Snell: controlling the process of the Administrative Appeals Tribunal

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At the hearing in *Commonwealth v Snell*[1] (*Snell*), it was not in issue that issue estoppel does not apply in the Administrative Appeals Tribunal (AAT). Nevertheless, the Full Federal Court explains why issue estoppel could not apply in the AAT. It is strictly obiter dicta but puts down any doubt on that point.[2]

At first instance, the AAT had acted by analogy with issue estoppel, to prevent what it characterised as relitigation of an issue, in exercise of powers to make directions under the *Administrative Appeals Tribunal Act 1975* (Cth) (AAT Act), s 33.

Of greater interest are the implications for litigants and the AAT in the future management of one of the AAT's busy jurisdictions — workplace injury and disease. The Full Court is careful to say that its treatment of the AAT's powers to manage and direct matters are restricted to the context of the injury compensation legislation on the Comcare model.[3] Nevertheless, the decision raises important issues more generally.

The effect of the Full Court's decision is that the AAT could not simply put to one side the Commonwealth's defence of a further claim. The context was a previous consent order concerning the link between skin disorder and work, which had been made against the Commonwealth. There are few cases in which the AAT has restricted the ability to review, under the principle in *Re Matusko and Australian Postal Corporation*[4] (*Matusko*), which have gone against the Commonwealth. Inevitably it is usually a claimant who is dissatisfied with a previous determination and attempts to relitigate.

The implications of *Snell* in the workplace injury and disease jurisdiction now must be thought through. The dynamics between claimant and the compensation authority have been clarified, in one sense, but it will take time and experience for the long-run implications to be confirmed. More broadly, we are enjoined to be careful, in seeking directions from the AAT, that the directions sought are consistent with the statutory scheme of the referring legislation as well as with the power to make directions under the AAT Act. Finally, this is an important case concerning the notion of the AAT standing in the shoes of the reviewed decision-maker.

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The author thanks his junior, Mr Travis O'Brien, of Inns of Court, Brisbane, for his comments upon an earlier draft. Any remaining errors are the author's own.

1 (2019) 370 ALR 1; 164 ALD 422; [2019] FCAFC 57.
2 Ibid [51]–[52].
3 Ibid [55].
4 (1995) 21 AAR 9; [1995] AATA 14.

Chronology

To understand *Snell* properly, the chronology helps. Here I draw heavily on the Commonwealth's document filed with the Full Court (but, for privacy, reducing the specificity of some dates where it does not matter).

Date	Event
1930s	Mr Snell's birth year
1950s–1990s	Works as seafarer; exposed to sun.
2000s–2010s	Solar-related medical conditions; medical procedures including malignant melanoma removals.
2011	Claim for 'solar-induced skin disease' — compensation for permanent impairment.
2 April 2013	AAT decision awarding permanent impairment compensation for solar-induced skin disease.
22 January 2017	Claim for permanent impairment compensation for solar-induced skin disease.
2 March 2017	Determination refusing liability.
22 May 2017	Reviewable decision affirming determination.
24 May 2017	Application to AAT to review the reviewable decision.
31 July 2017 – 15 August 2017	AAT hearing.
2 May 2018	AAT decision, *Snell and Commonwealth of Australia (Compensation)* [2018] AATA 1107 (Senior Member Tavoularis).
5 November 2018	Full Federal Court hearing of s 44 appeal (direct to a Full Court).
11 April 2019	Decision: [2019] FCAFC 57.
17 June 2019	Costs decision: [2019] FCAFC 97.

The *Seafarers Rehabilitation and Compensation Act 1992* (Cth) (Seafarers Act) and the *Safety, Rehabilitation and Compensation Act 1988* (Cth) (SRC Act) have, historically, great similarities. Each involves two tiers of internal decision-making before a matter comes to the AAT. Thus, before the most recent litigation, Mr Snell sought the required internal review of the determination refusing liability dated 2 March 2017. That led to the 'reviewable decision', affirming, on 22 May 2017. At that point, his right to seek review by the AAT was engaged.

