Errey was granted unemployment benefit by the Port Augusta office of the DSS in September 1983; but the DSS cancelled that benefit from mid-November 1983 and refused to pay her a special benefit. Errey then asked the AAT to review those decisions.

Unemployment benefit

Errey told the AAT that, from November 1983 to February 1984, she had remained camped in the Roxby Downs area, apart from trips to Brisbane in December 1983 and to Adelaide in January 1984. She had checked newspaper advertisements and CES notice boards for job opportunities; and, in January 1984, she had applied unsuccessfully for 3 jobs, including one as Assistant Director-General in the Commonwealth Department of Health.

The AAT concluded that Errey had been 'unemployed' throughout the relevant period. She had not been 'undertaking work even intended to be remunerative while at Roxby'. The Tribunal was also prepared to assume that she had been willing to undertake work at that time, 'had she been presented with suitable work at Roxby Downs, as it were on a plate'.

But, the majority (Todd and Browne) said, she had not taken reasonable steps to obtain employment: her job-seeking efforts varied 'from token efforts through reading of newspapers and inspection of notice boards to utter unreality if not frivolity in the case of the application for appointment as Assistant Director-General . . .': Reasons, para. 22. Accordingly, she could not qualify for unemployment benefit.

Moving to a low employment area

The AAT referred to an argument raised by the DSS, that the fact that Errey had moved to a low employment area was enough to disqualify her from unemployment benefit.

While the concept of 'job mobility' might still have a part to play in the Australian social security system, it was, the AAT said, 'hard to see how any absolute proposition can be set up to the effect that persons should be expected not to move away from areas where there is employment to areas where there is none, or very little'.

On the other hand, the AAT said, there might be cases where the movement of a person to a low employment or isolated area demonstrated an unwillingness to undertake paid work—particularly where the person had in the past demonstrated that he or she was willing to move in order to find work. Errey's case might well be such a case; and perhaps, the AAT said, it should not have assumed that she had been willing to undertake paid work: Reasons, para.23.

Special benefit

The majority of the AAT decided that Errey did not qualify for special benefit during the period in question because she had not been 'unable to earn a sufficient livelihood' within s.124(1) of the *Social Security Act*. While she had lived in straitened circumstances, the AAT said, this was a case of a person who adopted a 'particular lifestyle in pursuance of a particular cause and who managed, with the help of others, to support herself in so doing'.

Even if she had been 'unable to earn', the majority said, it would not have been a proper exercise of the s.124(1) discretion 'to grant a special benefit to a person whose need for it arises directly from his own action leading to the termination of an unemployment benefit which would otherwise be payable to him', as an earlier Tribunal had put it in *Law* (1981) 5 *SSR* 52: Reasons, para. 24.

The minority view

The dissenting member of the AAT (Nicholls) agreed that Errey had been unemployed and accepted that she had been willing to undertake paid employment. He also decided that her efforts to obtain work had been 'reasonable though not exhaustive', given Errey's 'lack of formal qualifications and limited work experience, together with the state of the labour market'. He would have awarded her an unemployment benefit.

Formal decision

The AAT affirmed the decision under review.

SMITH and SECRETARY TO DSS (No. N84/250)

Decided: 29 March 1985 by A. P. Renouf.

Maxwell Smith owned an orchard of some 25 hectares, which had been severely affected by drought. In early 1983, Smith began to look for outside work in order to maintain himself and his family.

He was granted unemployment benefit in February 1985; but the DSS cancelled this benefit in January 1984 on the ground that he was committed to maintaining and restoring his orchard. Smith then asked the AAT to review that cancellation.

The work test

The review focused on the question whether Smith could satisfy the requirements of s.107(1)(c) of the *Social Security Act*. The AAT decided that he had been capable of undertaking and willing to undertake suitable work and had taken reasonable steps to obtain work. But had he been unemployed during that period?

Smith told the AAT that he had had a strong commitment to his property and had worked it 7 or 8 hours a day while looking for outside employment; but that he would have given first preference to another job if he had managed to find one—if necessary, he would have let his property run down.

However, the Tribunal said, the fact that Smith had been rehabilitating his property so that eventually it would serve as a livelihood for him and his family prevented him from being treated as unemployed; and the AAT referred to *McKenna* (1981) 2 *SSR* 13; *Te Velde* (1981) 3 *SSR* 23; and *Vavaris* (1982) 11 *SSR* 110.

Special benefit?

The AAT then pointed out that Smith may have been eligible for special benefit when his unemployment benefit was cancelled—as a person who was 'unable to earn a sufficient livelihood for himself and his dependants', under s.124(1) of the *Social Security Act*. The AAT noted that this option had been used in *Kirsch* (1984) 20 *SSR* 222 and *Watts* (1984) 21 *SSR* 237; and that the DSS could treat Smith's application for unemployment benefit as an application for special benefit (under s.145 of the *Social Security Act*). [However, the AAT did not adopt the course of exercising the s.145 power itself—a course adopted, for example, in *Whitehead* (1985) 24 *SSR* 285.]

Formal decision

The AAT affirmed the decision under review, but recommended to the Secretary that Smith's application for unemployment benefit should be treated as an application for special benefit.

Widow's pension: cohabitation

CHAPMAN and SECRETARY TO DSS (No. N84/241)

Decided: 8 January 1985 by A.P. Renouf.

Deanna Chapman was granted a widow's pension in 1973. In 1981 the DSS cancelled this on the ground that she was living with a man, H, as his wife on a *bona fide* domestic basis although not legally married to him. The DSS decided that this relationship had persisted from 1970 to 1981 and that, accordingly, Chapman had received payments of widow's pension to which she was not entitled, totalling $22 893. The DSS decided to recover that amount from Chapman. She asked the AAT to review that decision.

