Ferneley v The <<Boxing Authority of New South Wales>> [2001] FCA 1740 (10 December 2001)

Last Updated: 11 December 2001

FEDERAL COURT OF AUSTRALIA

Ferneley v The <<Boxing Authority of New South Wales>> [2001] FCA 1740

DISCRIMINATION - Sex discrimination - State legislation requiring prior registration by State statutory <<authority of any person who engages in a boxing>> contest - Registration limited to males - Registration <<authority>> refused to consider application by female applicant - Whether refusal contravened Commonwealth sex discrimination legislation - Provision in Commonwealth Act proscribing sex discrimination in respect of qualification for engaging in an occupation but this provision does not bind the Crown in right of a State - Whether provision prohibiting discrimination in relation to provision of services applies - Application of exclusion relating to competitive sporting activity in which strength, stamina or physique is relevant.

Sex Discrimination Act 1984 ss 3, 4, 5, 12, 18, 22, 42

<<Boxing>> and Wrestling Control Act 1986 (NSW) ss 6, 7, 8, 9, 15

HOLLY LOUISE FERNELEY v THE <<BOXING AUTHORITY OF NEW SOUTH WALES>> and THE STATE OF <<NEW SOUTH WALES>>

N 1261 of 2001

WILCOX J

10 DECEMBER 2001

SYDNEY

IN THE FEDERAL COURT OF AUSTRALIA

<<NEW>> <<SOUTH WALES>> DISTRICT REGISTRY

N 1261 of 2001

BETWEEN:

HOLLY LOUISE FERNELEY

APPLICANT

AND:

THE <<BOXING AUTHORITY OF NEW SOUTH WALES>>

FIRST RESPONDENT

THE STATE OF <<NEW SOUTH WALES>>

SECOND RESPONDENT

JUDGE:

WILCOX J

DATE OF ORDER:

10 DECEMBER 2001

WHERE MADE:

SYDNEY

THE COURT ORDERS THAT:

1. The proceeding be dismissed.

2. The costs of the proceeding be reserved.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

IN THE FEDERAL COURT OF AUSTRALIA

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APPLICANT

AND:

THE <<BOXING AUTHORITY OF NEW SOUTH WALES>>

FIRST RESPONDENT

THE STATE OF <<NEW SOUTH WALES>>

SECOND RESPONDENT

JUDGE:

WILCOX J

DATE:

10 DECEMBER 2001

PLACE:

SYDNEY

REASONS FOR JUDGMENT

WILCOX J:

1 The issue in this case is whether <<New South Wales>> legislation preventing females from registering as boxers is affected by the Commonwealth Sex Discrimination Act 1984.

The <<New South Wales>> legislation

2 Section 4(1) of the <<Boxing>> and Wrestling Control Act 1986 (NSW) ("the NSW Act") constitutes a corporation called "<<Boxing Authority of New South>> <<Wales" ("the Boxing Authority"). Section 4(2)(b) provides this authority>> "shall, for the purposes of any Act, be deemed to be a statutory body representing the Crown". The reference in that paragraph is to a <<New South>> <<Wales>> Act, as distinct from a Commonwealth statute: see s 13(b) of the Interpretation Act 1987 (NSW). However, counsel for Ms Ferneley, Dr Gavan Griffith QC and Ms Kate Eastman, accept that, applying common law principles, the <<Boxing Authority>> is to be treated, for the purposes of the Sex Discrimination Act as "the Crown in right of a State".

3 Section 6 of the NSW Act provides for the prescription, by regulations, of classes of boxers according to the style of fighting practised by them. Section 7 requires the <<Boxing Authority>> to keep a register in respect of each class recording the names and addresses of persons who are registered as boxers of that class. Registration is important because it is an offence, under s 15 of the NSW Act, for a person to "engage in a <<boxing>> contest involving a particular style of fighting" if the person is not registered as a boxer of the appropriate prescribed class. The term "<<boxing>> contest" is widely defined (by s 3) to include virtually all <<boxing>> contests, displays and exhibitions involving monetary reward.

4 Section 8(1) of the NSW Act provides:

"A male person of or above the age of 18 years may make an application to the <<Authority>> to be registered as a boxer of a prescribed class."

5 The Act makes no provision for a female person to apply for registration. It follows there is no way in which a female can avoid the application to her of s 15 of the NSW Act; it is always a criminal offence for a female to engage in a "<<boxing contest" in New South Wales>>.

6 The exclusion of women from registration was deliberate. In his Second Reading Speech on the Bill for the NSW Act, the responsible Minister, Mr M A Cleary MP said:

"I turn now to the question of women boxers and women kick boxers. Women have not sought in great numbers to take part in professional or amateur <<boxing. However, since kick boxing>> began to grow in popularity in the past few years, a number of contests have been staged that have included women participants. Under this legislation, women will not be allowed to fight as boxers or kick boxers, amateur or professional. Part of the reason is that the spectacle of women attacking each other is simply not acceptable to a majority of people in our community. It may be said that people do not have to go along and watch such spectacles. However, the Government is unwilling to condone behaviour that is unacceptable by community standards. However, the Government is unwilling to condone behaviour that is unacceptable by

community standards. In addition, on the advice available to the government, it would appear that women are more at risk from this kind of sport than men. I have received advice from the State branch of the Australian Sports Medicine Federation which says, in part:

`Special risks for women appear to be associated with injury to the reproductive organs and, in particular, to a potential risk to an unborn foetus if a women were pregnant at the time of her involvement in a <<boxing>> match.'

