The AAT decided that such a blanket exclusion was too broad. While it might be sound as a general rule, it could not be applied to all cases irrespective of the particular facts of each case. And 'the particular facts of Miss Thomson's case [made] the general rule inapplicable to her situation': Reasons for Decision, p.8.

The relationship between full-time study and 'unemployment' was put in these terms by the AAT:

> We think that as a general rule and in the absence of special circumstances a person who is a full-time student attending a school or place of learning could not properly be regarded as being unemployed within the meaning of s.107. This result would not flow from any presumption of law to that effect, but rather because enrolment as a full-time student with consequent attendance at classes would demonstrate a commitment to and a preference for study as distinct from employment. It would demonstrate that the person was not unemployed because he had elected to become a full-time student in preference to entering the work force. Moreover, pursuit of full-time studies would of itself ordinarily demonstrate the unwillingness of the student to undertake paid work and inability to take reasonable steps to obtain it. In the usual case a person undertaking a full-time course of study would make such a commitment to that course of study as to demonstrate his unwillingness to look for and obtain paid work.
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> But whilst this may be the general rule, there will be cases where it does not apply. We think Miss Thomson's situation is one such case.

The AAT's assessment of Thomson's case

Thomson had given evidence to the AAT ('and we formed a favourable impression of her as a witness', said the AAT) that she had embarked on the course without any commitment to complete it; that she would have immediately given up the course if she had been able to obtain employment; that she actively sought employment, absenting herself from classes on about 12 occasions, between February and July 1980, to follow up job prospects; and that she had sought not only work as a commercial artist but less skilled work—'in fast food and other retail establishments'. The AAT concluded:

> We accept her evidence that her decision to attend the fashion design course was motivated only by a desire to fill in her spare time while she was looking for paid work. As we have already said we accept her evidence that she did not let her studies interfere with her efforts to obtain work and that she would have immediately discontinued her studies had she been able to obtain employment. She had no commitment to continue with the course and at all relevant times she was truly in the market for paid work. Her attendance at the College did not in any way preclude or inhibit her from seeking work and it did not reflect any election by her to become a full-time student in preference to entering the work force. In these circumstances we are satisfied that she was 'unemployed' within the meaning of s.107(1)(c)(i) at the relevant time.
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> . . . For these reasons we are satisfied that Miss Thomson was throughout the relevant period unemployed and was capable of undertaking, and was willing to undertake, paid work that was suitable to be undertaken by her. We are further satisfied that she took during the relevant period reasonable steps to obtain work. We therefore set aside the decision of the Director-General made pursuant to s.140(2) of the Act that the applicant be required to refund the amount of benefit paid to her.

[The Reporter understands that the Director-General of Social Services has lodged an appeal to the Federal Court of Australia; and that the principal ground of appeal relates to the AAT's decision that a full-time student could, in some circumstances, be 'unemployed'.]

Unemployment benefit: Self-help co-operative

McKENNA and DIRECTOR-GENERAL OF SOCIAL SERVICES (No. Q81/7)

Decided: 12 June 1981 by T. R. Morling J, J. B. K. Williams and J. G. Billings.

Malcolm Edward McKenna was born in 1941 and had qualified as a secondary school teacher. He worked in several teaching positions until the end of 1979. In January 1980 he applied for unemployment benefit which was granted by the DSS from 9 January 1980.

From about that time McKenna became involved in several self-help work co-operatives in which the participants pooled their money (almost all from unemployment benefits) to finance furniture making, soap making and vegetable farming: their objective was, through the sale of various products, to become self-supporting. McKenna was quite open about these activities, regularly reporting them to the DSS in his fortnightly income statements.

On 9 June 1980 McKenna made a written statement to a DSS field officer in which he said that he was '[putting] in an 8-hour day, 5 days a week' on the co-operative. He also said:

> My long term aim is to make the self help group a going concern and fully supportive, i.e. receiving salary, but in the meantime will accept work, if suitable to my qualifications.

On 28 August 1980 the DSS cancelled McKenna's unemployment benefit. He appealed to an SSAT which recommended that the cancellation be affirmed. On 10 December 1980 a delegate of the Director-General affirmed the decision to cancel. On 19 December 1980 McKenna applied to the AAT for review of that decision.

Before the AAT, the DSS argued that the

cancellation was justified because McKenna could not qualify for unemployment benefit: he was not unemployed, he was not willing to undertake paid work that was suitable to be undertaken by him, and he had not taken reasonable steps to obtain such work: see s.107(1)(c), *Social Services Act* (reproduced in *Thomson*, in this issue of the *Reporter*).

