satisfied the criteria in that section was a matter of degree with reference to the facts in the case. A full-time student was not as a matter of law to be regarded as 'unemployed'. The intention of the applicant was an important consideration. If the applicant had a commitment to full-time study that would take precedence over seeking employment, then he could not be described as 'willing to undertake' suitable paid work.

The Tribunal found that the applicant was not willing to undertake all suitable paid work available. Although the applicant was prepared during 1985 to abandon work that he considered suitable, that is non-manual work, his previous work experience indicated that manual work was also suitable for him. The AAT said:

> '...it is a reasonable inference from the applicant's evidence that he was prepared to abandon his studies only if work of a type more limited than the class of work for which he was otherwise generally suited presented itself in 1985. I conclude that he was not willing to undertake paid work within the full range for which he was suited. Accordingly, I find this requirement of s.107(1)(c) not satisfied.'

Other factors also worked against the applicant. Faced with financial need in 1985 the applicant refused to drop back his workload at University to enable him to qualify for unemployment benefit. This indicated a commitment to study over seeking work. Also, he only applied for unemployment benefit when his TEAS application was rejected. It appeared that he was primarily concerned with financing his studies, rather than gaining employment.

The case against the applicant was even clearer in 1986. He had a full workload and had one year to complete his degree. His commitment to study at that stage would render him unwilling to undertake work and prevent him from being described as 'unemployed'.

Formal decision
The Tribunal affirmed the decision under review.

SPEED and SECRETARY TO DSS (No.W87/28)
Decided: 5 June 1987 by J.O. Ballard.

Oliver Speed had been a full-time university student up to 14 December 1986, when his final examination results were published. On 20 November 1986, the date when he sat for his last examination, Speed claimed unemployment benefit. The DSS refused to pay S benefit before 1 January 1987 because he was receiving a TEAS allowance for the 1986 calendar year. Speed asked the AAT to review that decision.

The legislation
At the time of the DSS decision, s.133 of the *Social Security Act* prevented payment of unemployment benefit to a student enrolled in a full-time course for a period during which a TEAS allowance was paid to the student.

Regulation 37(1) of the *Student Assistance Regulations* 1973 provided that, where a student completed an accredited course during November or December, the student's TEAS allowance terminated on 31 December in that year.

An ambiguity
The AAT said that s.133 was ambiguous: it was not clear whether it referred to a course for a full year. This ambiguity was enough to justify looking at the Second Reading speech on the Bill by which that section was added to the *Social Security Act*, in accordance with s.15AB of the *Acts Interpretation Act* 1901.

The Second Reading speech said that the policy of s.133 was -

> 'that [full-time students] should look to and be covered by education allowance rather than what are, primarily, work-force related benefits.'

(Reasons, para.11)

This made it clear that s.133 had been intended to prevent double benefits - to prevent a person receiving TEAS and unemployment benefit for the same period. Accordingly, unemployment benefit should not be paid for any period for which a TEAS allowance had been paid.

Formal decision
The AAT affirmed the decision under review.

Cohabitation

KERSHAW and SECRETARY TO DSS (No. N86/710)
Decided: 6 April 1987 by A.P. Renouf, J.H. McClintock and M.T. Lewis

Maureen Kershaw asked the AAT to review a DSS decision to recover an overpayment of $3,128.80 in widow's pension. Mrs Kershaw had been granted the pension in 1977 as a deserted wife. In 1984 the DSS decided to cancel the pension on the basis that the applicant and her husband had reconciled. The dispute centred on the time of the reconciliation. The DSS said that it took place in June 1984, the applicant maintained that it occurred in November 1984. Pension was paid until November and the Department claimed an overpayment for the period between June and November.

When did reconciliation occur?
The applicant married her husband in 1960. Her husband was in the navy and was constantly at sea. Between 1960 and 1976 their relationship was 'turbulent'. In 1976 the husband left the navy and found local employment. In 1977 the applicant and her children left for Sydney to live alone. There was little contact until 1980 when her husband began to visit, seeking reconciliation but always failing. In 1983 the applicant moved closer to her husband in order that a reconciliation may be facilitated. Closer contact occurred but a resumption of their marriage still did not occur.

Later in 1983 the applicant's husband became ill with cancer. This made a reconciliation difficult as the applicant's husband thought that he was dying. After an operation for the cancer the husband requested that he come to live with the applicant. The applicant agreed as he needed care, but did not consider that at that stage a reconciliation would occur. Eventually the husband moved to alternative accomodation.

In June 1984 the applicant took her husband back in after he was advised to leave work for medical reasons. The evidence was that this was not seen as any resumption of their marital relationship, but based on the need of the applicant's husband for some support. Later in the year they took an overseas trip together although the trip was filled with conflict between them. It was not until they returned in November that the relationship improved to the point that a complete reconciliation took place.

Did a marital union exist?
The AAT had difficulty in characterising the relationship of the applicant with her husband. A strong bond clearly existed, divorce had never been considered, yet there had been long periods of separation. The only evidence that contradicted the applicant was that of a DSS social worker who gave evidence that the applicant told him in December 1984 that she had reconciled with her husband in June 1984.

