operative warrant some kind of financial aid. But this Tribunal is (as was the Director-General) bound to apply the provisions of the Act and it does not seem to us that the applicant's case falls within these provisions.

Is job creation consistent with 'unemployment'?

The AAT concentrated on two questions: could McKenna be said to be 'unemployed'; and could he be said to be 'willing to undertake paid work'? On the first issue, the AAT said:

> 11. The apparent legislative intent of the provisions of the Act concerned with eligibility for and payment of unemployment benefit is to provide those people who are not engaged in work of a remunerative nature with the means of subsistence in circumstances where, despite capacity, willingness and effort on their part, they have been unable to find paid work to maintain themselves. It is in this context that the word 'unemployed' is used, coupled with the other words in sub-section (c)(i) 'and was capable of undertaking and was willing to undertake paid work and that in the opinion of the Director-General was suitable to be undertaken by the person'. [Sub-paragraph (ii)] requires satisfaction on the part of the Director-General that reasonable efforts have been made to obtain paid work. When regarded in the context of the apparent legislative intent and the other terms and expressions used in the sub-section, it seems to us that the word 'unemployed' bears its colloquial or popular meaning of not being engaged in work of a remunerative nature. This meaning must, however, be modified to some extent in that the means test provisions of the Act recognize that some income may be earned by a grantee of an unemployment benefit resulting in the diminution of the grant but without destroying eligibility for it. It must also be modified to allow for those special cases where a person is not engaged in work of a remunerative nature but whose commitment to some activity, e.g. study or domestic duties demonstrates a preference for that activity rather than employment. Cf. *Re Thomson and Director-General of Social Services* [see this issue of the *Reporter*].
>
> 12. Turning to the facts of the present case it appears that, throughout the currency of his grant, the applicant was very actively engaged in the work of the co-operative group. In his statement of 9 June 1980, which has been referred to above, he said that he was engaged for 8 hours per day 5 days per week. The objective of the co-operative was to provide remunerative employment for those participating in it. There is no evidence before us of the financial results of the enterprise but from the picture painted by the applicant it appears that from a somewhat shaky start the enterprise got on its feet. In answer to a question put to him at the hearing before us the applicant agreed that he did not regard himself as unemployed. It appears to us that, in effect the applicant was actively engaged in the development and running of a labour intensive business with the object of making a living for those participating in it. Upon consideration of the whole of the evidence, we are not satisfied that at the relevant time the applicant was 'unemployed' within the meaning of that term in sub-section (c)(i).

Unemployment benefit: Opal prospecting & mining

BRABENEC and DIRECTOR-GENERAL OF SOCIAL SERVICES (No. S80/19)

Decided: 5 June 1981 by R. K. Todd, L. G. Oxby and P. C. Wickens.

Jaroslav Brabenec had migrated to Australia from Czechoslovakia and had worked as an opal miner at Andamooka (South Australia) for 14 years. In February 1979 he went to Melbourne where he had some casual work. He applied for unemployment benefit and this was granted from 17 April 1979. At some date after this (which is not specified in the reasons for decision) he left his wife and child in Melbourne and returned to Andamooka where he took out a miner's permit and worked several claims for 40–50 hours a week, but without finding any opal.

On 31 December 1979 the DSS cancelled Brabenec's unemployment benefit. He appealed through an SSAT to the AAT. The DSS defended the cancellation on the ground that Brabenec was not, while working the mining claims, unemployed, nor was he taking reasonable steps to obtain paid work. (See s.107(1)(c), *Social Services Act*, set out in *Thomson*, in this issue of the *Reporter*.)

The AAT agreed that Brabenec was not unemployed: he was 'working full-time as a self-employed opal miner . . . for 40 to 50 hours per week. He was, in this situation, no more "unemployed" than any person setting himself up on his own in a profession, trade or business (cf s.130A of the Act)': Reasons for Decision, para. 9.

(Section 130A obliges a person on unemployment, sickness or special benefit to notify the DSS immediately if the person commences paid employment or commences to carry on a profession, trade or business.)

The AAT did not find it necessary to make any finding on the issue of 'reasonable steps to obtain work', and affirmed the decision to cancel Brabenec's unemployment benefit.

At the conclusion of its Reasons for Decision, the AAT referred to the 'desperate position' in which Brabenec was placed when his unemployment benefit was cancelled: he was in Andamooka, a remote settlement with no employment prospects; he had no money and his dependants were in Melbourne. The AAT suggested that, in these circumstances, the DSS could have made a payment of special benefit to Brabenec. Special benefit is payable to a person who is not eligible for unemployment benefit and who is 'unable to earn a sufficient livelihood for himself and his dependents': s.124(1), *Social Services Act*. A payment could have been made to Brabenec 'in order to enable him to move to a place where he could "earn a sufficient livelihood for himself and his dependents"'. The AAT pointed out that s.145 of the *Social Services Act* permits the DSS to treat a claim for an inappropriate benefit as a claim for the appropriate benefits: Reasons for Decision, para. 11.

Unemployment benefit: Steps to obtain work

STEWART and DIRECTOR-GENERAL OF SOCIAL SERVICES (No. Q81/31)

Decided: 10 April 1981 by J. B. K. Williams, W. Tickle and I. Prowse.

Gavin Stewart ('about 20 years of age') had been paid unemployment and sickness benefits over the period between January 1978 and July 1980. In July 1980 he was being paid unemployment benefit.

On 7 July 1980 the Commonwealth Employment Service (CES) wrote to Stewart asking him to attend for interview at 8.45 a.m. on 14 July. Stewart did not attend.

On 17 July 1980 the Department of Social Security (DSS) wrote to Stewart. After referring to his failure to attend the interview, the DSS said:

> By your actions it cannot be accepted that you are taking sufficient steps to obain work. You are therefore no longer eligible to receive unemployment benefit and payment of benefit has been terminated.

Stewart appealed unsuccessfully to an SSAT and then applied to the AAT for review of the decision terminating his unemployment benefit. The DSS argued that Stewart had not taken reasonable steps to obtain work, as required by s.107(1)(c)(ii) of the *Social Services Act* (set out in *Thomson* in this issue of the *Reporter*).

This issue revolved around Stewart's failure to attend the interview on 14 July 1980. Stewart told the AAT that he had been unable to attend that interview because he had a job interview at the same time. However, he conceded that the purpose of the interview was to arrange his attendance at a work adjustment programme, which he was unwilling to attend because it would interfere with his immediate attempts to find work.

During the AAT hearing, Stewart accepted a suggestion from the Tribunal and undertook to attend the work adjustment programme. On the basis of that undertaking and of Stewart's evidence that he had regularly applied for jobs (evidence supported by the last fortnightly 'income statement' he had lodged), the AAT decided that he was '*bona fide* in his desire to obtain full employment' and had 'fulfilled the requirements of s.107(1)(c) of the Social Services Act': Reasons for Decision, paras 14, 15.