Relevance of a prior decision of a tribunal

Decisions here

There needs to be a connection between work and the injury or disease. This is where the prior consent decision of the AAT on 2 April 2013 was said to be crucial. As Senior Member Tavoularis said in *Snell v Commonwealth*:

> In order for the Applicant to succeed in the present case, the Tribunal must be reasonably satisfied that the Applicant's employment contributed in a material degree to the contraction of his metastatic malignant melanoma [in terms of the Seafarers Act s 3] … [The] Applicant has already had some success before the Tribunal in asserting that a solar-caused skin condition of his was contributed to in a material degree by his employment. Now, he asserts that his success in the 2013 decision prevents or ought to prevent the Tribunal from considering whether his metastatic malignant melanoma was contributed to in a material degree by his employment.[5]

The Senior Member described this prior success before the Tribunal:

> [The] Applicant has previously — and successfully — claimed compensation from … a company of which the parties agree the present Respondent is a legal successor, before the Tribunal. In that case, a consent decision was reached, whereby the then-respondent accepted liability for the Applicant's 'solar induced skin disease' under the [Seafarers] Act.[6]

Before Senior Member Tavoularis, Mr Snell contended that the consent decision of 2013 prevented or ought to prevent the Tribunal from considering the contribution of employment to the present condition the subject of the further application for compensation. The mechanism was referred to by the shorthand of 'issue estoppel', but what was put in substance was that the AAT should rely on the authority of two earlier cases as justifying 'a close analogue of issue estoppel'.[7]

Guba

The argument that the AAT might act by way of analogy with the doctrine of issue estoppel was given considerable life by the decision of the High Court of Australia on an appeal from the Supreme Court of the Territory of Papua and New Guinea — *Administration of Territory of Papua and New Guinea v Guba*[8] (*Guba*). As we shall see, this was cause of action estoppel, but the language used is persuasive. The facts of that case began with an 1886 purchase on behalf of the Crown of land at Port Moresby from local inhabitants. An order in council in 1901 also bore upon the issue. Questions remained. Historically, the next step was that in 1954 the Administrator summoned a Land Board to decide competing claims about various parcels of land that overlapped the land under consideration in *Guba*.

Justice Gibbs' reasons for judgment on estoppel were not obiter dicta. His Honour said that the references in the authorities to the phrase 'judicial tribunal', in the context of estoppel by *res judicata*, requires more than 'a mere administrative decision'. His Honour said, however,

5 [2018] AATA 1107; 74 AAR 526 [8].
6 Ibid [2].
7 Ibid [9].
8 (1973) 130 CLR 353.

that the application of such an estoppel was not determined 'by inquiring to what extent the tribunal exercises judicial functions, or whether its status is judicial or administrative'.[9] Justice Gibbs went on to say:

> The doctrine of estoppel extends to the decision of any tribunal which has jurisdiction to decide finally a question arising between parties, even if it is not a called court, and its jurisdiction is derived from statute or from the submission of parties, and it only has temporary authority to decide a matter ad hoc …[10]

Justice Menzies[11] and Stephen J[12] agreed with Gibbs J. Chief Justice Barwick, with whom McTiernan J agreed,[13] approached the issue differently. It was strictly unnecessary for the Chief Justice to decide the issue of estoppel. Nevertheless, his Honour said:

> I am unable to perceive what relevance questions of judicial power in the constitutional sense have in this connexion. What is central to the Board's power is the power to decide. It may well be that in a system where a separation of powers existed that function could be classed as an exercise of judicial power. But it is quite immaterial in the present connexion to consider such a question or decided cases which deal with it. In my opinion, the purpose of appointing a Board … was clearly to resolve a dispute and lay to rest the question of ownership of land …[14]

The Chief Justice went on to say[15] that the decision of the Board was 'a final decision'; that it bound the then claimant, his privies and the part of the clan which he represented; and that it bound the Land Titles Commission. His Honour said:

> I suppose there could not be a better justification for resort to the principle of estoppel than the present case. The Land Board had witnesses of whose evidence the Land Titles Commissioner did not have the benefit. We are told that every encouragement was given to the [other parties interested] … and, indeed, to the Papuans generally to tell all they knew or thought they knew about the title to the ownership of the lands about which the Board was enquiring. No appeal was brought from the Land Board's decision but now, 12 years later, it is sought to agitate the same question again and with lesser information than was available to the Land Board.[16]

