The practical/clinical training for an EN is conducted at a health facility approved by the Nurses Registration Board (NRB). This will generally be a public hospital (Ex 258 para 11). During this component a trainee EN is required to successfully complete the clinical rotations in basic nursing care, surgical nursing, medical nursing, nursing the aged, and a specialty elective (Ex 258 para 12). The two work practice modules (4357R and 4357S) total 1379 hours.

The Work of Enrolled nurses

In the period between 1982 and 1992, there were significant changes in the nature of the work performed by Ens, the evidence revealing that in the mid 1980s there was a severe shortage of registered nurses in New South Wales (Ex 258 para 29), which had the consequent effect that the services which ENs were required to perform were significantly expanded. In addition the pre-qualification training for ENs was increased. These changes resulted in substantial changes to the work value of Ens, as was recognised by the Commission in Court Session in *In re Public Hospital Nurses (State) Award and other Awards* (Matters 289, 290, 291 of 1989 and 338, 339 and 340 of 1990, 1 August 1990, *Cahill* VP, *Sweeney* J and *Hill* J), where the Commission noted the following 14 categories of change in work value:

> The basic training of enrolled nurses has been transferred to the TAFE system within the last few years with a consequent significant expansion and upgrading of the standard of training.

The Department of Health had adopted, on 25 February 1987, the recommendations of the Task Force Report including those that called for a higher standard of educational preparation for enrolled nurses.

In October 1988, the Nurses' Registration Board announced changes to the TAFE enrolled nurse training programme to reflect the view that enrolled nurses were now expected to work in a significantly wider range of health care settings and at higher levels of responsibility.

There are now 360 hours devoted to the TAFE training programme compared to 200 in hospitals, previously.

The differences between hospital-based and TAFE-based training are significant.

In the last 12 months there has been a substantial increase in the number and range of post-basic and continuing education programmes for enrolled nurses.

Enrolled nurses have increasingly been required to fill the gaps left by student registered nurses and a further impetus has been the well-known shortage of registered nurses. Short stay/high dependency patients have become the norm.

Specialist courses now exist for psychiatry and developmental disability, mothercraft nursing and gerontology whereas none of those existed in 1986.

There has been a rapid growth in the number, range and standard of in-service education programmes for enrolled nurses offered by individual hospitals.

There is a constant revision of post-basic training programmes having regard to the continuing pressure in the workplace for enrolled nurses to take a still more expanded role.

Enrolled nurses now carry out a much more extensive range of duties and procedures than was the case in 1985.

Enrolled nurses were excluded from Mental Health Nursing between 1963 and 1988, but with the advent of the new post-basic mental health nursing course, their re-entry into this field is now permissible. By the end of June 1991, approximately 100 enrolled nurses will have completed this specialist post-basic course.

Enrolled nurses are now regularly undertaking duties and responsibilities that until very recently would have been the sole domain of the registered nurse and they operate now in all acute and chronic nursing areas. They are regularly required to care for the critically ill or unconscious patient.

> The introduction of the Commonwealth Government's Outcome Standards legislation has also been a factor in the overall work value changes which have occurred in this classification although that factor obviously impacts more on nursing homes than in the public hospital area. (Ex 258, Annex 8, p 16-19)

In 1991, shortly after the handing down of the above case, a Task Force was established to review the education, role and function of ENs in the New South Wales health system. In its report the Task Force recommended the following role statement for ENs:

> The enrolled nurse is a second level nurse who provides nursing care within the limits specified by education and the registering authority's licence to practice.
>
> With the direction and supervision of a registered nurse, the enrolled nurse assists in the provision of nursing care in clinical and community settings.* This involves preventive, curative and rehabilitative nursing care which takes into account the individual needs of health care consumers.
>
> At all times the enrolled nurse retains responsibility for his/her own actions and remains accountable to the registered [nurse] for all delegated functions.
>
> * Supervision means the direction and guidance given by a registered nurse to an enrolled nurse. This supervision may be direct or indirect according to the nature of the work delegated to the enrolled nurse.
>
> (Ex 258 para 31)

The Task Force also gave consideration to the appropriate functions for an EN, determining:

> That the following function statement of the enrolled nurse in NSW be accepted:-
>
> Functions appropriate to the enrolled nurse must correlate with the National Competencies for enrolment and are determined in consultation with the appropriate Senior Nursing Management having regard to:

The degree of educational preparation and clinical assessment of the enrolled nurse;

The acuity of the person requiring nursing care;

The amount of clinical judgement required;

The level of technical skills required; and

The degree of registered nurse direction available.

(Ex 258 para 32)

Since the handing down of the 1991 Task Force Report there have continued to be significant changes in the nature of the work performed by ENs. Ms Stephanie Shean gave evidence that the basic level of education of many ENs has increased to the Advanced Certificate level as a result of ENs undertaking either pre-enrolment Advanced Certificate courses or conversion courses (Ex 258 para 33). There have also been a number of workplace changes which have impacted on ENs, including a general move from task allocation to holistic care of designated patients, changes in staff mix towards a higher proportion of ENs and an increased use of ENs in specialist and high dependency areas (Ex 258 para 33). Furthermore, there has been an attitudinal change towards ENs in a significant number of workplaces which has resulted in an expansion of the EN role in hospital units, from direct client care only, to include a range of other functions, such as participation in quality assurance programmes, orientation of staff, policy and procedure review and in-service education programmes (Ex 258 para 34).

Supervision of ENs

ENs are subject to varying levels of supervision depending on their experience. First year ENs initially provide only essential nursing for relatively stable patients. This would include:

- hygiene needs such as bathing and showering;
- nutrition and hydration needs;
- observation and reporting of changes to the RN;
- wound care such as simple dressings and care and removal of wound drains;
- pressure area care;
- documentation of care; and
- patient and family support.

(Ex 259 para 10)

The evidence revealed that in the Orthopaedic Ward at RNSH the relatively high level of supervision of 1st year ENs continues throughout their first 6 months of employment with supervision applying to even basic nursing care tasks because of the nature of the patients:

> What may be considered to be routine basic care such as washing a patient in another clinical setting is more complex in the orthopaedic setting. The positioning or moving of different types of orthopaedic patients requires different techniques. For this reason an inexperienced enrolled nurse would initially need to check with a registered nurse before undertaking even routine nursing care in this setting. (Ex 259 para 11).

Employee representation

The NSWNA is a State registered trade union which provides industrial coverage for the majority of nurses employed in NSW (Ex 258 para 5).

The NSWNA has a current membership of 45,953. Broken down by health sector NSWNA coverage is as follows:

	Females	Males	Total
Public Hospital Nurses' (State) Award	26,802	2,939	29,741
Nursing Homes, &c., Nurses' (State) Award	7,628	366	7,994
Private Hospital Industry Nurses' (State) Award	3,663	202	3,865
Other award coverage	3,911	442	4,353
TOTAL	42,004	3,949	45,953

(Ex 258 para 6)

As can be seen from the above table NSWNA membership is strongest in the public hospital sector, although the evidence revealed that private hospital sector membership is growing. This has been attributed to a calculated NSWNA strategy to increase membership in that area.

Post trade training

There are a number of post trade educational courses available to ENs. External training courses are offered through TAFE, the NSW College of Nursing, tertiary institutions and the regional health services. In house training programs are also offered by hospitals. (Ex 258 pars 22-27)

TAFE offers a number of continuing education courses, including a parentcraft certificate and courses in gerontology nursing, peri-operative nursing, rehabilitation and developmental disability (Ex 258 para 23).

The NSW College of Nursing offers approximately 25 courses to ENs which can be undertaken in both face to face and distance education mode. These include:

Course Name	Length of course
Anaesthetic Nursing	5 days
Palliative Care Nursing	5 days
Pregnancy and Childbirth	5 days
Medical Nursing	2 days
Surgical Nursing	2 days

(Ex 258 para 24)

The evidence also revealed that a number of tertiary institutions (such as Southern Cross University), provide ENs with distance education courses in subjects that include medical nursing, surgical nursing, care of the dying, support role in emergency settings (2 modules), rehabilitation, and care of the long stay client (Ex 258 para 25). Furthermore, the following clinical speciality courses for ENs are offered by the various regional health services:

Mental Health	Cumberland Hospital
Drug and Alcohol	Western Sydney AHS
Continence	Hunter AHS
Introduction to EKGs	Hunter AHS
Cancer Care	South Eastern Sydney AHS

(Ex 258 para 26)

The demand for entry into post qualification courses by ENs is high, a 1996 survey revealing the extent to which nurses have undertaken post-registration courses:

Area of study	Hospital/College of Nursing	Tertiary	Total with Either[1]
Accident and Emergency	74	2	75
Advanced nursing studies	144	20	159
Advanced Psychiatric	6	-	6
Cardio thoracic	9	1	9
Child and family health	8	-	8
Community Health	8	1	8
Coronary care	5	-	5
Developmental disability	11	3	13
Drug and Alcohol	38	5	42
Geriatric/Gerontology	85	20	104
Intensive care	3	-	3
Midwifery	8	1	9
Mothercraft	104	9	110
Neo-natal intensive care	1	-	1
Neurological/surgical	6	-	6
Occupational health	23	4	26
Oncology	9	-	9
Operating theatre	74	4	77
Orthopaedic	39	-	39
Paediatric	24	1	24
Paediatric intensive care	2	-	2
Psychiatric mental health	51	3	53
Renal	4	-	4
Spinal	2	-	2
Education	11	-	11
Administration	7	-	7
Other	178	26	199

(1) The total number of persons with a particular type of qualifications (hospital, tertiary or particular speciality) cannot be calculated by adding the individual figures as some Registered Nurses have multiple post-registration qualifications.

(2) The total number of working enrolled nurses reporting Hospital/College of Nursing qualifications was 748 (9.0%). The total number with tertiary qualifications was 85 (1.0%). The total number with any post-registration qualifications was 798 (9.6%).

(3) The table does not include information on refresher/training courses.

(Ex 258, Annex 4, p 12).

Overaward payments

Awards in the nursing industry are paid rates awards. As a consequence the incidence of overaward payments is limited (Ex 258 para 40). Whilst overaward payments do not exist in the public hospital sector, there was evidence that overaward payments apply to some nurses working in operating theatres in private hospitals (Ex 258 para 40). This is attributed to the fact that the operating theatres of private hospitals are one of the main income generating sources for private hospitals and, because of that, theatre staff are critical to overall profitability.

The evidence also revealed that overaward payments are sometimes made to those nurses occupying higher level positions, such as a Director of Nursing, who may be employed on a salary package.

Full time/part time employment/shift penalties

The majority of ENs employed in the public sector are employed on a full time basis and work a 7 day, 24 hour rotating shift system. This system provides ENs with the opportunity to earn between 20 - 22 percent in shift penalties (Ex 258 para 41).

Notwithstanding the prevalence of full time employment in the nursing industry, there has been an increase in the number of part time nurses working in the industry, Ms Shean giving evidence that whilst there has always been a certain amount of part time employment in private sector nursing, there has been an increase in part time nursing in the public sector.

As at 1996 the breakdown between full time and part time ENs in New South Wales was as follows:

	Main Job		2nd Job	
Classification	**No.**	**%**	**No.**	**%**
Permanent full time	3,842	48.3%	11	1.8%
Permanent part time	2,670	33.6%	91	15.1%
Temporary/Casual	1,444	18.1%	499	83.0%
Total	7,956	100.0%	601	100.0%
Non response/no second job	389	4.7%	7,744	92.8%

(Ex 258, Annex 4, p 10)

The increasing popularity of part time nursing has been traced to negotiations undertaken by the NSWNA in 1985 which led to a reduction in nurses' weekly working hours from 40 to 38. The evidence revealed that as a part of these negotiations a new category was inserted into nursing awards giving formal recognition to permanent part time employment. As a trade off for the inclusion of this clause, the 10 percent loading which had previously applied to part time nursing was removed, and permanent part time nurses were given access to all full time benefits on a pro rata basis .

The result of these negotiations are recognised in clause 25, part 1 of the Public Hospital Nurses' (State) Award (300 IG 1033) (Ex 258, Annex 9, p 28-30), clause 22, part 1 of the Private Hospital Industry Nurses' (State) Award (305 IG 454) (Ex 258, Annex 10, p 24-26) and clause 22, part 1 of the Nursing Homes &c., Nurses' (State) Award (289 IG 5) (Ex 258, Annex 11, p 22-23).

Overtime

Overtime is not a common feature of the work of ENs. Ms Shean said that the majority of hospitals utilise additional shifts by part time employees, permanent hospital pool staff or agency staff, rather than paying overtime. As such, overtime is generally limited to those nurses working in premises which do not work on a 24 hour 7 day basis and which attempt to cover out of hours service by an on call system. In her experience those types of services do not generally utilise enrolled nurses. (Ex 258 para 42)

Applicable awards & wages history

The majority of ENs are employed pursuant to one of the following 3 awards:

1. Public Hospital Nurses' (State) Award;
2. Private Hospital Industry Nurses' (State) Award;
3. Nursing Homes, &c., Nurses' (State) Award.

In 1972, *Cahill* J delivered the decision in *In re Private Hospital Nurses (State) Award* (1972 AR 156) in which wage parity was established in pay rates between nursing awards on the principle that "a nurse is a nurse". Since this decision wage parity has been maintained between the nursing awards (Ex 258 paras 37 & 38), although there was some evidence that the introduction of enterprise bargaining in 1992 has meant that the NSWNA has had a mixed success rate in achieving flow on increases from the public to the private sector awards.

An examination of the wages history for ENs pursuant to the Public Hospital Nurses' (State) Award is contained at Appendix No. 14 to this report.

Work value cases

The evidence taken by the Inquiry revealed that the work value cases which have been run by the NSWNA have focussed attention on the technological skills that are associated with the provision of nursing care. These skills are said to be characteristically "male skills". By focussing on technological changes, the NSWNA has been able to focus on how these changes have impacted on the work performed by nurses. According to Ms Shean the reliance on modern technology in the nursing industry is different from most other industry sectors:

> Technology in health is somewhat dissimilar to other areas. Generally it does not mean a decrease in the workforce nor deskilling. What it means is exactly the opposite. The introduction of new technology in health generally means that people are up

skilled to cope with it.

The attention paid in work value cases to the technological and highly visible aspects of the nursing profession, such as the work performed by nurses in neo-natal intensive care and intensive care units, is to be contrasted with the work performed by nurses in other less visible areas, such as that performed in aged care and psychiatric wards. Ms Shean spoke of the "difficulties" of demonstrating the subtle skills associated these areas:

> [I]t is somewhat more difficult to demonstrate the skill involved in a psychiatric hospital where the nurse is involved in, I suppose, reading and interpreting human behaviour to predict when an acutely ill psychiatric patient may run amuck and smash a ward up with a chair as opposed to a nurse in the intensive care unit where the patient's progress can often be predicted from reading the dials on a machine...

