



FAIR WORK
AUSTRALIA

DECISION

OH&S Review Authority

Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU)

v

Comcare

(C2009/2431)

VICE PRESIDENT LAWLER

MELBOURNE, 9 APRIL 2010

Appeal against the decision of Mr Michael Davson, Comcare Investigator, on 31 March 2009 to vary a provisional notice under section 29 of the OHS Act and to issue an improvement notice under section 47(1) of the OHS Act.

[1] This is an appeal by the CEPU under s.48 of the *Occupational Health and Safety Act 1991 (Cth)* (**OHS Act**) against a decision by Mr Michael Davson, a Comcare Senior Investigator, on 31 March 2009 to issue an improvement notice to Australia Post under s.47(1) of that Act by virtue of having varied under s.29 of that Act a provisional improvement notice (**PIN**) previously issued to Australia Post by an employee health and safety representative. This matter was commenced in the Australian Industrial Relations Commission (**AIRC**). Pursuant to transitional legislation my decision is a decision of Fair Work Australia (**FWA**)

Relevant Legislation

[2] It is necessary to advert to various provisions of the OHS Act and the *Occupational Health and Safety (Safety Standards) Regulations 1991 (Cth)* (**Regulations**). Much of the following summary I adopt from Comcare's submissions.

[3] Section 16 of the OHS Act imposes certain duties upon employers to whom the Act applies (there is no contest that the OHS Act applies to Australia Post). Relevantly:

- (a) s.16(1) requires an employer to take all reasonably practicable steps to protect the health and safety at work of the employer's employees; and
- (b) s.16(2)(c) provides that an employer breaches s.16(1) if it fails to take all reasonably practicable steps to ensure the safety at work of, and the absence of risks at work to the health of, the employees in connection with the use, handling, storage or transport of plant or of substances.

- (c) s.16(4) provides that the obligations of an employer in respect of the employer's employees, that are set out in ss.16(1) and (2) apply also in respect of persons who are contractors of the employer but only in relation to:
 - (i) matters over which the employer has control; or
 - (ii) matters over which the employer would have had control but for an express provision in an agreement made by the employer with such a contractor to the contrary, being matters over which the employer would, in the circumstances, usually be expected to have had control.

[4] Section 28 confers power upon a health and safety representative to issue a PIN. Section 29 sets out the required content of PINs.

[5] Relevantly, reg. 1.05 of the Regulations provides that:

- (a) an employer must ensure that appropriate steps are taken to identify all reasonably foreseeable hazards arising from work which may affect the health or safety of employees or other persons at work;
- (b) if a hazard is identified, the employer must ensure that an assessment is made of the risks associated with the hazard; and
- (c) such identification of hazards and assessment of risks must be undertaken before the introduction of any plant or the introduction of a work practice or procedure.

[6] Relevantly, reg. 4.11 of the Regulations provides that:

- (a) an employer must take all reasonably practicable steps to ensure that hazards relating to plant at work are identified in accordance with Division 7 (Regulations 4.31 to 4.38):
 - (i) before and during the introduction of the plant to a workplace; and
 - (ii) when new or additional health and safety information relating to the plant, or a system of work associated with the plant, becomes available to the employer;
- (b) if a hazard is identified, the employer must ensure that the risks associated with the hazard are assessed in accordance with Division 7 and sub-regulation 4.11(4);
- (c) in carrying out a risk assessment, the employer must take all reasonably practicable steps to assess the risk arising from, amongst other things:
 - (i) any system of work associated with the plant; and
 - (ii) the layout and condition of the work environment in which the plant is to be used; and

- (iii) the capability, skill and experience of the operator ordinarily using the plant; and
- (iv) any reasonably foreseeable abnormal condition;
- (d) the employer may carry out a risk assessment on a representative sample of the plant if the items of plant are to be used under the same conditions;
- (e) if a risk to health and safety may vary from operator to operator, the employer must carry out a separate risk assessment on each item of plant to determine the risk to each operator of the plant.

