The AAT then reviewed the meaning of the cohabitation rule. Section 59(1) of the *Social Services Act* says that a 'widow' (that is, a person qualified under s. 60 to receive a widow's pension) does not include

> a woman who is living with a man as his wife on a *bona fide* domestic basis although not legally married to him.

This test was undoubtedly difficult to apply – it had become 'difficult to generalise about distinctive elements that characterise [marriage-like] relationships'. the AAT said. But the Act required this test to be used. The test had two distinct elements, both of which had to be present:

> a woman may live with a man on a *bona fide* domestic basis without living as his wife. A woman may live with a man as his wife without living with him on a *bona fide* domestic basis.

(Reasons for Decision, p. 36)

The first element – the marriage-like relationship – could not be assessed by applying specific criteria: there was an 'infinite variety of circumstances in which husbands and wives live together'. But there were factors which could be used as guides. In *Pavey*, (1976) 10 ALR 259, the Family Court referred to elements, some or all of which might be present in a particular marriage. These included

> dwelling under the same roof, sexual intercourse, mutual society and protection, recognition of the existence of the marriage by both spouses in public and private relationships [and] the nurture and support of the children of the marriage.

To these elements the AAT added 'the taking by the woman of the name of the man with whom she is living . . . ordinarily a statement to the world and a recognition by the parties of the existence of a marriage-like relationship': Reasons for Decision, p. 38.

The AAT rejected the argument that economic support (of the woman by the man) was the most significant factor. The Tribunal said this was a significant factor and, 'if that element is not found, that is a strong guide to the conclusion that the specified relationship is not satisfied'. But the *Social Services Act* did not treat the economic relationship as decisive: it looked (in s. 59(1)) 'not to economic circumstances but to the replacement of the earlier relationship with a new marriage-like relationship': Reasons for Decision, p. 39.

[In rejecting this argument, the AAT followed, although it did not mention, earlier AAT decisions in *Lambe* (1 *SSR* 5) and *Tang* (2 *SSR* 15). And its view has now been reinforced by the Federal Court in *Lambe*, noted in this issue of the *Reporter*.]

The second element – living on a *bona fide* domesitic basis, required that the woman live with a man 'in a common household'. This notion, said the AAT, was 'adequately clarified in *Furmage v Social Security Commission* (1980) 2 NZAR 75'.

[In *Furmage*. The New Zealand Supreme Court said that the phrase 'on a domestic basis' in the NZ *Social Security Act* 1964 required 'a living together under the same roof on a basis of some permanence': 2 NZAR, p. 79]

Reviewing the evidence in this case, the AAT said: 'all the significant indicia of a marriage-like relationship are present'; The Tribunal referred to the 'close relationship since March or April 1977' between R.C. and K.C.; their living together for most of the time; the birth of their child; the formation of a family unit with R.C.'s first child and their child; their adoption of the surname 'C'; the probable pooling of incomes for the family unit, the strong and affectionate bond between R.C. and K.C.; and the appearance, presented to the outside world, of an ordinary household. The AAT concluded:

> We think they have had a caring relationship, a common household and, with the children, a family unit. They gave the appearance of being a married couple. In these circumstances, we are of the view that, on 26 February 1979 and thereafter, the applicant lived with K.C. as his wife on a *bona fide* domestic basis though she was not lawfully married to him.
>
> We would therefore affirm the decision under review.

(Reasons for Decision, p.43).

Unemployment benefit: work test

WEEKES and DIRECTOR-GENERAL OF SOCIAL SERVICES
(No. T81/9)
Decided: 1 October 1981 by Ewart Smith, M.J. Cusack, J.G. Billings.

On 5 August 1980, Ronald Weekes lodged a claim for unemployment benefit. He declared that he intended to start a tanning business but would be available for full time alternative work. An officer of the DSS discussed the claim with Weekes and recorded the discussion. The record included the following note:

> I have advised Mr. Weekes that benefit would be paid subject to income for a period of 3 months and then his situation would have to be reviewed.