Ms Shean went on to give evidence that she did not recall the NSWNA ever running much evidence of psychiatric nursing in work value cases. However, the NSWNA:

> ... would always run evidence from an intensive care unit and a neonatal intensive care unit, liver transplant, heart transplant, all those sorts of things, you know, the cutting edge areas.

Notwithstanding the "non technical" nature of the work performed by nurses in the psychiatric and aged care nursing, and the lack of evidence presented from these sectors in work value cases, the evidence before the Inquiry pointed to the fact that nurses in these fields exercise highly specialised nursing skills:

> [I]t is a particularly difficult area of nursing, the care of dementia patients. It is a developing area and there have been specialised units that have been established. The purpose of those units is to maintain as close to normal living arrangement [sic] as possible and to encourage those people to participate in daily activities. A lot of them are not, they don't have serious pro morbidities, that require professional nursing care but they are extremely difficult patients to care for in an environment like that.

As a result of the difficulties associated with identifying changes in the skills base of aged care and psychiatric nurses, an attempt is made to "level the playing field" for nurses through the use of paid rates awards system. Paid rates awards are seen as recognising that the skills required by the differing sectors of the nursing profession, whilst individually unique, are equally important. In this regard, Ms Shean gave the following evidence:

> The advantage that I see is to have, I suppose, a homogenous pay and award system so that different sectors within the health industry are competing with each other for nurses on an equal footing, that areas of nursing which may be less attractive than others and a case in point would be the nursing home area and geriatric nursing, are offering the same rates of pay and similar conditions so that they can compete and attract a high calibre of nurse. I would think it is a matter of public interest.

I will discuss this evidence further in the chapter dealing with work value. However, the evidence plainly demonstrates how work value mechanisms may have the potential to undervalue women's work, where so called 'softer' or 'non-technical', but nonetheless significant and important skills and responsibilities, are prevalent. This evidence points to the need for principles which focus attention upon the potential for undervaluation of work in female dominated industries exhibiting those characteristics.

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COAL MINERS

Gender analysis and Employee Representation

The evidence taken by the Inquiry suggests that coal mining is predominantly a male occupation. The Mount Thorley Operations Pty Limited (MTO) open cut mine employs 350 production employees, all of whom are male (Ex 278 para 5). Union membership amongst this workforce is well above 95 per cent.

Hours of work, overtime and wages

Production employees at MTO are rostered to work 42½ hours per week, including a non-discretionary 7½ hours of overtime.

The base rate of pay for a new production employee at MTO is $637.25 per week. This rate of pay applies for three months, or until the production employee has obtained a required level of competency, at which time his base rate of pay rises to $730.80. In addition to the base rate of pay, employees at MTO are paid a $300 per week site allowance (Ex 278 para 7) and are entitled to a maximum bonus of $65 per week if production targets are met.

Qualifications and continuing training

There are no formal qualifications required of production employees at the MTO. Newly recruited production employees are obliged to undertake an induction course which includes a 5 day safety training program. In addition, new production employees must acquire a competency in at least one skill as defined by the MTO Work Model and Classifications (Ex 278 para 8). These competencies are defined in the MTO Enterprise Agreement as follows:

SKILL	DEFINITION	ASSOCIATED SKILLS THAT WILL ASSIST IN THE OPERATION OF EQUIPMENT
1. Trucks	240,190, Low loader	Excavator, Medium and light vehicles, water truck
2. Dragline. NOTE: Dozer skill also essential to operate dragline	Dragline	Dragline service vehicle, Cable reeler, farm tractor
3. Dozers	Truck and rubber tyre dozers	Pumps
4. Shovels	All shovels	Cable reeler
5. Graders	All graders	pumps, small excavators
6. Loaders	All loaders	
7. Equipment Servicing	Machine servicing	Service truck, tyre handling
8. Shot firing	Shot firing certificate	Small loader, medium vehicles, pumps
9. Explosives handling	Handling explosives under supervision of shot-firer. All blast hole drills	Small loader, blast hole pumps
10. Drill		

(Ex 278, Appendix 2, Table 1, pp 46-47)

Given that the MTO mine is an open cut "truck and shovel" mine, production employees are required to have a truck drivers licence. As such the compulsory competency training undertaken by new production employees is based around a familiarisation with the vehicles used at the mine.

Work performed by new production employees and level of supervision

Ms Helen Spencer described the work performed by newly recruited employees at MTO as follows:

> Basically they are truck drivers. Some of them may drive a water truck from time to time. Some of them if they require [sic] additional skills may drive the grader. They may drive a bulldozer but basically they are truck drivers. They drive either coal loaders or the big shovels handling the over burner. They get loadings. They drive to a dump. They dump it. They drive back to the loader and they get loaded and they move off again.

The evidence also indicated that the production employees operate under a high degree of supervision:

> Q. Do they work under a fair degree of supervision or do they operate under their own initiative?
>
> A. They did work under quite a high level of supervision. That is starting to change but it's still quite embryonic. It's an industry that has been highly regulated, is highly regulated in terms of its safety. People are basically used to being given the bear [sic] minimum information of what they are supposed to do and that is all they do.

CONCLUSIONS

In its final submission regarding the comparison between 1st year enrolled nurses and 1st year coal miners, the ACM suggested that the Inquiry should make the following findings:

(a) First Year Enrolled Nurses is a female dominate [sic] occupation;

(b) First Year Miners is a male dominated occupation;

(c) The skills exercised, the level of responsibility, training and attributes required to perform the work of a First Year Nurses [sic] is equal or greater than that required from a First Year Miner;

(d) The work of First Year Nurses has been undervalued.

(Ex 441 para 74)

In support of its submission, the ACM stated that when comparing 1st year enrolled nurses with 1st year coal miners, the nurses are:

(a) better trained;
(b) more skilled;
(c) required to exercise greater responsibility;
(d) more multi-skilled;
(e) required to work under more stressful conditions;
(f) required to have a higher level of accountability.

(Ex 441 para 76)

Significantly, the ACM submission that the evidence revealed an undervaluation of the work of 1st year enrolled nurses was rejected by the Crown parties who submitted that:

> Judicial notice could be taken of the fact that the remuneration in the coal mining industry has been for [sic] higher than if not all, almost all, other industries in Australia (whether they be male or female dominated). Accordingly, no helpful insight into the question of whether the work of public sector enrolled nurses is undervalued arises.
>
> ...
>
> The Inquiry ought find that enrolled nurses have been ably represented under the existing wage fixation principles; and that there is no evidence before the Inquiry of undervaluation of enrolled nurses remuneration based on gender bias.
>
> (Ex 459 paras 102, 104)

It is the view of the Inquiry that the evidence which has been lead in relation to comparison between 1st year enrolled nurses and 1st year coal miners is not, of itself, sufficient to found a conclusion that the work of 1st year enrolled nurses has been undervalued.

In reaching this conclusion the Inquiry has taken into consideration a number of factors, the most important of which being that the nomination, whilst accepted, was not properly addressed by the parties to the Inquiry. This manifested itself in the complications which arose as a result of the withdrawal of the coal mining enterprise initially nominated and the fact that the limited evidence which was presented did not allow for a proper examination or comparison to be made of the nursing and coal mining industries. In particular:

- no evidence was led from employee or trade union representatives in the coal mining industry;
- the evidence with respect to coal miners was limited to that

presented by Ms Spencer, the Manager Organisations at MTO;

- only limited evidence was taken with respect to the nursing industry from the employer interests; and
- the comparison as a whole was restricted to only two enterprises (MTO and RNSH), therefore limiting the ability of the Inquiry to reach any industry wide conclusions.

Notwithstanding the above, the evidence which was presented regarding the nursing industry was of assistance to the Inquiry, because it provided a useful reference point against which to examine the other female dominated industries which were examined by the Inquiry. In particular, the evidence of Ms Shean revealed that the nursing industry is highly unionised (Ex 258 para 6) and that the NSWNA has been able to successfully increase its coverage in the private hospital and nursing home sectors.

One consequence of the high level of unionisation in the nursing industry is that the NSWNA has been able to run a number of successful work value cases; has been able to achieve regular wage increases for its members and has been able to negotiate the inclusion of a permanent part time clause into the nursing awards, which clause has entitled nurses employed on a permanent part time basis to pro rated full time benefits.

However, the evidence plainly demonstrates how work value mechanisms may have the potential to undervalue women's work, where so called 'softer' or 'non-technical' (but nonetheless significant and important skills and responsibilities) are prevalent. This evidence points to the need for principles which focus attention upon the potential for undervaluation of work in

female dominated industries exhibiting those characteristics.

There is a tendency to examine the nursing profession as an exception to other female dominated industries and occupations, because of the recognition of a 'professional' nursing status and the work value of this occupation. However, such analysis fails to recognise that this development is relatively recent, and that the recognition of the nursing profession also evolved from earlier periods of non-recognition of work value.

The important distinction is two fold:

1. That due to the nature of the nursing profession, at least as it evolved in certain sectors, traditional valuation techniques could be utilised to produce a recognition of work value, not only in the commonly recognised 'hard' skill areas but, at least indirectly, through the general paid rates award movements, in the so-called "soft skill" or non-technical areas.

2. The determining factors of undervaluation for most female dominated industries, which are discussed more generally in the section dealing with hairdressers, and the dimensions of undervaluation, are absent in nursing (at least in its current day form). This situation is bolstered by the significant place nursing occupies in the public sector.

3. Thus, it is wrong to hypothesise, as is sometimes done, that the solution to undervaluation lies in the development of qualifications or credentialling alone. The solution to undervaluation is plainly multi-factored.

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OUTWORKERS

The examination of workers in the clothing industry formed an essential part of this Inquiry, in particular providing an insight into the working conditions and wages in the lowest paid, unqualified, female dominated occupations, and an opportunity to examine an extreme case of undervaluation and the source of that undervaluation.

I commence this chapter with a discussion of how outworkers came to be included in the Inquiry, and then give an outline the clothing industry before turning to the work performed and the valuation of that work.

In the context of this Report, an "outworker" is as defined by cl.27 of the Clothing Trades (State) Award (the Clothing Trades Award) (282 IG 1 at 79) and the deeming provisions of the *Industrial Relations Act* 1996 (NSW) (the 1996 Act).

Clause 27 of the Clothing Trades Award defines "outworker" as a person who performs hand or machine sewing in the construction of a garment or part thereof being work performed other than in a factory or workshop, for an employer outside the employer's workshop or factory under a contract of service.

Section 5, definition of "employee", of the 1996 Act provides in sub-s.(3) that "deemed employees" are:

> The persons described in Schedule 1 are taken to be employees for the purposes of this Act. Any person described in that Schedule as the employer of such an employee is taken to be the employer.

Schedule 1 states that, amongst the persons to be taken to be employees, are:

> (1)(f) **Outworkers in clothing trade.** Any person (not being the occupier of a factory) who performs, outside a factory, for the occupier of a factory or a trader who sells clothing by wholesale or retail, any work in the clothing trades for which a price or rate is fixed by an industrial instrument. (In such a case, the occupier or trader is taken to be the employer.)

The relevant Federal award in the area is the Clothing Trades Award 1982 (the Federal Award).

SELECTION OF OUTWORKERS AND OTHER EMPLOYEES IN THE CLOTHING INDUSTRY

By letter dated 23 April 1998, counsel assisting communicated with all parties to the Inquiry advising them that on 24 April 1998, the Commission would hear submissions in relation to the proposal to include a further occupation or industry for the consideration of the Inquiry, namely the clothing industry. Prior to this letter being forwarded, counsel assisting had advised the parties at the hearing on 22 April 1998, that the persons within the clothing industry that it was proposed to examine were outworkers, particularly persons who performed work in their own home, and also workers engaged in a factory, who were not being treated or paid as employees, notwithstanding that the work done by them

is described in the relevant State and Federal awards. He noted that these places of work are sometimes referred to as "sweat shops".

The two comparative areas that were proposed for examination were, firstly, employees in a factory engaged pursuant to the terms of the relevant Textile Industry, &c. (State) Award or the Textile Industry Award 1994 Federal. These awards were selected because the factory to be examined was Bonds at Unanderra which applies these awards. That occurs because the business of Bonds is vertically operated and the majority of its employees are textile industry employees. However, the work performed at Unanderra is the making up of knitted piecegoods as comprehended in the terms of the Clothing Trades Award, and the same award classifications and rates of pay apply under both the Textile and Clothing Industry Awards, for garment making up. I make this point because any issues in this Inquiry concerning outworkers relate to the Clothing Trades Award. The second area of comparison proposed was of metals machinists engaged under the Metal Industry Award at the C12 level, that being equivalent to the comparison made in 1993 in the MRA process (Ex 216).

In the 23 April 1998 letter, counsel assisting indicated a particular procedure and restrictions on evidence that would be proposed to be put in place, in order to facilitate the availability and acquisition of relevant evidence concerning pay equity in this area. In particular, limitations were placed on examination and cross examination as to payment of social security benefits, payments to other persons in the household, taxation issues and the immigrant status of the outworker and family. Counsel assisting also advised parties that

he would seek orders from the Commission to limit counsel assisting's responsibilities in relation to the distribution of material, so that such material would only be distributed to parties actively participating in the clothing industry area (Ex 216).

On 24 April 1998, a number of parties made submissions in relation to the proposed nomination of the clothing industry area. Counsel assisting tendered proposed short minutes of orders describing the work to be examined, the comparators to be examined and the procedural arrangements to be put in place. A copy of these orders as subsequently made by me, following submissions from the parties, appears at Appendix No. 17 (Ex 215).

Mr *Britt* of counsel, for the ACM, put a primary position of opposing the inclusion of the clothing industry, consistent with the position that the ACM had earlier taken in relation to the nomination of areas when that matter was first before the Commission in January 1998. I note that one of the reasons cited by Mr *Britt* for opposing the nomination was that it would be extremely difficult to obtain the evidence by the close of taking evidence in the Inquiry, which at that time was proposed to be the first week of June. As it transpired, and notwithstanding the inclusion of the clothing industry, evidence was completed by 12 June 1998.

The ACM did put a helpful alternative position in relation to its acceptance of the draft orders put forward by counsel assisting in the event that the clothing industry was selected.

Mr *Nettheim* of ABL supported the submissions put by Mr *Britt* and opposed the selection of the examination of outworkers. Mr *Nettheim*, however, opposed the selection outright. He was deeply fearful that any investigation by the Inquiry would jeopardise the Home Workers' Code of Practice, a Practice that both the union and his members were struggling to introduce to try to obtain some proper regulation of the conditions applying to outworkers.

Mr *McDonald*, representing the Employers' Federation, opposed the nomination on the basis that the examination should be seen to be limited to the work of employees and not extend to companies and other business entities in the clothing industry.