Mr Snell relied on *Guba* in the Full Court. The Full Court pointed out that the High Court of Australia was dealing with cause of action estoppel, not issue estoppel.[17] The High Court was also dealing with a tribunal which was not subject to 'the unique dictates of federal judicial and administrative power'.[18] (It is notable that *Guba* has a clearer reception in New Zealand, which has no written constitution.[19]) The Full Court considered that, in the light of the different context and the alternative viewpoints that had been expressed, including in the High Court of Australia, a less rigid approach to questions of relitigation should be adopted

9 Ibid 453.
10 Ibid 453.
11 Ibid 405.
12 Ibid 460.
13 Ibid 404.
14 Ibid 402–3.
15 Ibid 403–4.
16 Ibid.
17 As to the distinction, see Wilken and Ghaly, *The Law of Waiver, Variation, and Estoppel* (3rd ed, OUP, Oxford, 2012) [14.09]. See also *Shiels v Blakeley* [1986] 2 NZLR 262, 266 (CA).
18 (2019) 370 ALR 1 [50].
19 *P v Iyengar* [2012] NZAR 829; [2012] NZHC 2168 [16] (Kós J), applying *Shiels v Blakeley* [1986] 2 NZLR 262, 266 (CA).

by the AAT. The policy of avoidance of relitigation could be achieved by such an approach. Indeed, the Full Court cited *Matusko* in that context.

This is not a rejection of *Guba* but, rather, an indication that much the same result can be achieved, and perhaps more appropriately given the statutory and institutional context, by a modified *Matusko* approach.

Matusko

The two cases relied on by Mr Snell in the AAT were *Matusko*[20] and Senior Member Tavoularis' decision of *Moore and Military Rehabilitation and Compensation Commission*.[21] However, there is a larger body of case law about this topic, referenced in *Matusko*. *Matusko* is the product of a line of earlier decisions in the Tribunal dating back to *Re Quinn and Australian Postal Corporation*[22] (*Quinn (1992)*).

Quinn (1992)

Before the Full Court, Mr Snell relied on the joint judgment in *Quinn (1992)* of President O'Connor J and Member Barbour:

> The Tribunal does not need to decide in this case whether as a matter of law the doctrine of estoppel applies to administrative decisions. The Tribunal's process is administrative and in understanding the task of review is obliged to consider the administrative consequences and fairness of the investigation it makes in reaching the correct and preferable decision. The policy basis upon which the doctrine of estoppel rests, that is, 'it is for the common good that there should be an end to litigation' and 'no one should be harassed twice for the same cause', are relevant to administrative law. The Tribunal should be guided by the principles of 'equity, good conscience and the substantial merits of the case, without regard to technicalities' … The reexamination of the extent of the original injury nearly eight years ago would defy these principles.
>
> …
>
> The Tribunal considers that there are strong reasons, both in case law and expressed in public policy, to limit the relitigation or continual review of substantively similar matters. To this end, the Tribunal believes it more appropriate that, pursuant to its powers under s 33, it determine when parties tender evidence to it whether such evidence shall be admitted.[23]

Ms Quinn was injured at work in 1984. In previous proceedings, she had, historically, been held entitled to compensation based on total incapacity for a 14-month period. But in 1991 the Australian Postal Corporation determined that liability to pay compensation had ceased.

Quinn (1992) is a decision on an application for directions about the conduct of the oral hearing in the matter. The directions sought by Ms Quinn were intended to prevent the employer departing from a decision of the Tribunal in 1988. The directions were intended to focus the factual inquiry on any change in circumstances after the 1988 Tribunal decision. The directions sought by Ms Quinn were not made in the reported case (which was a pretrial directions matter). Nevertheless, and as shown above, the majority of the Tribunal gave an

20 (1995) 21 AAR 9; [1995] AATA 14.
21 (2017) 72 AAR 71; [2017] AATA 532.
22 (1992) 15 AAR 519; [1992] AATA 668.
23 Ibid 525–6.

indication of what should happen should a party tender evidence at the later oral hearing, tending to the relitigation of the 1988 decision. Hence, in *Snell v Commonwealth*, the AAT stated as its guiding principle that, if the issues now are the same as before, the 'issues should generally not be relitigated', unless there be reason to allow it.[24]

For completeness, in *Quinn (1992)* Member Katz went down a different path, holding that issue estoppel applied in the AAT. Member Katz would have made the directions sought. Given the weight of authority against that by 2018, Mr Snell did not promote that dissent in the Full Court.