The advice goes on to describe the risks to women in some technical detail. It is not very edifying material, and I do not propose to read it in full to honourable members. It is probably enough to say that it recommends that women boxers should wear breast plates and abdominal shields. Any sport that requires that sort of protection for women is too much of a risk for the Government to allow. There would be, of course, enormous risks associated with pregnant women. It is totally impractical to carry out pregnancy tests in a gym or before a fight at a licensed club. The dangers are simply too great. I have also obtained legal advice from the Crown Solicitor's office. I am told that the proposed ban on women boxers and kick boxers does not contravene the Commonwealth Sex Discrimination Act.

There is another risk to which women are particularly vulnerable. That is the risk of becoming freaks in some sort of roman circus disguised as a sporting contest. To sum up, I, and the Government, feel that to allow women to compete in these sports would be dangerous to them, would put them at risk of becoming sideshow freaks, and would be unacceptable by current community standards. Women with a genuine interest in these sports will still be allowed to take part as referees or officials. There is no question of barring them from any involvement in a sport they may enjoy. The Government simply is not prepared to expose them to risks that no responsible government should condone. I commend the bills."

The facts

7 The applicant, Holly Louise Ferneley, lives in Sydney. She is above the age of 18 years. She is a professional boxer with no other paid occupation.

8 In about 1986 Ms Ferneley commenced training for, and competing in, semi-contact karate. In March 1994 she fought her first full contact kung fu bout at Sydney Town Hall. This bout was conducted by the Australian Chinese Kung Fu Association which, at that time, was not required to obtain a permit for such a bout. Presumably that was because the <<Boxing Authority>> did not then consider a kung fu bout was a "<<boxing>> contest" within the meaning of the NSW Act.

9 During 1994 and 1995 Ms Ferneley fought a number of kung fu full contact bouts. In 1995 she registered as a kickboxer in Victoria. Since that time she has participated in a number of professional kickboxing, <<boxing>> and karate bouts; nine in Melbourne, one bout in each of Japan and <<New>> Zealand and five in Sydney. She was paid a fee for each of these bouts. The Japanese bout (in 1996) was against the reigning world champion. It ended in a draw.

10 In September 1999 Ms Ferneley fought her first professional world championship bout at Bankstown, Sydney, under the auspices of the International Kick <<Boxing>> Federation ("IKF"). This bout was sanctioned by the Australian Chinese Kung Fu Association. Possibly for that reason, it was not considered Ms Ferneley had infringed s 15 of the NSW Act.

11 Ms Ferneley planned another professional kung fu bout in <<New South Wales>>, for March 2000. However, she discovered the then <<New South Wales>> Sports Minister, Mr John Watkins, had reviewed the position and decided a kickboxing bout would infringe the NSW Act. So Ms Ferneley decided not to proceed with the planned bout. She has not, since then, fought any kickboxing, <<boxing>> or kung fu bouts in <<New South Wales>>.

12 On 4 May 2001 Ms Ferneley applied to the <<Boxing Authority>> for registration in two classes of the register established under the NSW Act: fist fighting and kickboxing. She paid the prescribed fee and

submitted a completed information form. It included a medical practitioner's report certifying her fitness to participate in <<boxing>>.

13 Section 9 of the NSW Act requires the <<Boxing Authority>>, on receipt of an application for registration under the Act, to determine whether it is satisfied the applicant "is a fit and proper person to be registered as a boxer of the prescribed class in respect of which the registration is sought" and, if so, to register the boxer.

14 In the case of Ms Ferneley, the <<Boxing Authority>> did not take this course. Instead, on 13 June 2001, the Executive Officer of the <<Authority>> wrote to Ms Ferneley drawing her attention to s 8(1) of the NSW Act and enclosing a cheque refunding her application fee.

15 Through her solicitor, Ms Ferneley made a complaint to the President of the Human Rights and Equal Opportunity Commission. On 2 August 2001 a delegate of the President terminated the complaint. In giving her reasons, the delegate identified two aspects to Ms Ferneley's complaint: a complaint against the State of <<New South Wales>> in relation to the terms of the NSW Act and a complaint against the <<Boxing Authority>> concerning its handling of her application for registration. The delegate rejected the complaint against the State of <<New South Wales>> on the ground that the making and existence of State legislation is not an area covered by the Sex Discrimination Act. The delegate rejected the complaint against the <<Boxing Authority>> on the basis that the <<Authority>> "was acting in direct compliance with the (NSW Act) when it refused to register the complainant as a boxer".

The proceeding

16 Section 46PO(1) of the Human Rights and Equal Opportunity Act 1986 permits a person whose complaint has been terminated by the President to make an application to this Court alleging unlawful discrimination by one or more of the respondents to the complaint. Section 46PO(4) empowers this Court, if satisfied there has been unlawful discrimination by a respondent, to make a variety of orders including an order for payment of damages.

