v McMahon, Pincus J, by whose judgment I am bound, decided that the Tribunal could not review a matter expressly determined by its previous decisions. He reached that conclusion on the basis that those previous decisions had been made as a result of consent orders made pursuant to the Tribunal's powers under section 43. Consequently, it is settled by *Boggard's case* that when the Tribunal deals directly with a decision under review by exercising its powers under section 43, it is *functus officio*... It is arguable that this is also applicable to decisions made under sub-section 34(2).

Boggards' case does not deal with an order made under section 42A(1) and I do not consider that it is applicable in its terms to such an order. Section 43 deals with the Tribunal's powers "for the purpose of reviewing a decision". Sub-section 34(2) deals with the Tribunal's power to make a decision in certain circumstances where the parties agree on what the terms of that decision should be. The Tribunal must be satisfied that it is within its powers and these powers would include its powers under section 43 for the purpose of reviewing a decision. There is a distinction then between the provisions in sections 34 and 43 which deal with the power of the Tribunal to make decisions and, directly or indirectly, to exercise powers of review and sub-section 42A(1) which specifically provides that the Tribunal may dismiss an application "without proceeding to review the decision" or if it has commenced to do so, without completing that review. If an order is made under section 42A(1) it may be that the Tribunal has never exercised its powers of review pursuant to section 43.'

(Reasons, pp.16-17)

Thus the AAT drew a distinction between 2 different powers of the Tribunal under ss.42A and 43. The first related to the application and the second to the review of the decision. This accorded with the approach in *Nolan* and *Babiker*. The AAT continued:

'It follows that the Tribunal may have exercised all of its powers in relation to a particular application when it dismisses it but it does not follow that it has exercised all of its powers in relation to the review of a decision. It follows that the applicant may bring a fresh application to review that decision. There is some weight added to this view by the fact that there is no condition or limitation placed on the power given to the Tribunal under section 43 to review a decision i.e. it is not limited to review of decisions in relation to which an application has previously been made.'

(Reasons, pp. 17-18)

The Tribunal sounded a note of caution:

'... I would observe that this interpretation does not give *carte blanche* to any applicant whose application has been dismissed to bring an endless line of fresh applications. Once the original application has been dismissed, his subsequent applications will usually be out of time. He will need to seek an extension of time and make out a case for such an extension.'

(Reasons, p.18)

Application of the law to the facts

The AAT then proceeded to consider the particular facts in this case to determine whether it could entertain the third application.

The Tribunal concluded that it was unable to do so. Although it could not have reinstated the first application once it was dismissed it was still able to exercise jurisdiction in relation to review of the decision as it had not begun to review the merits of the decision.

However, the order made with respect to Nicholson's second application was in different terms. It had stated that 'the Tribunal has no jurisdiction to receive' the application. As the Tribunal could not review its own earlier decisions and thus go behind the correctness of this order, the case came down to the Tribunal deciding on the second application that it had exhausted its jurisdiction. In part this also involved an analysis of whether the Tribunal on the second application was deciding whether it could entertain an application to reinstate the first application or an application to review the decision on its merits. The AAT concluded with respect to the second application that:

'... the Tribunal has considered whether an application can be made to review the decision. It decided on the second application that it had no jurisdiction to do so. It seems to me that it follows that the Tribunal is *functus officio* on that point. Had it been decided on the second application that, for example, the first application could not be reinstated then the third application could still have been brought. The Tribunal would only have been *functus officio* in relation to the issue of reinstatement. The direction on the second application, however, was far more wide-ranging and cannot be limited simply to reinstatement or to the lodgment of the second application itself. It is expressed in far more wide-reaching terms.'

(Reasons, p.22).

The AAT expressed some sympathy with the applicant, but noted that it must 'follow the law even though [it] would wish to find otherwise'.

Criticism of DSS

The AAT concluded by making a criticism of the DSS. It commented that, during the proceedings, the Department conducted a further review of the case and corresponded with the applicant indicating that it would now refund part of the moneys. The Tribunal said:

'Some aspects of the review and the Department's subsequent correspondence with Mr Nicholson have caused me some concern. It is quite proper for the Department to conduct a review at any time, even if an application has been made to this Tribunal... I am concerned, however, with the terms in which Mr Nicholson was advised. While noting that the decision on review did not dispose of his current application, the letter dated 18 June 1990 took no account of the fact that, if Mr Nicholson were successful in his current application, that decision would be substituted for the original decision by virtue of s.206. It expressly gave the impression that he had to start all over again. That has been the conclusion I have in fact reached but, for the Department to so advise an applicant while proceedings were on foot in this Tribunal causes me considerable disquiet.'

(Reasons, p.26)

Formal decision

The Tribunal decided that it had no jurisdiction to accept the application.

[B.S.]

Recovery of overpayment: no evidence of cause of overpayment

SECRETARY TO DSS and ROWE (No. T90/30)

Decided: 26 October 1990 by R.C Jennings.

The Secretary sought review of a decision of the SSAT which had set aside a decision that Rowe had been overpaid $1520.45 by reason of his failure to declare his wife's earnings between September and November 1987.

Because the Department had destroyed all but one of Rowe's income statements for the relevant period before notifying him of the overpayment, the SSAT had substituted a decision that –

(1) no overpayment existed,
(2) recovery of any moneys from Rowe was inappropriate, and
(3) the DSS should refund any moneys already recovered.

On behalf of the DSS it was conceded before the AAT that the DSS was unable to prove that the overpayment was in consequence of any false statement or representation by Rowe or of any failure or omission by Rowe to comply with any provision of the *Social Security Act*, and that therefore recovery was not available under s.246(1) of the Act.

