Sangricoli owned a 56-acre farm, which was planted with grape vines and fruit trees. The farm was worked by his two sons under Sangricoli's supervision, to which Sangricoli devoted 3 to 4 hours a day.

The AAT noted that the question of incapacity for work usually arose 'in the context of an employer/employee relationship, where the question has arisen of the ability of the disabled person to attract an employer who is prepared to engage him.' Here the applicant was self-employed, managing and supervising the farm. For that reason, he could not be considered as incapacitated for work:

> It seems to me that he is carrying out many of the functions that he has carried out for many years and that the only part of his former activities in which he does now engage is heavy physical work. This is now, apparently, carried out by his sons. This, to my mind, is not an unusual situation in a family business where young and active sons carry out physical work with which parents, advancing in years, find difficulty in coping.

(Reasons, p. 10)

WILLIAMS and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. N84/270)

Decided: 11 December 1984 by R. Balmford.

The AAT *set aside* a DSS decision to reject a claim for an invalid pension lodged by a 33-year-old man who suffered from epilepsy.

Williams had worked in a variety of unskilled occupations since 1968 but had been unemployed since 1979. He was currently living in Broken Hill, caring for his elderly father.

The AAT was told that Williams had applied for jobs without success; that his epilepsy ruled out much of the work for which he was qualified and made it unlikely that he would be offered employment; and that there was an accute shortage of jobs in Broken Hill.

The AAT said that Williams' case had to be considered on the basis that he lived in Broken Hill: it was his family home and he was the only person available to care for his father. Taking into account his medical condition and the employment situation in Broken Hill, the AAT was satisfied that he had lost his capacity to attract an employer and was therefore permanently incapacitated for work.

During its Reasons for Decision, the AAT examined the form letter sent to Williams when his application had been rejected by the DSS. This letter had emphasised that eligibility for invalid pension depended on the claimant having 'a significant physical or mental disability', which, along with other factors, such as age, sex, education and lack of skills, made the person 'unfit for work'.

The AAT said that, while this was a sincere attempt to explain the basis for the DSS decision, the form letter was 'simply wrong' as a summary of the tests of permanent incapacity:

> 16. Without wishing to analyse in detail the errors apparent in this letter, I should point out that the draftsman of the form letter has overlooked the fact that eligibility for invalid pension, as interpreted in the cases, beginning with *Panke* (1981) 2 *SSR* 9, is not related to incapacity to perform work as such, but to incapacity to obtain employment.

TRENGOVE and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. N83/818)

Decided: 11 December 1984 by R. Balmford.

The AAT *set aside* a DSS decision to reject an application for invalid pension lodged by a 49-year-old former miner, who had defective eye sight and hearing and who suffered from lower back pain and depression.

The AAT accepted medical evidence that Trengove could undertake no work which involved decision-making, responsibility, heavy lifting or bending or working in a dusty atmosphere.

Trengove had lived all his life in Broken Hill, where there were 1265 unemployed men and 62 job vacancies (for both men and women). A local union official said that there was, in his opinion, no chance of Trengove finding a job, given his disabilities.

The AAT said that Trengove's position had to be considered on the basis that his home was in Broken Hill; and it referred to *Bavcevic* v *Commonwealth* (1957) 98 CLR 296, where two High Court justices had said, when discussing a person's capacity to find work in the labour market:

> In many places in Australia avenues of employment can hardly be dignified by such terms [as 'labour markets']. Yet one can hardly expect the injured man to change his habitat in search of work . . .
>
> The 'concomitant conditions' in which the capacity is to be exercised must be judged reasonably in accordance with common conceptions of what is customary in travelling to work or in the movement of labour when suitable work is available elsewhere although not at hand.

After declaring the employment situation in Broken Hill should not be overemphasized, the AAT said that Trengove's incapacity derived from his medical condition in combination with that employment situation.

ALLBON and SECRETARY TO DSS (No. N83/533)

Decided: 17 January 1985 by A.P. Renouf.

The AAT *varied* a DSS decision to reject a claim for invalid pension lodged by a 38-year-old former carpet-layer, who had been injured in a car accident in 1981. There was, the AAT said, an unusually direct conflict in the medical evidence in this case. One orthopaedic specialist called by Allbon said that he would not 'be able to return to the workforce at any time in the future in any worthwhile capacity.' But another orthopaedic specialist, who had examined Allbon on behalf of the DSS, said that he was able to work full time in a light job.

The AAT said that it was impossible to resolve the conflict between this medical evidence and it was –

> extremely difficult at present to reach a decision whether Mr Allbon's incapacity for work is permanent, whether this medical disability is significant enough to attract the invalid pension or whether that incapacity is of the order of 85% or more.

This difficulty, the AAT said, was compounded by the fact that Allbon had failed to attend a rehabilitation programme which had been arranged for him. The AAT said that, in the absence of some assessment of Allbon's rehabilitation potential, it could not decide his entitlement to invalid pension.

Accordingly, it set aside the decision under review and remitted the matter to the Secretary, with a direction under s.135M(1) of the *Social Security Act* – that an invalid pension was not to be granted unless Allbon received suitable rehabilitiation treatment.

Unemployment benefit: industrial action

HENNESSY and OTHERS and SECRETARY TO THE DSS (Nos. A8/54, 57, 58 and 65)

Decided: 4 January 1985 by R.K Todd, P. J. Gibbes and H. N. Pavlin.