17 Ms Ferneley decided to take advantage of s 46PO. On 29 August 2001 she filed in this Court an application alleging unlawful discrimination. She named the <<Boxing Authority and the State of New South Wales>> as respondents to her application. The application indicated Ms Ferneley relied on ss 4, 5 and 22 of the Sex Discrimination Act. It sought the following remedies:

"1. A declaration that section 8(1) of the <<Boxing>> and Wrestling Control Act 1986 NSW is inoperative on the grounds that it is inconsistent with s 22 of the Sex Discrimination Act 1984 Cth.

2. A declaration that the First and Second Respondents have committed unlawful discrimination.

3. An order requiring the First and Second Respondents to pay to the Applicant damages by way of compensation for loss and damage suffered because of the conduct of the Respondents including;

(i) damages for loss of income; $1,000.00.

(ii) damages for humiliation, pain and suffering; $20,000.00.

4. An order for Costs."

18 The matter came before me on 11 October 2001. I made directions about affidavits and fixed a hearing date of 8 November 2001. By consent, I directed this hearing not include evidence as to the extent of the damage allegedly sustained by the applicant.

19 On 26 October 2001 the Sex Discrimination Commissioner, appointed under s 96 of the Sex Discrimination Act, applied for leave to appear at the hearing as amicus curiae. Counsel for the Commissioner stated his client wished to put submissions to the Court regarding the proper construction of

s 42 of the Sex Discrimination Act. No party opposed this application. I granted leave, on the basis that no order for costs would be made for or against the Commissioner.

The Sex Discrimination Act

20 Section 3 of the Sex Discrimination Act sets out five objects. They are:

"(a) to give effect to certain provisions of the Convention on the Elimination of All Forms of Discrimination Against Women; and

(b) to eliminate, so far as is possible, discrimination against persons on the ground of sex, marital status, pregnancy or potential pregnancy in the areas of work, accommodation, education, the provision of goods, facilities and services, the disposal of land, the activities of clubs and the administration of Commonwealth laws and programs; and

(ba) to eliminate, so far as possible, discrimination involving dismissal of employees on the ground of family responsibilities; and

(c) to eliminate, so far as is possible, discrimination involving sexual harassment in the workplace, in educational institutions and in other areas of public activity; and

(d) to promote recognition and acceptance within the community of the principle of the equality of men and women."

21 Section 5 of the Act explains the concept of sex discrimination. It includes subs (1), which provides:

"For the purposes of this Act, a person (in this subsection referred to as the `discriminator') discriminates against another person (in this subsection referred to as the "aggrieved person") on the ground of the sex of the aggrieved person if, by reason of:

(a) the sex of the aggrieved person;

(b) a characteristic that appertains generally to persons of the sex of the aggrieved person; or

(c) a characteristic that is generally imputed to persons of the sex of the aggrieved person;

the discriminator treats the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person of the opposite sex."

22 Part II of the Sex Discrimination Act is headed "Prohibition of Discrimination". It includes Division 1 (ss 14 to 20), entitled "Discrimination in Work", and Division 2 (ss 21 to 27), "Discrimination in Other Areas". Division 3 (ss 28A to 28L) concerns sexual harassment and Division 4 (ss 30 to 47) sets out some exemptions.

23 Division 1 of Part II includes s 18, as follows:

"It is unlawful for an <<authority>> or body that is empowered to confer, renew, extend, revoke or withdraw an authorization or qualification that is needed for or facilitates the practice of a profession, the carrying on of a trade or the engaging in of an occupation to discriminate against a person on the ground of the person's sex, marital status, pregnancy or potential pregnancy:

(a) by refusing or failing to confer, renew or extend the authorization or qualification;

(b) in the terms or conditions on which it is prepared to confer the authorization or qualification or to renew or extend the authorization or qualification; or

(c) by revoking or withdrawing the authorization or qualification or varying the terms or conditions upon which it is held."

24 There seems to be no doubt that, if s 18 was available to Ms Ferneley in this case, it would provide her a basis for relief. The <<Boxing Authority>> is an <<authority>> empowered to confer an authorization or qualification (registration under the NSW Act) needed for engaging in an occupation (<<boxing>>). And it is clear that, in refusing to consider whether Ms Ferneley is a fit and proper person to be registered under the NSW Act in either of the prescribed classes of fistfighting and kickboxing, the <<Boxing Authority>> treated her, because of her sex, less favourably than, in the same circumstances, it would have treated a male applicant. The <<Boxing Authority>> would have considered a male applicant's application for registration on its merits, as required by s 9 of the NSW Act. It did not consider Ms Ferneley's application in that way.

25 Of course, the <<Boxing Authority>> took this course because of the restriction imposed by s 8(1) of the NSW law: only a male person may apply for registration under the NSW Act. However, if s 18 applied to this case, the limitation in the NSW Act would not have mattered; by force of s 109 of the Commonwealth of Australia Constitution, s 18 of the Sex Discrimination Act would have overridden the limitation contained in s 8(1) of the NSW Act; s 18 of the Sex Discrimination Act would have made the <<Boxing Authority>>'s conduct unlawful, notwithstanding its compliance with s 8(1) of the NSW Act.