[7] Relevantly, reg. 4.31 of the Regulations provides that:

- (a) a person who is required to identify any hazard to health and safety associated with plant must identify all reasonably foreseeable hazards;
- (b) this requires the person to identify hazards arising from, amongst other things, the following matters to the extent that they are relevant to the design, manufacture, erection, installation, commissioning or use of plant:
 - (i) the actual and intended use of the plant;
 - (ii) the environmental conditions and terrain in which the plant may be used;
 - (iii) the suitability and condition of accessories used for the plant;
 - (iv) the presence of persons and other plant in the vicinity of the plant;
 - (v) the systems of work associated with the plant;
 - (vi) the need for, and adequacy of, access and egress associated with the plant;
 - (vii) the competency of an operator of the plant.

[8] Relevantly, reg. 4.32 of the Regulations provides that a person who is required to assess a risk arising from a hazard to health and safety must determine a method of assessment that adequately addresses the hazards which are identified and carry out a range of activities identified in sub-regulation 4.32(b).

[9] Relevantly, reg. 4.33 provides that where a risk assessment identifies a requirement to control a risk to health and safety relating to plant, the person who is required to control the risk must take all reasonably practicable steps to eliminate or minimise the risk. It then sets out a number of controls which may be implemented. These controls may include the substitution of plant or part of plant, the modification of a design, or administrative controls including safe work practices.

[10] The word "minimise" is defined in Regulation 20.01 to mean "to reduce to the lowest level that is reasonably practicable to achieve".

[11] Subsections 29(1) and (2) of the OHS Act make provision for a health and safety representative for a designated work group to issue a “provisional improvement notice”:

“(1) Where a health and safety representative for a designated work group believes, on reasonable grounds, that a person:

- (a) is breaching a provision of this Act or the regulations; or*
- (b) has breached a provision of this Act or the regulations and is likely to breach that provision again;*

being a breach that affects or that may affect one or more employees included in the group, the representative must enter into consultations with the person supervising the work performed by the employee or employees in an attempt to reach agreement on rectifying the breach or preventing the likely breach.

(2) If, in the health and safety representative’s opinion, agreement is not reached within a reasonable time, the health and safety representative may issue a provisional improvement notice to the person (in this section called the responsible person) responsible for the breach.”

[12] Section 29(3) deals with service of the notice.

[13] Section 29(3A) provides that:

“(3A) The notice has effect as soon as it is given to a person in accordance with subsection (2) or (3).”

[14] Sections 29(4) to s.29(7) deal with required and permissible content, extension of the notice period and the provision of copies to specified persons.

[15] Under s.29(8) the person to whom the notice has been given “may make a request to Comcare or to an investigator that an investigation of the matter the subject of the notice be conducted.” Under s.29(9), when such a request is made, the operation of the notice is suspended pending the determination of the matter by an investigator. Section 29(10) and following relevantly require that an investigation be conducted and empower the investigator to confirm, vary or cancel the PIN:

“(10) As soon as possible after a request (under subsection (8) or (9A)) is made, an investigation must be conducted of the work that is the subject of the disagreement, and the investigator conducting the investigation must:

- (a) confirm, vary or cancel the notice and notify the responsible person and any person to whom a copy of the notice has been given under subsection (2) accordingly; and*
- (b) make such decisions, and exercise such powers, under Part 4, as the investigator considers necessary in relation to the work.*

(11) Where the investigator varies the notice, the notice as so varied has effect, and, except in so far as it imposes additional obligations on the responsible person, is to be taken to have always had effect, accordingly.

...

(14) *The responsible person:*

- (a) *must ensure that, to the extent that the notice relates to any matter over which the person has control, the notice is complied with; and*
- (b) *must take such steps as are reasonably practicable to inform the health and safety representative who issued the notice of the action taken to comply with the notice.*

(15) *For the purposes of section 48, where the investigator confirms or varies the notice, the investigator is to be taken to have decided, under section 47, to issue an improvement notice in those terms.”*

[16] Section 47 confers a power to issue improvement notices:

“47 Power to issue improvement notices

(1) *Where, having conducted an investigation, an investigator forms the opinion that a person:*

- (a) *is breaching a provision of this Act or the regulations; or*
- (b) *has breached a provision of this Act or the regulations and is likely to breach that provision again;*

the investigator may issue an improvement notice, in writing, to the person (in this section called the responsible person).