The four applicants had been employed on the new Parliament House construction site in Canberra, three as members of the Builders Labourers Federation (BLF) and the fourth as a member of the Building Workers Industrial Union (BWIU)

At the beginning of 1984, the Trade Unions on the site made a claim on their employers for severance pay and, when this was not granted, placed 'black bans' on selected areas within the site.

Before the AAT, there was some dispute as to what happened next. However, the AAT approached the matter on the basis that each of the applicants was then dismissed by his employer; and the AAT found that these dismissals occurred for reasons directly related to industrial action; but that none of the applicants had been engaged in that industrial action. Following their dismissal in February 1984, two of the applicants remained unemployed until work resumed on the site in May 1984; but the other two applicants obtain-

ed employment for short periods between their dismissal and the resumption of work.

When the applicants claimed unemployment benefits for the duration of their unemployment, the DSS rejected their claims.

The legislation

Section 107(4) of the *Social Security Act* disqualifies a person from unemployment benefit where the person's unemployment is due to the person's industrial action or due to the industrial action of another member of that person's trade union.

Section 107(5) declared that a person was not disqualified from receiving unemployment benefit once the relevant industrial action had ceased.

Section 107(7) defined 'industrial action, as meaning 'a ban, limitation or restriction on the performance of work'.

Formal procedures

In its Reasons, the AAT responded to what it saw as criticism of its 'too formal' procedures. It was clear, the AAT said, that the *AAT Act* 1975 required that there should be a hearing; and the International Covenant on Civil and Political Rights (to which Australia was a signatory) demanded a 'fair and public hearing by competent, independent and impartial tribunal established by law'.

While the AAT had some flexibility in dealing with proceedings and while there was no single level of formality or informality appropriate for all cases, –

> considerable experience has demonstrated that a degree of so-called formality in fact serves to confer, and not to detract from, that equality of treatment to which applicants, particularly unrepresented applicants, are entitled.

(Reasons, para. 5)

Industrial action

Proceeding on the assumption that the applicants had not participated in the industrial action and that they had not actually refused to work for their employers, the AAT nevertheless decided that

they had been dismissed for reasons directly related to industrial action. It did not matter, the AAT said, whether the applicants had participated in that industrial action: the evidence showed that there had been industrial in the form of bans on performance of work and that these bans had been imposed after meetings of members of the BLF and the BWIU, to which the applicants belonged. Because those bans amounted to 'industrial action' and because they had been imposed by other members of the applicants' trade unions, s.107(4) operated to disqualify them from receiving unemployment benefit.

Unemployment 'due to' industrial action?

The AAT then looked at the situation of the two applicants who had found work for short periods between their dismissal and resumption of work on the site. The question was whether their unemployment after those short periods of employment could be described as still 'due to' the original industrial action at the Parliament House site.

The Tribunal admitted that there would be circumstances where the connection between the industrial action and unemployment could be broken. But the Federal Court decision in *Savage* v *Director-General of Social Security* (1983) 15 *SSR* 156 made it clear that the applicants' unemployment should be regarded as 'due to' the original industrial action, even though they had obtained work for shorter periods.

That result was produced for two reasons. First, it was clear from *Savage* that it was 'enough that the industrial action be a cause of the unemployment. It need not be the sole or dominant cause': Reasons, para 33. The reasoning in *Savage* indicated that s.107(5) should be read as requiring that a person remain disqualified from unemployment benefit until the relevant industrial action on the part of other members of the person's union ceased. Second, the intervening employment should be regarded as 'an interruption of a state of unemployment': it did not provide the basis for new unemployment for those applicants who had obtained short term work 'remained "due to" other members being or having been, engaged in industrial action. A "sufficient nexus" remained':
Reasons, para. 35

Formal decision

The AAT affirmed the decision under review.

Unemployment benefit: work test

PORTER and SECRETARY TO DSS (No. Q84/130)

Decided: 14 February 1985 by J.R. Dwyer, H. Pavlin and W. De Maria.

John Porter had worked as a carpenter for some 20 years. From 1977 he was employed by his family company (a contract builder) on building sites on the Gold Coast, Queensland. Following a fall-off in the building industry, the family company stopped employing Porter from 20 January 1984.

On 25 January 1984, Porter applied to the DSS for unemployment benefit. In that application, and in subsequent applications for continuation of the benefit, Porter said that he was looking for paid work as a carpenter and also tendering for building jobs on his own account. On 23 March 1984, the DSS rejected Porter's claim for benefit on the ground that he was not 'unemployed' This was because, the DSS said, he was still tendering and quoting for jobs, which showed a 'continued committment to working in and maintaining (his) business'.

Porter asked the AAT to review that decision.

The legislation

Section 107(1) of the *Social Security Act* provides that a person is qualified for unemployment benefit if –

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

Unemployed?

The AAT noted that in several earlier decisions, such as *Vavaris* (1982) 11 *SSR* 110, the Tribunal had decided that a self-employed person who was trying to attract work was 'underemployed, not unemployed' In *Vavaris*, the Tribunal had described the example of 'the briefless barrister [waiting] anxiously in his chambers for the call from a solicitor'. But, the AAT said, the case of a skilled tradesman like Porter could be distinguished from that of a briefless barrister. Porter had not attended his business office because he had no office other than his home and, he had not confined his efforts to looking for work as a carpenter on his own account