26 However, it is common ground that s 18 is not available to Ms Ferneley in this proceeding. As I have mentioned, counsel for Ms Ferneley accept the <<Boxing Authority is properly to be regarded as the Crown in right of New South>> <<Wales>>. The significance of that fact, in relation to the Sex Discrimination Act, is stated by s 12(1) of that Act. That subsection reads:

"This Act binds the Crown in right of the Commonwealth and of Norfolk Island but, except as otherwise expressly provided by this Act, does not bind the Crown in right of a State."

27 Nowhere does the Sex Discrimination Act expressly provide that s 18 (or any other provision in Division 1 of Part II) binds the Crown in right of a State. Section 9(6) has the effect of applying s 18 to Commonwealth <<authorities>>, and s 9(7) makes it apply to exercises of power under Commonwealth or Territory laws; but there is no corresponding provision in relation to State <<authorities >> and State law.

28 Accepting that s 18 is not available to their client, counsel for Ms Ferneley based their case on s 22 of the Sex Discrimination Act. That section is as follows:

"22 (1) It is unlawful for a person who, whether for payment or not, provides goods or services, or makes facilities available, to discriminate against another person on the ground of the other person's sex, marital status, pregnancy or potential pregnancy:

(a) by refusing to provide the other person with those goods or services or to make those facilities available to the other person;

(b) in the terms or conditions on which the first-mentioned person provides the other person with those goods or services or makes those facilities available to the other person; or

(c) in the manner in which the first-mentioned person provides the other person with those goods or services or makes those facilities available to the other person.

(2) This section binds the Crown in right of a State."

29 The term "services" is defined by s 4 of the Sex Discrimination Act in this way:

"`services' includes:

(a) services relating to banking, insurance and the provision of grants, loans, credit or finance;

(b) services relating to entertainment, recreation or refreshment;

(c) services relating to transport or travel;

(d) services of the kind provided by the members of any profession or trade; and

(e) services of the kind provided by a government, a government <<authority>> or a local government body."

30 It will be noted that s 22, unlike s 18, binds the Crown in right of a State. It is therefore available against the <<Boxing Authority>>, and the State of <<New South Wales>>, if Ms Ferneley's case falls within the terms of subs (1). Whether or not it does so is the major issue in this case.

31 A subsidiary issue arises out of a submission of the respondents that, even if s 22(1) covered Ms Ferneley's situation, the <<Boxing Authority>>'s treatment of her would be saved from unlawfulness by s 42 of the Sex Discrimination Act. That section provides:

"42 (1) Nothing in Division 1 or 2 renders it unlawful to exclude persons of one sex from participation in any competitive sporting activity in which the strength, stamina or physique of competitors is relevant.

(2) Subsection (1) does not apply in relation to the exclusion of persons from participation in:

(a) the coaching of persons engaged in any sporting activity;

(b) the umpiring or refereeing of any sporting activity;

(c) the administration of any sporting activity;

(d) any prescribed sporting activity; or

(e) sporting activities by children who have not yet attained the age of 12 years."

The sport of kickboxing

32 Having regard to the terms of s 42, it is convenient, before going to the parties' submissions, to note some evidence concerning the sport of kickboxing, none of which was contentious.

33 Ms Ferneley said kickboxing bouts are always between people of the same sex and of equal weight, within a few hundred grams, and of comparable experience. Bouts are determined by the comparative skill, agility and willpower of the combatants.

34 Ms Ferneley also said the participants agree in advance as to the number of two minute rounds they will fight, subject to the bout being earlier terminated by a second throwing in the towel or by the referee. Ms Ferneley said that, at her level, there are usually between six and ten rounds.

35 As the name suggests, it is legitimate in kickboxing for a participant to use feet as well as hands. Ms Ferneley said feet are a major weapon; "With <<boxing>> it is very difficult to avoid the contact being hit in the face an awful lot, but with kickboxing it is much easier to keep them at bay with your legs". She added that "the range of targeting goes from just the calves to the thighs all the way up. It is not just mostly focused on punching to the head".

36 Ms Ferneley also mentioned mu thai, a traditional sport of Thailand. In mu thai, though not in kickboxing, it is permissible to use one's knees to inflict blows. It is also permissible to grapple with an opponent; something not permitted in fistfighting or kickboxing.

37 Evidence was given by Dr Peter Lewis, head of the International Sports Karate Association ("ISKA") about the controls applying to martial arts, including kickboxing. Dr Lewis is a medical practitioner resident in Melbourne. He has officiated as a ringside medical officer at professional kick bouts since 1985. Since 1991 he has directed a martial arts training centre.

38 Dr Lewis said ISKA "crown world champions in seven types of martial arts competition, including kickboxing". ISKA sanctions "over 200 major title kickboxing events per year on five continents". The organisation "continues to update rules, train and certify officials and maintain the ratings necessary to recognise both champions and kickboxing contenders in this sport".

39 Dr Lewis deposed to the registration procedure:

"The ISKA has a standardised registration procedure for men and women. Both men and women can apply and be registered as professional and amateur kick boxers with the ISKA. To register competitors must fill out and submit an application form which can be obtained from our website ...

Our registration procedure is recognised in all states in Australia, except in <<New South Wales>> and Victoria where it is superseded by the States' own statutory registration procedures. Men and women can register as kick boxers in Victoria. NSW however does not allow women to register.