The Crown took a neutral position in submitting that the selection or otherwise of outworkers was a matter for the Commission. Similarly, neither the PSA nor the NPEC objected to the orders being sought by counsel assisting.

The TCFUA, the Working Women's Centre and the Labor Council each supported the inclusion of the outworkers as an area for examination in the Inquiry.

The Retail Traders' Association of New South Wales had leave to appear before the Commission and at the first directions hearing on 17 December 1997 was represented by Mr Peter *Kite* of counsel, who also appeared for other employer organisations, including the Employers' Federation.

Subsequent to that directions hearing, the Retail Traders' Association did not appear before the Inquiry and its participation in the Inquiry was limited to some correspondence arising out of the examination of the outworkers in the clothing industry.

Correspondence with the Retail Traders' Association included:

- a letter from counsel assisting of 5 May 1998 (Ex 396) (which in similar terms was also forwarded to the Employers' Federation, the ACM, Australian Business Limited and the TCFUA) seeking assistance in the taking of evidence;
- a letter from counsel assisting dated 8 May 1998 (Ex 396) which enclosed an extract of evidence of Ms Laura Bennett in relation to retail traders and outworkers;
- a letter from the Retail Traders' Association of NSW dated 13 May 1998 (Ex 267) responding to the letter enclosing Ms Bennett's transcript and enclosing the Australian Retailers' Association submission to the Senate Inquiry into the Textile Clothing and Footwear Industries dated February 1997 and a Homeworkers Code of Practice signed by the Australian Retailers' Association and the TCFUA. Some further information was requested as to the identification of literature referred to in evidence;
- a letter dated 8 June 1998 (Ex 401) from counsel assisting to the Retail Traders' Association enclosing references to the literature as sought by the Association and reminding the Association that that was the last week for taking evidence.

I regret that notwithstanding counsel assisting's efforts to keep the Retail Traders' Association informed of relevant matters, the Association did not participate in and contribute to the Inquiry. One of my recommendations, in relation to the clothing industry, is the holding of an Inquiry into outworkers. I hope that in the event that recommendation is accepted and acted upon, the Association will take the opportunity to be actively involved in that Inquiry.

I determined that this further occupational area would be examined in the Inquiry. Ultimately, the inclusion of the clothing industry in this Inquiry proved most valuable, not only in relation to the evidence collected and findings and recommendations made in that area, but also for a better understanding of the Inquiry as a whole.

The value of including the outworkers is indicated by the submissions made by parties at the close of the Inquiry which, with the exception of the Employers' Federation and ABL, sought findings and recommendations in relation to the clothing industry, influenced, no doubt, by the useful, and at times shocking, evidence obtained during the course of taking evidence in that part of the Inquiry.

THE EVIDENCE

The Commission had the, probably, unique opportunity of taking evidence from outworkers in their homes (or workshops in their homes). The persons who gave evidence did so candidly, referring, sometimes emotionally, to their often tragic working circumstances. They were, without exception, an impressive group of people, who are treated oppressively in their ordinary working lives and exploited both in terms of the payment received and their conditions of work. The circumstances of their work is disgraceful.

I note the description given by Professor Emerita Hughes:

Q. Well let us consider then the proper evaluation of women's work. You have indicated in your statement that there is a choice attached to where women might go and you also indicate the difficulties in ascribing value to work outside the market forces, but by that evidence are you suggesting that people say working as outworkers in the clothing industry, are being remunerated fairly or properly according to the value of their work?

A. Of course not. They are all illegal workers. Quite often the majority are illegal workers. I think the situation is absolutely appalling and I think it is a situation where Australia really must do something about it.

...

Q. The issue is in fact the valuation of that work in the outwork area. That is the issue. That is the issue before this Inquiry, the value of the work performed by outworkers in the clothing industry in Australia. Now are you saying that their work is properly valued?

A. No, I am not. I was saying they are mainly migrant women whose communities forbid them to learn English and this is a fact and as a result they do not have access to other jobs they could easily do, for example such as jobs in the tourist industry. That is what we found when we were looking into this in the Fitzgerald Inquiry and because they are repressed by their own communities, not able to learn English they allow employers to pray [sic] on them and under pay them. There are clothing manufacturers in this country who are paying award wages and who are exporting. That is another thing we found in that industry. So why should we permit first of all these women to be penalised by not being able to learn English and to be working illegally?

However, the description of the plight of outworkers is best given out of their own mouths. I refer to some of the evidence of the outworkers given to the Inquiry (which evidence is taken from confidential transcript, but which is sufficiently general to not reveal the identity of any person):

Q. Is there anything else you would like to say to the judge or tell the judge about your feelings of work as an outworker or your experience as an outworker, other than what we have discussed?
A. I work hard. I just want you to get into the factories and see

if they can improve the price because working at home - I have children I have to look after and I experience - what they pay me very low too and it is really unfair so I just want mainly to improve the price so we can work better because if I try to find a job in the factory they don't want to take me. They prefer to send the job for outside worker. They pay only half price from the price they have to pay wages for the inside worker.

...

Q. Finally, is there anything you would like to say to the judge about your experiences as an outworker or any difficulties you are experiencing at the present time as an outworker?
A. This field of work it is getting more and more like in the past. For example, in the factory every year you get an increment, even 20 cents or whatever. Even in relation to transport fees, costs are increasing every year. But the outworker is getting less and less rather than more and more. I can say our livelihood is getting more and more difficult. The government usually increases those who are very low paid every year but for the outworker I hope they will increase that too and then you can balance.

...

Q. There are two other areas I want to ask you about. The first one is do you have anything you wish to say to the judge as to your experience as an outworker or any difficulties you have encountered as an outworker or when working as an outworker?
A. After the factory closed down, because it was difficult to find a job outside that is why I collected the clothing to do it at home. It is three years that I have done this now. (Witness distressed)

I only did the jacket in the factory. When you collect the stuff from outside to do at home, you have no choice. Sometimes you have to do some skirts like evening fashion and I have had no experience with these things. I had to learn it myself. The price is very low. I had no experience. I did it very slowly. I cannot say it is making money but it was just a learning period of time. It went on for over half a year. It is very very hard to do this kind of work - you can't describe it with words. But for the sake of a livelihood and for the children I still had to endure. After ... years I can say now I can do practically anything. If you ask me if I like this kind of work or not, I can say I do not like this kind of work. I have tried to look for a job outside. I know in the factory because I used to work in the factory, the conditions were quite good and it was stable. But at home whenever I have a batch of things I have to rush through to get it done, even if you don't have good health, you still have to rush.

I summarise the evidence received (although confidentiality restrictions will sometimes prevent a full description):

A person employed as an Asian community worker.

Hung Nguyen, Ethnic Liaison Officer with the TCFUA. (Ex 289)

Natasha Derevnina, Workers Compensation and Occupational Health and Safety Officer with the TCFUA (Outwork Liaison and Education Officer, TCFUA, 1996-1997). (Exs 257 and 290)

Anthony Richard Woolgar, National Secretary of the TCFUA. (Ex 302)

Gary Douglas Laver, General Manager, Sales and Marketing of Target Australia Limited. (Ex 317)

Anthony John Toohey, Director of the Office of Business and Technology at the University of New South Wales (who had given evidence before the Senate Economics Reference Committee in his capacity as a Director of the Industry Development Branch, Worksafe Australia). (Ex 318)

Paul Clive Lister, General Manager of Done Art and Design. (Ex 319)

Timothy Lempriere Todhunter, Manager of JGL Investments Pty Limited (who gave evidence before the Senate Economics Reference Committee in his capacity as President of the Council of Textile and Fashion Industries of Australia). (Ex 320)

Debra Janet Carstens, Co-ordinator of Asian Women at Work Inc. (Ex 321)

David Edward Butler, Deputy Commissioner, Small Business Income of the Australian Taxation Office. (Ex 322)

Robert Bruce Hershan, President of the Council of Textile and Fashion Industries of Australia. (Ex 323)

Barrie Neil Thomas, Director of the Body Shop. (Ex 346)

The Honourable J M Riordan, former Senior Deputy President of the Australian Industrial Relations Commission. (Ex 347)

Ian Batty, WorkCover Inspector. (Ex 345)

Outworkers receiving codenames OW1 to OW7

Sinnika Pollari, Outworker. (Ex 342)

Sharren Nance Turner, Clerical Assistant in the Inquiry (taking records of interviews in the clothing industry). (Ex 348)

Satinder Mohan Singh, employer (Ex 306) (Summons).

Mai Tuyet Thi Doan, employer (Ex 311) (Summons).

Thai Lan Anh Nguyen, employer (Ex 309) (Summons).

Sally Anne Pembroke, employer (Summons).

Kerrie Lee Falting, employer (Summons).

Megan Smith, Director and Co-owner, Labour Market Alternatives Pty Ltd (Exs 183, 184 and 336).

Slavica Ratajkoska, Machinist, Bonds, Unanderra. (Ex 332)

Katrina Mihalopoulos, Utility Operator, Bonds, Unanderra. (Ex 333)

Jon Nolan, Human Resource Manager of Bonds Industries Limited. (Ex 334)

Barbara Joan Jenson, organiser TCFUA.

The Commission's reference to the evidence of these persons is affected from time to time due to the severe confidentiality requirements that were imposed by the Commission upon many parts of this evidence, in order to protect outworkers and other persons giving evidence before the Inquiry.

The need to provide special protections and remedies for outworkers is eloquently stated in the evidence of the Honourable J M *Riordan* AO as follows:

> The available evidence suggests that, in spite of all the activity by the TCFUA, the exploiters of unorganised labour are winning the battle and that the campaign for social justice and equity is not being sufficiently successful to turn the tide ...
>
> (Ex 347 para 33)

HISTORY AND NATURE OF THE CLOTHING INDUSTRY AND OUTWORKERS

In preparing this history I have made use of the affidavit of evidence of Mr Barry Tubner, the State Secretary of the Textile, Clothing and Footwear Union of Australia NSW Branch (Ex 292). In adopting his evidence I accept that he has had a long and committed involvement in the clothing industry. I also note that there was no challenge as to the accuracy of this history in the cross examination of Mr Tubner. Moreover, his evidence in relation to the structure of the industry, the chain of relationships between the fashion house and the outworker, and the process by which an outworker is exploited were amply supported by other evidence, including the independent investigation conducted by Mr Batty , community workers, experts and direct evidence received from outworkers by the Inquiry. I will refer to the evidence from these persons after I have discussed the industry and occupation at a more general level.

During the 1960s the employment of machinists and cutters occurred more predominantly in factories than in homes. The percentages would be roughly 90% to 10%. Outworkers essentially consisted of women who had left the factory because of pregnancy, childbirth or child rearing and continued to carry out work for the employer. The employer provided the worker with a sewing machine and work and normally paid the award rates. Union coverage was high. Traditionally factories in the clothing industry have demonstrated high levels of union coverage.

In 1974 the Federal Government introduced a 25% drop in the tariff protection for the clothing industry. This led to a significant decline in employment of clothing workers as was demonstrated by a drop in TCFUA membership. This declining union membership has continued. About one third, to one half, of the current membership of the NSW Branch of the TCFUA consists of clothing industry workers generally employed in factories. The remainder of the membership of the TCFUA is located in textile work and footwear factories.

The proportion of TCFUA members employed as outworkers is comparatively small, and usually represents members seeking the TCFUA's assistance in a one off way to obtain payment for work done or for other assistance. The union has assisted these workers even when they are not members of the union, because of its view that social justice considerations mean that these workers should be helped, and also because the exploitation of these workers adversely affects union members, including their employment opportunities.

Following the introduction of the tariff reductions the industry went in one of two ways. With the exception of small tailoring outlets making made-to-measure suits (which outlets have remained fairly constant in size and number over time), the men's fashion industry moved predominantly offshore to the point that there are now, to Mr Tubner's knowledge, only 2 factories in NSW which make suits and each factory employs approximately 60 persons. This compares

to the situation as it existed in 1974 when there when there were many factories employing thousands of people. Those included the Ernest Hillier factory at Guildford which employed over 500 machinists and cutters; Anthony Squires at St Marys which employed over 500 machinists and cutters; and Amco, also at Guildford, which employed up to 1000 machinists and cutters.

The women's fashion industry to some degree moved offshore but encountered some difficulties because of the need for quick turnover of production in response to fashion demand. As a result a proportion of the industry returned to Australia but not to factory production. Instead the manufacture of ladies' fashions moved increasingly to the outwork area. In recent times this trend has escalated, so that the current figures show a significantly higher number of persons employed as outworkers as against those employed in the factories.

After the tariff reduction the industry considered a number of options to reduce costs and compete with cheaper imports. The options were as follows:

(i) reduce or cease Australian manufacture of ladies' fashions and engage in imports;

(ii) invest in substantial capital with technologically improved production methods; and

(iii) lower the cost of labour.

Because of the rapidly changing nature of ladies fashion, option (i) was not feasible as it took too long to respond to changing fashion trends. The second option was not pursued, perhaps because ladies fashion requires

frequent short production runs, which did not match up with the technology available. Mr Tubner suggested that the introduction of non award paid outworkers on a large scale is likely to be a direct consequence of the adoption of the last option.

Mr Tubner also expressed the view that this change in the industry was enhanced by the influx of persons from developing countries who had experienced work under depressed and exploitative working conditions. These persons almost invariably had, and have, no concept of basic worker entitlements in this country.

STRUCTURE OF THE CLOTHING INDUSTRY

The structure of the clothing industry is usefully demonstrated in the diagrammatic presentation provided by Mr Tubner as follows:

CUSTOMER
↑
RETAILER
↑
PRINCIPAL
FASHION HOUSE
MANUFACTURER
SUPPLIER
WHOLESALER
↑
SUB-CONTRACTOR
MIDDLE MAN
MAKER
↑
OUTWORKER
HOMEWORKER
INDIVIDUAL CONTRACTOR
WORKING FROM HOME

(Ex 292 Annex B)

I shall briefly consider each level in turn.

As indicated in the diagram, the customer is the ultimate consumer of goods manufactured by outworkers. Issues that are likely to influence the customer's purchasing decision include whether the consumer is seeking goods that are fashionable; goods that are Australian made; goods at a cheap price; and/or goods that are imported.

The customer purchases the goods from the retailer. According to Mr Tubner, a significant shift in the industry has occurred over the last ten years in that there has been a monopolisation of retail outlets. For example, the Coles Myer Group now includes K-Mart, Target, Katies, Coles Myer and Fosseys. The second largest group is Woolworths which includes Big W, Woolworths and Rockmans. He says that one result of the increased monopoly amongst retailers is that the retailer, rather than the fashion house, now dictates the type of clothing, the price that will be paid for the clothing and other matters which ultimately affect payments to outworkers.