Matusko

Matusko provides a thorough treatment of the development of case law which purported to show that a variant of issue estoppel, which might be called '*Matusko* estoppel', can be applied as a matter of discretion by the Tribunal. This was said to be because the Tribunal should not allow re-litigation of issues already decided. It was said in summary that the Tribunal should use its flexible procedures to allow further consideration of issues where there is a reason to do so — for instance:

a. where there is a different decision;

b. where there is a clear legislative intent;

c. where the reconsideration decision is final;

d. where there has been a change in circumstances or fresh evidence; and

e. where justice to the parties requires a departure from the general rule.[25]

Mr Matusko unsuccessfully sought review in the Tribunal of a refusal of a claim for compensation for incapacity, in 1991. The claimed incapacity related to chest pain and a stroke in November 1987, which he said were related to an anxiety state caused by stress at work. Then, in 1992, he made a further claim for a stress condition, but in respect of the period after November 1987. On Mr Matusko's review in the Tribunal of a negative reviewable decision by the employer, the employer sought an order (at the commencement of the hearing) dismissing the matter under the AAT Act, s 42B, based on an allegation that the application was frivolous or vexatious. But the employer also relied on *Quinn (1992)*, which is the point of greater interest here. Senior Member Dwyer and Members McLean and Shanahan found:

> From the authorities cited we conclude:
>
> (a) No formal issue estoppel arises from the Tribunal's findings …
>
> (b) The Tribunal should not *generally* allow relitigation of issues already decided,
>
> (c) But the Tribunal should use its flexible procedures to allow further consideration of issues where there

24 *Snell v Commonwealth* [2018] AATA 1107 [15].
25 See (1995) 21 AAR 9 [24]–[33], principally at [33].

is reason to do so, … [where there is a different decision; where there is a clear legislative intent; where the reconsideration decision is final; where there has been a change in circumstances or fresh evidence; and where justice to the parties requires a departure from the general rule] ...

(d) The Tribunal should usually consider the evidence proposed to be called and make appropriate directions as to its admissibility during the hearing, as suggested in re Quinn, rather than in a directions hearing prior to the substantive hearing.[26]

Mr Snell adopted that before the AAT. While found to be in error by the Full Court, that illustrates why Mr Snell was ultimately granted a certificate under the *Federal Proceedings (Costs) Act 1981*. The Full Court said there:

> The reasons of the Court reflect an important debate that was had about how the Administrative Appeals Tribunal should approach its task. That is a matter of significant public importance. The position taken by the respondent, was, in the Court's view, incorrect; but it had some support from existing authorities, as the reasons reveal. The respondent's position taken in the litigation was reasonable.[27]

For all that, it is important to understand where the Tribunal was found to have gone wrong in *Snell*, so that proper procedures are followed in future.

Scheme of legislation

The legislative scheme involves elements as outlined by the Full Court:[28]

a. the liability of an employer to pay compensation to a person, in an amount determined under the Act;[29]

b. the right of the employee who suffers injury resulting in any of death, incapacity for work, or impairment, to payment of compensation;[30]

c. the specific right to compensation for permanent impairment, which was relevant here;[31]

d. in particular, a requirement to assess whether an impairment was permanent and a requirement to assess the degree of permanent impairment as a percentage;[32]

e. the obligation of an employer to make an interim determination of the degree of permanent impairment and payment in the interim, awaiting final determination[33] (I leave to one side nuances of degree of impairment and of non-economic loss);

26 See ibid [33].
27 *Commonwealth v Snell (No 2)* [2019] FCAFC 97 [5].
28 (2019) 370 ALR 1 [24]ff.
29 *Seafarers Rehabilitation and Compensation Act 1992* (Cth) s 24.
30 Ibid s 26.
31 Ibid s 39.
32 Ibid s 39(2), (5) and (6).
33 Ibid s 40.

f. a claim must be made.[34] There is provision for investigation, and a time limit for determination. This leads toward a 'determination' under one of the respective provisions;

g. the employer must reconsider a determination, on application, or *may do so* on own initiative.[35] A decision made under s 78 of the Seafarers Act is a 'reviewable decision'; and

h. an employee may apply to the AAT for review of such a 'reviewable decision'.[36]