Once competitors are registered with the ISKA they are placed in the appropriate weight divisions and matched for competition against competitors at a similar level of experience. This process is the same for men and women. Men and women kick boxers do not compete against each other in ISKA kickboxing bouts nor in any other kickboxing bouts in Australia."

40 Dr Lewis annexed to his affidavit an abbreviated set of ISKA's rules for full-contact karate and kickboxing competitions. They cover many topics. Combatants are required to use gloves, a mouthpiece and, in the case of female competitors, breast protectors. There are provisions for the fight to be stopped at any time by the attending physician, the referee or any one of other specified officials.

41 Dr Lewis said kickbox competitors must have a medical examination each time they fight; the examinations are the same for men and women.

42 Mr Michael Sexton SC, who appeared with Mr Mark Leeming for the respondents, asked Dr Lewis what was the purpose of the medical examination. Dr Lewis replied:

"To exclude major illness that would predispose to an increased risk of entering competition. We're particularly looking for things like broken noses, broken jaws, history of concussion and major medical illness such as bronchitis, pneumonia, asthma."

43 Dr Lewis said women contestants are asked whether there is any chance they could be pregnant. If the answer is "yes", a pregnancy test is carried out. Mr Sexton asked what follows if pregnancy is established. Dr Lewis replied:

"it's never actually arisen because I've never had a pregnant female wishing to fight. This is something that has never occurred in my entire history of examining a large number of female fighters. One could speculate as to the reasons for this ... but if that were to happen one would then establish the period of the pregnancy and the rules actually state that a female fighter should not box and what I would do is I would sit down with the patient and counsel them about potential risks that might occur from fighting while pregnant."

44 Dr Lewis agreed that, as the rules prohibit a pregnant woman fighting, "it's not so much a matter of counselling but that person wouldn't be allowed to proceed".

Section 22

(i) Submissions of the applicant

45 As I have said, counsel for Ms Ferneley base their case on s 22 of the Sex Discrimination Act. They argue the <<Boxing Authority>> provides services to applicants for registration. They say the <<Authority>> "provides information to applicants and application forms", it "receives the applications, processes the applications, determines whether the applicant satisfies all relevant requirements", and then exercises a discretion in relation to whether or not the application should be accepted and the applicant registered. Counsel said:

"The Applicant submits that the provision of information to applicants, the determination of an application, determining a boxer's classification and issuing a certificate is a `service' for the purpose of section 22 and 4(1) of the Act. The First Respondent refused to provide the full range of services to the Applicant by refusing to consider her application."

46 In support of their argument, counsel for Ms Ferneley cited IW v City of Perth (1997) 191 CLR 1. In that case the High Court of Australia considered an appeal concerning s 66K(1) of the Western Australian Equal Opportunity Act 1984. That subsection made it unlawful for a person who provides services to discriminate against another person on the ground of the other person's impairment, by refusing to provide the other person with services or in the manner of provision of services. A complaint was made by an organisation called People Living With Aids (WA) Inc ("PLWA") and IW, a member of PLWA, that Perth City Council infringed this section when it rejected an application by PLWA for town-planning approval of a day time centre for HIV infected people. The (Western Australian) Equal Opportunity Tribunal upheld the complaint and awarded damages. That decision was upheld by a judge of the Supreme Court of Western Australia. However, the Full Court reversed the primary judge's decision. IW appealed to the High Court against the Full Court's decision. By majority (Brennan CJ, Dawson, Gaudron, McHugh and Gummow JJ; Toohey and Kirby JJ dissenting) the High Court dismissed IW's appeal.

47 Brennan CJ and McHugh J, while agreeing that councils provided various services to ratepayers and residents, held (at 17) it was not accurate to regard refusal to approve a planning application as a refusal of the service the council provided. Their Honours noted there was no assertion that the council failed to provide the service of considering the application. They said:

"... the City did not provide any service of giving approvals. Conversely, it did not provide any service of refusing approvals. The Council, acting on behalf of the City, merely had a duty to consider applications and a discretionary power to refuse or approve those applications unconditionally or on conditions."

48 Dawson and Gaudron JJ made a similar distinction. At 24 they said:

"The appellant's argument that the first respondent's refusal of planning approval was a refusal to provide a service cannot be sustained. Once the service in issue is identified as the exercise of a discretion to grant or withhold planning approval, a case of refusal to provide that service is not established simply by showing that there was a refusal of planning approval. Rather, it is necessary to show a refusal to consider whether or not approval should be granted. And that case is foreclosed by the very matter of which the appellant complains, namely, the Council's refusal to grant approval.

49 Their Honours went on to agree with Gummow J that, in any event, the appellant was not an "aggrieved person" entitled to complain of discrimination; he was not the applicant for planning approval. Dawson and Gaudron JJ said at 25:

"As already indicated, there was no refusal of services in this case. And if anyone was the recipient of treatment which might constitute discrimination, it was PLWA, not the appellant."