At the next level the retailers will obtain the services of a fashion house (also known as a principal, a manufacturer, or a supplier/wholesaler). Prior to the increased monopoly at a retail level, it was the fashion houses who tended to set the rates of pay and to benefit most from suppressed wages. In recent times fashion houses are subject to a much greater control by the retailers. In particular, if one of the major retailers is supportive of a particular

fashion house, that fashion house will succeed; if the retailer is not supportive, then that fashion house will fail. The price charged by a fashion house to obtain clothing would be a factor taken into account when a retailer deals with a fashion house. The suppression of returns at this level is the origin of the suppression of payments at each successive level in the abovementioned chain, resulting in the outworker suffering the ultimate detriment.

At the next level are the makers. Other descriptors of the maker include middle man or subcontractor.

The final category is the person who actually makes up the garment, that is, the outworker (also known as homeworker or individual contractor).

The link between each of the areas described in the diagram goes to the issue of who is responsible for employing outworkers. The TCFUA's evidence is that for many years its activities were directed to assisting the outworkers to obtain payment of proper wages and other employment related matters, dealing mainly with the makers who were responsible for paying the outworkers. Over time, makers complained to the union that they were unable to pay outworkers the proper rate because the makers were forced to accept low piece rates in order to obtain work from the fashion houses. Almost without exception, makers state that if they do not accept the work, someone else will.

In about 1992 the TCFUA started communicating more often with

the fashion houses. This was around the time that the retail industry was becoming more monopolised. While some fashion houses would disclaim responsibility for the ultimate wage paid to outworkers, on the basis that the makers were free to take up the work or not at the prices paid to them by the fashion houses, others stated that they were unable to pay the makers a better piece rate because of the pressures put on by the retailers. Unless a fashion house could provide garments at a low enough cost to the main retail groups, that fashion house would not survive, because there were insufficient retailers to which to sell their goods.

When the issue of suppressed piece rates was raised with the retailers by the TCFUA, they explained that they were constrained by the demands of consumers who required certain levels of quality and price, and those demands could only be met by keeping piece rate payments to a minimum.

PRODUCTION PROCEDURE

In terms of work in factories in the clothing industry, there are two distinct types. There is the legitimate clothing company which produces clothes using award paid employees, of which type the TCFUA was able to identify only one in NSW that produces ladies' fashion garments. There are other factories operating in garment production such as Bonds and King Gee. I call these manufacturers or manufacturing companies.

The second class of factories consist of registered factories used to produce clothes under sweated conditions, usually also in association with the use of outworkers. These factories are makers and contractor factories linked to principals and fashion houses, not to manufacturing companies. I describe this group in greater detail below.

In the production of clothing, the first point of reference is the fashion houses. During the Senate Economics Reference Committee Inquiry into outwork, the TCFUA took steps to identify fashion houses that were producing their own goods, to enable the committee members to visit such factories. During the course of the hearing, the TCFUA was only able to identify one fashion house which was still producing its own goods at its own factory using employed labour paid in accordance with the award. That factory is J A Kenyon Pty Ltd with the label of Kenwell Clothing.

Other fashion houses, without a manufacturing or production area, are set up with four separate areas as follows:

- Design
- Sample making up
- Cutting room
- Warehousing

Sampling and cutting are now commonly sub contracted out and accordingly the work may not be performed by employees of the fashion house.

In order to have its designs made up, a fashion house will

commonly hold a "dutch auction" on a regular basis. This "dutch auction" will be attended by makers, who are generally male. The fashion house will employ a co-ordinator who will operate the "dutch auction". The fashion house will require that a certain number of a particular garment is to be made up. The co-ordinator will ask whether any of the makers are able to make that item for a certain specified price and will then propose a price until one maker is prepared to make it at a base line price.

Makers almost invariably will be from a non English speaking background and will either take an interpreter with them to the "dutch auction" of the fashion house or, alternatively, the coordinator employed by a fashion house will be of a particular ethnic origin and will deal with other makers of the same ethnic origin.

There is a variation to the "dutch auction" process whereby the coordinator may favour a particular maker and give work to that particular maker without going through the process of the "dutch auction". In order to do this, the coordinator must satisfy his fashion house employer that a good price is being obtained from that maker.

The makers are essential to the fashion houses, because the makers carry the responsibility of obtaining Factory Registration and holding a Workers Compensation certificate. Commonly, makers lease a small area of space and then obtain factory registration from the Licensing Branch WorkCover. The maker may be a sole operator or a husband and wife team operating as a

corporation. Thus the fashion houses, which are generally also registered corporations, may be dealing, not with individuals, but with other registered corporations. Commonly, although the makers will hold a Workers Compensation Certificate, the makers will register only themselves as employees of the company, with the result that workers' compensation will not extend to other workers engaged, either at the factory, or as outworkers. According to Mr Tubner, the Factory Registration and the Workers Compensation Certificate break the nexus between the fashion house and the outworkers.

Evidence from Ms Sally Pembroke, who was subpoenaed to appear before the Inquiry, supports this description of the relationship between fashion houses, makers and outworkers. Ms Pembroke is involved in the design, manufacture and distribution of children's clothes, selling to large retail stores, such as David Jones, as well as to up to a hundred retail outlets around Australia. Ms Pembroke gave evidence that although some of the work was carried out at what she described as the "studio", (which by her description appeared to be a factory with a small number of sewing machines), she retained the services of what she described as sub-contractors to cut material and manufacture clothes for her. The documents produced by Ms Pembroke in answer to a subpoena disclosed that a number of the sub-contractors, or makers, appeared as business names or corporate names. Ms Pembroke's evidence was that some makers were established at factory premises while others were established at residential premises. Her evidence was that the addresses of these makers tended to change frequently over time.

Ms Pembroke did not distinguish between the situation of makers set up in a factory, and that of a person who gave evidence before the Inquiry, Miss Sinnikka Pollari, who was engaged directly by Ms Pembroke to make samples and also to do production runs.

It was the evidence of Ms Pollari (Ex 342) that, in relation to one particular production line, from March 1998 she had been paid approximately $50 a day for working 8 to 10 hours per day to complete the garments. Ms Pollari's evidence was also that she suffered a significant delay in the payment for that work.

While Ms Pembroke denied the late payment to Ms Pollari and claimed that a document existed in which Ms Pollari had estimated the length of time required to complete each garment, it appeared that, even on Ms Pembroke's own evidence, Ms Pollari would not have been paid in accordance with the award. In any event, wherever there is a factual conflict between Ms Pembroke and Ms Pollari, upon my assessment of the witnesses and of the documentary evidence, I prefer the evidence of Ms Pollari.

Ms Pembroke indicated that she did not pay workers compensation for persons engaged to manufacture garments for her, including Ms Pollari. In addition, Ms Pembroke agreed that, when seeking to have work performed by makers or outworkers, it was more usual than not that her company would be able to obtain the services of a manufacturer to perform the work at a price set by the company, even if some makers or outworkers rejected the work at the price offered.

[I note that Ms Pembroke, and Mr Singh whose evidence follows, claimed, and were granted privilege as to their evidence, in accordance with the provisions of s.128 of the *Evidence Act* 1995.]

Another person subpoenaed to attend before the Inquiry was Mr Saetinder Singh. His evidence came to the Inquiry through the investigation of Mr Batty (to whose evidence I will refer shortly). Mr Singh operates a factory making garments mainly supplied to the New South Wales Government authorities. The evidence from Mr Singh was that he did engage outworkers, whom he referred to as "subcontractors", and it was clear from the records produced on subpoena, that there was no structure in place to ensure that outworkers were paid in accordance with the award, nor to guard against exploitation of outworkers and their families in the making of garments. It was also clear from the records that the outworkers used by Mr Singh in his factory operation were unlikely to be being paid in accordance with the award. Evidence called before the Inquiry demonstrated that a maker engaged by Mr Singh was involved in the ill-treatment of an outworker, by cutting the price for garment product to a point where the returns received were well under the award rate, by placing pressure to meet unreasonable deadlines and by threatening to withdraw work if the price stipulated was not unconditionally accepted.

EMPLOYEES AT MAKERS' FACTORY

The makers will often have a workforce operating at their registered factory. However, the workforce will usually be small in number and will be

performing in one of two ways:

- finishers who trim cotton, hang garments and attach swing labels.
- cutters and machinists engaged in manufacture of wholesale garments, or in a production line of garments. This may involve the use of specialty machinery that outworkers generally do not own.

It has been the experience of the TCFUA, however, that these workers in most cases are not paid in accordance with the Award and are paid below the Award entitlements. They will not receive the benefit of any Award conditions nor the benefit of Workers Compensation. It is these factories that give rise to the expression "sweat shop" in the clothing industry.

In addition, a majority of makers will engage outworkers, either to process the bulk of the maker's garment production, or to do overflow work (Ex 292).

Mr Ian Batty, a senior inspector with the WorkCover Authority of New South Wales, was seconded to the Inquiry. He undertook a series of investigations, interviews and surveillance activities at makers' factories between the dates 7 May and 15 May 1998 and on 1 June 1998. The geographical location of most of the factories was in the western suburbs of Sydney, with most of the factories being run as small businesses.

Mr Batty performed three vital roles for the Inquiry:

1. He provided direct evidence of the relationships existing in the chain between the outworker and the fashion house, and of the factors leading to the ill-treatment and undervaluation of outworkers;
2. He provided some evidence as to occupational health and safety issues in the industry;
3. He provided evidence as to the difficulties encountered in investigation, including detection and evidence gathering, which is relevant to the discussion of remedial action.

Mr Batty was accompanied by a certified interpreter in the relevant language of the persons at the factories and by a clerical assistant who transcribed interviews with the makers. His role was not to investigate for prosecution but to provide relevant information to the Inquiry.

The surveillance activities were concentrated at fashion houses and at makers' factories for the purpose of observing the movement of materials and garments between fashion houses and various locations including the makers' factories and outworkers.

Although Mr Batty was able to obtain eight records of interview and/or statements from makers, at a number of other premises his presence was met with point blank resistance. His witness statement (Ex 345) discloses that the response of persons at a number of premises was consistently guarded, nervous, suspicious of authority, apprehensive, agitated, cautious, timid and

scared. A significant number of persons refused to give Mr Batty the name of the manager or owner of the premises; refused to give any information about the work conducted at the premises, indicating that such information should only be obtained from the manager or owner; and generally were evasive and resistant, refusing to co-operate in even the most basic way with the enquiries being made by Mr Batty.

The questions asked by Mr Batty of persons engaged at factories were not difficult questions but rather concerned issues such as the number of workers employed there and the type of work performed there.

On at least one occasion, another person interrupted Mr Batty's conversation with a female employee at a factory. That second person displayed some signs of aggression and attempted intimidation of Mr Batty in the conduct of his enquiries. Employees at some of the factories also took steps to avoid detection, such as putting their heads down, and acting in a manner consistent with apprehension or fear (Ex 345 para 64).

Although Mr Batty left his business card at each of these places and requested that the manager call him, only one call was returned. On that occasion the female spoke only to the interpreter and refused to leave her name, indicating that if she thought that it would be of any benefit to her she would contact Mr Batty again.

Taken together, the responses indicated a misunderstanding, and

rejection, of the regulation and monitoring of occupational health and safety and industrial matters by government authorities. Indeed Mr Batty's formed the view "that in the majority of cases the employees of clothing factories were coached by their employers to act in such a negative manner to avoid detection of circumstances which may give rise for concern" (Ex 345 para 68).

At one light industrial site visited by Mr Batty, where a number of separate factories appeared to be operating, Mr Batty observed a female of Asian appearance visiting the factories while he was engaged in conversation at one such factory and following the visit by that female, Mr Batty saw a large number of persons leave the premises and the factories were locked up. Mr Batty formed the view that the exodus of persons and the locking up of factories were as a direct result of his visiting the premises (Ex 345 para 57).

The working conditions at a number of these factories were identified by Mr Batty as being cluttered, dusty, with no safe passage through the aisleways, and with fixed seating not capable of being adjusted. Given the non-responsiveness of employees and managers, Mr Batty was unable to gain access to documents and thereby determine the extent of compliance or non-compliance with industrial laws.

One exception was a woman whose factory was clean, well lit and well set out. This woman indicated to Mr Batty that she did not engage outworkers and that she was opposed to the use of sweated labour, preferring instead to see an industry that operated on a "level playing field". She also

indicated a willingness to be interviewed. However, when Mr Batty contacted this person at a later time with a view to interviewing her, she indicated that she was too busy and could not make time available either during work hours or after work hours. This behaviour is consistent with most of the other makers, indicating that even those who were at first prepared to discuss matters, when given any period of time to reflect on and perhaps to discuss the matter with other persons, then retracted any agreement to be involved (Ex 345 paras 55, 56, 93).

A number of persons who agreed to meet with Mr Batty at a later time then failed to keep their appointment. In the case of one interviewee who had agreed to meet and sign his witness statement, that person then refused to sign the witness statement, apparently having obtained advice in the intervening period from either his accountant or solicitor. (Ex 345 para 32)

In another instance, the manager, who had been exhibiting signs of distress, requested that the interview be terminated in order to allow him to complete an order that was due for delivery to a fashion house. That person indicated that the fashion house would fine him $200 plus 50 cents per garment for each day that the garments were delivered late (Ex 345 para 49). Mr Batty agreed to terminate the interview on the basis of that information and made arrangements for another time for the taking of the interview. On this occasion the maker did meet with Mr Batty and the following matters were disclosed in the course of that interview:

- The maker employed persons at his factory, three full time and seven part time - as well as engaging a number of outworkers.

  In relation to the employees engaged at the factory, the employees rotate around different sewing tasks including sewing whole garments, sewing on buttons, and sometimes pressing.

- The work is all ladies' fashions with the material delivered to the factory pre-cut.

- The employees engaged by the maker were all known to him including family or friends.

- The full time workers were paid $380 per week while the others were engaged on $9.50 per hour. Although the maker described the other employees as "part time" it was clear from the terms of their engagement, which included being laid off or called in, depending on flow of work, that these people were in fact casuals, but were not being paid the casual loading, with the hourly rate being paid at $9.50 per hour.

- The workers were female and predominantly Vietnamese.

- Overtime would be paid at time and a half where there was an overload of work but generally it was the maker's practice not to obtain more work than could be performed. He could not pay double time as he would not make a profit.

- The maker had no knowledge of the Clothing Trades Award or the concept of different payments for different skill levels.

- The so-called part time workers generally worked ten to twelve hours per week on the basis of approximately three hours each morning.

- The outworkers are described as "licensed sub-contractors" and included individual's names and business names.

- The outworkers complete the same sort of sewing being ladies' fashions such as jackets.

- On average, a hundred garments per week were given to each outworker.

- The maker paid between 60 to 70 per cent of the price received from the fashion house to outworkers.

- The retail price for the simple jackets, for which the maker was paid $18 and for which the outworker is paid $12 to complete, would retail for approximately $130 to $150.