...

(3) *The notice must:*

- (a) *specify the breach of the provision of this Act or the regulations that, in the investigator’s opinion, is occurring or is likely to occur, and set out the reasons for that opinion; and*
- (b) *specify a period, being a period that is, in the investigator’s opinion, reasonable, within which the responsible person is to take the action necessary to prevent any further breach of the provision or to prevent the likely breach of the provision, as the case may be.*

(4) *The notice may specify action that the responsible person is to take during the period specified in the notice under paragraph (3)(b).*

(5) *Where, in the investigator’s opinion, it is appropriate to do so, the investigator may, in writing and before the end of the period, extend the period specified in the notice.*

(6) *The responsible person must ensure that, to the extent that the notice relates to any matter over which the person has control, the notice is complied with.*
...”

[17] Section 48 deals with appeals:

“48 Appeals

(1) *Where an investigator, in conducting an investigation or having conducted an investigation:*

(a) *decides, under section 29, to confirm or vary a provisional improvement notice; or*

...

(f) *decides, under section 47, to issue an improvement notice; or*

...

an appeal against the decision may be made, by notice in writing, to the reviewing authority by:

...

(l) *an employee representative in relation to the designated work group that includes an employee affected by the decision who has requested the employee representative to make the appeal; or*

(6) *The reviewing authority may affirm or revoke the decision appealed against under subsection (1) or (2) and may, if it revokes the decision, substitute for the decision such other decision, being a decision of the kind appealed against, as it thinks appropriate.*

(7) *Where the decision is varied, revoked or revoked with the substitution of another decision, the decision is to be taken to have effect, and to always have had effect, accordingly.*

...”

(emphasis added)

Background

[18] In about 2006 Australia Post embarked on a program to select a new postal delivery van to replace its aging fleet of Ford Transit vans. Those Ford Transit vans have a window in the sliding door to the cargo compartment on the passenger side of the vehicle. Australia Post selected a Mercedes Sprinter van as the replacement but ordered those vans without a window in the sliding door to the cargo compartment on the passenger side of the vehicle. A concern developed among members of CEPU that the reduced visibility on account of the absence of window in the rear passenger side sliding door was an unacceptable safety hazard, both to drivers and members of the public.

[19] The PIN was issued to Australia Post by an employee health and safety representative on 21 July 2008. It identified as a contravention of the OHS Act that certain Mercedes vans “are not safe for hub work in [their] present form... due to lack of a clear left side view of oncoming traffic.” It identified as “the installation of a clear window panel in the self sliding door of the above vehicle” as the “action that should be taken”.

[20] In accordance with s.29(8), Australia Post requested Comcare to investigate the matter the subject of the PIN, thus suspending the operation of the PIN in accordance with s.28(9).

[21] On 31 March 2009 Senior Investigator Davson varied the PIN in reliance on s.29(10) of the OH&S Act. The notice issued by Mr Davson was as follows (**Improvement Notice**):

*“I, Michael Davson, an investigator appointed under section 40 of the Occupational Health and Safety Act 1991 (**the Act**), am satisfied that the person named above as the responsible person is breaching or has breached and is likely to breach sections 16(1), 16(2)(c) of the Act and regulations 1.0,4.11 and 4.32 of the Occupational Health and Safety (Safety Standards) Regulations 1991 (**the SS Regulations**) at:*

APC Mount Waverley transport hub 29 Gilby Road, Mount Waverley The reasons for my opinion are:

*On 21 July 2008, Mr Lou CATHERINE, health and safety representative (**HSR**) at the APC Mount Waverley transport hub, issued under s 29(1) of the Act, a provisional improvement notice (**PIN**) to APC in relation to the use of newly introduced Mercedes-Benz Sprinter vans. The PIN identified health and safety concerns regarding visibility issues on the rear left side of the vans. On 28 July 2008, the APC requested that Comcare conduct an investigation of the matter the subject of the notice.*

On 28 July 2008, I commenced an investigation, pursuant to s 29(10) of the Act, into the work the subject of a disagreement. Having conducted an investigation, I have formed the opinion that the APC has failed to conduct adequate hazard identification and risk assessment of the new vans, in particular, in relation to the range of environments and tasks in which APC drivers are required to operate.