Unemployment benefit was granted from 5 August 1980. On 24 November 1980 Weekes advised the DSS that 'Full-time Tannery operations commenced on 11-11-80'. The DSS then terminated the benefit.

On 15 January 1981, Weekes again applied for unemployment benefit and stated:

> From August I have been fully involved in setting up a small Tannery at La Trobe. All indications are that this will be a viable operation when fully operational. A small shop is also being operated in Devonport as a local outlet for items tanned at La-Trobe.

On 21 January 1981, the DSS rejected the application for unemployment benefit on the ground that Weekes was not 'unemployed'. He appealed to an SSAT but, on 20 March 1981, a delegate of the Director-General affirmed the decision to reject his claim.

Weekes then applied to the AAT for review of this decision.

Section 107(1) provides that a person is qualified to recieve unemployment benefits if

> (c) the person satisfies the Director-General that–
>
> (i) throughout the relevant period he was unemployed and was willing to undertake, paid work that, in the opinion of the Director-General, was suitable to be undertaken by the person; and
>
> (ii) he had taken, during the relevant period, reasonable steps to obtain such work.

Weekes told the AAT that, in January 1981, he spent the bulk of his time at the tannery and some time at the shop; but he could have 'dropped them both' at any time. He was, however, under financial pressure to continue because of the large debts which he had accumulated.

The AAT agreed with the observations made by the Tribunal in *McKenna* (2 *SSR* 13): in particular, that 'unemployment' meant not engaged in remunerative work; but this was to be modified to include 'special cases where a person is not engaged in work of a remunerative nature but whose commitment to some activity . . . demonstrates a preference for that activity rather than employment'.

The AAT agreed that a self-employed person would be engaged in remunerative work, even where outgoings exceeded income:

> There are many self-employed businesses, including professional business, which would not be 'profitable' in this sense in the early stages of their establishment. But it could not be said, in our view, that it followed that the persons involved were 'unemployed' within the meaning of s.107.

(Reasons for Decision, para. 24.)

On this basis, the AAT said, Weekes was not unemployed when his benefit was terminated in November 1980, nor when he applied for benefit in January 1981, even though his tannery and shop were not profitable.

The AAT also observed that, given the financial pressures on Weekes to continue his tanning operations, the Tribunal would have had difficulty in concluding that he was willing to accept full-time employment or was taking steps to obtain employment in January and February 1981: Reasons for Decision, para. 29.

Finally, the AAT noted that Weekes had not at any time sought a special benefit (unlike the applicant in *Te Velde* 3 *SSR* 23.)

WHYTE and DIRECTOR-GENERAL OF SOCIAL SERVICES
(No. Q81/21)
Decided: 4 August 1981 by J.B.K. Williams.

Whyte, a 21-year-old man, had been paid unemployment benefit between June

1979 and May 1980, when the benefit was terminated because of his failure to attend a job interview arranged by the CES. He applied to the AAT for review of this decision.

Whyte had worked (up to June 1979) as a radio announcer. The AAT found that, at the time when his unemployment benefit was terminated, he was well qualified for other employment (as a clerk or a salesman) but had taken no independent steps to obtain employment. According to the AAT, s.107(1)(c) (set out in *Weekes*, in this *Reporter)* 'required the applicant to pursue his own avenues to obtain suitable employment', not merely to rely on the CES. And the AAT was not satisfied that Whyte had taken 'reasonable steps to obtain employment outside his field of radio broadcasting [although] he was qualified for employment on other fields': Reasons for Decision, paras. 16, 18.

The AAT affirmed the decision under review.

ANDERSON and DIRECTOR-GENERAL OF SOCIAL SERVICES
(No. Q81/2)
Decided: 17 August 1981 by J.B.K. Williams.

Anderson (a 25-year-old-woman) was paid unemployment benefit between December 1977 and October 1980, when the benefit was terminated by the DSS because she was unwilling to accept a job referral. She applied to the AAT for review of that decision.