Having pointed to the statutory scheme, and to the fact that the compensation legislation 'does not operate in a once-and-for-all manner in relation to the employee's entitlement to compensation', the Full Court said:

> [33] … it is contemplated that a final assessment of an employee's level of impairment arising from an injury may well be subsequently reviewed where the impairment increases with the consequence that a further entitlement to compensation will arise. Necessarily that requires the decision-maker to be satisfied that the subsequently increased degree of impairment was the consequence of the compensable injury.
>
> [34] The flexible nature of the compensatory scheme in cognate legislation, being the *Safety, Rehabilitation and Compensation Act 1988* (Cth) …, was identified by the Full Court in *Telstra Corporation Ltd v Hannaford* …[37]

This is a critical passage from *Telstra Corporation Ltd v Hannaford*[38] (*Hannaford*). Justice Conti (Heerey and Dowsett JJ agreeing) speaks of the corresponding statutory scheme of the SRC Act:

> The statutory scheme allows for progressive and evolving decisionmaking giving effect to the provisions of ongoing review of relief or entitlements in the nature of course of workers compensation, being review which allows for adjustment or change in the light of events and circumstances which may subsequently happen. The statutory scheme hence reflects a flexible scope for adjustment by way of decisions in the nature of awards to be made subsequently to the determination of … liability, whether that determination be made in isolation, or in the context of decisionmaking concerning consequential relief that may be required in the light of evolving circumstances. It is therefore a scheme which allows progressively for ongoing relief, and is thus not comparable of course with the process of curial resolution of the traditional common law entitlement of an injured employees for damages as a result of the negligent conduct of an employer.[39]

The last sentence bears emphasis.

This statutory form of relief for injured workers differs from the common law of torts. This difference is critical to the Full Court's decision in *Snell*.

34 Ibid s 63.
35 Ibid s 78.
36 Ibid s 88(1).
37 (2019) 370 ALR 1 [33], [34].
38 (2006) 151 FCR 253.
39 Ibid [57].

Statutory powers of the AAT

The AAT in *Snell* set about to apply the principles identified in *Matusko*, in purported exercise of the AAT's powers in s 33 of the AAT Act. That section begins with the broad statement that, in a proceeding before the AAT, 'the procedure of the Tribunal is, subject to this Act and the regulations *and to any other enactment*, within the discretion of the Tribunal' (emphasis added). That is critical. But let us also remind ourselves of other principles in AAT Act s 33:

a. Proceedings are to be conducted 'with as little formality and technicality, and with as much expedition', as the AAT Act and other relevant enactments permit and as a proper consideration of the matters before the AAT permit.

b. The AAT is not bound by the rules of evidence.

c. The person who made the decision is to assist the AAT. So is a party to a proceeding and that party's representatives.

There is then provision about holding directions hearings.

Section 33(2A) of the AAT Act gives a non-exhaustive list of the kinds of directions that might be given. There is nothing in that list explicitly enabling the AAT to give a direction effectively preventing re-litigation of a matter determined adversely to a party who now seeks to re-litigate. By the same token, there is no explicit exclusion. As will emerge, the AAT must nevertheless act within power in making a direction.

The AAT does have power to deal with proceedings which are frivolous or vexatious, under s 42B of the AAT Act. The kinds of proceedings which can be dismissed under that power are described exhaustively as frivolous, vexatious, misconceived, lacking in substance, having no reasonable prospect of success, or otherwise an abuse of the process of the Tribunal. Section 42B of the AAT Act does not, however, deal with a situation where the *respondent* to an application seeks, by the conduct of its defence, to do any such thing. As the respondent will usually be the government or a government agency, it should be expected that there is little call for a power, such as one to strike out a defence. Nevertheless, it is a potential gap in the AAT's armoury.

As we will see, it matters little in the present context, since the AAT stands in the shoes of the person who made the 'reviewable decision'. That person is part of a decision-making process described by Conti J in *Hannaford*, above. Thus, it seems that some degree of relitigation, albeit on emerging evidence, is part of the process contemplated by the compensation legislation, read with the directions power in s 33 of the AAT Act. The principal point that can be made about s 33(1) of the AAT Act is that it does require that any direction be consistent with other relevant legislation.

I now turn to the key submissions and how they were answered.