50 Counsel for Ms Ferneley argue that, in the present case and unlike the position in IW, there was a failure to consider an application for exercise of a statutory discretion; because of her sex, Ms Ferneley was treated less favourably than a man would have been treated. Counsel acknowledge this was because of the terms of s 8 of the NSW Act, but they say this only means there is an inconsistency between the State law and the

Commonwealth law and the latter must prevail. In their written submissions, they put the argument in this way:

"The Act gives effect to the Convention on the Elimination of All Forms of Discrimination against Women (`CEDAW') and prohibits sex discrimination in various fields of public life, including the provision of services. The rights set forth in CEDAW are intended to apply throughout Australia and guarantee that women will be treated on an equal basis with men. Australia is internationally obliged to remove such legislative and other administrative barriers which prevent the equal treatment of men and women in relation to relevant fields of activity. Section 8(1) of the BWC Act make a distinction between men and women and require women to be excluded from the opportunity of being registered as boxers. It represents a legislative barrier to a woman's ability to be registered as a boxer in <<New South Wales>> and thereby have the right to participate in certain sporting activities and enjoy the same opportunities as men who have been registered as boxers.

Where the provisions of a State enactment operate in a manner which sanctions discrimination, the terms of the enactment will be inoperative: see Pearce v <<South>> Australian Health Commission (1996) SASR 486 in relation to the Act and similarly in relation to the Racial Discrimination Act 1975 (Cth) see Mabo v Queensland (No 1) (1988) 166 CLR 186 and Gerhardy v Brown (1985) 159 CLR 70."

(ii) Submissions of the respondents

51 Counsel for the respondents accept that the <<Boxing Authority>> is a "qualifying body within the scope of s 18 of the Sex Discrimination Act". But they say it does not provide "services" within the scope of s 22.

52 Counsel for the respondents contend the applicant's argument has three flaws:

"(a) it is contrary to the plain meaning of the section;

(b) it is contrary to the decision of the High Court in IW; and

(c) it ignores the structure of the Act, in that if it were correct, s 18 would be left with no work to do."

53 In the way counsel put their case, points (a) and (c) seem to overlap. It is convenient first to note what counsel say about point (b).

54 Counsel for the respondents argue "the approach to determining whether a body provides services within the meaning of s 22 has been authoritatively established by IW. The first step is to identify with precision what service has allegedly been refused and what service the alleged discriminator provides". Counsel go on:

"In her written submissions, the applicant states that the service said to be provided by the <<Boxing Authority>> is `the provision of information to applicants, the determination of an application, determining a boxer's classification and issuing a certificate'.

On any view, there was no discrimination by the <<Boxing Authority>> in relation to the provision of information to the applicant. There is no evidence that she was deprived of any information she requested. She plainly was able to obtain the registration papers and other materials attached to her application.

The applicant's real submission is that in refusing her application for registration, the <<Boxing Authority>> was providing a service." (Original emphasis)

55 Counsel also say:

"The word `service' is defined inclusively and circularly in s 4 of the Act. However, such indications as there are in s 4 point against the decision to grant or refuse registration constituting a service, just as they pointed against the decision to grant or approve development approval in IW constituting a service.

56 In relation to points (a) and (c), mentioned in para 52, counsel for the respondents argue:

"When a statute addresses a series of particular subject matters, in the manner adopted by the Act, although it is possible that the same activity may fall within more than one of those subject matters, it is most unlikely that one of those subject matters should be entirely contained within another. Such a construction gives no work for the former to do, and ignores the context of the latter ...

That submission is fortified by the fact that the Legislature deliberately chose to render the `goods, services and facilities' prohibition in s 22 binding on the States, but not the s 18 `qualifying bodies' prohibition: see s 22(2) and s 12(1). It is plain that the Legislature intended that there be some State qualifying bodies whose activities were not subject to the prohibition. That no doubt is an aspect of the legislative compromise. The applicant's construction destroys the distinction between ss 18 and 22, because if the <<Boxing Authority>> provides `services', then so too does any other qualifying body."

57 Counsel cite the observation of Mason CJ, Dawson, Gaudron and McHugh JJ in Smith v The Queen (1994) 69 ALJR 24 at 29:

"It is but common sense that Parliament having before it two apparent conflicting sections at that same time cannot have intended the general provision to have deprived the specific provision of effect."

(iii) Conclusions on s 22

58 IW teaches that, in applying a provision such as s 22 of the Sex Discrimination Act, it is necessary precisely to identify the relevant service.

59 The provision of information by a statutory <<authority>> may constitute a "service" within the meaning of s 22. Paragraph (e) of the s 4 definition of "services" refers to "services of the kind provided by a government, a government <<authority>> or a local government body". The provision of information about their activities is now an important feature of the operations of government bodies. This is particularly true of bodies whose functions include the exercise of statutory discretions. They usually give information about that exercise to potentially affected persons. That includes the supply of information and application forms to people interested in making an application for a favourable decision. To the extent the <<Boxing Authority>> does these things, it provides a "service" within the meaning of s 4 of the Sex Discrimination Act.

60 However, Ms Ferneley does not complain about failure by the <<Boxing Authority>> to provide information or application forms. She does complain about its failure to consider, on its merits, her application for registration. That failure was because of her sex. So the critical question is whether it was a failure to provide a "service", within the meaning of s 22.

