tance under s.1064D of the *Social Security Act 1991*. The issue was whether she qualified for an additional amount of rent assistance because of the $154 she paid every 4 weeks towards the deferred balance of the entry contribution.

The law

The AAT considered the definition of 'rent' in s.13(2) of the Act and the provisions of s.1147 and s.1148 which concern entry contributions paid by residents of retirement villages. The AAT said that the provisions were ambiguous, but allowed an interpretation favourable to Knight. The AAT accepted as submitted on behalf of Knight that s.1147(1C)(a) implied an entry contribution could be 'rent' for the purposes of the Act. The Act had varied the common law definition of rent so as to include payment for occupation of premises between parties who were not necessarily landlord and tenant.

Knight could be seen as paying two rent components:

- an amount which was a condition of occupancy under s.13(2)(a)(i); and
- an amount paid 'for services provided in a retirement village, that is the person's principal home' under s.13(2)(a)(ii) of the Act.

The AAT distinguished the case of *Whelan and Secretary, Department of Social Security* (1987) 14 ALD 185, on its facts.

Formal decision

The AAT affirmed the decision under review.

[G.H.]

Family payment overpayment: notifiable event

SECRETARY TO DSS and ARCHER (No. 10712)

Decided: 5 February 1996 by D.W. Muller.

The DSS raised an overpayment of family payment (FP) of $2343 for the period July 1992 to June 1993 on the basis that Archer failed to notify a 'notifiable event'.

Background

Mr and Mrs Archer operate a plant nursery business. Archer was granted FP in May 1991 following the birth of their sixth child.

In October 1991 Archer advised the DSS that her 1990-91 combined taxable income was $50,612. She estimated that her 1991-92 combined income would be $53,000. Her actual 1991-92 combined income was $70,021. Archer did not advise the DSS of this.

In October 1993 Archer responded to a request for information by advising the DSS that her 1992-93 combined income was $94,500. During the period the DSS had written to Archer twice. In a letter dated 21 December 1991 she was informed of her 1992 FP entitlement. On the back of the letter was a request to contact the DSS if her combined income was likely to exceed $64,167 (that is the one child threshold). In January 1993 a letter was sent relating to the 1993 entitlement. It contained a similar request to contact the DSS if her combined income was likely to exceed $64,938.

Throughout the period Archer's FP income threshold was between $74,000-77,000.

The issue

The issue the AAT considered was whether or not Archer failed to notify a 'notifiable event'.

The legislation

Section 872 *Social Security Act 1991* provides for the service of notices seeking information by the DSS to FP recipients. Section 872(2) states that an event or change of circumstances is not to be specified in a notice unless it may affect the payment of FP.

Notifiable event

The AAT concluded that the letters sent to Archer on 21 December 1991 and in January 1993 did not contain a valid notifiable event, as the threshold for Archer of $77,000 far exceeded that of $64,167 shown in the letter. The letter did not require Archer to notify the DSS if her combined income increased by more than 25%. Thus Archer did not fail to notify the DSS of a notifiable event, and there was no overpayment to her.

In reaching this decision, the AAT referred to the error made by the DSS and the SSAT in assuming that the increase in income by more than 25% during the 1992-93 financial year was a 'notifiable event'. The SSAT, setting aside the DSS decision, did so on the basis that, due to the unpredictable nature of their business, Archer was not alerted to the increase in income by any specific event during the 1992-93 financial year.

Formal decision

The AAT affirmed the decision of the SSAT that there was no debt but for different reasons.

[A.A.]

Overpayment and write off: intellectual disability

McCAGH and SECRETARY TO DSS (No. 10618)

Decided: 20 December 1995 by T.E. Barnett, J.G. Billings and P.A. Staer.

The DSS raised an overpayment of invalid pension (IP) and disability support pension (DSP) totalling $11,150 for the period June 1991 to December 1992. The overpayment arose because McCagh did not inform the DSS that he had obtained employment.

Background

McCagh had an intellectual disability and was illiterate. He was in receipt of IP and then DSP. The DSS had issued notices to him telling him to inform them if he found work. McCagh obtained work but did not tell the DSS. He assumed that his employment program coordinator had notified the DSS, as had happened on previous occasions.

Mr and Mrs McCagh's financial circumstances were poor with expenses exceeding their income from pensions. They had no savings and no assets other than a car which required repair.

The issues

There was no dispute that an overpayment of IP and DSP had occurred. The issues to be considered by the AAT were:

- whether there had been a contravention of the Act leading to a recoverable debt;
- if there was a recoverable debt, whether it could be written off.