Key submissions of the parties and result

The Commonwealth's principal ground of appeal in *Snell* was that the AAT incorrectly approached the review on the basis that there was a general rule which prevented a party relitigating a matter determined by an earlier decision. The Commonwealth went further and characterised the earlier decision as having been made in respect of a different matter, being a different injury.

At the forefront of the submission was *Hannaford* but, in particular, a passage from the judgment of Heerey J.[40] There his Honour said it was within the AAT's jurisdiction to make a finding as to whether or not a particular condition was a compensable injury *at the time of the hearing*. The primary decision-maker could reconsider its own earlier determinations. Thus, the AAT could reconsider earlier findings of fact.

The respondent contended that *Hannaford* did not prevent the AAT giving effect to a variant of issue estoppel, shorthanded as '*Matusko* estoppel'. The respondent identified the issues that the AAT should consider under *Matusko* and identified how the AAT had dealt with those issues. The respondent framed the decision of the AAT, to prevent relitigation of the connection between the work and the medical condition, as simply being a matter of procedure, where the appellant had to show error of the kind in *House v King*.[41]

The Full Court decided that:

a. Issue estoppel as such does not apply in the AAT.

b. The AAT erred in this case because it refused to consider the merits of a prior determination, despite the compensation legislation expressly empowering the primary decision maker to reconsider prior decisions.[42]

c. The AAT, on Mr Snell's 2017 hearing, 'again stood in the stead of the Commonwealth as decision-maker and exercised all the powers which the Commonwealth was entitled to exercise in relation to Mr Snell's application for compensation'. Thus, the AAT had power to 'reconsider any prior decision'. And it was thus obliged 'to assess whether he had sustained a relevant injury'.[43]

d. Because the AAT had the power to reconsider earlier decisions of the primary decision-maker, it also had power to reconsider its own earlier decisions.[44]

This last is the nub of the decision. It does raise a question about the wider consequences of identifying the AAT with the primary decision-maker, dealt with below. Some immediate implications can be addressed.

40 Ibid [9].
41 (1936) 55 CLR 499.
42 (2019) 370 ALR 1 [55].
43 Ibid [56].
44 Ibid [59].

Issue estoppel in AAT

It is probably enough for those working in the AAT simply to note the conclusion that issue estoppel is inapplicable to the AAT. In Queensland, the Queensland Civil and Administrative Tribunal (QCAT) has also determined (on the ground that it is not bound by the rules of evidence) that issue estoppel does not arise there.[45] The issue had to be considered, as QCAT is constituted as a 'court of record'.[46] Considering *Snell*, that reasoning now appears incomplete.[47]

For those wishing to delve a little deeper, the following points are made by the Full Court:

a. The Full Court looked at the nature of the AAT, under its constituent Act. Its power is derivative upon the power of the reviewed decision-makers. Its decision is deemed for all purposes to be that of the original decision-maker. And its procedures are informal, without demanding obedience to the rules of evidence.

b. Thus, it has been said in *Minister for Immigration and Ethnic Affairs v Daniele*[48] that issue estoppel has no place in proceedings in the AAT. Historically, issue estoppel was generally seen as a rule of evidence, but the rules of evidence are expressly excluded by the AAT Act.

c. To the extent that issue estoppel is regarded now as a rule of law, it was nevertheless relevant that, at the time the AAT Act was enacted, the doctrine was understood to be a rule of evidence.[49]

d. Perhaps more fundamentally, issue estoppel must emerge from a judicial decision which is final. The AAT is not a court.[50]

e. The AAT sits within the context of a constitutional division between federal judicial and administrative powers. That is also relevant.[51]

So where does this leave the AAT when faced with a plain attempt to relitigate?

Preventing re-litigation

Compensation context — SRC Act and Seafarers Act

It is now a delicate thing for the AAT to handle attempted relitigation of a matter it has previously determined. An applicant may still face an application under s 42B of the AAT Act, but even then it would be a delicate thing to say that an applicant is (for example) abusing

45 *Coral Homes (Qld) Pty Ltd v Queensland Building Services Authority* [2012] QCATA 241 [103].
46 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 164.
47 (2019) 370 ALR 1 [45].
48 (1981) 61 FLR 354, 359.
49 (2019) 370 ALR 1 [45].
50 Ibid [46]–[48].
51 Ibid [50]–[51].

the AAT's process by requiring reconsideration of a previous determination. A respondent cannot face effective strike-out of its defence under s 42B.

