This case concerned alleged age discrimination by the Belmont 16 Foot Sailing Club Ltd (the Club). The Club is a registered club in New South Wales. The applicant is 51 years old and complained that the Club had limited sailing and competition in the Cherub class of vessel to persons aged under 25 years through the introduction of a new rule. The Club maintained that it had the right to introduce the new rule.

The applicant had been sailing and competing in the Cherub class for at least ten years at the time of the rule change. The President of the Club gave evidence that the Cherub class was introduced in 1988 or 1989 to transition sailors from the junior VJ class to the 16 foot Skiff class. The 16ft Skiff class is the premier class within the Club. The Club’s constitution provides that the objects of the club include ‘to promote the sport of sailing generally, and, in particular, the 16 ft skiff sailing class’.

In 2011 the Club developed a strategic plan which included reducing the Cherub class and another class, the 29er skiff class, to one class. In early June 2012, the Club’s Sailing Sub-Committee (being a subcommittee of the Board) resolved that ‘the Cherub Class be discontinued as a fleet supported by Belmont 16ft Sailing Club after the 2015/2016 sailing season’. In late June 2012, the Club resolved to adopt the decision of the Sailing Sub-Committee to discontinue the Cherub class. Following this resolution, submissions were received from members of the Club who had concerns about the discontinuation of the class, particularly as it related to developing the sailing skills of younger members.

As a result of these submissions, at a meeting on 25 March 2014, the Board of the Club resolved to continue the Cherub class for members aged under 25 years. There was to be some ‘limited support for’ sailors over the age of 25 years. Rules were drafted accordingly for the 2014-2015 sailing season. In particular rule 3.7.2 provided:

Any competitor in the Cherub class who has attained their 25th birthday on or before the 1st September of the current season, may still be accepted as a Registered Crew of a Registered boat however the Boat shall not score points in the Club Championship series or most fastest times trophy.

This meant that the applicant was excluded from competition for the Club Championship or for the ‘most fastest times’ trophy. However, he could still compete for the handicap trophy. On 14 November 2014 the applicant made a complaint to the President of the New South Wales Anti-Discrimination Board, alleging discrimination on the ground of age. In his complaint, the applicant stated that the Cherub class had been raced at the Club for 25 years by sailors of all ages. He said that each sailing class, including the Cherub class, had a yearly club championship of about eight races with a trophy which was listed on the wall of the Sailing Club. He also stated that there was no age restriction in the National or State Cherub Association rules and the class had sailors up to 75 years of age sailing in it. The complaint was referred the Tribunal for consideration under the Anti-Discrimination Act 1977 (NSW) (the Act).

Part 4G of the Act deals with age discrimination. Section 49ZYA describes what constitutes age discrimination:

(1) A person (the perpetrator) discriminates against another person (the aggrieved person) on the ground of age if the perpetrator:

(a) on the ground of the aggrieved person’s age or the age of a relative or associate of the aggrieved person, treats the aggrieved person less favourably than in the same
circumstances, or in circumstances which are not materially different, the perpetrator
treats or would treat a person who is not of that age or age group or who does not
have such a relative or associate who is that age or age group.

(2) For the purposes of subsection (1)(a), something is done on the ground of a person’s age
if it is done on the ground of the person’s age or age group, a characteristic that appertains
generally to persons who are that age or age group or a characteristic that is generally
imputed to persons who are of that age or age group.

Section 49ZYP applies this definition to registered clubs providing:

(2) It is unlawful for a registered club to discriminate against a member of the registered club
on the ground of age:

(a) by denying or limiting access to any benefit provided by the club, or
(b) by depriving the member of membership of the club or varying the terms of that
membership, or
(c) by subjecting the member to any other detriment.

Section 49ZYR (special needs programs and activities) and section 49ZYW (sport) were also
considered by the Tribunal.

Since the Club is a registered club, section 49ZYP applied. Was section 49ZYP breached by the
Club? The Tribunal agreed that section 49ZYP(2)(a) was breached and other subsections did not
need to be considered. The applicant was denied the ability to gain points in competition, and was
deprived of the benefit of winning either of the trophies excluded. The Club’s argument that the rule
change was to help younger members gain points and win trophies by excluding older members in
the Cherub class was not accepted.

Had the Club therefore discriminated against the applicant because of his age? The applicant relied
on section 49ZYA(1)(a). The Tribunal agreed that there was discrimination, and said on this issue (at
[34]):

We are satisfied that, by the imposition of r 3.7.2, the Sailing Club has treated Mr Duggan less
favourably than in the same circumstances, or in circumstances which are not materially
different, the Sailing Club treats or would treat a person who is not of that age or age group
(the relevant age group being people over the age of 25). It has done this by excluding him
from eligibility to earn points towards the club championship trophy and the ‘most fastest time’
trophy. We are also satisfied that it has done so on the ground of Mr Duggan’s age (that is, on
the ground that he is over 25 years old). So much is clear from the terms of r 3.7.2.

The ‘special needs’ exception in section 49ZYR was held not to apply. The Club argued that it was
attempting to build up the skills of the 17–25 year age group, so that more sailors could move to the
more prestigious 16 ft Skiff class. The Club was concerned that too many members were staying in
the Cherub class and not progressing, but the Tribunal did not accept these concerns as valid.

The ‘sport’ exception in section 49ZYW also did not apply. Section 49ZYW provides that nothing in
Part 4G of the Act renders unlawful the exclusion of persons of particular ages from participation in
any sporting activity. The exclusion here was in competition and awards for over 25s. This was
discrimination. The Tribunal said on this point (at [54]):

Having regard to the language and purpose of s 49ZYW, it is our view that the words
‘exclusion of persons of particular ages from participation in any sporting activity’ refer to
excluding people of particular ages from physical participation in a sporting activity, and not to
the way in which such participation is assessed or rewarded. That is the ordinary meaning of the words. Therefore, the applicant’s complaint of age discrimination was upheld. Both the opportunity to compete for the club championship trophy and the opportunity to compete for the ‘most fastest times’ trophy conferred substantive benefits on members. The Club was enjoined from continuing or repeating the conduct of making and applying sailing competition rules in the Cherub class which precluded competitors over the age of 25, or the boat of competitors over the age of 25, from scoring points in the Club Championship series or the most fastest times trophy, and rules to the same or similar effect.

The case may be viewed at: http://www.austlii.edu.au/cases/nsw/NSWCATAD/2015/226.html