The legislation

Section 59(1) of the *Social Security Act* defines 'widow' so as to exclude a woman who is living with a man as his wife on a bona fide domestic basis although not legally married to him.

Section 140(2) allows the Secretary to the DSS to recover, through deductions from a current pension, any amount of pension which should not have been paid.

A marriage-like relationship?

Evidence given to the AAT showed that, between 1973 and 1981, Chapman had lived at several houses owned by H. Chapman claimed that she had lived there as H's housekeeper and that they had not had a sexual relationship.

Chapman explained that the main reason why she had continued to live in the same house as H was her fear of his physical violence - he had assaulted her and her children on several occasions, particularly when he was drunk. On one occasion, Chapman had moved to her parents' house following a violent incident and stayed there for 3 months; but she had returned to H's house because she was frightened of H's threats.

Eventually, Chapman had sought psychiatric help in 1981 and had been persuaded by her daughter to leave H's house and return again to her parents' home. Although H had forced his way into the parents' house in 1982, it appeared that whatever relationship existed between Chapman and H came to an end at that time.

The DSS admitted that most of the factors used to demonstrate the existence of a *de facto* marriage relationship had not been established in this case. However, the DSS maintained, the behaviour of Chapman and H over 8 or 9 years was only consistent with an intense emotional relationship between Chapman and H.

The AAT said that this argument was 'intellectually appealing for there is considerable illogicity [*sic*] in the applicant's conduct.' However, the AAT concluded as follows:

> 'Nevertheless, I am not convinced that the applicant's explanation for her behaviour in persisting to reside in the various residences owned by H is substantially false. In reason, her behaviour appears strange but there is little limit to the range or relationships between human beings and many in the range can lead to reactions which one would not normally expect . . . I have therefore to accept as correct the applicant's statements about the nature of the relationship between H and herself.'

(Reasons, paras 25-6)

Formal decision

The AAT set aside the decision under review, directing that Chapman had been qualified to receive an invalid pension from 1973 to 1981.

Family allowance: sharing

McNAMARA and SECRETARY TO DSS
(No. V84/368)

Decided: 8 March 1985 by R. Balmford.

Louis McNamara had married in 1976. In the same year, he and his wife, E, had a son, J. In 1981, McNamara and E were divorced and the Family Court gave E custody of J, subject to McNamara having regular access. In fact, McNamara cared for J 5 days a fortnight and shared with E joint responsibility for J's schooling and for all decisions about J's welfare.

Early in 1984, McNamara applied to the DSS for family allowance and family income supplement in respect of J. The DSS rejected these applications and McNamara asked the AAT to review the DSS decisions.

The legislation

Section 95(1) of the *Social Security Act* provides that family allowance is payable to a person who has the custody, care and control of a child. Section 99A gives the Secretary power to divided family allowance for a child between 2 or more persons.

Section 85(1) provides that an unmarried person who is qualified for family allowance in respect of a child may also qualify for family income supplement for that child.

'Custody, care and control'

The AAT adopted the view expressed in *Hung Manh Ta* (1984) 22 *SSR* 247, that a person had the custody, care and control of a child if that person was responsible for the actual day-to-day maintenance, training and advancement of the child. It was not necessary, the AAT said, for the person to have the legal custody of the child.

In the present case, the AAT said, McNamara had the custody care and control of J when the child was with him; and E had the custody, care and control of J when the child was with her.

Sharing family allowance

The AAT said that the power to apportion family allowance (in s.99A) should be exercised so as to promote the purpose of paying family allowance, that is, to enable the allowance to be spent on the maintenance of the child in question.

Because of the relatively small sums of money involved and because of the difficulty in precisely determining the shares of responsibility taken by 2 parents, the division of the family allowance should be done on a fairly broad basis. In the present case the AAT divided the allowance so that McNamara received one-third and E received two-thirds.

Family income supplement

Because McNamara was eligible for family allowance it followed that McNamara would be eligible for family income supplement.

Formal decision

The AAT set aside the decision under review and remitted the matter to the Secretary with directions that McNamara was qualified to receive family allowance and family income supplement in respect of his child J, and that E was also qualified to receive family allowance in respect of J.

Family allowance: discrimination?

McDONALD and SECRETARY TO DSS
(No. V84/362)

Decided: 8 March 1985 by R. Balmford, G. Brewer and H. C. Trinick.

The AAT *affirmed* a DSS refusal to pay family allowance to Bernard McDonald, in respect of his son, S.

When S had been born in 1981, his mother (McDonald's wife) had applied for and been granted a family allowance. The couple then decided that McDonald would stay at home to care for S and his wife would return to work—as the family's breadwinner. McDonald's wife then asked the DSS to pay the family allowance to McDonald.

The legislation

Section 95(1) of the *Social Security Act* provides that family allowance is payable to a person who has the custody, care and control of a child.

Section 94(2) provides that, where a husband and wife are not separated, their child 'shall be deemed, for the purposes of this Part, to be in the sole custody, care and control of the wife'.

An outmoded policy?

The AAT observed that the assumptions upon which family allowance had been based (when introduced as child endowment in 1941) 'no longer hold good for anything like all Australian families': Reasons, para. 11.

The AAT noted that the DSS was currently reviewing the basis for entitlement to family allowance. This review, the Tribunal said, would raise policy considerations 'which go beyond the purview of the DSS', because one of the policy justifications for paying the allowance to a wife had been 'to bring about some redistribution of income within families': Reasons, para. 16.

As the legislation stood at the moment, however, there was no discretion to pay the allowance to anyone other than McDonald's wife, even if she was not the primary care giver for their child.