However the DSS argued that his inability to prove a breach did not impede 'administrative as distinct from legal recovery' under the general law, e.g. by virtue of a mistake of fact, or alternatively under s.246(2)(c) of the Act.

The latter section provides that, where an amount has been paid by way of pension, benefit or allowance that should not have been paid, and the recipient of the overpayment is receiving or entitled to receive a pension, benefit or allowance, the overpayment shall, unless waived by the Secretary under s.251(1), be recovered by withholding a proportion of the person's payments.

The Tribunal accepted the Department's argument and found that the SSAT was wrong in directing that the moneys already recovered from Rowe should be refunded to him.

In view of the inadequacy of the material placed before it by the DSS, the Tribunal chose not to make any finding that 'an amount has been paid by way of benefit . . . that should not have been paid'. The Tribunal remarked that it was unclear that the Secretary had power to make such a determination.

At the time of the hearing, Rowe was not receiving or entitled to receive any pension, benefit or allowance and therefore recovery under s.246(2) was not available. The AAT decided that any recovery action should be deferred until such time as that condition of s.246(2) should be met. At that time the Secretary would need to consider whether to exercise the power of waiver under s.251(1).

[P.O'C.]

Compensation award: recovery of sickness benefits

MORGANTE and SECRETARY TO DSS
(No. 6136)
Decided: 24 August 1990 by S.A. Forgie.

Pasqualeno Morgante suffered a work injury in 1984 and 1985. He received worker's compensation payments until April 1985, when he was granted sickness benefit, which continued until May 1987.

In March 1987, Morgante settled a claim for a lump sum worker's compensation for $5 000, made up as follows:

- $40 000 for compensation under ss.69 and 70 of the *Workers' Compensation Act* 1971 (SA);
- $5000 for redemption of the employer's liability to pay future medical expenses; and
- $10 000 for redemption of Pilgrim's right to bring a common law action against the employer.

The DSS then decided that $22 856 of the compensation award was a payment for the same incapacity for which Morgante had received sickness benefit; and that he should repay $5949.40 of the benefit payments.

After an unsuccessful appeal to the SSAT, Morgante asked the AAT to review the DSS decision.

The legislation

At the time when Morgante received his sickness benefit and the compensation award was made, s.115B(3A) of the *Social Security Act* provided that a person, who received sickness benefit payments for an incapacity and also received (after June 1986) compensation payments 'in respect of that incapacity', was liable to repay part of those sickness payments to the DSS. The part to be repaid was to be calculated under s.115B(2A), (2B) and (2C).

A payment in respect of the same incapacity?

On behalf of Morgante, it was conceded that he had received sickness benefit payments and a payment of compensation. But it was argued that the compensation payments were for Morgante's 'degree of disability' rather than an incapacity for work. This argument was based on the Federal Court decision in *Siviero* (1986) 68 ALR 147.

On the other hand, the DSS relied on the AAT decision in *Cocks* (1989) 48 *SSR* 622, to the effect that the Tribunal could go behind the terms of the compensation award, and conclude that it had included a component for past incapacity for work. It also relied on a 'concession' made by Morgante's legal representative before the SSAT, that the compensation award may have included a component for past economic loss.

After referring to the AAT decision in *Hunt* (1989) 53 *SSR* 698, the Tribunal examined the available evidence. This included medical opinions, the bulk of which declared that Morgante had a continuing disability from his work injury which prevented him from returning to his former occupation.

The AAT pointed out that ss.69 and 70 of the *Workers' Compensation Act* 1971 (SA) did not allow for payment in respect of past periods of incapacity. The medical evidence of Morgante's continuing disability was sufficient to support a claim under s.69 of the *Workers' Compensation Act*. There was, the AAT said, no evidence upon which it could be satisfied on the balance of probabilities that part of the compensation payment was paid for the same incapacity as that for which Morgante had received sickness benefits.

Formal decision

The AAT set aside the decision under review and decided that the sum of $5949.40 was not recoverable from Morgante under s.115B.

[P.H.]

Compensation payment: preclusion

SECRETARY TO DSS and PILGRIM
(No. 6134)
Decided: 20 September 1990 by R.A. Balmford.

Harold Pilgrim was injured in a motor car accident in October 1985. In November 1988, he settled an action for damages for the sum of $80 902.55, from which $60 902.55 was deducted as a refund of payments received by Pilgrim under the *Accident Compensation Act* (Vic).

Two days after this settlement, Pilgrim applied for unemployment benefit. The DSS accepted that he was qualified for unemployment benefit; but decided that he was precluded from receiving benefit until March 1989.

On review, the SSAT set aside that decision. The DSS then applied to the AAT for review of the SSAT decision.

The legislation

Section 153(1) of the *Social Security Act* provides that where a person, qualified to receive a pension under the Act, has received a lump sum payment by way of compensation, pension is not payable to the person during the lump sum payment period.

Section 152(1) defines 'pension' to include unemployment benefits.

Section 152(2)(a) defines a payment by way of compensation as including a payment in settlement of a claim for damages, being a payment made after 1 May 1987 in whole or in part 'in respect of an incapacity for work'.

Section 152(2)(e) requires the lump sum payment period to be calculated on the basis of 'the compensation part of the lump sum payment'.

Section 152(2)(c)(i) defines the compensation part of a lump sum payment, where the payment is made in settlement of a claim on or after 9 February 1988, as 50% of the lump sum payment.

Section 156 gives the Secretary a discretion to treat the whole or a part of a lump sum payment as not having been made, 'if the Secretary considers it appropriate to do so in the special circumstances of the case'.

Payment received

The AAT decided that Pilgrim had received a payment in settlement of a claim for damages within s.152(2)(a), and this payment amounted to $20 000.