Before the AAT, McKenna said that one of the reasons he had given up teaching was that he wanted to appreciate the problems of unemployed people and that he could not do this while on a salary substantially in excess of unemployment benefit. He also said that he would not accept an offer of a teaching job if it meant cutting his involvement with the co-operative movement.

On the question of McKenna's 'willingness to undertake paid work', the AAT referred to McKenna's evidence that he would be unlikely to take a paid position if that inhibited his work with the co-operative; and to information supplied by him to the DSS on 7 August 1980 (when he said that he had contacted no employers in the previous 14 days) and 26 August 1980 (when he had said that he had made only one inquiry at the local CES office and had added 'work in the co-op. is going well'). The AAT concluded:

> 17. As has been stated, it was originally for the applicant to satisfy the Director-General that he was willing to undertake paid work and that he had made reasonable efforts to obtain it. It is now for this Tribunal to be so satisfied. It is evident that the applicant was and is enthusiastic concerning the work of the co-operative and that prominent in his thoughts was a concern that the co-operative and his involvement in it should not suffer from his unavailability to participate in it. It would also seem that the applicant had principles which inhibited his engagement in paid employment of the ordinary kind and that he felt that his duty lay in engaging himself to work which he thought was of assistance to others rather than to his own pecuniary advantage. His answers of 7 August 1980 and 26 August 1980 given shortly before the decision to terminate his grant do not indicate any serious effort on his part to obtain work other than with the co-operative. All these considerations give rise to uncertainty as to his attitude at the relevant time and are productive of a lack of satisfaction on our part that he came within the provisions of s.107(1)(c) of the Act.
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> 18. For these reasons we consider that the decision under review should be affirmed.
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> 19. It should be stated that we saw no reason to doubt the *bona fides* of the applicant. We formed the clear impression that he was earnest and sincere in his desire to direct his efforts to the assistance of unemployed persons. On the version given to us by him it would seem that his work has assisted others and it may well be that the efforts of the co-

operative warrant some kind of financial aid. But this Tribunal is (as was the Director-General) bound to apply the provisions of the Act and it does not seem to us that the applicant's case falls within these provisions.

Is job creation consistent with 'unemployment'?

The AAT concentrated on two questions: could McKenna be said to be 'unemployed'; and could he be said to be 'willing to undertake paid work'? On the first issue, the AAT said:

> 11. The apparent legislative intent of the provisions of the Act concerned with eligibility for and payment of unemployment benefit is to provide those people who are not engaged in work of a remunerative nature with the means of subsistence in circumstances where, despite capacity, willingness and effort on their part, they have been unable to find paid work to maintain themselves. It is in this context that the word 'unemployed' is used, coupled with the other words in sub-section (c)(i) 'and was capable of undertaking and was willing to undertake paid work and that in the opinion of the Director-General was suitable to be undertaken by the person'. [Sub-paragraph (ii)] requires satisfaction on the part of the Director-General that reasonable efforts have been made to obtain paid work. When regarded in the context of the apparent legislative intent and the other terms and expressions used in the sub-section, it seems to us that the word 'unemployed' bears its colloquial or popular meaning of not being engaged in work of a remunerative nature. This meaning must, however, be modified to some extent in that the means test provisions of the Act recognize that some income may be earned by a grantee of an unemployment benefit resulting in the diminution of the grant but without destroying eligibility for it. It must also be modified to allow for those special cases where a person is not engaged in work of a remunerative nature but whose commitment to some activity, e.g. study or domestic duties demonstrates a preference for that activity rather than employment. Cf. *Re Thomson and Director-General of Social Services* [see this issue of the *Reporter*].
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> 12. Turning to the facts of the present case it appears that, throughout the currency of his grant, the applicant was very actively engaged in the work of the co-operative group. In his statement of 9 June 1980, which has been referred to above, he said that he was engaged for 8 hours per day 5 days per week. The objective of the co-operative was to provide remunerative employment for those participating in it. There is no evidence before us of the financial results of the enterprise but from the picture painted by the applicant it appears that from a somewhat shaky start the enterprise got on its feet. In answer to a question put to him at the hearing before us the applicant agreed that he did not regard himself as unemployed. It appears to us that, in effect the applicant was actively engaged in the development and running of a labour intensive business with the object of making a living for those participating in it. Upon consideration of the whole of the evidence, we are not satisfied that at the relevant time the applicant was 'unemployed' within the meaning of that term in sub-section (c)(i).