- No steps were taken to determine the capacity of an outworker to complete a particular garment within any particular time, with the maker stating that in large run orders the proficiency of the outworker meant that the time taken to make the garments would be reduced, presumably increasing the profitability of the work.

- No workers' compensation was paid for outworkers, this being described as "their own problem, not mine".

- No register of outworkers was retained.

- Outworkers are provided work on a supply and demand basis.

- The deadlines imposed on the outworkers are effectively imposed by the fashion houses.

- The maker does not give the outworker more work than can be completed within the allocated time.

- The maker may retain more complicated fashions to be done in the factory, because the outworkers refuse to undertake the complicated work at the lower prices offered by the fashion houses.

- Compliance with the *Occupational Health & Safety Act* was limited, with no ongoing training, no manual handling training, no register of injuries.

- The maker indicated that the price paid by fashion houses, in particular for complicated garments, was often insufficient for him to make a profit. However, he felt obliged to accept all work from the fashion houses as being part of what the fashion houses described as "playing the game". The maker indicated that when he did not accept work then the fashion houses would not provide him with further work.

- The maker indicated at the end of his interview that he was fearful of appearing at the Inquiry to give evidence because of the impact it may have on his relationship with the fashion houses.

(Ex 345)

The maker concluded by indicating that if the fashion house would improve the price that would improve the industry, whereas in the current circumstances the income earned by the maker is little more than he could earn as a worker in a factory.

Although the maker indicated that he was not intimidated by these actions of the fashion house, and that he could always obtain work from other fashion houses, this seems to contradict his evidence that he felt obliged to take the complicated garments even though he made no profit from them. It also seems to contradict his own evidence that he performed work for mainly one fashion house.

The difficulties being faced by makers were highlighted in a conversation with Mr Batty (that was not reduced to a record of interview given the initial apprehension of the maker and the sensitivity of information that he provided) in which the maker indicated that he had not made any garments at the premises visited for three months because of the suppressed state of the clothing manufacturing industry. The maker had had to terminate the employment of four persons who had been working for him. The reason for closure was attributed to fashion houses who would provide work on the basis of manufacturing prices in other countries for example, China, Indonesia, Malaysia, Thailand, with the effect that offshore cheap manufacturing prices were being forced on to local makers. One example was the payment of $3.50 for each pair of men's trousers and $3 per shirt with the maker carrying the responsibility for the cost of the cotton, buttons, pressing, and attachment of swing tickets. The

maker gave evidence that any complaints about the price to the fashion house have been met with the response that if the makers "don't like the price, bad luck we will give the work to someone else".

This person also suggested that a group commonly known as the "production managers club", which comprises membership from various fashion houses, meets on a regular basis and networks to determine and set prices, production methods and strategies in order to become more competitive in relation to makers (Ex 345 para 86).

Just prior to closing his business, the maker had approached a fashion house seeking work but had been told that, as he had refused to do the work for the low price before, they would not assist him by providing work to him then.

As with the other maker who indicated concerns about fashion houses discovering that any assistance had been rendered to the Inquiry, this maker also, after considering attending the Inquiry, indicated that he would not do so, because he did not want to get into trouble and would not want the fashion houses to find out (Ex 345 para 88).

Mr Batty in his evidence indicates that when this conversation was being conducted, the maker was panicky and appeared to be frightened with tears welling in his eyes and complaining of feeling nauseated. Mr Batty formed the view that the maker had some real concerns for his safety should it became

public knowledge that he had assisted the Inquiry (Ex 345 para 89).

Evidence of control and coercion was also obtained from another maker who had indicated concerns about the involvement of the Vietnamese community in the manufacturing industry. The conversation progressed as follows:

> I Said: "Do you recall a conversation you had with [a person] on [...], relating to your concerns about the involvement of Vietnamese people in the industry?"
>
> He Said: "Yes, what I said to [...] was that the Vietnamese, I believe, are controlling the industry, in that they stick to their own and will not give work out to Chinese.
>
> I Said: "Is there anything that you would like to relate to me in relation to your concerns?"
>
> He Said: "Only that the Vietnamese are scared of the Government and because of that they have a code that nobody will speak, they keep very much a closed shop. The place I believe you should be directing your inquiries is in the Old Town Mall at Bankstown. There are lots of signs there which are written in Vietnamese and if you could read them you would probably find that they are all garment manufacturers. I have also heard that there is a syndicate that controls all the work done by Vietnamese, but that is only hearsay."
>
> (Ex 345 para 94)

Mr Batty followed up on the evidence in relation to the Old Town Mall, Bankstown conducting some surveillance and taking video footage of that site. At one clothing manufacturing workplace, Mr Batty approached the front door, which was sheeted in steel and locked, but an elderly Asian lady eventually appeared, opened the door a very small distance and anxiously waved her

hands at both Mr Batty and the interpreter to go away. Despite a sign advertising a factory clothing sale, this woman stated that they did not sell to the public and only made up [garments] on the premises. Mr Batty was able to view the premises by looking under the door, a look which revealed a significant amount of cloth and partly made up garments and several clothing [sewing] machines, although no workers were there at the time (Ex 345 para 107).

Mr Batty interviewed a number of makers who were of Vietnamese or Chinese origin. The only non-Asian maker interviewed by Mr Batty was of Greek origin. He provided a statement to the Inquiry. The evidence of that maker included the following:

- He engages two females as needed, but provides full time work when they are engaged, paying $315 per week to perform buttons, buttonholing, hemming and finishing.
- The sewing of the garments is performed by outworkers who operate under a corporation or business name.
- The majority of manufacturing work is ladies' fashions with specific examples given of jackets and dresses.
- For jackets, the maker was paid between $13 to $15.50 per jacket including trimming, pressing and ticketing. Cut material was delivered to the factory.
- The jackets take between 1 to 1 ½ hours to finish, with the outworkers being paid $8.50 to $9.50 per jacket. Delivery and collection of the work would sometimes be by the outworker and sometimes be by the maker.
- The estimate in relation to the completion time of the jacket was restricted to the basic manufacture only, with a further ten minutes for hemming, pressing and marking for buttonholing and further time allowed for buttonholing, delivering the jacket to the presser and attaching the swing tickets, putting them on the hanger and delivering the goods to the fashion house. The presser is paid $1.40 per jacket to

press the garment.

- The outworkers own their own machines.
- The maker might be paid $19 or $25 per jacket by other fashion houses but for the $19 jacket, the material would be more difficult to work with, and for the $25 jacket, the maker had experienced delays of payment of up to three months.
- The production managers at fashion houses were being paid by makers with a view to obtaining work from those fashion houses.
- No documentation of the work provided to outworkers is retained.
- One maker penalised late delivery with a clause in the contract to the effect of "late delivery 50 cents docked per day late per unit".
- The retail price of a jacket for which the maker would be paid $19 and which, on the maker's estimate, may contain $20 worth of material is estimated to be around $130.
- The maker was forced to purchase a double stitch machine in order to manufacture one style of dress. The machine cost $3500 and is now only loaned out to outworkers when necessary but otherwise is not being used.
- The maker indicated that labour could be obtained even more cheaply to do the finishing and buttonholing than the wages paid by him to the workers engaged at his factory.
- It was this maker's view that the government should legislate to prevent what he described as "makers" from operating from home and that instead that everyone should have to work from factories and pay all the proper expenses and that then everyone would be on an equal playing field including the payment of tax and other expenses of running a business.

Another maker who provided a statement to Mr Batty indicated that his business operated as a husband and wife team and had been involved in the manufacturing industry for more than 10 years. Over that period of time the work had declined, much less work now being available. The problem was identified

as being cheap imports from countries where labour costs were much cheaper. Although this maker expressed satisfaction with the three fashion houses with whom he was dealing, his evidence indicated the following:

- One fashion house would not pay him for up to two months claiming that it did not have the money to do so.
- The hourly rate of pay for his wife and himself would vary between $9 to $15 per hour for each of them.
- The fashion labels identified by this maker were well known labels with high retail prices.

Although the Inquiry did not hear evidence from any of the persons currently employed at one of these factories, the Inquiry did have evidence from a community support worker who had worked in comparable factories over some two and a half year period. This person had had six months experience using an overlocking machine in her country of origin and upon arrival in Australia immediately sought work in the clothing industry. This decision was influenced by her lack of English skills and also by the encouragement of friends who indicated that work was easy to find in this industry. This person worked in a number of different places. Her first place of employment was in an ordinary residence in a room equipped with ten sewing machines and had approximately six other people working there. This person worked for two and a half weeks for eight hours a day between five and seven days a week and left after she was not paid for any of the work she had performed. She then obtained two jobs, one working for a Vietnamese person and one working for someone from Hong Kong. She worked for the Hong Kong employer for four weeks and was paid at the rate of $3.20 an hour for that work. She worked for the Vietnamese

employer for approximately one year for $5.00 an hour, working approximately six days a week from 8 a.m. to 5 p.m, the rate of pay being the same for the weekend work. The premises were in a factory in a commercial area and there were approximately nine or ten persons employed there. The work performed was children's wear, making many different styles of dresses, all of which were of high quality. This person did the overlocking work on the garments and rarely completed a garment from beginning to end, but rather worked on a kind of production line with the other employees. The payment of $5.00 an hour was higher than average and reflected this person's skill on the overlocking machine.

For the period of one week this person obtained employment performing high quality work on bridal wear for children e.g. bridesmaids dresses, page boy suits, for an Australian employer at a factory in Bankstown. However, she was not asked to return to this work and believed that it was her lack of English speaking skills which made it difficult for her to communicate with other workers and meant that she was unable to retain her employment there.

This person also worked at a number of different factories in different areas including Rockdale, Auburn and Sydenham. The pay at Auburn and Sydenham was approximately $5.00 an hour for all hours worked, working full time, often including Saturday and Sunday, and working from 8 a.m. to 6 p.m. and sometimes through to 9 p.m. At the Rockdale factory the person was engaged on piece rates, being paid, for example, six cents per leg for hemming shorts and five cents per label for sewing on labels. The pay worked out at approximately $1.00 an hour, with the factory located in a badly lit garage. A

friend of this person working at this garage earned between $35 and $150 per week, usually working six days per week, and when she suffered a needle stick injury to her finger, she was required to return to work as soon as the bleeding had stopped, notwithstanding that the finger swelled up and became infected.

The worker gave evidence that at each of these places the workers were predominantly of Chinese origin, most of whom had lived in Australia for some time and had extensive family ties here.

This person's last place of employment, for a period of approximately one year, was at another factory at Sydenham, making T-shirts and dresses made out of stretch material. At this factory she was paid a flat rate of $6.00 per hour for working 8 a.m. to 6 p.m. six days a week. Other persons engaged at that factory would be paid $3.00 an hour for cutting the threads to finish the garment, and other workers performing sewing work would be paid $4.00 an hour. Another work colleague, who had been employed at the factory for over seven years, was being paid $6.50 an hour for overlocking work. Where necessary, workers would work as late as 11 p.m. in order to complete urgent work.

The evidence of this person is consistent with the evidence of Mr Batty, both in relation to his site inspections and with the interviews obtained from makers.

The evidence in relation to employees engaged in these small

factories indicates widespread underpayment. In addition, the video evidence demonstrates unsafe working conditions. Given the nature of this part of the industry, it is not possible to determine whether there is undervaluation. There is no evidence of any work value ever having been undertaken of the work performed at these factories, nor indeed of any real understanding of the scope or nature of the work performed.

However, what Mr Batty's evidence does demonstrate, is the very substantial difficulty in carrying out investigations in this area. In my view, the difficulties which he encountered in carrying out investigations in the areas described by him, are just as evident in the outworker areas (as small factory areas) where one might expect to find some further difficulties in detection and investigation.

Mr Batty's evidence on this point is vividly expressed as follows:

> In my long experience as an investigator and having conducted countless investigations, I wish to comment that this is the worst area I have had to investigate both because of the difficulty of making inquiries and conducting interviews (and generally difficulties of detection) and the very poor circumstances in which I found employees engaged. In my opinion the whole area demands further intensive investigation and inquiry. (Ex 345 para 150)

Furthermore, Mr Batty made clear that special steps need to be undertaken in order to investigate in this area (which in my view indicate the need to give more generous rights of entry to the TCFUA in outworker cases). His evidence was as follows:

> It is my experience in dealing with establishments such as these, if notice was required to be given of visits, inspections or investigations, it is highly likely that any breaches of statutory impositions or award conditions would not be detected or would be difficult to detect because of the level of deception, avoidance, secrecy and resistance to authority, in this part of the industry. (Ex 345 para 147)

OUTWORKERS AND MAKERS

According to Mr Tubner (Ex 292), the relationship between makers and outworkers generally falls into one of two categories. In the first category, the outworkers only know the maker by a first name, do not know the whereabouts of the maker's factory, have the cut garments delivered to them and may only know the name of the labels, for whom the work is being done, because part of their task involves the sewing on of those labels.

The second category are those outworkers who know their maker relatively well. The maker (usually male) will make himself known to the outworker through community links. Often the maker will assist the outworkers in other aspects of their lives and accordingly the outworkers may feel some sense of obligation towards the maker. The outworker may be introduced to the maker's accountant who in turn will assist the outworker in establishing a business name, or some other process, which will then be used to identify the outworker as a "sub contractor" rather than an employee. The maker will then "assist" the outworker further by obtaining outwork for the outworker. The outworker's opportunity to query or object to low payment is seriously compromised by the relationship between the outworker and the maker. This

relationship may in turn be exacerbated by community expectations and community involvement.

The evidence taken from outworkers in this Inquiry indicates the vulnerable position faced by outworkers, arising out of the fact that the maker knows where the outworker lives. This knowledge in itself can provide leverage to makers, particularly in circumstances where the makers may live close to the outworkers, or where the outworkers may be likely to meet the makers during the course of their day to day lives.

AWARD PROTECTION FOR OUTWORKERS

There is a long history of awards providing special protection for outworkers in that industrial tribunals have recognised the particular vulnerability and lack of bargaining power of these workers.

For example, the Federal Commission has long recognised the disparity in bargaining power between those who engage outworkers, and the outworkers, and has recognised the vulnerable position of those workers:

> *The Federated Clothing Trades of the Commonwealth of Australia v J A Archer & Ors)* (*Archer's Case*) (1919) 27 CLR 207;
>
> *ABY Manufacturing Co Pty Ltd v The Amalgamated Clothing and Allied Trades Union of Australia & Ors* (1939) 40 CAR 744; (1940) 42 CAR 738;
>
> *The Victorian Chamber of Manufactures & Ors v A Abotomey & Sons & Ors* (1956) 87 CAR 327;
>
> *Re Clothing Trades Award* (1969) 129 CAR 84;

Re Clothing Trades Award 1982 [1987] 19 IR 416;

Re Clothing Trades Award 1982; *Williams*, DP, 12 June 1995, Print M3574.

