of the period of his enrolment in university degree courses, he would have accepted full-time employment and reduced his commitments to university studies if such employment had become available. He said that, if it had been absolutely necessary, he would have abandoned his university studies completely in order to obtain full-time employment.

The AAT referred to a series of earlier decisions in which the eligibility of tertiary students for unemployment benefits had been considered. These decisions included the Federal Court decision in *Thomson* (1981) 38 ALR 624 and the AAT's decisions in *Bouris, Martens* (1984) 22 *SSR* 248, *Kontogeorgos* (1984) 22 *SSR* 249 and *Collins* (1985) 27 *SSR* 328. The central question posed in each of these cases had been the primary commitment of the applicant: was it to the completion of his or her studies or to the obtaining of employment? The AAT said that, although it was not bound by particular decisions in earlier cases, a number of factors emerged as relevant to the eligibility of a full-time student for unemployment benefit. These factors were:

- the applicant's intentions at the relevant times;
- the nature of the course of study being pursued by the applicant;
- the amount of time required in attending the course;
- the way in which the course requirements interfered with the applicant's availability for full-time employment;
- the applicant's 'actual or demonstrated or stated willingness to give up the course of study' for full-time employment;
- the length of time spent by the applicant in the course of study;
- the applicant's level of commitment or involvement in the course of study and in associated activity;
- the surrounding circumstances before, during and after the relevant period insofar as they shed light on the true situation on the relevant period;
- accepted opinions of relevant institution in respect of course requirements; and
- the other elements of the work test.

In the present case, the AAT said, Long's intentions, expectations and aspirations had varied from time to time. But it would, the AAT said,

> be stretching the concept of 'unemployment' too far if it were to regard Mr Long's circumstances, as stated by him in the evidence, as constituting those of an 'unemployed' person. His circumstances over a period of several years indicate rather the position of a young man whose commitment was to the completion of studies, and supported by various part-time jobs during term time and 'full-time seasonal' work during university vacation . . . It is acknowledged that at certain times he has made intense efforts to find full-time employment . . . At other times his efforts have been much less intensive. His efforts to find employment have not on the facts interfered with his ability and intentions to continue with his studies where possible and to complete each year of study once he has enrolled, at least since 1982, while 'leaving his options open' and supporting himself in the meantime by part-time and other work.

(Reasons, para. 18)

Formal decision

The AAT affirmed the decision under review.

Special benefit: disabled student

ROBSON and SECRETARY TO DSS (NO.V85/258)

Decided: 29 November 1985 by R.K.Todd.

Hayden Robson, who was 22 years of age, suffered from a number of disabilities which seriously affected his physical capacity and left him incapable of performing manual work. He had held a number of short-term jobs, each of which he had failed to perform effectively.

At the beginning of 1984, Robson enrolled at an independent theological college in order to enter the Anglican Ministry. The course in which he enrolled was not recognised under the TEAS scheme; and Robson's parents met the cost of his education and board (which totalled some $5000 for the year).

When he began the course, Robson had savings of $400 to cover his incidental living expenses. He had spent this money by June 1984 and, in July 1984, he applied to the DSS for a special benefit. When the DSS refused to pay that benefit, Robson asked the AAT for review.

The legislation

Section 124 of the *Social Security Act* provides that the Secretary to the DSS may, in his discretion, grant a special benefit to a person not receiving another pension or benefit, if -

> '(c) . . . the Secretary is satisfied that, by reason of age, physical or mental disability or domestic circumstances, or for any other reason, that person is unable to earn a sufficient livelihood for himself and his dependants (if any).'

'Unable to earn'

The AAT adopted the interpretation of 'unable to earn' put forward in *Te Velde* (1981) 3 *SSR* 23: the word 'unable' did not mean 'impossible' but referred to an act which, in all the circumstances, a person could not reasonably be expected to do.

The AAT also said that when judging a person's ability to 'earn', it was necessary to focus on what the person could receive as a reward for labour rather than as a gift. This approach the AAT said, was in line with earlier decisions in *Takacs* (1982) 9 *SSR* 88 and *Spooner* (1985) 26 *SSR* 320.

'Sufficient livelihood'

The AAT said that the ability to hold short-term jobs from time to time would not necessarily establish that a person was able to earn a 'sufficient livelihood': that phrase referred to a level of earnings sufficient to maintain the normal standard of living 'expected of civilized citizens of a post-industrial affluent society like Australia'. The point that survival at a subsistence level did not of itself show a 'sufficient livelihood' had been made in such earlier decisions as *Beames* (1981) 2 *SSR* 16 ; *Guven* (1983) 17 *SSR* 173; and *Ezekiel* (1984) 21 *SSR* 237.

In the present case, the AAT concluded, both Robson's physical disability and his poor employment history showed that he was 'unable to earn a sufficient livelihood' and accordingly the foundation for the exercise of the Secretary's discretion had been established.

The discretion

Robson's counsel had argued that the discretion should be exercised in Robson's favour because his need for support was only temporary, because there was a clear government policy of encouraging people to enrol in tertiary education and because the alternative forms of income support (either unemployment benefit or invalid pension) would have been more expensive.