The AAT found that Anderson had worked in a food processing business (which her mother was developing) for about ten years; and that, while she received only a small income from this work, she was committed to helping her mother develop the business to the point where it would be profitable.

The AAT decided (after referring to *McKenna*: 2 *SSR* 13) that her connection with this business was more than a casual one and showed 'a preference for that activity rather than an engagement in outside employment'. Accordingly, there was real doubt that the applicant was 'unemployed' or that she 'was genuinely willing to undertake work outside her mother's organisations': Reasons for Decision, para. 17.

The AAT affirmed the decision under review.

Unemployment benefit: discretion to ignore earnings

HINE and DIRECTOR-GENERAL OF SOCIAL SERVICES
(No. T81/10)
Decided: 16 October 1981 by R.K.Todd.

Nicholas Hine was granted unemployment benefit by the DSS in August 1980. While on benefit, he worked on a casual basis as a taxi driver and he regularly informed the DSS of his income from this source.

On 10 October 1980, the DSS terminated his benefit because his income from taxi driving had, for four consecutive weeks, exceeded the permissible income level – that is, the application of the income test in s.114 eliminated all the unemployment benefit payable to Hine.

Hine applied to the AAT for review of this decision. He maintained that the Director-General should exercise, in Hine's favour, the discretion in s.107(3). Under this provision,

> the Director-General may, in his discretion, treat a person as having been unemployed throughout a particular period [for the purpose of qualifying for unemployment benefit] notwithstanding that the person undertook paid work during the whole or a part of that period if the Director-General is of the opinion that, taking into account the nature and duration of the work and any other matters relating to the work that he considers relevant, the work should be disregarded.

[**Note:** Even if this discretion had been exercised in Hine's favour, the termination of his benefit would still stand: s.107(3) allows the Director-General to disregard 'the work' but not the income from that work; and it was Hine's income, rather than the work which produced it, which caused the DSS to terminate his unemployment benefit. However, the AAT did not refer to this difficulty.]

Hine argued that this was a proper case for the exercise of the discretion because of the long hours (55 hours a week) he was working, his relatively poor remuneration (unspecified), the lack of permanency and the fact that he was paid on a commission basis. The DSS argued that these factors were irrelevant to the s.107(3) discretion.

The AAT agreed that the discretion in s.107(3) could not be exercised here: 'it strains the concept of "unemployment" to an unacceptable level', the AAT said, 'to find that a person in casual work involving 55 hours work per week is unemployed'.

The AAT referred to, and adopted what was said in, *McKenna* (2 *SSR* 13), *Te Velde* (3 *SSR* 23), and *Weekes* (this issue of the *Reporter*) on 'unemployment' and people working, more or less full-time, for little reward.

The AAT affirmed the decision under review.

Unemployment benefit: 'regular' maintenance of children

MATONS and DIRECTOR-GENERAL OF SOCIAL SERVICES
(No. N81/24)
Decided: 21 August 1981 by R.K. Todd, I. Prowse, M.S. McLelland.

Cipriano Matons was granted unemployment benefit in January 1975. It appears that he was still being paid unemployment benefit in 1981.

At the time of the initial grant of unemployment benefit, Matons was separated from his wife, who had custody of their three children. He was paying maintenance of $8 a week for each child, under a children's court order of July 1972. These payments continued until 24 April 1976 (although not always in weekly instalments) when the court order was varied to nil 'until such time as the husband obtains employment'.

In February 1975, Matons applied to the DSS for an increase in his rate of unemployment benefit because of his contribution to the maintenance of his children. Section 112(5) of the *Social Services Act* provided that an unemployment beneficiary who 'is making regular contributions towards the maintenance of a child or children' is to be paid an extra $5.50 a week for each child.

Section 112(6)(b)(iii) provided that this extra payment may not be made if any child 'has been taken into account in fixing the rate of a widow's pension'. (In 1980, s.112(6)(b)(iii) was amended by adding 'or of a supporting parent's benefit' after the words 'a widow's pension'; but, at the relevant time, the provision made no mention of supporting parent's benefit.)