The Full Court recognises the value of preventing relitigation, but what must be done is to 'prefer a less rigid approach' to the doctrine of issue estoppel. The Full Court mentions *Matusko* but says 'the principles to be applied may be further refined'.[52] Thus, the Full Court says in *Snell* that, if no new evidence has been advanced, which relevantly undermines or alters the effect of the earlier decision, 'it is most likely that, if the application for review is not disposed of in a summary manner, the earlier decision will have significant if not overwhelming weight'.[53]

It appears that the AAT's error in *Snell v Commonwealth* was that the AAT began with a disposition against relitigation, whereas the compensation legislation was more flexible and involved a continuous decision-making process.[54]

As mentioned, s 42B of the AAT Act does not apply to a respondent's case. Critically, the Full Court considered that an employer is unlikely inappropriately to rely on power in the compensation legislation to reconsider matters settled by the AAT 'without justification'. The Full Court said that that would 'inevitably lead to further proceedings', restoration of the original decision, and liability on the employer for costs.[55] However, in the case of a dissatisfied employee who 'simply makes repetitious claims based on substantially the same facts', the Full Court highlighted s 42B of the AAT Act, saying that such proceedings 'may be easily seen as frivolous, vexatious, misconceived or lacking in substance'. The one note of caution is that s 42B requires that the proceeding be 'of such a nature that the issues raised should not be accorded a proper hearing'.[56]

Attempts to relitigate outside compensation context

The *Matusko* principle had been applied beyond the context of the SRC Act and the Seafarers Act. The Full Court makes plain that *Snell* does not venture into what might be a more usual statutory context:

> It ought also be stressed that the consequences of the admixture of the provisions of the AAT Act and of any other legislation which does not afford the decision-maker the power of reconsideration are not dealt with in these reasons.[57]

The Full Court reinforces that (unless there is the statutory ability to reexercise a power to determine a matter), 'once a power is exercised to determine the rights of a subject, the exercise is final and conclusive'. Indeed, once the power has been exercised, the person on whom the power is conferred is *functus officio*.[58] This is what made the compensation legislation a distinct category. Indeed, s 78 of the Seafarers Act permitted own motion reconsideration, as does the equivalent provision in the SRC Act.

52 Ibid [50].
53 Ibid [76].
54 Ibid [77].
55 Ibid [79].
56 Ibid [78].
57 Ibid [55].
58 Ibid [71].

In *Re Benjamin and Federal Commissioner of Taxation*[59] (*Benjamin*), Forgie DP conducted a comprehensive consideration of the *Matusko* principle. Mr Benjamin was dissatisfied with objection decisions involving his income tax. He failed to apply within time for review of the objection decisions. His application for an extension of time was opposed. The AAT refused an extension of time. The reported decision, however, is a further application for extension of time, relying on a new basis for delay. Mr Benjamin now articulated his basis for delay as health problems, both his own and his family's. However, Mr Benjamin produced no medical evidence to support those submissions. There was evidence indicating that he had been active in business, which tended to contradict the new basis. Deputy President Forgie determined that s 42B of the AAT Act could not apply to an application for extension of time.[60] More importantly, the AAT was concerned that it may be *functus officio* and thus unable to hear the further application for an extension of time.

In retrospect, Forgie DP's analysis of the cases following *Quinn (1992)* and *Matusko* foreshadows disposition of *Snell*.[61] Deputy President Forgie's first and important step is to consider 'whether the Tribunal has jurisdiction in relation to the particular type of decision of which review is sought', and then:

> If it has jurisdiction in relation to that particular type of decision, the next question — and it usually does not arise — is whether the Tribunal has previously exercised its jurisdiction in relation to that particular decision of which review is sought. That requires consideration again of the relevant statutory framework, of the particular decision that has been made and whether the Tribunal has previously exercised jurisdiction in relation to that particular decision as opposed to a decision to similar effect.[62]

As Forgie DP had previously said in *Re Rana and Military Rehabilitation and Compensation Commission*:

> The duty that is imposed upon the Tribunal must be to review the particular decision of which review is sought and in relation to which the Tribunal is given jurisdiction. Once it has done so in accordance with its statutory authority and power, it seems to me that the Tribunal has done all that it can lawfully do. It is *functus officio*.[63]