The Commission has also recognised the difficulties in enforcement in the industry (see the 1987 and 1995 cases) and the disparity in rates of pay between outworkers and factory workers (see the abovementioned cases and *Re the Clothing & Allied Trades Union of Australia v Acme Frocks & Ors* (1965) 110 CAR 3).

Currently the Federal Award contains cl.26 and cl.27 which deal in some detail with the procedures to be followed by makers in relation to record keeping of details of outwork. It was not until the current form of cl.26 was inserted into the Award approximately 2.5 years ago, that the TCFUA had a more effective tool to force the makers to identify particular outworkers.

Although a clause in similar terms has existed since 1983, it did not operate effectively. One of the reasons for its ineffective operation was that when makers were asked for details of the outworkers that they used, the makers simply stated that they did not use any and the TCFUA could not prove otherwise. Information from the fashion houses, that would demonstrate that the maker must be using outworkers in order to produce a particular level of output, was not released to the TCFUA by the fashion houses, on the basis that such information was "confidential".

The changes to cl.26, which followed extensive negotiation with the Australian Chamber of Manufactures in each State, put an obligation on the fashion house to disclose information about orders that were being filled by makers and the names of the makers filling those orders. Clause 26 also requires the fashion houses to provide high levels of detail, including the number of garments made in any order, the style of those garments, the stitch type of those garments, the time taken for production of each garment, the price paid for each garment and a rough drawing of the garment.

Notwithstanding these requirements under the Federal award, and/or the requirements of cl.27 of the State award, the majority of outworkers who gave evidence to this Inquiry were not provided with this documentation. The most common way of providing work to outworkers was by provision of a sample of the made up clothing, which was then used by the outworker as a guide for production of the garments. In those cases where the documentation was provided, it was clearly a useful record of the work performed by the outworker, and invaluable in permitting the outworkers to assert their rights under the relevant award. In the absence of such documentation, outworkers often do not keep records because of the pressure of work deadlines and an inability to maintain the relevant records. In one instance, where an outworker had not been paid by a fashion house and a sum of in excess of $3000 was being pursued by the TCFUA for that outworker, the documentation recorded useful information in support of the pursuit of that claim.

One key way makers attempt to avoid their obligations under the

Award (and the reason why the deeming provisions were introduced into the *Industrial Relations Act* 1996 (NSW)) is by claiming that their outworkers are not employees. Mr Tubner detailed the steps some makers take to establish a supposedly "non-employee" relationship as follows:

- tell their outworkers to obtain a business name (and withhold work until they do);
- tell their outworkers that because their husband assists in some small way they are a partnership;
- tell their outworkers to tell anyone who may inquire that they are a small business or contractor or sole trader;
- tell their outworkers that they are "fabric converters";
- "sell" the outworkers the materials for a price, say 0.50c, and "buy" the completed material back for a higher price, say $2.00.

The evidence taken from outworkers illustrated some consistency in the relationships between outworkers and their makers. For example, all outworkers worked for only a small number of makers, usually one or two, and in each case had worked for that maker for at least a year. Most outworkers were reliant on one maker for the majority of their work, the reason for having more than one maker being given as simply to ensure continuity of work and income. Most outworkers were reluctant to name their makers or, indeed, knew little about their makers other than their first name. In addition, only two of the outworkers demonstrated any knowledge of the links in the chain beyond a maker, such as the relationship between the maker and the fashion house, and the fashion house with the retailer.

Of the total of eight outworkers who gave evidence to the Inquiry, the two who gave their evidence in English, and who were also the most confident and the most aware of their rights and of the fact that their rights were being abrogated, nevertheless gave evidence of the dependent relationship that forms between an outworker and a maker, with the maker always owing the outworker money, and the outworker always feeling obligated to and controlled by the maker.

As I discuss in more detail below in relation to the payment of outworkers, it is clear that the makers exercise a great degree of control, not only by withholding pay, but also in the manner in which work is offered, so that a refusal to accept work for whatever reason - including that the price is too low or that the outworker is sick or has other obligations - means that the outworker may not receive further work from that maker, or may not receive work for some period of time. The maker controls the time allocated to perform the work, the way the garment is to be made and the quality of production.

This control is exercised to the detriment of the outworker, who is then forced to accept work at a lower rate of pay, or at inconvenient times, in order to maintain her position as a person who will be re-engaged by that particular maker. The relationship of dependency that this creates is obviously useful to the maker, and entirely inconsistent with notions that the outworker is engaged as other than an employee.

No doubt, there has been improvement in the position of

outworkers since the changes in these clauses. However, Mr Tubner sees that the use of clauses 26 or 27 to overcome the problem of outworkers is inhibited for the following reasons:

(i) Clauses 26 and 27 are threatened federally due to the operation of the provisions of the *Workplace Relations Act* 1996 (C'th) which limits allowable award matters. Indeed, the publication by the Commonwealth Government dealing with the protection which may be afforded outworkers (Ex 393) talks about removing award conditions by an award simplification and allowable matters process. However, it should be noted that s.89A does contain a special provision for outworkers.

(ii) The clauses are avoided or attempted to be avoided (particularly federally) on the basis that the workers affected are not treated as employees and the principals and makers argue that the outworkers are sub-contractors or the like. It is frequently argued against enforcement clauses in the Federal and State arenas that the awards do not reach outworkers who are contractors. He sees that there is a need for federal statutory provisions to over come the "contractor" issue. It must also be made absolutely clear that the deeming provisions in NSW make the state Award cover all classes of outworkers.

(iii) The provisions are difficult to enforce, particularly given the limited resources of the union. Enforcement by government departments is necessary to ensure the protection of outworkers. (Ex 292 para 48)

In relation to (i) I note that documentation was tendered in this Inquiry comprised some information leaflets apparently distributed by the Federal Department of Workplace Relations. The material is divided up into information for outworkers, information for contractors or makers and information for manufacturers. Although purporting to give advice as to rights and entitlements, all of the documents carry a disclaimer to the effect that the Commonwealth and its employees, officers and agents do not accept any liability for the results of

any action taken in reliance upon the documents. The documents purport to assist these people in the clothing industry to know their rights and responsibilities as contained in the *Workplace Relations Act* 1996.

The information directed at outworkers commences with the statement that "your rights and entitlements as an outworker will be dependent upon whether you are an employee or an independent contractor" (Ex 393). Generally, in the light of the complexities surrounding this very question, it is my view that the information distributed is in fact of very little assistance to outworkers or, indeed, to the other persons at which it is directed. In some respects it is either misleading or is simply factually wrong. In this regard, I note that the information directed at contractors/makers is based upon an outworker being entitled to clothing machinist grade 2 salary level. As later discussed in this chapter, the evidence in this Inquiry indicated that a significant majority of outworkers operate at a much higher level than the classification level 2 in the award. The effect of including the lower rate of pay in the ready reckoner included in the documentation has the potential to lead to significant underpayment of outworkers, and may be contrary to the award entitlement.

In saying that however, I am fully cognisant of the fact that few, if any, outworkers are paid even at the level 2 classification, let alone being accorded the other entitlements pursuant to the Award. This merely emphasises that such documents as the above mentioned reflect a simplistic view of the clothing manufacturing industry with no apparent regard to the complex issues surrounding proper valuation and enforcement, and no understanding of the

ingrained nature of the exploitation of outworkers. The production of such Federal Department documents emphasise the need for a full inquiry into the outworkers, as I recommend in the conclusions to this chapter.

The difficulties faced by outworkers in establishing their employee status was demonstrated by the only outworker to appear before the Inquiry in the usual court proceedings, and the only outworker who was able to be named, Ms Sinnika Pollari. It will be useful to set out in full Ms Pollari's circumstances as an illustration of the treatment of outworkers, of the need for award protection and of some of the difficulties with enforcement. Furthermore, I note that this case represents a good contrast between factory employment and homework.

Ms Pollari was originally from Finland, and has lived in Australia since 1960. Citing her difficulties with the English language at the time of completing her Intermediate Certificate at High School, Ms Pollari indicated that the job options presented to young women, who had failed English, were generally restricted to the clothing trade. Ms Pollari obtained her first job in the Amco Clothing Company as a clothing machinist.

As a junior and new employee Ms Pollari spent six months clipping threads from garments before taking the option to train on one sewing machine and then having indicated her willingness to advance was then trained on a number of different machines used at the Amco factory. Within a short space of time, Ms Pollari was promoted to being a "special girl", in which position she took the place of anyone who was away. This involved payment of a special wage

which allowed her to maintain her bonus, a bonus which was available to all workers who achieved the set bonus level. Ms Pollari gave the following evidence in relation to that job:

> That was the very best job I ever had. We were well cared for. The place we worked was totally industrial area and even the boss and his son make sure all the juniors were taken care of. On Tuesday, Thursday and Saturday we worked overtime and in the evening they make sure juniors were well cared for and get taxis home.
>
> (Ex 342 pp 2 and 3)

The position described by Ms Pollari in this job, where she worked for six years before marrying and having a child, is in stark contrast to the evidence that the Inquiry took at the home of outworkers and indeed is the antithesis of the situation faced by those outworkers.

Some time after leaving her employment at Amco, and after working across different industries, Ms Pollari obtained employment as an outworker. The circumstances in which Ms Pollari obtained work as an outworker are different from those circumstances described by the Chinese and Vietnamese outworkers who gave evidence to the Inquiry. Ms Pollari frequented a shop where she purchased her own clothes and had indicated that she could alter as required such clothes as she purchased for herself on her own machine at home. The owner of that shop subsequently advised another customer of Ms Pollari's sewing skills and that person then contacted Ms Pollari and asked if she could assist her in making up a small run of garments.

Ms Pollari then was employed by this person over a period of some ten years making clothes, which that person then supplied to retail outlets in Perth and also sold at stalls at two markets in Sydney. Ms Pollari gave evidence of receiving payment equivalent to $6 an hour for the sewing performed by her for this person. This person would regularly supply cut material on Tuesday with Ms Pollari being expected to complete sewing by Friday. Ms Pollari gave evidence of an evening dress that she sewed for her employer for which she was paid $8 for work taking a little over an hour and which retailed in Perth for $108. As with all outworkers Ms Pollari was paid no annual leave and no penalty rates for working at weekends or over Easter or Christmas. Ms Pollari eventually terminated the employment relationship with this person after persistent difficulties in being paid, always having to ask for payment and having to wait three to four weeks for payment. After ceasing employment with this person, Ms Pollari obtained the advice of the TCFUA (of which she had remained a member during her time as an outworker having originally joined when working at Amco) and, on the advice of the union and with its support, Ms Pollari commenced a claim against this employer for award entitlements.

The applicant's statement of contentions was tendered in evidence before the Inquiry and indicates a reliance upon cl.26 and cl.27 of the Clothing Trades (State) Award (Ex 343). The total of Ms Pollari's claim is $17,108.51. The respondent's statement of contentions (Ex 344) maintains that the relationship between Ms Pollari and the other person was not one of employer and employee pursuant to a contract of service, but rather was a commercial relationship whereby Ms Pollari performed work from time to time on terms

dictated by Ms Pollari.

The respondent's contentions also reject the reliance upon Schedule 1(f) of the 1996 Act which is a deeming provision stating as follows:

> **Outworkers in clothing trade.** Any person (not being the occupier of a factory) who performs, outside a factory, for the occupier of a factory or a trader who sells clothing by wholesale or retail, any work in the clothing trades for which a price or rate is fixed by an industrial instrument. (In such a case, the occupier or trader is taken to be the employer.)

The respondent's contentions claim that the respondent was not "the occupier of a factory or a trader who sells clothing by wholesale or retail". The respondent's contentions also state that the annual leave provisions of either the award or the *Annual Holidays Act* cannot apply to Ms Pollari as she was not in receipt of "ordinary pay". "Ordinary pay" was not described further but may relate back to cl.18(j) of the Award which refers to wages normally due and payable.

The contentions also included the following paragraph:

> 11. If Ms Pollari is found to be an employee, and if Ms Pollari is found to have been making taxation deductions not available to an employee, the Commission should refer its file to the attention of the Deputy Commissioner of Taxation. (*Building Workers Industrial Union of Australia (New South Wales Branch) v M Rados Building Pty Limited.* Unreported; *Maidment* J; 19/8/94; CT93/1207). (Ex 344)

At the time of taking Ms Pollari's evidence the proceedings claiming payment of monies for annual leave and other payments had not been

determined by the Commission. Accordingly, the merits or otherwise of the applicant's and respondent's respective cases had not been determined and were not before this Inquiry for such determination.

Nevertheless, the evidence of the claim and the contentions put in response are indicative of the significant difficulties faced by outworkers when relying upon the award provisions to enforce their entitlements. When the difficulties faced by someone in Ms Pollari's position, who was able to produce documents indicative of a long term ongoing and regular relationship between herself and the person engaging her for the clothing machine work, was still faced with legal proceedings that would involve difficult legal issues involving interpretation and application of award and statutory provisions, then it is easy to conclude that outworkers, less certain of their rights and entitlements and less confident in pursuing their rights and entitlements, would be faced with enormous difficulties in bringing a claim, even with the full support of the TCFUA.

The provisions of the award are essential components to the protection of outworkers. However, it is important that these protections be supplemented by other strategies to which I will now turn.

The deeming provisions introduced into the State legislation are intended to ensure that outworkers are identified and treated as employees, notwithstanding that their work is performed under conditions that are very different from those experienced by most employees. Mr Tubner, in cross examination by Mr *Britt*, agreed that the deeming provisions have not yet been

tested and that the sufficiency of the provisions will not be identified one way or the other until those provisions have been tested in Court. In re-examination, Mr Tubner agreed that the deeming provisions are out of the ordinary precisely because they are attempting to address what is a very difficult problem. Mr Tubner's evidence was to the following effect:

> A. There is no doubt that deeming provisions were put there for a purpose and the purpose is very honourable, to try and stop the exploitation of home workers. It's like the award itself. Every time you come up with a legal document to protect someone, some brief [sic] will find away [sic] of dismantling it, and I think they are people who are looking at the deeming provisions right now and it's linking with the award.
>
> Q. So in the union pursuing and obtaining the deeming provisions in the Act, it was intending to obtain a process whereby the legislation together with the award and together with all the other activities undertaken by the union would ensure or would assist in ensuring that out workers are properly paid?
> A. Most definitely.
>
> Q. And that in doing that the union was aware that it was perhaps out of the ordinary in terms of having statutory provisions to this effect, that it wasn't an ordinary statutory provision that would normally apply to workers in a factory?
> A. Most definitely. It was specifically put there for home workers to try and stop this grey area. The argument is if the employer says to the home worker call yourself a subcontractor and I'll give you work, call yourself employee and you will never get work; that is not the grounds for deciding whether a person is an employee or not but, unfortunately, that is the rules that is played out there.

