that matter addressed in the letter of the ARO dated 25 June 1993. That letter asserted only that Bartlett had failed to reach agreement with the CES on the contents of his new agreement. It simply provided notice of the decision to affirm the cancellation of his allowance under s.600I, the reasons for that, and his right to apply for review. The ARO's letter did not refer to any of the matters in s.607(1)(b).

The AAT held, therefore, that Bartlett's allowance had been cancelled under s.660I without any decision first having been made to give him notice under paragraph 607(1)(c), and without any notice pursuant to that paragraph ever having been given.

Was a proposed requirement proper?

The AAT stated that at all material times Bartlett was prepared to enter into another Newstart Activity Agreement. This was indicated by the evidence of the two interviews he had. Bartlett's reason for not entering a new agreement was that he did not agree with the requirement that he provide copies of all job applications. The DSS gave two possible reasons for insisting on the inclusion of such a term. The first was a desire to check up on whether he was truly complying with the requirements of the Act, and the second was to evaluate the quality of his applications with a view to helping him write better ones.

The AAT did not consider the first of these two motives was proper, and pointed out that the Newstart Activity Agreement provisions detracted from the operation of the common law principle of freedom of contract. On that basis, the provisions should be read narrowly: they should not be construed as authorising the inclusion of contractual terms purely for the purposes of monitoring an allowance recipient's compliance with the Act.

The AAT then considered the other rationale, i.e. to help him write job applications, but did not consider that it had been established that this would have maximised his chances of securing interviews, and ultimately finding employment.

The AAT held that in all the circumstances it was not prepared to make a finding that Bartlett's unwillingness to produce those applications suggested an unwillingness to enter into a fresh Newstart Activity Agreement. Therefore, at all material times Bartlett satisfied paragraph 593(1)(d).

As it was not disputed that in all other respects Bartlett satisfied the criteria for qualification for a newstart allowance set out in s.593(1), the AAT set aside the decision under review.

CES Policy Manual

The AAT also considered some extracts of the CES Policy Manual and pointed out that the part dealing with deeming a person to have failed to come to agreement on the contents of a Newstart Activity Agreement had no legal basis at all. It was therefore suggested that those paragraphs were misleading; it was considered desirable that they be rewritten as a matter of urgency.

Formal decision

The AAT set aside the decision under review and remitted the matter to the DSS for reconsideration with a direction that Bartlett continued to be entitled to payment of newstart allowance from 24 June 1993, at least until the commencement of the period in which his partner was subsequently paid job search allowance.

[R.G.]

Child disability allowance: child's behavioural problems

KELLY and SECRETARY TO DSS (No. 9543)

Decided: 14 June 1994 by K.L. Beddoe.

Kelly applied for a child disability allowance (CDA) on 2 June 1992 and her application was refused by the DSS. This decision was affirmed by the SSAT and Kelly sought review by the AAT.

The legislation

Section 954 of the *Social Security Act* sets out the basic qualification for CDA. A person may receive CDA if the young person in respect of whom the allowance is paid is a 'CDA child of the person'. The child must be a disabled child as provided by s.952 of the Act:

> 'Subject to section 953, a young person is a disabled child if:
>
> (a) the young person has a physical intellectual or psychiatric disability; and
>
> (b) because of that disability the young person:
>
> (i) needs care and attention from another person on a daily basis; and
>
> (ii) the care and attention needed by the young person is substantially more than that needed by a young person of the same age who does not have a physical, intellectual or psychiatric disability; and
>
> (c) the young person is likely to need that care and attention for an extended period.'

The facts

Kelly had an 11-year-old son named Scott, who suffered from asthma, chronic nasal obstructions, sleep apnoea and various adverse behavioural problems. Kelly told the AAT that she had problems disciplining her son and gave examples that he refused to eat the meal that she had prepared for the family, turned on the television too loudly and ignored requests to turn it down, and refused to voluntarily undertake treatment for his asthma.

The AAT commented that the oral evidence of Kelly was grossly exaggerated as to the circumstances. Nevertheless, the AAT was satisfied that the son had a severe discipline problem which resulted in anti-social behaviour. The AAT relied on a report by Mr Chittenden, a registered psychologist who found that as well as his physical problems which required monitoring, Scott did have behavioural problems and also appeared to have a learning difficulty.

A physical, intellectual or psychiatric disability?

The AAT referred to the case of *Blades and the Secretary to DSS* (1993) 76 *SSR* 1103 where it was considered that in order for a child to be regarded as having a disability, there must be a physical, intellectual or psychiatric impairment which, 'without treatment or care or attention, limits the child's capacity to engage in ordinary activities or ordinary life or in his or her ability to meet personal demands': Reasons, para.28.

