being to the extent they both report to Andrew Lillyman there is no organisational distinction.”⁴⁹

[157] I am not satisfied that the Network Operations Division within the OCC is operationally distinct. I accept the Respondent’s position that the proposed group exhibits a significant level of interconnectedness between all employees working within, and outside, the OCC to deliver the Respondent’s essential and critical services on the day of operations. I accept that it is not clear what the discrete, identifiable industrial or productive activity is within the proposed group. The collective focus on the ‘day of operations’ and failure of the

⁴⁶ PN175 to PN178.

⁴⁷ PN38.

⁴⁸ PN907.

⁴⁹ PN912.

Applicant to precisely define what that activity is, is fatal to their argument that the group is operationally distinct.

[158] It is also evident that all people employed in the OCC on any particular day, regardless of their separate lines of responsibility; ultimately report to the Duty Manager, whose job it is to supervise employee activities on the day of operations, as confirmed by Mr Pomeroy who stated during the Hearing:

“Yes. Now every person in the OCC on a particular day of operations reports into the OCC duty manager?---Yes. Yes, they do eventually.

And they are with the OCC duty manager, as responsible for overseeing the entire OCC?---They are, yes.

And that's regardless of whatever notional corporate line responsibility might happen outside of a day of operations. On a day of operations they are the one responsible for oversight of the OCC?---Of the OCC. I think you'd find, like similar to duty pilots, they couldn't override them. But they can consult with them.”⁵⁰

[159] The employees in the OCC and the Network Operations Division are all part of one interconnected operation that is responsible for ensuring the Respondent's domestic and international flights arrive at their destination safely. On the material I cannot be satisfied the proposed group is operationally distinct.

Organisationally distinct

[160] The Applicant has asserted that while the stakeholders and functional departments work collaboratively with the OCC, organisationally they do not fall under the same corporate organisational line of responsibility.

[161] In relation to organisational distinction, the Respondent stated that organisation refers to the manner in which the employer has organised its enterprise. It is also noted that the performance of particular tasks does not mean that employees are organisationally distinct.

[162] The Respondent submitted that the organisation is structured as an indivisible whole to ensure the complex delivery of services by all employees in the OCC and Network Operations Divisions work collectively and have been organised into a single reporting structure which is critical to the day of operations. Mr Pomeroy referred to this structure as an indivisible whole during cross examination. The evidence demonstrated the integration between the OCC and non-OCC Network Operations Division all focused on the safe, timely transition of planes:

“MR MINUCCI: Now just in terms of this integration between the OCC and Network Ops, I just want to go through that briefly. So I just want to take an example to talk through some of this. So let's assume that an aircraft is grounded for a period of seven days following an identification of a fault. The grounding of that aircraft creates issues requiring managing by the OCC, as well as others in Network Operations?---Correct, yes.

⁵⁰ PN238 to PN240.

Now in order to minimise the impact on the schedule each of the airline operations departments within the OCC would need to work together and come up with a solution to minimise the impact?---Yes.

Those departments would be Crew Control; Ops Control and Customer Disruption Services?---So that was – can you just, sorry, can you say that again?

So the Airline Ops departments within the OCC - - -?---Yes.

Being Crew Control; Ops Control and Customer Disruption Services?---Yes, and probably Flight Dispatch would be a small part of that too, yes.

Okay, need to come up - and they need to come up with a solution?---Mm-hm.

So that would include things like trying to secure an alternative aircraft?---Yes, it's very rare but yes, okay, I'll give you that, yes.

And as part of that you'd need to get alternative crew?---If you were securing an outside aircraft that would all come together. So we don't really do it. We'd be using our own aircraft and our own crew, generally, but yes.

But an alternative crew, as in, you have to get a crew in to crew the aircraft?---Yes, correct. So Crew Control will actually – will re-crew the aircraft.

Yes. Then you've got to cancel, or potentially might have to cancel or delay flights?---Correct.

For the day or for moving forward?---Mm-hm.

You might have to move passengers around?---Mm-hm.

Or move crew around?---Yes.

Now there's interfaced in this process in finding a solution for this example that we're using, between Airline Operations and other departments, correct?---Sure, yes.

And that's Ops Control to identify aircraft recovery ops for the day of operations?---Mm-hm.

Liaise with Ground Ops?---Yes, sure.

To work out impact as part of where they're being allocated?---Mm-hm.

You've got Airline operations interacting with Crew Control to assist in liaising with cabin crew impacted with the changes?---Mm-hm.

And CCOS, as well?---Yes. Sure.

Now Airline Operations would be talking to the Duty Pilot?---Perhaps, depending on what the issue was, yes.

You'd be talking about Customer Disruption Services and the Club with Airline Operations to try and assist in managing passengers?---Sure.

There'd be interactions between Airline Operations and Customer Disruption Services to reschedule flights if needed?---Mm-hm.

Or about interconnected flights or missing flights, et cetera?---Yes.

You need to interact with Social Media to manage queries and comments from either news or from customers?---Mm-hm.