The AAT commented:

> 'We appreciate the unenviable position of the respondent when confronted with a direct conflict between the statements of a recipient of benefit and of one of his officers who, in our view, is very unlikely to have made an error of the kind in question. We find ourselves confronted with the same

dilemma...[W]e believe that as the act is beneficial legislation, we are obliged to give the benefit of the doubt to Mrs Kershaw, that is, to find that reconciliation did not take place until the end of November, 1984. The evidence is such that we cannot be sure beyond reasonable doubt that reconciliation transpired earlier, that is, at the end of June, 1984.'

Formal decision
The Tribunal set aside the decision under review.

WEST AND SECRETARY TO DSS (No. N86/700)
Decided: 1 May 1987 by A.P. Renouf, M.S. McClelland and C.J. Stevens

The AAT affirmed a DSS decision to recover an overpayment of $10,474.20 in supporting parents' benefit paid to the applicant after she commenced living in a de facto relationship.

In deciding whether a de facto relationship existed the applicant asked the Tribunal to give more weight to the 'subjective indicia' - how the applicant and the alleged de facto regarded the relationship - than to the 'objective indicia' - such as the existence of a sexual relationship, permanency and living under the same roof. The AAT did not accept that approach:

'...while the subjective indicia have to be considered, the decision maker has to look more to the objective indicia. Even in Re Smith (1985) 26 SSR 314 we note that the Tribunal said that 'where subjective considerations play so large a part, corroboration becomes highly desirable'.
(Reasons, para.30)

BUSH AND SECRETARY TO DSS (No. N86/66)
Decided: 27 February 1987 by A.P. Renouf, G.P. Nicholls and M.T. Lewis.

The AAT affirmed a DSS decision to recover an overpayment of $2,546 in supporting parent's benefit. This was raised because the DSS alleged that the applicant had not notified the Department that she had formed a de facto relationship.

The evidence was that she did not notify the DSS because although there had been a prior relationship the situtation relevant to the proceedings was not one of a *de facto* relationship. The applicant was living with Mr H as a matter of convenience in order that they could share accomodation. The lease was signed by the applicant but using the surname of Mr H. The applicant paid the bills and Mr H made a contribution. The applicant shopped for him. She did not clean his room. They had a separate social life. It was a very different relationship to the one they had had in the past when they were in a de facto relationship.

The Tribunal found that 'on the balance of probabilities' the relationship was quite different to that which they had had previously. But it was still a de facto relationship, albeit a bad one.

'The features in the relationship which support our view include that, at least with the estate agent, the couple presented as being married, Ms Bush signed a form 'J. Hudson', and they set up an independent living arrangement with their child notwithstanding that they occupied separate bedrooms and 'went their own way'. Beyond this, it is difficult to know the precise nature of the relationship, nor do we need to. If the couple were in fact legally married and experienced the same 'bad marriage' relationship they would, without a doubt, have been regarded for pension or benefits purposes as being married. To consider the relationship...in any other way merely because they are not legally married is inconsistent with the Act and indeed would place them in an advantaged position compared with married couples in similar circumstances.'
(Reasons, para.24)

Overpayment: amnesty

PATRON and SECRETARY TO DSS (No. N86/899)
Decided: 16 March 1987 by G.P. Nicholls

The applicant asked the AAT to review a decision of the DSS to refuse to apply the 'amnesty' provisions of the Social Security Act in respect of an overpayment of $912.40 in supporting parent's benefit.

The legislation
The Social Security Legislation Amendment Act 1986 provided in s.45 that where a person had failed to notify the DSS of changed circumstances which may affect their eligibility for a pension or the rate of their pension, then provided that they notify the Department of those changed circumstances by 31 May 1986 the person will not be guilty of an offence for failing to notify, nor will they be indebted for the amount that may have been overpaid.

It was a condition of the amnesty that the pensioner had not previously been informed that they were indebted to the Commonwealth due to an overpayment.

The facts
The applicant had been in receipt of supporting parent's benefit since 1983. In 1984 she undertook a course at a college for which she received a TEAS alllowance. She did not notify the DSS that she was in receipt of the allowance. It was in respect of this period that the overpayment was raised.

The DSS said that they notified the applicant by letter in May 1986 that recovery of the overpayment would be made. The applicant said that she never received that advice. On 30 May 1986 the applicant applied for the amnesty under the above legislation.

However, the AAT found that the applicant was vague as to the details of the date on which she had completed the amnesty form. She said that she completed and dated the form on 22 May but did not lodge it until the 30 May. Yet the applicant could remember clearly the people she spoke to about the amnesty and the actual words on the amnesty form.

This led the Tribunal to conclude that it was more likely than not that the applicant did receive the letter from the DSS on or before 28 May and that her amnesty form could not be treated as having been lodged prior to 30 May.

As a result of this finding the Tribunal found that the applicant could not satisfy the condition precedent to the operation of the amnesty provisions. She had been informed in writing of the overpayment prior to her application for amnesty.

There was no case for the application of the waiver provisions in s.146 of the Act. A repayment of $20 per fortnight would not impose a real financial burden on the applicant.

Formal decision
The AAT affirmed the decision under review.