The AAT found that Scott was disabled as defined by s.952 of the *Social Security Act 1991* because of his asthma, and his heart and sleeping conditions. In assessing whether Scott required substantially more care and attention than a child without a disability, the AAT took into account his behavioural problems. The AAT found that these behavioural difficulties resulted in him being 'disabled to a

greater extent than the normal situation': Reasons,para.25.

The AAT found that Scott required substantially more care and attention than that required by a young person of the same age because of a combination of his disabilities and adverse behavioural patterns. The AAT indicated that greater degree of care and attention was likely to continue for at least the foreseeable future.

Formal decision
The AAT allowed the appeal and decided that CDA would be payable from June 1992 to the end of June 1995. If Kelly were to seek further payment of CDA after June 1995, she would be required to lodge a new application with the DSS.

[H.B.]

Disability support pension: evidence of ability to work

BOSKOVIC and SECRETARY TO DSS
(No. 9488)
Decided: 23 May 1994 by K.L. Beddoe.

Boskovic requested that the AAT review the decision of the SSAT rejecting his claim for disability support pension (DSP).

The issues
There were two issues before the AAT. Firstly whether or not Boskovic had a physical, intellectual or psychiatric impairment of 20% or more under Schedule 1B of the *Social Security Act 1991*. Secondly, whether or not Boskovic had a continuing inability to work as required under s.94 of the same act.

The facts
Boskovic had previously been in receipt of an invalid pension under the *Social Security Act 1947*. He had been assigned an impairment rating of 35%; a 25% impairment for blindness in his right eye and a 10% impairment for arthritis in both knees. Additionally, there was a recognised condition of arthritis in one ankle.

Boskovic had worked at his own business since 1988, selling flowers by the roadside. He worked at this business from 2 p.m. till 7 p.m. each day, and it sometimes required him to work longer hours. Boskovic also drove to Sydney once each week so he could purchase stock. In evidence before the AAT, he mentioned that his wife was also involved but sold flowers at a different location. Boskovic's situation had been investigated by the Australian Taxation office as well as the DSS for some time.

His impairments under Schedule 1B of the 1991 Act had been assessed at 10% for arthritis of both knees by a Commonwealth Medical Officer. The CMO assigned a nil ratings for his vision problems and for post concussion syndrome. Boskovic objected to this impairment rating, so he was examined by another Commonwealth Medical Officer. He was assigned a 25% impairment rating for his disabilities.

Notwithstanding this higher impairment rating the DSS decided that Boskovic was still not entitled to DSP as he did not have a continuing inability to work. The DSS contended that his involvement with the flower selling business was evidence of this.

Work activity
The AAT accepted that Boskovic had a 25% impairment rating, but decided he did not have a continuing inability to work.

Boskovic submitted in evidence to the AAT that the business was unprofitable, required little attention and was therefore not evidence of an ability to work. The AAT examined the finances of the business and found that he had declared the gross income of the business to be $500 net per week in a finance application for purchase of a carry van. Evidence before the AAT showed that Boskovic had traded this van in 1990, purchasing a new Ford Econovan priced at $23,900. He claimed that the purchase was made possible by gambling profit. Further, this van was also traded on a Toyota Hi Ace van in 1993 which Boskovic claimed was also financed by gambling. Contrary to this, Boskovic stated in evidence that he never made more then $80 a week from selling flowers, and sometimes made nothing.

The AAT established that Boskovic regularly operated the flower van between 1991 and 1993. It found that he was obviously capable of performing light duties, but not necessarily other kinds of work. The AAT found that some testimony given by Boskovic in relation to his business activities was false, and not a frank and true account of his affairs. The AAT concluded that the flower selling business was reasonably successful and was conducted for at least 40 hours per week.

Additionally, the AAT found that there was no principle of law which required them to find that just because the Australian Taxation Office fails to assess income, that Boskovic did not derive income.

Formal decision
The AAT decided that Boskovvic did not have a continuing inability to work and affirmed the decision under review.

[B.M.]

Disability support pension: application of impairment tables

SECRETARY TO DSS and BELL
(No. 9454)
Decided: 4 May 1994 by K.L. Beddoe, E.K. Christie and K.P. Kennedy.

The DSS appealed to the AAT for review of the SSAT decision that Bell was entitled to receive the disability support pension (DSP).

The issues
The issue before the AAT was whether or not Bell had an impairment of 20% or more pursuant to Schedule 1B of the *Social Security Act 1991*. The DSS claimed that the decision of the SSAT was not justified by the available medical evidence.

The medical evidence
Several medical practitioners gave evidence in this hearing. Dr Rolls gave evidence that he did not physically examine Bell, but had reviewed reports of two Commonwealth Medical Officers as well as Bell's own medical practitioners. Dr Rolls stated that the assessment of a 30% impairment under Table 26.4 was not appropriate because Table 26.4 dealt with intermittent conditions, whereas Bell's condition was definitely chronic. Dr Rolls concluded that, although Bell was not fit to perform his usual work, he would be capable of light duties.

Dr Rolls stated that in his opinion