Unemployment benefit: Opal prospecting & mining

BRABENEC and DIRECTOR-GENERAL OF SOCIAL SERVICES (No. S80/19)

Decided: 5 June 1981 by R. K. Todd, L. G. Oxby and P. C. Wickens.

Jaroslav Brabenec had migrated to Australia from Czechoslovakia and had worked as an opal miner at Andamooka (South Australia) for 14 years. In February 1979 he went to Melbourne where he had some casual work. He applied for unemployment benefit and this was granted from 17 April 1979. At some date after this (which is not specified in the reasons for decision) he left his wife and child in Melbourne and returned to Andamooka where he took out a miner's permit and worked several claims for 40–50 hours a week, but without finding any opal.

On 31 December 1979 the DSS cancelled Brabenec's unemployment benefit. He appealed through an SSAT to the AAT. The DSS defended the cancellation on the ground that Brabenec was not, while working the mining claims, unemployed, nor was he taking reasonable steps to obtain paid work. (See s.107(1)(c), *Social Services Act*, set out in *Thomson*, in this issue of the *Reporter*.)

The AAT agreed that Brabenec was not unemployed: he was 'working full-time as a self-employed opal miner . . . for 40 to 50 hours per week. He was, in this situation, no more "unemployed" than any person setting himself up on his own in a profession, trade or business (cf s.130A of the Act)': Reasons for Decision, para. 9.

(Section 130A obliges a person on unemployment, sickness or special benefit to notify the DSS immediately if the person commences paid employment or commences to carry on a profession, trade or business.)

The AAT did not find it necessary to make any finding on the issue of 'reasonable steps to obtain work', and affirmed the decision to cancel Brabenec's unemployment benefit.

At the conclusion of its Reasons for Decision, the AAT referred to the 'desperate position' in which Brabenec was placed when his unemployment benefit was cancelled: he was in Andamooka, a remote settlement with no employment prospects; he had no money and his dependants were in Melbourne. The AAT suggested that, in these circumstances, the DSS could have made a payment of special benefit to Brabenec. Special benefit is payable to a person who is not eligible for unemployment benefit and who is 'unable to earn a sufficient livelihood for himself and his dependents': s.124(1), *Social Services Act*. A payment could have been made to Brabenec 'in order to enable him to move to a place where he could "earn a sufficient livelihood for himself and his dependents"'. The AAT pointed out that s.145 of the *Social Services Act* permits the DSS to treat a claim for an inappropriate benefit as a claim for the appropriate benefits: Reasons for Decision, para. 11.

Unemployment benefit: Steps to obtain work

STEWART and DIRECTOR-GENERAL OF SOCIAL SERVICES (No. Q81/31)

Decided: 10 April 1981 by J. B. K. Williams, W. Tickle and I. Prowse.

Gavin Stewart ('about 20 years of age') had been paid unemployment and sickness benefits over the period between January 1978 and July 1980. In July 1980 he was being paid unemployment benefit.

On 7 July 1980 the Commonwealth Employment Service (CES) wrote to Stewart asking him to attend for interview at 8.45 a.m. on 14 July. Stewart did not attend.

On 17 July 1980 the Department of Social Security (DSS) wrote to Stewart. After referring to his failure to attend the interview, the DSS said:

> By your actions it cannot be accepted that you are taking sufficient steps to obain work. You are therefore no longer eligible to receive unemployment benefit and payment of benefit has been terminated.

Stewart appealed unsuccessfully to an SSAT and then applied to the AAT for review of the decision terminating his unemployment benefit. The DSS argued that Stewart had not taken reasonable steps to obtain work, as required by s.107(1)(c)(ii) of the *Social Services Act* (set out in *Thomson* in this issue of the *Reporter*).

This issue revolved around Stewart's failure to attend the interview on 14 July 1980. Stewart told the AAT that he had been unable to attend that interview because he had a job interview at the same time. However, he conceded that the purpose of the interview was to arrange his attendance at a work adjustment programme, which he was unwilling to attend because it would interfere with his immediate attempts to find work.

During the AAT hearing, Stewart accepted a suggestion from the Tribunal and undertook to attend the work adjustment programme. On the basis of that undertaking and of Stewart's evidence that he had regularly applied for jobs (evidence supported by the last fortnightly 'income statement' he had lodged), the AAT decided that he was '*bona fide* in his desire to obtain full employment' and had 'fulfilled the requirements of s.107(1)(c) of the Social Services Act': Reasons for Decision, paras 14, 15.