CODES OF CONDUCT/DEEDS OF CO-OPERATION

During the period of time leading up to the amended cl.26, the TCFUA was concurrently negotiating an agreement with Target Australia Pty Ltd (Target) entitled "The Deed of Co-operation" ("the Target Agreement").

With the Target Agreement it was possible for the union to visit each fashion house and present the fashion house with a breakdown of each unit of clothing, which had been supplied by that fashion house over the past six months, and the price paid for it by Target. The fashion house was thus forced to disclose the names of the workers used to produce the garments supplied to the retailer, as well as the names of the makers.

Because Target is a large retailer, it was able to provide the TCFUA with the names of approximately 300 fashion houses nationwide, a significant proportion of which were in NSW. As a result of visiting one fashion house that dealt with Target, the TCFUA became involved in negotiations for a code to cover retailers, homeworkers and manufacturers in the one agreement.

Deeds of cooperation in similar terms were also entered into with Witchery Fashions Pty Ltd; Just Jeans Pty Ltd; Target Australia Pty Ltd; Country Road Clothing Pty Ltd; Ken Done & Associates Pty Ltd; and Australia Postal Corporation. Of all these codes, the one entered into with Ken Done and Associates Pty Ltd is probably the most comprehensive in terms of the sanctions extending downwards to the protection of outworkers.

The Deeds of Co-operation were important in that they contain "social clauses" that give expression to the signatories' commitment to avoid exploitation of outworkers. The Deeds also enabled the TCFUA to obtain information from fashion houses, which information could then be used to force

makers to disclose the true position in relation to their use of outworkers.

While the Deeds enable the union to identify to the retailers who have signed such Deeds, those fashion houses that do not comply with the Award, the Deeds do not provide a transparent procedure whereby the production of garments can be tracked from the retailers down to the outworker and back. It has been the TCFUA's experience that, unless concurrent agreements could be entered into with each of the main players in the clothing industry, it will be difficult to enforce award conditions. It is equally clear that the codes of conduct will only function effectively if they are underpinned by the outworker clauses of the award.

The Inquiry benefited from affidavit evidence presented by Mr Barrie Thomas, the director of Adidem Pty Ltd, trading as The Body Shop, which has been trading in Australia since approximately 1983.

The Body Shop manufactures and retails skin and hair care products and, as such, is not directly involved in the clothing industry. The evidence provided by The Body Shop was useful, however, as The Body Shop, which is an international company, is built upon principles of ethical trading. Mr Thomas describes The Body Shop's core values as including care for the environment, concern for human rights, and opposition to animal testing in the cosmetics industry.

Mr Thomas describes the process by which The Body Shop

engages suppliers, which process includes a screening process by way of questionnaire to ensure that the suppliers adhere to the principles and standards of The Body Shop, and which also includes site inspections of suppliers to ensure compliance with The Body Shop Code of Practice.

Part of the compliance includes a record kept of a Quality Assurance and Ethical Vendor Audit. This audit includes a check list relating to the rights of employees, including training and development, occupational health and safety, freedom of association, policies on discrimination and sexual harassment and other matters related to employment. Specifically, the audit ensures that there is no child labour, forced labour, and that there are fair working hours and pay policies and security of employment policies in place to protect the employees of its suppliers.

Mr Thomas gives evidence that the issues surrounding the exploitation of clothing trade outworkers in Australia, being issues related to human rights and global competition, are similar to those faced by The Body Shop in trading with its local and international suppliers. Mr Thomas in particular states:

> 29. In The Body Shop's view, codes of conduct are a great way to start encouraging businesses to operate in a just and fair manner. Codes of conduct are usually based on a minimum requirement and therefore are not, by themselves, enough. For example, The Body Shop takes steps taken to ensure compliance with the standards it sets for its suppliers, as I have described in paragraphs 14 to 19 of this my affidavit.

(Ex 346 para 29)

The importance of the approach taken by The Body Shop is the merging of its ethical standards with its business and economic outlook. The Body Shop is succeeding in a competitive environment and Mr Thomas gives evidence that its ethical policies in fact attract customers because:

> 10. The Body Shop's ethical trading principles and practices are based on the goal of sustainability, therefore the organisation as well as its stakeholders benefit in the short and long term.
>
> 11. The Body Shop's trading partners are expected to comply with ethical guidelines and deliver products and raw materials to The Body Shop at an appropriate price and quality. "Appropriate" does not necessarily mean the lowest price, as The Body Shop considers that there is more than one bottom line to business.
>
> 12. Subscribing to an ethical trading policy does not affect The Body Shop's ability to be competitive or profitable in a global marketplace. The Body Shop considers that its ethical policies attract customers, particularly consumers concerned about animal testing of cosmetic products and ingredients. Further, in a global competitive retail environment, consumers will increasingly seek out companies who demonstrate a commitment to ethical trading practices. Therefore ethical companies will have a definate [sic] competitive advantage over their competitors in the future.
>
> (Ex 346 p 2)

Mr Thomas indicates that in circumstances where The Body Shop might obtain supplies that could be made by Australian outworkers, then The Body Shop would put in place screening procedures, including questions specifically directed at suppliers in relation to their treatment of outworkers in particular, to ensure that employment conditions of outworkers complied with any established codes of practice, legislation or regulations. Although site

inspections are not currently undertaken by The Body Shop Australia, which instead relies upon site inspections undertaken by the company in Britain, Mr Thomas indicates that The Body Shop in Australia is moving towards conducting its own site inspections and would consider doing the same in relation to any outworkers who would be engaged in making any products that could ultimately be sold by The Body Shop.

In my view, the evidence from Mr Thomas indicates that adherence to ethical standards is an economically viable position for businesses to take, and this applies in the clothing industry as much as anywhere else. Of course the situation, as it applies to outworkers in Australia, involves wide spread industry evasion of legislative responsibilities which is inexcusable in any event. The Body Shop evidence is important, however, in indicating that a positive stance taken against exploitation is consistent with good business practice. Moreover, it indicates that if a proactive stance is taken by the principals in the industry, and that those corporations take direct and positive steps to ensure that appropriate standards are met, rather than simply adhering passively to such standards, then the circumstances of outworkers might be substantially improved.

CODE OF PRACTICE

A comprehensive TCFUA Homeworkers' Code of Practice has recently been agreed. The Code is in two parts, the first part of which has been executed by the Australian Retailers' Association (the ARA) . Retailers who are members of the ARA have also executed the Code, their names appearing under

the signing clause containing the ARA's signature. The TCFUA believes that approximately 70% of all retailers are now signatories to the Code. Those retailers, who are not members of the ARA, can sign to the Statement of Principles that appears in the first section of the second part of the Code.

The second part of the Code is entitled "Homeworkers Code of Practice" and applies to fashion houses. This has been signed by the major parties including the Australian Chamber of Manufacturers, the Australian Business Chamber, and the Council of Textile and Fashion Industries of Australia Ltd. A number of fashion houses have individually signed the Code, a list of their names appearing in the Code.

The TCFUA estimates that approximately 70% of fashion houses have signed the Code. The first meeting of the Code of Practice Compliance Committee was held on 11 May 1998.

At this stage the Code is essentially only a statement of principles. The Code, however, is only one part of the process of obtaining proper rates of pay and conditions for outworkers. The next step of the process involves obtaining federal funding, with a view to establishing a manual which is based on realistic time and motion studies undertaken by method engineers, who will visit fashion houses and determine a proper time and price structure for the making of various garments. Once that process has been completed, there will be a proper basis for calculating reasonable hours of work and an overall transparency of process, for the manufacture of garments from the fashion houses to the

outworker and back. Once this model is established it will be tested both against work undertaken by factory workers and by outworkers.

The final product of this review will be a comprehensive manual which sets out the number of minutes that will apply to the production of classes of garments. All signatories to the Code will be required to ensure that the proper rate of pay applies to the production of those garments, from the retailer, through to the fashion house, through to the maker, and through to the outworker. There will be no opportunity for any of these to deny that a particular garment takes less time to make than that claimed by the outworker.

When the manual has been established, it is intended that the parties to the Code will enter into a certified agreement that will give expression to the proper piece rates to apply based on the Manual. The certified agreement will co-exist with the Award. The TCFUA believes that the certified agreement is a more principled way of applying the Award and will simultaneously bind the retailers, fashion houses and makers into paying a proper rate of pay to outworkers.

The benefits to retailers is that they can sell garments in their outlets that will be promoted to consumers as being Australian made and made free from sweated labour. Retailers are also currently benefiting to some degree by being publicly aligned with the non-exploitation of outworkers publicised by means of the Fair Wear campaign, which has been promoted by the TCFUA and the ACTU during the course of producing the Code of Practice. However, as I

have noted in the discussion of 'ethical trading', this Code will only ever be fully effective if retailers actively take responsibility to ensure adherence to it, by satisfying themselves through proper procedures that the goods received have been produced in conditions satisfying the requirements of the Code/Agreement, and meet the minimum acceptance standards for workers in the industry.

There are also benefits to fashion houses, because they will obtain a fair price from retailers, and be able to pass on those benefits to makers and outworkers. Fashion houses should also take responsibility for ethical trading. Consumers will also benefit as the proper payment of outworkers will reduce the burden on consumers who are currently indirectly subsidising the wages of outworkers.

Once this process has been completed, the TCFUA is considering establishing an outworker co-operative that will employ outworkers on proper wages and conditions. It is expected that the co-op will compete with makers to obtain work from fashion houses. Such a co-op would accord greater respectability and visibility to the clothing industry. It would also address the needs of outworkers who express to the TCFUA a desire to work in accordance with proper award conditions. The TCFUA states that it is not currently viable to operate such a co-op as it could not compete in a market where underpayment of outworkers suppresses the price of garments.

The TCFUA has also recently negotiated a code of agreement with the NSW State Government. The effect of the code is to ensure that one

particular body is responsible for the proper payment of wages, regardless of what process of subcontracting may occur. If the Government enters into an agreement with supplier X to provide garments to the NSW Government, supplier X is ultimately responsible for the proper payment of all persons engaged in the manufacture of those garments. The suppliers cannot waive their responsibility by pointing down the line to subcontractors, middle men or other parts of the manufacturing chain. This is the only government code existing in Australia and is an advance on other codes because it makes the principal contractor responsible for any exploitation by the principal or his sub-contractors.

However, the need for pro-active auditing to ensure standards are met are also evident here. In the investigations conducted by counsel assisting, it was proven that a government department had engaged a corporation to produce garments for its operations. That corporation engaged a series of makers who in turn engaged outworkers. It was shown that:

1. The price paid by the government department could not have sustained the payment of award wages to the maker, let along the outworker;
2. The outworker was wholly mistreated in these arrangements. Excessive production demands were placed upon the maker who was required to work extremely long hours. The rate paid was far inferior to the award rate, and moreover, was regularly reduced as part of a process of control and exploitation.
3. It appears that both the government department and the factory

owner were unaware of these circumstances, but clearly there were no checks, audits or controls to prevent such circumstances (when it would have been obvious from the production levels that outworkers must have been engaged).

4. A capacity for enforcement is clearly desirable, but this needs to be considered in the light of the circumstances of the outworker who may very well lose her source of livelihood by any challenge as to the prices paid to her (and make worse the already difficult socio-economic circumstances of this person).

RELATIONSHIP WITH ENFORCEMENT AGENCIES

In my view, the active enforcement of the award is an essential ingredient in removing the exploitation of these workers and establishing appropriate minimum standards.

With this consideration in mind, it was significant that there was tendered to the Inquiry correspondence from the Attorney General, Minister for Industrial Relations and Minister for Fair Trading indicating that:

1. The Department of Industrial Relations has adopted a well-thought and effective strategy to increase outworkers' awareness of their rights and to overcome the barriers which impede outworkers from approaching the Department or the TCFUA to obtain their legal entitlements. Hence the New South Wales Government had funded the production of an "Outworker's Diary";

2. On 18 March 1998 the Department's Inspectors along with those of the WorkCover Authority and in collaboration with officers of the Liverpool City Council visited a number of factory unit sites in

south west Sydney which were involved in clothing manufacture. Arising from these visits, inspectors from the Department have thus far identified 38 breaches of New South Wales industrial laws by nine employers who will be subjected to prosecution action and penalty notices. Furthermore on 27 May the Department commenced another round of workplace visits in other locations in metropolitan Sydney. This was as part of an ongoing campaign which will result in a number of targeted activities in the clothing industry throughout 1998. This activity was undertaken notwithstanding the difficulties associated with detecting avoidance of the award in relation to outworkers.

3. Most significantly it was indicated:

> "Nevertheless, given my ongoing concerns about the extent of exploitative practices within the industry, I have directed the New South Wales Department of Industrial Relations and the WorkCover Authority to carry out further investigations in relation to the clothing industry during 1998. These investigations will involve a team of inspectors from both agencies working in a co-ordinated manner to ensure compliance with New South Wales industrial and safety laws."

(Ex 294)

Mr Tubner considered these efforts to be a commendable and desirable step. By reference to Exhibit 294 Mr Tubner gave the following evidence:

> Q. Included in that is communication about directions he has given to both the Department of Industrial Relations and the WorkCover Authority to work in a collaborative way together to carry out further investigations in this area?
> A. It's the only government in Australia who is actually looking at the problem.

The problems which will face the Government's Inspectors in relation to these enforcement activities are substantial. As the Commission has observed in this Inquiry through its own investigations, the industry is immersed in processes of deception, avoidance and the creation of an effective invisibility

for outworkers. This makes the process of investigation and detection extremely difficult but not impossible. It appears to me that the conduct of an Inquiry with full investigative powers may well assist in the processes of investigation so as to literally break into the chains of exploitation that feature in this industry and to better identify the principal sources and factors which permit the continued ill-treatment of outworkers.

In any event the excellent work carried out by Mr Batty for this Inquiry should represent a good starting point for any further inquiries which are to be conducted in this area.

OUTWORKERS

I will now deal with the circumstances of outworkers as disclosed in the evidence before the Inquiry. The principal source of this evidence was that of the outworkers themselves. Evidence was taken at the home of seven outworkers, partly in camera and partly with the attendance of representatives of the parties (with rights of cross-examination). The names of these outworkers have been suppressed and a code number attached. This procedure was essential as the following discussion of the evidence will indicate. As I have noted, one outworker gave evidence in the Commission in open session. All this evidence was supported by the evidence of community workers.

Mr Tubner estimated that there are currently 130,000 outworkers operating in the state of NSW, mostly in Sydney in the following suburbs:-

- Cabramatta
- Liverpool
- Fairfield
- Auburn
- Bankstown
- Marrickville
- Surry Hills

(Ex 292 para 8)

In addition, there are outworkers operating in a number of populated areas along the coastline of NSW and in some regional areas. The clothing industry in these areas tends to be fairly specialised, so that along the coastal areas surfwear and T shirts will be the predominant items of production, while in rural areas, school wear and sporting wear as well as T shirts, are likely to be the main items produced. In all of these cases outworkers are employed. There are few manufacturing factories located outside the metropolitan area. The recent closure of the Berlei Lithgow factory is symptomatic of the disappearance of manufacturing from rural and regional areas.