The arguments

The submission on behalf of McCagh was that there was no debt pursuant to s1224, as McCagh did not contravene s.163(5) of the *Social Security Act 1947*. It was argued that the only part of s.163 which contains an obligation to comply with a notice served by the DSS, is s.163(5). This subsection makes provi-

sion for a reasonable excuse, and McCagh had a reasonable excuse in that due to his intellectual disability, he was incapable of complying with the notice.

Whilst accepting that McCagh was incapable of complying with the notice, the DSS argument was that the requirement to notify is contained in s.163(1) and that s.163(5) relates only to the discretion to lay criminal charges. As McCagh had contravened s.163(1) a recoverable debt existed.

The debt

The AAT found that a recoverable debt existed. Mr McCagh had a duty to notify changes of circumstances by virtue of s.163 of the 1947 Act and s.132 of the 1991 Act. Section 163(5) only provides a defence to any criminal charges relating to compliance.

Section 1236 of the 1991 Act allows the Secretary to write off a debt where apropriate. Writing off a debt means that it is unlikely that the debt will be recovered. The AAT applied the factors outlined in the Federal Court decision of *Hales* (1983) 47 ALR 281 as they were summarised in *Waller* (1985) 8 ALD 26 at p.42 in considering write off. It concluded that in view of the circumstances in which the overpayment arose, and the significant financial hardship of Mr and Mrs McCagh, that recovery of the debt should be written off pursuant to s.1236.

Formal decision

The AAT set aside the decision under review and substituted the following decision:

- There was an overpayment of IP and DSP totalling $11,150 and it is a debt to the Commonwealth.
- The balance of the overpayment outstanding at the date of the application be written off.

[A.A.]

Drought relief payment: meaning of 'farmer'

SECRETARY TO DSS and BREDHAUER (No. 10657)

Decided: 16 January 1996 by D.W. Muller.

The facts

The farm enterprise in this case was operated by a family trust and a partnership. The beneficiaries of the family trust were Mr and Mrs Bredhauer and their 4 children. The respondent in this case was an adult daughter of Mr and Mrs Bredhauer, and was a beneficiary of the trust, but was not a partner in the partnership company.

Two properties were involved in the farm enterprise, one being owned by Mrs Bredhauer, the other having been purchased by way of bank loan taken out by a company acting as the trustee for the family trust. That loan was personally guaranteed by all of the beneficiaries of the trust. Mr Bredhauer and Mrs Bredhauer were the registered proprietors of that property.

The respondent worked for little or no wages for the farm enterprise because of its parlous state during the drought, and had also done a small amount of work outside the farms to earn money in order to survive. All members of the trust had entered into an agreement whereby work done for the farms by each person would be given 'value agreed credits' to be redeemed when the enterprise became profitable, if the farms should be sold, or if the parents died.

The issue

A 'Drought Exceptional Circumstances Certificate' was issued in respect of the respondent, but the DSS argued that she was not a 'farmer' as defined in s.3(2) of the *Farm Household Support Act 1992*. That section required that she have a right or interest in the land used for the purposes of a farm enterprise, that she contribute a significant part of her labour and capital to the farm enterprise, and that she derive a significant part of her income from the farm enterprise. The DSS argued that she satisfied none of these criteria, and was hence not qualified for drought relief payment under s.8A(1) of that Act.

The meaning of 'farmer'

The AAT looked to the aims of the legislation and determined that the respondent fell within the category of persons the legislation was meant to benefit.

The Tribunal found that the respondent had a right or interest in one of the properties as a beneficiary of the family trust which operated the farm enterprise, and because she was also personally liable for the mortgage taken out to buy that property. In addition, she had a stake in the 'value agreed credits' arrangement which would ultimately entitle her to a percentage of the profits or of the value of the land.

The Tribunal regarded the respondent's unpaid work and the 'value agreed credits' as amounting to a contribution of capital. Further, the Tribunal found that the respondent had contributed a significant part of her labour to the farming enterprise, from which she would have derived a significant part of her income if there had not been a drought. The Tribunal noted that it would be a curious result if she was denied drought relief payment simply because she could not receive much in the way of income from the farming enterprise as a result of the drought.

Formal decision

The AAT affirmed the decision of the SSAT that the respondent qualified for drought relief payment with effect from the date of her claim.

[A.T.]

Newstart allowance: unemployed

Sickness allowance: temporary incapacity

BOSKOVIC and SECRETARY TO DSS (No. 10738)

Decided: 14 February 1996 by M.T. Lewis.

The AAT was asked by Boskovic to review two decisions of the DSS, both of which had been affirmed by the SSAT. The first decision was to cancel payment of newstart allowance from 30 May 1994, and the second decision was to reject Boskovic's claim for sickness al-