Nevertheless, Forgie DP, in *Benjamin*, went on to consider the ability to limit the scope of the review, as foreshadowed by *Matusko*. She made the following points:[64]

a. The jurisdiction to consider an application for review 'does not necessarily mean that [the AAT] must review the decision that is the subject of the application or that it need consider every aspect of that decision'. However, this statement seems to be linked with a reference to s 42B, as well as the idea of limiting the scope for review 'in some circumstances'.

b. The AAT may 'in appropriate circumstances, conclude that a previous decision should be applied again as the correct and preferable decision when it is sought to

59 [2017] AATA 39; 71 AAR 226.
60 Ibid [51].
61 Ibid [52]ff.
62 Ibid [65].
63 [2008] AATA 558; 48 AAR 385; 104 ALD 595 [99].
64 [2017] AATA 39; 71 AAR 226 [66]ff.

revisit the earlier decision at some later time'. Deputy President Forgie is quoting from *Morales v Minister for Immigration and Multicultural Affairs*.[65]

c. Deputy President Forgie also points to s 25(4A) of the AAT Act, which provides that the AAT 'may determine the scope of the review of the decision by limiting the questions of fact, the evidence and the issues that it considers'.[66] This was a power not relied on by the Tribunal in *Snell v Commonwealth*.

d. Deputy President Forgie proceeded to determine the application for extension of time in *Benjamin* informed by those principles and by reference to s 2A of the AAT Act, which sets out the objectives of the AAT.[67]

Some of Forgie DP's analysis may still require consideration, as she was referred to decisions under the compensation legislation, as well as other decisions. Nevertheless, it does seem, with respect, that Forgie DP has injected a note of realism into consideration of the issue of application of the *Matusko* principle outside the context of compensation legislation of the kind considered in *Snell*. In short, it will often be a completely different decision which is now under review. For example, it has been held that, even in income tax, and where the decision is made by the court, there is no issue estoppel as between the subject and the Crown as between different years of income.[68]

Standing in another decision-maker's shoes

A critical aspect of the reasoning in *Snell* is that the AAT stood in the shoes of the person who made the reviewable decision. Of course, that does not mean that the AAT could do all of the things that the other person could do (under other powers). Thus, the AAT does not itself raise a new assessment of income tax, when it is considering the Commissioner of Taxation's objection decision. Rather, it is the objection (and relevant powers in that regard) which are relevant. In *Frugtniet v Australian Securities and Investments Commission* the majority frame the point this way:

> The AAT exercises the same powers as the primary decision-maker, subject to the same constraints. The primary decision, and the statutory question it answers, marks the boundaries of the AAT's review. The AAT must address the same question the primary decision-maker was required to address, and the question raised by statute for decision by the primary decision-maker determines the considerations that must or must not be taken into account by the AAT in reviewing that decision. A consideration which the primary decisionmaker must take into account in the exercise of a statutory power to make the decision under review must be taken into account by the AAT. Conversely, a consideration which the primary decision-maker must not take into account must not be taken into account by the AAT.[69]

That passage will bear study, alongside the Full Court's decision in *Snell*.

65 (1998) 82 FCR 374, 387–8 (FC).
66 (2017) 71 AAR 226; [2017] AATA 39 [68].
67 Ibid [69].
68 *Commissioner of Taxation v Phillips* (1917) 17 SR (NSW) 641 (FC).
69 (2019) 93 ALJR 629; 367 ALR 695; [2019] HCA 16 [51].

Whether new dynamic in compensation litigation

The Full Court in *Snell* says:

> Nor is it likely that an employer will inappropriately rely on s 78(1) to reconsider matters settled by the Tribunal without justification.[70]

In light of *Snell*, the AAT might be wary in its approach to controlling employers' presentation of evidence and submissions, even if there is a risk of overstepping. The dynamic has always been that the employer is moneyed, whereas the employee is an injured or sick person, often reliant on 'no win, no fee' legal assistance. Thus, it is to be hoped that an employee whose condition worsens and who could make a new application seeking greater benefit will not be unreasonably deterred from doing so by the prospect of the employer reducing or terminating benefit. Were there to be an adverse determination, the employee would then face the prospect of the internal and external review processes and playing for everything all over again. These are all matters that can only be determined in the light of experience.

70 (2019) 370 ALR 1 [79].