61 If s 22 stood alone, I would hold the <<Boxing Authority>>'s failure to consider Ms Ferneley's application on its merits was an act falling within s 22. However, s 22 does not stand alone. Although s 18 does not apply to the <<Boxing>> <<Authority>>, its existence must be taken into account in determining the proper construction of s 22 and, in particular, the extent of the latter section's operation. Notwithstanding its limited application, s 18 is part of the Act.

62 In para 57 I noted the reference by counsel to Smith v The Queen. The statement quoted from that case reflects the principle of statutory construction that is sometimes expressed in the Latin maxim generalia specialibus non derogant (general provisions do not derogate from special provisions). The principle was explained by Deane J, while a judge of this Court, in Refrigerated Express Lines (Australasia) Pty Ltd v Australian Meat and Live-Stock Corporation (1980) 29 ALR 333 at 347:

"As a matter of general construction, where there is repugnancy between the general provision of a statute and provisions dealing with a particular subject matter, the latter must prevail and, to the extent of any such repugnancy, the general provisions will be inapplicable to the subject matter of the special provisions. `The rule is, that wherever there is a particular enactment and a general enactment in the same statute, and the latter, taken in its most comprehensive sense, would overrule the former, the particular enactment must be taken to be operative ...' (per Romilly MR: Pretty v Solly (1859) 26 Beav 606 at 610). Repugnancy can be present in cases where there is no direct contradiction between the relevant legislative provisions. It is present where it appears, as a matter of construction, that special provisions were intended exhaustively to govern their particular subject matter and where general provisions, if held to be applicable to the particular subject matter, would constitute a departure from that intention by encroaching on that subject matter."

63 In Perpetual Executors and Trustees Association of Australia Limited v Federal Commissioner of Taxation (1948) 77 CLR 1 at 29, Dixon J pointed out the principle expressed in the Latin maxim was initially restricted to the operation of one statute upon another. However, his Honour noted it had more recently been used "in relation to ... the interpretation of a single statute containing a special and a general provision".

64 In the present case, it seems to me, Parliament made a special provision (s 18) concerning sex discrimination by <<authorities>> empowered to confer an authorization or qualification needed for engaging in an occupation. The general words of s 22, which might otherwise have been thought wide enough to cover such a case, must therefore be read down to the extent necessary to exclude cases covered by the special provision. As I have indicated, the words of s 18 cover this case. Whatever might be the position in relation to an application for exercise of a statutory discretion in respect of something not related to a person engaging in an occupation - for example, a permit to participate in an amateur <<boxing>> contest - s 22 does not cover applications for registration in respect of professional bouts.

65 I think this conclusion is supported by the structure of the Act. As I have mentioned, Division 1 of the Sex Discrimination Act is headed "Discrimination in Work". All the sections in that Division are concerned with aspects of peoples' lives that can readily be called "work". By contrast, Division 2 is headed "Discrimination in Other Areas"; that is, areas other than "work". So it is reasonable to read the general words of s 22, in relation to provision of services, as not extending to the exercise of statutory discretions in relation to those aspects of life that are included in the "work" provisions of Division 1.

66 In my opinion s 22 does not apply to this case. It was not a breach of that section for the <<Boxing Authority>> to decline to consider Ms Ferneley's application on its merits.

67 As counsel for Ms Ferneley accepted, there is no question of invalidity of s 8(1) of the NSW Act unless it is first shown that provision prescribes conduct by the <<Boxing Authority>> that is inconsistent with something in the Sex Discrimination Act; in the way the matter was argued, s 22. It therefore follows from my conclusion about s 22 that s 8(1) of the NSW Act is not invalidated by s 109 of the Constitution.

68 Before leaving s 22, I should mention that counsel referred me to Australian Education Union v Human Rights and Equal Opportunity Commission (1997) 80 FCR 46. In that case Merkel J considered the interaction of s 22 with s 14 of the Sex Discrimination Act, relating to discrimination in employment or in superannuation. His Honour held that, as a matter of construction of the Act, and particularly because of the terms of ss 41A and 41B, the subject conduct fell within s 22; consequently, it did not matter that the complaint was made against a State (Tasmania). He did not decide whether it also fell within the terms of s 14, but said (at 55):

"However that possibility does not render the basic immunity granted to the State by reasons of ss 12(1) and 13(1) nugatory or meaningless. Rather, in so far as the contravening conduct falls within s 14 (in respect of employment) and s 22 (in respect of services) or, to use an additional example s 23 (in respect of accommodation), the immunity under s 14 will operate but, as was Parliament's expressly stated intention, no such immunity is to operate in relation to ss 22 or 23 which each provide that `This section binds the Crown in right of a State.' Further, I do not accept the primary contention of the State of Tasmania that if

the same conduct falls within s 14 and s 22 it would largely render nugatory and defeat the purpose of the immunity granted in respect of s 14. As pointed out above, s 14 has a substantial sphere of operation in areas that do not touch upon or involve the provision of services. It is primarily concerned with protection of the State from federal legislation in relation to terms and conditions of employment. To render the State liable under other sections, such as s 22 or s 23, would not significantly impinge on that immunity."

