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-

lowance because he was fit for light work.

In May 1994 the AAT had affirmed an earlier decision of the DSS to cancel payment of disability support pension to Boskovic ((1994) 80 *SSR* 1171). This decision had been affirmed by the Federal Court ((1995) 83 *SSR* 1222).

Newstart allowance: the facts

In the earlier decision of the AAT, it had been found that Boskovic had been engaged in a roadside flower selling business. Evidence was provided at the hearing that Boskovic had worked approximately 300 days in the last 10 years selling flowers. According to Boskovic his son had taken over the business in June 1994. The son had closed the business down after 3 months because he did not make enough money. The DSS was satisfied that Boskovic ceased the business in June 1995, and he had been paid job search allowance from then. Therefore, the period under review was from June 1994 to June 1995.

The law

Section 593 of the *Social Security Act 1991* sets out the qualifications for newstart allowance. One of the requirements is that the person be unemployed throughout the period. The AAT decided: 'That the onus is on the applicant [Boskovic] to demonstrate that he was unemployed for the period 7 June 1994 to 14 June 1995': Reasons, para. 6.

The AAT found that Boscovic's evidence contradicted earlier evidence which had been provided to the AAT. It cited numerous examples of contradictory evidence and, in particular, evidence that Boskovic had held a Hawker's licence in 1994, and in 1995 until May. Boskovic was unable to give a precise estimate of his weekly earnings, and became evasive when answering questions about where the earnings had been held. The AAT concluded that:

> 'The applicant has been self employed as a flower seller over a number of years, and he has not provided corroborative evidence that during the period 7 June 1994 to 14 June 1995, the period under review, he had ceased being employed in that business.'

(Reasons, para. 24)

According to the AAT, Boskovic had been underemployed in the flower selling business, and had been fit for light work throughout the period. There was no evidence that Boskovic had been looking for work during the period, despite his evidence to the contrary. Boskovic had been pursuing a claim for sickness allowance for most of the relevant period. Therefore, he was not qualified to receive newstart allowance.

Sickness allowance — the facts

Boskovic told the AAT that during the winter months he was affected by arthritis, having pain in every joint. A DSS officer had observed in a file note, that Boskovic had limped into his office but had left walking normally. He also recorded that he did not accept the medical certificate dated 6 July 1994 provided by Boskovic's doctor because the doctor: 'is not to be believed, as I am personally aware of his practices': Reasons, para. 9. Boskovic was referred to a Commonwealth Medical Officer who found that he was fit for light work. No reference was made in that medical report to Boskovic suffering from a temporary condition such as sinusitis or bronchitis.

Boskovic obtained another medical certificate on 16 August 1994 in which his doctor stated that he was unfit for work because of bronchitis and influenza. At the hearing, Boskovic told the AAT that he had difficulty walking because of his arthritis, he had headaches as a result of a fractured skull, and he had lost an eye.

The law

Section 666 of the Act sets out the qualifications for sickness allowance, which include that a person must be incapacitated for work throughout the period because of a sickness or accident, and that incapacity must be of a temporary nature. The AAT stated that it must decided: 'whether the applicant has suffered a temporary incapacity to work, and whether except for that incapacity he would be either working or receiving JSA': Reasons, para. 7.

The AAT found that there was evidence before it, namely the medical certificate of 16 August 1994, which showed that Boskovic was temporarily incapacitated for work because of influenza and bronchitis from 16 August 1994 to 15 September 1994. This evidence had not been challenged. A later medical certificate from the same doctor did not refer to influenza or bronchitis. The AAT concluded that Boskovic was temporarily incapacitated for work from 16 August 1994 to 15 September 1994.

Formal decision

The AAT decided:

- to affirm the decision to cancel newstart allowance; and
- to set aside the decision not pay sickness allowance in relation to the claim lodged on 17 August 1994.

[C. H.]

[Editor's Note: The onus of proof placed on Boskovic by the AAT to show that he was unemployed during the relevant period would seem to be contrary to the pronouncements of the Federal Court in *McDonald v Director General of Social Security* (1984) 6 ALD 6. In *McDonald* the court had decided that there is no onus of proof in these administrative proceedings. However, where the DSS has cancelled a pension, the circumstances might indicate that the DSS should show that the person is no longer qualified to receive that pension. A similar argument might be mounted in this case.]

Special circumstances, waiver and write-off

SECRETARY TO DSS and DUZEVICH (No. 10752)

Decided: 19 February 1996 by S.D. Hotop.

The SSAT had decided to treat the whole of periodic compensation received by Duzevich as not having been made, and therefore decided that social security payments made during the same period as compensation were not recoverable. The DSS appealed this decision to the AAT.

The facts

Duzevich had sustained an injury in the course of her employment whilst living in New Zealand. She had received periodic compensation from the New Zealand Accident Compensation Corporation for the period 24 July 1985 to 19 September 1989.

Duzevich arrived in Australia in 1988, whereupon in July 1989, the Accident Compensation Corporation decided that she was no longer entitled to payments. In May 1992, Duzevich sought review of the Corporation's decision, and in March 1994, the Corporation agreed to restore payment with arrears from September 1989.

The DSS advised Duzevich by letter in early September 1994 that receipt of compensation would cause social security payments to be recoverable. In late September 1994 the corporation advised that the amount of $NZ 41,625, after tax, was credited to her bank account, being arrears for the period September 1989 to June 1992.

The DSS then gave Duzevich notice that $14,633.26 was to be repaid to the DSS.