Sorry, is that a yes?---Yes, yes. Sure.

Then there's be Airline Operations discussing with Load Control about scheduled aircrafts and accounting for any different configurations that might arise in that respect?---Yes.

There'd be interactions between Slot Control to consider whether there's amendments to time slots or gates?---Slots, yes, absolutely, Metron(?) Slots, yes.

There'd be interaction between Airline Operations and Tactical Operations to assist in assist in mapping solutions in terms of flight cancellations, moving passengers around, moving crew, et cetera?---Yes. Yes.

And there'd be an interaction between Airline Operations and Catering to adjust catering requirements?---Yes, very simplistically, yes, there would be.

There'd be Schedule Change Control, interaction between Airline Operations and Scheduled Change Control, advising schedules for the relevant period?---Sure.

And Load Control and Flight Dispatch would be involved with Airline Operations but also people like Maintenance Watch?---Mm-hm.

Navigation Analysis from Flight Planning Services support?---Not on a daily basis, no.

No?---No.

As part of this example they would be - - -?---No. No.

Of managing an aircraft over seven days?---No. They wouldn't be.

And Tactical Operations, they'd also be involved with them too?---Who, Flight Dispatch?

No, this is Airline Operations?---Yes. Yes, they would be, yes.

So that there demonstrates how complicated and interconnected this whole process is?---Yes. Yes, it's an airline. So you've simplistically named a few

people. But the entire airline is working together to solve a seven day disruption, so there's people in every department working together, so - - - (emphasis added)

And what the ASU's application would result in is carving out a small part of that which doesn't take into account all the various other interactions that are going on externally to that proposed group?---Yes. Except other people are already on agreements in that group you've mentioned. (emphasis added)

Okay?---So that we're already in that position, I guess.

Certainly there is a significant level of integration and interconnectedness, isn't there?---There is, yes.⁵¹

[163] It is evident that the Respondent has structured its enterprise in such a way to ensure that all employees in the OCC and the Network Operations Division work collectively. The structure is composed in a manner that is focussed on the collective goal of ensuring the complex delivery of services for which the Respondent is responsible. I accept that each person in the OCC and the Network Operations Division is working together towards this collective goal, that is, as referred to, ensuring the smooth operation of the airline to getting planes to their destinations safely.

[164] Mr Pomeroy referred to this collective goal during the Hearing, stating:

“And you would accept that the OCC is a co-ordination hub for all the day of operations activities?---It's the co-ordination centre, that's the name, Operations Co-ordination Centre, or Control Centre.

Well, that might be the name but do you accept that it is a co-ordination hub for the day of operations activities?---It is – that's where we control the day of operations.

Accept it's critical to Virgin Australia's functions?---Yes.

And you'd accept that its sole function or activity is to ensure that on the day of operations, all Virgin domestic and international flights depart and arrive safely?---Correct, yes. That's the primary function, safety⁵²

[165] I do not accept that the organisational distinction (as referred to in the table 0.1-2) exists in terms of the day of operations and therefore I am not satisfied that the Network Operations Division within the OCC, is organisationally distinct for the purposes of s.237(2)(c) and (3A).

[166] Mr Lillyman referred to the collaborative nature of the OCC and their collective focus on the day of operations:

“All right. So if we go then to paragraph 72, you say you've chosen to develop the network operations division on the basis of three core timeframes: 28 days from the

⁵¹ PN455 to PN496.

⁵² PN162 to PN165.

date of flying, 28 days to T minus 1, and day of operations. The group that is focused on day of operations predominantly as their main effort, it's what they're managing, is the OCC elements of network ops, isn't it? ---Yes, they're a collaborative group. They're not a separate group but they're a collaborative team that comes together to focus on the day of operations."⁵³

[167] Given the evidence on the integration, collective work and the reporting structure between the OCC and Network Operations Division it is therefore not clear what the discrete, identifiable industrial or productive activity actually is within the Proposed Group. The failure of the Applicant to define precisely what that activity is fatal to their argument that the proposed group is organisationally distinct.

Section 237(2)(d) it is reasonable in all the circumstances to make the determination.

[168] In respect of s.237(2)(c) and s.237(3A), on the evidence and material I am not satisfied that the group of employees who will be covered by the Agreement was fairly chosen. I am not satisfied that the group of employees to be covered by the agreement are geographically, operationally or organisationally distinct.

[169] Given the finding that the group is not fairly chosen, the necessity to answer this criteria in s.237(2)(a) is negated.

CONCLUSION

[170] For the abovementioned reasons, the majority support determination is not made as the proposed group is not in accordance with s.237(3A) geographically, organisationally or operationally distinct. Therefore I am not satisfied that the proposed group of employees was fairly chosen, in accordance with s.237(2)(c). Therefore given this conclusion it has not been necessary to further determine application or the accuracy of the Pledge in terms of s.237(2)(a) as to whether a majority of employees want to bargain.

[171] For the aforementioned reasons, the application pursuant to s.236 is dismissed. I Order accordingly.



COMMISSIONER

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⁵³ PN1244.