There is also some evidence to suggest that some APC drivers required to operate the vans have not yet undertaken the training program developed for their use.

I hereby vary the PIN and issue an improvement notice, pursuant to sections 29(15) and 47(1) of the Act, in the following terms.

You are required to take action within 60 days of the date of this notice to prevent any further breach or likely breach of that section or regulation.

The following action must be taken by the responsible person within the period specified above:

*1. Identify, in accordance with the requirements of regulations 1.05, 4.11 and 4.31 of the SS Regulations, any hazards to health and safety arising from the use of Mercedes-Benz Sprinter vans used by APC nationally, including **but not limited to** the identification of hazards arising from the following matters (see regulation 4.31(2)):*

- The suitability of the vans for the task that is to be carried out;*
- The actual and intended use of the vans;*

- *The environmental conditions and terrain in which the vans may be used;*
- *Any ergonomic requirements relating to the use of the vans;*
- *The presence of persons and other plant in the vicinity of the vans; and*
- *The competency of the drivers of the vans.*

2. Carry out, in accordance with the requirements of regulations 1.05, 4.11 and 4.32 of the SS Regulations, risk assessment in relation to any hazards arising from the use of the Mercedes-Benz Sprinter vans nationally, including, **but not limited to**:

- *Discussions with employees (and/or their representatives) involved in the use of the vans.*

3. Implement, in accordance with the requirements of regulations 1.06, 4.12 and 4.33 of the SS Regulations, risk control measures to eliminate or minimise any risks associated with the use of the Mercedes-Benz Sprinter vans nationally, in the range of operational environments and locations in which they are used. This may include, **but is not limited to**, the installation of additional windows where identified as a necessary control measure for vans operating in particular locations;

4. Take all reasonably practicable steps to provide, in accordance with the requirements of s 16(2)(e) of the Act and regulation 4.15(2)(a) of the SS Regulations, to all APC drivers who operate the Mercedes-Benz Sprinter vans nationally, the information, instruction, training and supervision necessary to enable them to perform their work in a manner that is safe and without risk to their health. This may include, **but is not limited to**:

- *the training and familiarisation package developed for the Mercedes-Benz Sprinter vans.*

(original emphasis)

[22] By varying the PIN, for the purposes of s.48 Mr Davson was taken to have issued an improvement notice in those terms: s.29(15).

[23] The notice was varied on several occasions to extend the time for compliance.

[24] Each of the CEPU and Australia Post filed and appeal pursuant to s.48 against the issuing of the Improvement Notice. The matter was before the AIRC on several occasions. In mid 2009 the parties reach a partial settlement in relation to the two appeals. Australia Post discontinued its appeal and announced that it would proceed to comply with the Improvement Notice but reserved a right to renew its appeal in certain circumstances. The CEPU appeal was adjourned generally with a right to seek to have it relisted. Some months later the CEPU subsequently exercised that right and a hearing of the CEPU's appeal was held on 23 and 24 November 2009.

[25] The CEPU's notice of appeal alleges the following errors on the part of Mr Davson:

5. *The investigator has erred when, having made the finding that a real risk to health and safety exists, he did not make a decision that driving of the Mercedes Sprinter vans should cease immediately.*

6. *The investigator has erred when, having made the finding that a real risk to health and safety exists, he did not make a decision that all drivers in Australia Post be informed of the risk immediately.*

7. *It would have been open to the investigator to set conditions to be satisfied before any employee was directed to drive vehicles that were a real risk. However, it was incumbent on the investigator to comply with the Act and ensure that employees were not exposed to a real risk to injury or possibly death.*

[26] The CEPU's fundamental contention is that the Mercedes van without a rear passenger side sliding door window is unsafe to use in the Australia Post work environment; that existing Mercedes vans in Australia Post's fleet should have such windows retrofitted and new Mercedes vans should be orders with such windows installed. The CEPU contends that that this is what Comcare should have found and required Australia Post to do. That essentially what the CEPU pressed upon the Commission in its capacity as the appeal authority.