Mr Tubner, whose oral evidence confirmed his affidavit evidence in relation to his long experience in assisting outworkers, gave evidence of his practice in relation to interviewing outworkers as follows:

- making sure that they were relaxed and have them explain their circumstances;
- asking them to write down what they could recall about the person who gave them work, the hours worked, the circumstances of the work, etcetera This could be completed in their own language;
- their notes translated into English; and

- visit their employer and negotiate for the recovery of underpayment of monies. In most cases there was a clear underpayment under the award and these cases most often settled.

Mr Tubner vividly described the difficult circumstances of providing assistance to outworkers:

> Q. Has your union undertaken steps to gain that trust for a period of time?
> A. Most definitely. We have two people working at the union who are respected and trusted in this industry and they work closely with the outworkers. Like I said, we guard that trust and we make sure we don't betray it.
>
> Q. What would be the likely consequence in the proceedings such as this, or other activities which we engaged in if the identity of the outworkers were revealed even inadvertently as part of the process?
> A. That is a hard question. I have seen homeworkers who have been assaulted. I have seen homeworkers who have just not been given work, they have been 'blacked' for talking to the union. It depends on the different community groups and the people that they are linked with. Some of them have just stopped coming for work but in other cases there could be more - threats are greater than just stopping their work.

Mr Tubner's approach reflects the reality that many outworkers are extremely fearful of seeking assistance, even if they are aware that they have been wrongly treated, underpaid, or not paid at all.

The Inquiry had before it persuasive affidavit material to this effect, and in addition experienced this difficulty at first hand.

Ms Natasha Derevnina of the TCFUA, spent almost two years as the union's Outworker Liaison and Education Officer. In support of counsel assisting's application to limit the attendance of parties in the taking of outworker

evidence, Ms Derevnina gave the following affidavit evidence:

3. It is also common for outworkers to carry a high degree of mistrust of people in authority. This reflects a number of factors, including:

   - the ethnic origin of many outworkers who often come from countries where organisations and persons in authority are associated with the government and are not independent;

   - communication difficulties (as most outworkers do not speak English) and a complete lack of knowledge or understanding of Australian practices or law;

   - the vulnerability of the outworkers to be pressured by their employer, and in particular the real fear of losing their job and accordingly their livelihood should their employer find out that they have spoken out about conditions of employment;

   - the outworker may have obtained the work through a friend or relative and the outworker is therefore hesitant to take action that may result in that friend or relative being in trouble. This difficulty is heightened because the outworker, being unfamiliar with Australian ways, would be uncertain of what sort of trouble such a friend or relative may be in.

4. In agreeing to give evidence in this Inquiry, the outworkers are undertaking a significant and frightening process of which they have little or no knowledge. In particular they have no concept of the adversarial process or of cross examination.

5. In my view, with the exception of perhaps a very small number of outworkers, outworkers will not present themselves to a formal court room setting to give evidence. Further, their willingness to communicate their experiences will be adversely affected by the prospect of being scrutinised by a large number of people, all of whom will be perceived as being people of authority and therefore to be feared.

6. The court process will not enhance the prospects of the outworkers of telling their story. It is only through a long process of building trust with these people that they are prepared to talk at all, and I believe that most of the

outworkers will not give evidence at all if they are forced to do so where the normal court processes apply.

7. Another problem is that it is relatively easy to lose the trust of outworkers, and if the process of giving evidence should cause even one outworker to lose trust in me or the union or other community organisations, then this will have a significant negative impact on the ability to present any assistance at all to these outworkers. The TCFUA is one of the organisations attempting to assist these people and any loss of trust is a serious setback in that process.

...

9. I believe that the capacity to take evidence from outworkers will be severely affected, possibly to the point of obtaining no evidence at all, unless the outworkers can be protected from cross examination.

(Ex 257)

In relation to this particular issue, the Inquiry took evidence from a particular outworker whose evidence appeared to be contradictory in that she expressed concerns about her position, but also indicated that she was "happy".

After taking this evidence, a community support worker who had attended, was informed by this outworker that she was afraid that her employer would find out about that she had given evidence, and that she might lose her job. The outworker also had some fears for her physical well being. This fear arose notwithstanding that the same protections and confidentiality applied and had been explained to this outworker by the interpreter and the community support worker.

After advising the Commission of these fears, the community worker asked the outworker if she was prepared to give further evidence, to

which the outworker agreed. However, when the Commission again attended at the outworker's home, the outworker again became concerned and refused to give evidence as to the fears she had raised with the community worker.

These circumstances starkly and directly informed the Inquiry as to the level of fear residing in outworkers, even those whose very involvement in the giving of evidence had resulted from the Commission putting in place a number of protections including confidentiality. They also emphasised the fragile nature of the relationship between outworkers and those attempting to assist, as demonstrated further by the evidence of the above community worker gave evidence as follows:

> 12. My position with OW2 has now deteriorated and there has been damage to the trust relationship I had with her. I am now rebuilding that relationship.
>
> 13. I have requested counsel assisting not to require OW2 to answer further questions, as it will further damage my relationship with her and may also do damage to my community work with outworkers.

The evidence taken before the Inquiry from outworkers was that all of the outworkers were women; all but one were married with children, most of school age; and most were middle aged, although one younger and another was older. All outworkers had been immigrants. All outworkers cited language difficulties as a factor affecting their capacity to obtain alternative work.

One of the outworkers held tertiary qualifications from her own country in a related area and had used those qualifications in the performance of

her work in that country. She also used those qualifications in the first job that she obtained when coming to Australia where she worked for some [...] years, but after leaving that job because of the sale of the business and her family's move away from that area, she had been unable to find any further work that would have used her tertiary qualifications, notwithstanding that she had continued to search through the CES and through newspapers and had applied for two jobs which would appear to have required utilisation of the skills commensurate with that qualification.

Another outworker also held tertiary professional qualifications. Those tertiary qualifications were not recognised in Australia and the outworker was unable to obtain equivalent Australian qualifications, because of the cost impost and the associated period of no income that this would impose on her family. In any event, the further qualifications that she could have obtained here would only have enabled her to work at lesser assistant level and not at the fully qualified professional position that she had held in her country of origin.

One of the outworkers had been employed as machinist in charge of a clothing machine factory in her country of origin.

One outworker undertook part of a TAFE fashion course in order to familiarise herself with Australian systems and language but did not complete that course.

Most of the outworkers were Asian. One was not. Most had been

in Australia for between five and ten years and all had been outworkers for more than three years, with one having been an outworker for ten years.

Two outworkers had paid $100 for training in the use of a machine upon arrival in Australia, which training was concluded over the period of a week. Others were trained through being employed at factories.

The common source of employment on reaching Australia, whether in a factory or as an outworker, was through the newspaper published in the outworker's own language. Most of the outworkers had only considered and applied for work in the clothing industry, all of them citing lack of English speaking skills as the reason for seeking work in that area. Some outworkers indicated that friends or family had alerted them to the possibilities of employment in clothing factories or as clothing outworkers.

Factories at which outworkers were previously employed varied as to the terms of wages and conditions. For those outworkers employed at factories paying low wages, the outworkers had left the employ of those factories relatively quickly, indicating some awareness of the proper payments of work. Some examples of factories that did not pay properly included one that paid $4.00 per hour; one that paid $230.00 for a 38 hour week for employment as a sample maker; and one that paid a piece rate without holiday pay or any other award entitlements.

In at least two cases outworkers indicated that they had been

employed at factories paying award rates and had been happy with their employment but those factories, which in each case were comparatively large ones employing in excess of 100 persons, had been forced to close down.

One outworker, who had sought employment in factories in the course of the last couple of years, gave evidence that one such factory had been offering $253.00 gross per week. She had decided not to pursue that application, given that the weekly pay would be reduced by taxation and by the costs of travelling to and from, and being at, work.

The decision to move to outwork was prompted by a variety of factors including the closure of factories as noted above. One outworker gave evidence that the pressure of working at the factory became too great and that she had thought that moving to outwork would provide her with greater flexibility.

Two outworkers expressed a strong preference to return to factory work, citing the better working conditions, less responsibility, the capacity to obtain assistance in the work and a general overall improved working conditions. Others who did not expressly state a desire to return to factory work nevertheless gave evidence that their work in factories, which had paid award rates and treated their employees properly was the best working experience as a clothing machinist that those outworkers had had.

The income that outworkers received was identified as being essential to the family's survival. At least one outworker's husband has recently

lost his employment so that her income is the only income available to the family, while another's husband had recently returned to their homeland and her income was the only money supporting her family at that time.

Despite all the difficulties outlined earlier in relation to finding outworkers prepared to give evidence, a number of outworkers were prepared to allow the Inquiry to take evidence at their homes. In total, five homes were visited, with restricted parties attending at two of those homes for the purposes of cross examining the outworker witnesses.

The Inquiry, in visiting these homes, identified the following working conditions:

- Most outworkers own at least three machines, those often being two sewing machines and an overlocker.
- At one outworker's house the machines were located within family living areas including the dining area and the front lounge. Although at the time that the Inquiry visited this person, there was no work being performed there the outworker indicated that when garments were delivered for production a large amount of floor area was taken up with those clothes.
- Another outworker was set up in shed measuring approximately four metres by three metres with one window and two work benches which were ordinary tables. The building was made of fibreglass panels and was not lined. It had one fluorescent light and one desk lamp, a concrete floor and a corrugated iron roof. The garments were piled up within the shed leaving only a very small area to walk into the shed and sit down at the sewing machines.
- Another outworker was set up in a larger garage attached to the home but nevertheless working in cramped and dark conditions. The garage was brick with a steel roller door. A number of trestle tables filled the middle of the room with machines set up on tables around the side of the room. The floor was concrete and there was evidence of mildew inside the garage. The garage was unlined

and had only rudimentary heating. There were no windows at all in that area.

- Another outworker had set up a workroom in a larger shed located in the rear of the back garden of the property. Although this shed was larger and had floor covering with windows and lighting, it was still located some distance from the outworker's residence and there was no paved walkway between the residence and the shed.

- The other home visited had a covered in verandah the area of which was completely taken up with sewing machines on tables and with boxes of material and garments.

None of the outworkers were using ergonomic furniture such as adjustable chairs or tables. Where outworkers had garments ready for manufacture, it was clear that there was a significant amount of lifting and carrying of the pre-cut material or of the finished garments between the car and the sheds. Three outworkers gave evidence of suffering sore backs and necks, while one outworker gave the following evidence:

> Q. In terms of your physical state, have you sustained injuries whilst working as a homeworker?
> A. Especially during the rush order I get sore in the neck and my whole body feels like I have just come back from a fight and I feel really exhausted.

The community support worker, to whom I earlier referred, gave evidence to the Inquiry that she had ceased working as a clothing machinist after sustaining a permanent injury to her shoulder. The circumstances in which she suffered this injury were that, having worked for approximately two and a half years in small factories as a clothing machinist, this person was engaged at one particular factory to do all of the overlocking work. At this factory she was paid $6.00 an hour working from 8 a.m. to 6 p.m. six days a week and receiving a flat rate for all hours, including any extra work on a Sunday or in the evening, even

when, for example, she sometimes worked until 11 p.m. in order to complete orders. One 10 minute morning tea break and one half hour lunch break were the only breaks available, unless working late, in which case a 15 minute break was provided when employees could eat a bread roll provided by the employer as dinner.

At this factory the employer pressured the women so that they were reluctant even to take toilet breaks, because the employer would publicly name an employee taking toilet breaks as lazy.

The wages paid to other persons engaged at this factory included $3.00 an hour for cutting threads and finishing the garment and $4.00 an hour for other machining work. The person giving evidence before the Inquiry indicated that her skills at overlocking resulted in a higher remuneration for her.

In the last week or two of her employment at this factory the person was given the work of sewing elastic into the waistbands of skirts. The person described this work as very labour intensive as it involved stretching out the elastic to put on a much longer piece of material. Although the person raised with the employer the fact that her shoulder was becoming sore doing this work full time, and although the employer indicated that he would find someone to swap to do the work, in fact this never happened. The shoulder became so sore that this person collapsed at work and required four injections from a doctor to reduce the swelling. Some months following the cessation of work this person, although not in pain, was completely unable to use her shoulder. The doctor

advised her that if she returned to work she would sustain a permanent injury and prevented her from doing any lifting or any other sort of actions for approximately two to three months, severely restricting this person's capacity to do anything at all. After living in this way for some two or three months and using up all her savings, this person was then forced to obtain employment, this time as a cleaner. This work also exacerbated her shoulder injury, and it was at this time that she was able to find employment through the TCFUA, which in turn allowed her develop her English language skills (she had been a teacher in her country of origin) and to then assist other workers in the clothing industry.

The injury sustained by this worker continues to adversely affect her daily life; she is unable to lift heavy objects at all and cannot use her arm for common every day purposes such as shopping washing and cleaning. She estimates that she has lost 50% usage of that arm. Since mobility has returned to her shoulder she suffers continuing pain and is susceptible to changes in the weather.

No workers' compensation or other payments were made to this outworker in relation to her injury. She subsequently discovered from other persons still working at the workplace that the employer had told the other workers that this person was lazy and that was why she had left her job.

OUTWORKERS - HOURS OF WORK

Outworkers commonly have significant variations in their hours of

work. An outworker may have no work for some weeks on end causing significant financial hardship. A secondary effect of deliberately withholding work from an outworker over a period of time is to increase that outworker's vulnerability to demands to complete work at a reduced price and/or within an unreasonably short time frame. A common and repeated occurrence is for a maker to demand an outworker to complete manufacture of a batch of garments within a number of days, and the outworker may be in sufficient need of the money offered, to accept the work notwithstanding that it may involve working very long hours and necessitate using the services of other members of the family including spouses, parents and children in order to complete the order.

In evidence taken in the Inquiry, children as young as 12 assisted in meeting deadlines by doing simple measuring, marking and cutting strips needed for the garment; and folding garments. Husbands commonly collect and deliver the pre-cut material and completed garments. There is no payment for these services, and the hourly rate calculated by outworkers did not include the time spent by family members. If it were included, the rate would decline further. It is also common for the maker to make threats to the outworker, for example, if the outworker refuses to accept the order, the maker may threaten not to provide that outworker with any work in the future.

The evidence from outworkers indicated that long hours are a common feature of outworker work. One outworker gave evidence that working from 8 a.m. to 10 p.m. would be a standard day, another that 15 to 16 hours per day 7 days a week was common, another that 12 to 14 hours per day was a