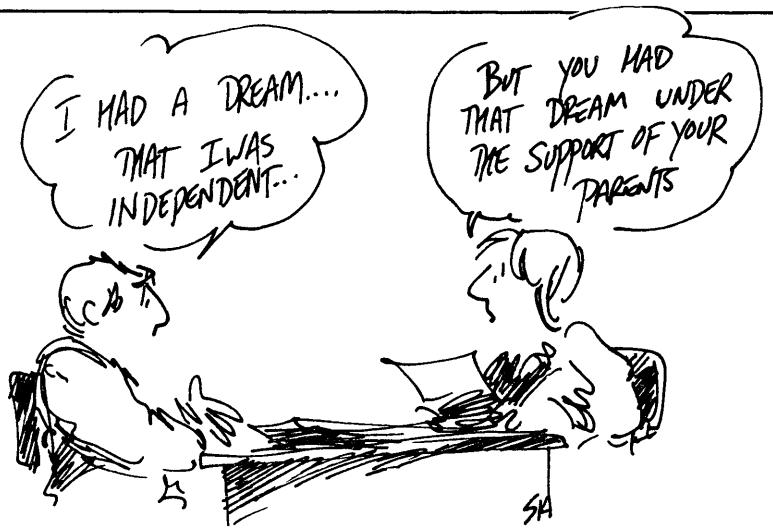
However, the AAT concluded that each of these factors was not relevant to the exercise of the discretion in s.124(1)(c). The critical factor, according to the AAT, was the fact that Robson's parents had willingly provided him with financial support during the period in question and had apparently been ready to increase the level of that support.

Robson had told the AAT that he was pressing this claim for special benefit 'to try to stand on one's feet independently so as to lessen the amount of money that has to be paid by my parents.' The AAT referred to the 'questionable assumptions wrapped up in the applicant's concept of "standing on his own two feet"'; and said that 'these sentiments had little role to play in the exercise of a discretion in the context of the Social

Security Act': Reasons, para.21.

Because of the purpose of special benefit and the financial support provided by and available from his parents during the period in question, the AAT decided, as a matter of discretion, that a special benefit should not be granted to Robson for the period during July and December 1984.

Formal decision
The AAT affirmed the decision under review



Cohabitation: age of consent

KENNISON and SECRETARY TO DSS
(No.S85/42)
Decided: 25 November 1985 by J.A.Kiosoglous, F.A.Pascoe and B.C.Lock

Thomas Kennison had been granted unemployment benefit in July 1982. In December 1982, he was granted additional benefit on the basis that he was living with a woman, C (who was then 16 years old), and should be treated as a 'married person' when calculating the rate of benefit payable to him. In June 1983, the DSS decided to pay Kennison the single rate of unemployment benefit because C was under the age of 17 years, the legal age of consent to sexual intercourse in South Australia.

Kennison asked the AAT to review that decision.

The legislation
At the time of the DSS decision, s.112(2) of the *Social Security Act* provided that additional unemployment benefit should be paid to a 'married person' who had a dependent spouse.

Section 106(1) defined 'married person' as including a man with whom a woman was living 'as his wife on a *bona fide* domestic basis although not legally married to him.'

The South Australian *Criminal Law Consolidation Act* 1935 provided in s.49 that it was an offence for a person to have sexual intercourse with a person under the age of 17 years, unless that other person was at least 16 years and the accused 'believed on reasonable grounds' that the other person was at least 17 years old.

The evidence
Kennison and C told the Tribunal that, during the period from December 1982 to August 1983, they had lived together in what they described as a *de facto* relationship. They said that they were financially and socially interdependent during that period. But there was no direct evidence before the Tribunal of a sexual relationship between Kennison and C.

The DSS argument
The DSS relied on 2 written opinions given by the Commonwealth Attorney-General's Department. Between them, these opinions argued that the DSS could not accept that a woman was living with a man as his wife where the woman was below the legal age of consent in the relevant state. This was, the opinions said, because the DSS could not administer the social security system so as to allow any person to benefit from the commission of a criminal offence and because the word 'woman' in s.106(1) should be read as referring to 'an adult female human being'.

The AAT's view
The AAT said that the question whether 2 people were living as man and wife within the *Social Security Act* depended on all aspects of their inter-personal relationship. A number of factors had to be considered; and the existence or not of a sexual relationship was only one of those aspects.

In the present case, there was no evidence of a sexual relationship between Kennison and C and neither the DSS nor the AAT was obliged to investigate the existence of any such relationship. Although it might be proper for the DSS to refuse to pay a benefit to a person who was otherwise entitled when that person's entitlement rested upon facts which amounted to a criminal offence under State law, where there was no evidence of the commission of such an offence. Neither the DSS nor the AAT was the appropriate body to pursue that evidence.

The AAT rejected the narrow reading given by the Commonwealth Attorney-General's Department to the word 'woman' in s.106(1). The Tribunal noted that, under the *Marriage Act* 1976 (Cth), a female person (subject to some restrictions) had the capacity to marry and become a wife from the age of 14 years. It followed, the AAT said, that -

> 'a female person has the capacity and may become a "dependent female" and may live together with a male person as his wife (i.e. as if she was his wife), although not legally married to him, from the age of 14 years. The legal impediments do not prevent the existence of a *de facto* relationship, or of a "*bona fide* domestic relationship" of unmarried husband and wife, because those impediments are related simply to consent to *marry* and to the ceremony of marriage. Therefore, because a female person has the capacity (marriageability) to become a legally married wife or spouse of a male person from the age of 14 years, she also has the capacity to become a dependent female "as his wife".'
>
> (Reasons, para.17)

In the present case, the AAT said, there was sufficient evidence (in the financial and personal interdependence of Kennison and C) to establish that Kennison and C were living together in a *bona fide* domestic relationship as unmarried husband and wife at the relevant times.

Formal decision
The AAT set aside the decision under review and substituted a decision that Kennison was a 'married person' as the husband of a 'dependent female' between December 1982 and August 1983.