Consideration

[27] I agree with Comcare's submission that the powers of the AIRC (now FWA) under s.48(6) and (7) are as follows:

- (a) The FWA may affirm or revoke the decision appealed against (the decision to issue the Improvement Notice by varying the PIN).
- (b) If it revokes the decision of Senior Investigator Davson, it may substitute for his decision such other decision, being a decision of the kind appealed against, as it thinks appropriate.
- (c) Where the decision is varied, revoked or revoked with the substitution of another decision, the decision is to be taken to have effect, and to always have had effect, accordingly.

[28] I accept Comcare's submission that, in performing its role as the review authority under s.48,

“[I]n essence, the AIRC is in the position of the investigator. It can affirm or revoke the improvement notice. If it revokes the improvement notice, it can substitute its own improvement notice on such terms as it thinks appropriate. That improvement notice would then be taken to have effect and to always have had effect.

These powers are indicative of an appeal by way of a hearing de novo. This involves a fresh hearing with the parties entitled to begin again and adduce new evidence.”¹

¹ Comcare correctly noted the following authorities in this regard: *Australian National Railways Commission v Rutjens* (1996) 66 IR 237 at 247.3. *Telstra Corporation Limited v Comcare Australia Pty Ltd* [2007] AIRC 136 (23 February 2007, Lawler, VP) confirmed on appeal [2007] AIRCFB 438 (30 May 2007, Giudice, J, Watson, SDP and Harrison, C).

[29] While, essentially, it is for the AIRC (now FWA) to make its own decision based on the evidence and material before it and there is no presumption as to the correctness of Senior Investigator Davson's decision,² I would add that, given that Comcare investigators are specialists in hazard identification, risk assessment and risk control, FWA should be reluctant to revoke an improvement notice issued by an investigator and substitute one of its own unless FWA is satisfied that the investigator made an error of fact or law or, if no such error was made, formed an opinion that was not reasonably open on the evidence.

[30] Comcare notes that, in paragraph 5 of the notice of appeal, the CEPU seeks an order requiring Australia Post to immediately cease the use of all Mercedes Sprinter vans. I agree with Comcare's submission that it is not open to the AIRC (now FWA) to make such a direction. I agree that a direction of that nature is a prohibition and ought be properly recorded in a prohibition notice. As such, the direction sought is not within the AIRC's power under ss.48(6) and (7) of the OHS Act.

[31] There were only three witnesses who gave evidence at the hearing. Mr Mark Dohrman, an engineer and ergonomist, gave expert evidence for the CEPU. Dr Rechnitzer, an engineer, and Mr David Axup, an expert in traffic engineering and accident investigation, gave expert evidence for Comcare. Australia Post participated in the hearing. It had filed and served an expert report but chose not to rely upon it. A number of other statements were tendered without the witnesses being required for cross-examination, including portions of statements by Mr Davson.

[32] The experts were unanimous in their opinion that reduced visibility towards the rear passenger side of the Mercedes vans presented a material risk to the driver of the van and to members of the public, particularly in circumstances where the van is

- (a) part turned to the right and turning right;
- (b) reversing from laneways across pedestrian pavements;
- (c) reversing from 90 degree angle parking spaces and other angle parking spaces on to the carriageway, or in the vicinity of pedestrians;
- (d) entering divided roads, seeking refuge in the median strip area before turning right;
- (e) entering angled intersections;
- (f) being manoeuvred in delivery dock areas.

[33] Australia Post did not seek to challenge that opinion.

[34] The CEPU relied on a video of one of the vans in question being driven in particular circumstances. At one point when the van is being reversed from an angle park an oncoming car is heard to blow its horn before driving around the reversing vehicle. I accept that this incident is anecdotally indicative of the risk presented by obscured visibility towards the rear of the passenger side of the vehicle.

² *Australian National Railways Commission v Rutjens* (1996) 66 IR 237 at 247.

[35] On any view that risk would be reduced by the presence of a window in the passenger side rear sliding door when compared to a solid door without such a window. Mr Dwyer for the CEPU tendered an overlay³ that I find is indicative of the arc of obscured vision in the absence of a window in the passenger side rear sliding door, and the reduction in that arc when such a window is fitted.

[36] However, Dr Rechnitzer made the obvious point that, while the presence of a window in the passenger side rear sliding door may reduce that risk, it does not eliminate it.⁴ This is because, for example:

- (a) Substantial blind spots remain because parts of the field of vision towards the rear of the passenger side of the vehicle remain obscured even in the presence of such a window (on account of the side of the van behind the sliding door, the frame of the sliding door).
- (b) When the rear of the van is fully loaded (for example when finishing collections or starting deliveries during the Christmas period), the load may obscure vision even if the window in question is fitted.
- (c) A wall or adjacent vehicle may obscure approaching pedestrians or traffic when the van is being reversed out of a narrow lane or angle parking even if the window in question is fitted.

[37] While this risk is real and should be addressed (a matter which Australia Post accepts), it should not be overstated. There was no evidence of any accident involving injury to a person that was properly attributable to the absence of the window in question (albeit there are incident reports that are indicative of this situation being a result of good luck rather than anything else). The vans in question comply with all applicable Australian standards. A significant proportion of delivery vans in use in the community more broadly do not have the relevant window. Nevertheless, the risk in Australia Post's work environment has been assessed as "moderate"⁵ and the relevant experts were unanimous in their view that steps should be taken to control the risk. Again, this is something that Australia Post accepts.

[38] Mr Dohrmann insisted that the relevant window should be fitted to all Australia Post Mercedes vans and that Mercedes van was unsafe for use in the Australia Post work environment without such a window. However, even Mr Dohrmann agreed in cross-examination that the relevant window would not be necessary for every van:⁶

"The reality is, is it not, Mr Dohrmann, that it's not necessary to retrofit windows on every van in the Australia Post fleet to secure a measure of safety in the use of the vans that's acceptable to meet the statutory standard isn't it?---I'd have to agree with that, because if it's true that there are vans that are used in circumstances or places to which they're not exposed to the kinds of hazards that I've raised in my report then there is an argument to say they don't require the same vision scenario.

³ Exhibit 7

⁴ For example, transcript at PN1032

⁵ Ex C1, Dr Rechnitzer's (Delta-V) report at p.64-5

⁶ Transcript at PN322

[39] Mr Dohrmann also agreed that the risk in particular situations could be eliminated in by other means.⁷

“So if a process was undertaken to identify where the hazards of the nature that you've focused on do exist and can't be eliminated, say by other means such as the use of the parking configuration or moving of pillar boxes, that may result in no need to retrofit windows at all?---Well, it might but I'm not about to agree that it would be a reliable process without knowing all about the way that inquiry was made and with what degree of rigour the risks were laid out and assessed. It's a serious matter though.

And that is the very thing that's the subject of the improvement notice isn't it? ---Well, I'm not sure about that. I can just agree that if there was a little one shop town with one post box where it was proposed to use a van without a window there might well be an argument to say that a van of the present sort is fine. That's all I can say.”

[40] Dr Rechnitzer took a more nuanced view. He opined, particularly in light of the matter referred to in paragraph [36] above, that the risk should be controlled through a range of measures determined after a careful risk assessment and consideration of the full range of control measures to reduce the risk.

[41] Dr Rechnitzer gave the following evidence which I accept:⁸

“MR DWYER: ...You've suggested cameras as being superior to windows?---Cameras should be - in a way, yes, but let me qualify that - to investigate their use and utility because I also saw the cameras at the back to be able to look down the road. They're not just the normal reversing cameras. In other words they then provide you that ability to look at oncoming traffic so this next generation, I see this happening, your Honour, vehicles will have these cameras as standard in the next few years, for handling this reversing and the ability to see more fully, yes.

I think Mr Dohrmann said he would want to see that a properly mounted camera would do the same thing as a window or a better job than the window?---I think it would because you would then not have these many cases where a window doesn't work. I think you need to test it, though. I'm not recommending you just install it, you have to actually validate it properly.

We're talking more the remedy here. We're talking about a remedy, how to fix the problem or a way to overcome the problem?---I'm talking about, having done a risk assessment, identified the hazards and the risks, what's the best control measure and we saw that the use of cameras may be the most effective control measure.”

[42] Thus, Dr Rechnitzer opined that a particular type of camera mounted on the rear of the vehicle, with proper training in its use, would be a significantly more effective way of

⁷ For example, Transcript at PN285ff.

⁸ Transcript at PN1083

reducing the risk than the installation of the relevant window.⁹ The CEPU's expert, Mr Dohrmann conceded as much in cross examination.¹⁰

[43] The evidence before me demonstrates that Mr Davson approached his task of reviewing the PIN with care and thoroughness. He reached a conclusion that led to him vary the PIN in the way that he did. In light of the evidence of Dr Rechnitzer and Mr Axup I am satisfied that Mr Davson was correct to conclude that a further process of hazard identification, risk assessment and implementation or risk control measures (with installation of the relevant window being expressly identified as a possible risk control measure that may need to be implemented) rather than simply to require the installation of the relevant window. The conclusions embodied in the Improvement Notice accord with the expert evidence I have accepted.

[44] For these reasons I affirm the Improvement Notice.

[45] I should note that this decision should not be interpreted as being in any way critical of Australia Post's initial decision to acquire the Mercedes vans without the window in question. It is appropriate to record that Australia Post undertook a comprehensive program of analysis, consultation and testing before selecting the Mercedes vans without the relevant window. This included having a significant number of its employed drivers assess the vehicle through test drives. Drivers who participated in the evaluation program generally gave the Mercedes van a high rating for "Vision of Road and Surrounds" and "Rear Vision".¹¹ It appears that the decision to acquire the vans without the relevant window may have originated in a driver complaint that the presence of the window increased security risks. It should also be noted that the CEPU has a representative on the evaluation committee that selected the Mercedes van in the form that it was acquired. There is no evidence that the CEPU representative raised any concern about risks arising from the absence of the window in question. In short, the evidence suggests that Australia Post undertook the evaluation and assessment process that led to the selection of the Mercedes van without the window in question in a responsible manner. It appears that concerns over the risks presented by the absence of the relevant window were not expressed to Australia Post until after a number of the vans had been introduced into service.

[46] Nevertheless, it seems to me that the pattern of driving that Australia Post drivers engage in makes it desirable for Australia Post to take readily available steps that are easily identified and practicable to control what is an accepted risk. Further, it seems to me obvious that if a decision is made not to introduce special cameras of the sort addressed in the evidence, then the installation of the relevant window is an obvious measure to control the risk as part of a suite of control measures.¹² On the evidence, any security concerns can be addressed through the use of pinhole decals on such windows. On the evidence, it does not seem that the additional cost including the relevant window when vans are purchased is unreasonably high. I recommend that, at least in relation to future van acquisitions, Australia

⁹ Transcript at PN1083-4

¹⁰ Transcript at PN286 and PN294

¹¹ Exhibit C2, Attachment MD11, Tab 2

¹² It struck me that while Mr Dohrmann may have tended to overstate the utility of the relevant window, Dr Rechnitzer tended to underplay the utility of such a window as part of a suit of controls that include such things as driver training and redesign of routes etc. Dr Rechnitzer's reluctance seems to have sprung from a determination that the installation of the relevant window was impractical because of the many commercial vehicles, eg. trucks, where there is no possibility of fitting such a window: see, eg. transcript at PN1024ff.

Post acquire vans with the relevant window fitted. Whether retrofitting of existing vans with the relevant window should occur is a matter that will have or will emerge from the process of complying with the Improvement Notice, including a cost/benefit assessment of the camera option. I canvassed with the representatives making a recommendation as part of these reasons. No objection was made to that course. The recommendation I have made has no binding force.



VICE PRESIDENT

Appearances:

Mr D Dwyer of CEPU.

Mr P Priest, of counsel, and Mr M Croucher, of counsel, for the respondent.

Mr P O'Grady of Comcare for Mr M Davson, the Comcare Inspector.

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