69 Neither party placed reliance on this case. That is understandable because Merkel J was addressing a different argument. It was apparently not put to him that s 14 affected the proper construction of s 22; rather, it was argued that, if particular conduct was covered by both s 14 and s 22, the immunity in respect of s 14 that was enjoyed by Tasmania extended also to s 22, notwithstanding that subs (2) of that section made it binding on the Crown in right of a State. It is unsurprising that his Honour rejected that proposition.

70 Merkel J observed that, if s 22 covered the case before him, s 14 was still left with a substantial sphere of operation. That situation contrasts with the relationship between s 18 and s 22. If s 22 applied to statutory decisions about authorizations and qualifications concerning the practice of a profession, the carrying on of a trade or engaging in an occupation, s 18 would be redundant.

Section 42

(i) Preliminary

71 In view of my conclusion about s 22, it is strictly unnecessary for me to deal with the arguments concerning s 42 of the Sex Discrimination Act. That section operates as a qualification on the provisions contained in Divisions 1 and 2 of Part II of the Act. If none of those provisions applies to particular conduct, s 42 has no role to play in the case.

72 However, the proper interpretation of s 42 was fully argued in this case, including by counsel for the Sex Discrimination Commissioner. Moreover, I was told this is the first occasion on which that matter has been argued in court, as distinct from before an administrative tribunal. So it seems desirable to deal with it.

73 Prior to the trial of this matter, Ms Ferneley formally admitted that "kickboxing is a competitive sporting activity". She declined to concede it is "an activity in which the strength, stamina or physique of competitors is relevant". However, in the light of her evidence, I have no hesitation in finding that to be the case. The same finding may be made about fist-fighting, the other class of <<boxing>> covered by her application for registration.

(ii) The respondents' submissions

74 Counsel for the respondents submit that a finding that kickboxing (or fist-fighting) is a "competitive sporting activity in which the strength, stamina or physique of competitors is relevant" is enough to bring s 42 into play, overriding any otherwise relevant provision in Division 1 or Division 2 of Part II of the Act. They say this is so even for a same-sex activity, where there is no issue of male and female disparity in strength, stamina or physique. Counsel concede this interpretation of s 42 would make a deep inroad into the protection from discrimination in sport otherwise provided by Divisions 1 and 2 of Part II; strength, stamina and physique are relevant in virtually all sports. But they respond:

> "The effect of the construing s 42 in accordance with its ordinary meaning is not, as the applicant submits, to give a green light to discrimination in sport. The effect is simply to leave the field of discrimination in sport to the legislative regimes enacted by the States. The stated intention of the Minister introducing the original Bill was that `the present Bill is designed to complement and preserve the concurrent operation of existing State legislation' (Hansard (Senate) 2 June 1983, at 1186)."

75 The respondents' counsel referred to the history of what became s 42 of the Act. The original Sex Discrimination Bill, introduced in June 1983, contained cl 35, in the following form:

" (1) Nothing in Division 1 or 2 renders it unlawful to exclude persons of one sex from participation in any sporting activity.

(2) Sub-section (1) does not apply in relation to the exclusion of persons from participation in -

(a) the coaching of persons engaged in any sporting activity;

(b) the administration of any sporting activity; or

(c) any prescribed sporting activity."

76 On 20 October 1983, the Attorney-General, Senator Gareth Evans, made a statement in the Senate about this Bill in which he said:

"The Government will move an amendment to limit the exemption in relation to sport by providing that persons of either sex can be excluded from any competitive sporting activity where the strength, stamina or physique of competitors is relevant. The Government is of the view that its amendment would accommodate the amendment to the clause proposed by the Australian Democrats."

See Senate Debates, 20 October 1983, page 1893.

77 On the following day, the leader of the Australian Democrats, Senator Janine Haines, made a speech in which she said:

"The Government indicates that its amendments to the section of sport should accommodate some of the concerns raised by the Australian Democrats, but I am not exactly sure whether they in fact achieve that end. The Government will move an amendment to limit the exemption in relation to sport by providing that persons of either sex can be excluded by any competitive sporting activity where the strength, stamina or physique of competitors is relevant. The Government does say that it is of the view that this would encompass an amendment that I suggest - that sporting teams in which the participants were under the age of 12 should not be able to exclude one sex or another. It seems to me that that is very important since it is fairly well known that attitudes to role stereotypes are developed frequently at the primary school level and that at the same time it is at that very stage that girls are likely to be stronger, faster, smarter, and so on, than boys and that if they are entitled to engaged [sic] in sporting competition it will make it even easier to dispel the myths that surround women at post-puberty levels that they cannot engaged in competitive sport against men."

See Senate Debates, 21 October 1983, pages 1929-1930.

78 Subsequently, the original Bill was withdrawn and a <<new>> Bill substituted. The <<new>> Bill contained cl 42(1), in the same form as the Act's s 42(1). Clause 42(2) contained paras (a), (b), (c) and (d), as set out in the Act's s 42(2); but not para (e). That paragraph came from an amendment moved by Senator Haines during the Committee stage. In moving the amendment, she said:

"Sub-clause (2) then lists what does not apply in relation to the exclusion of persons from participation. That includes the coaching of persons, umpiring, referring, administration of any sporting activity and any prescribed sporting activity. I am aware that that clause appears to cover the area which is affected by my amendment; that is, sporting activities of children who have not yet attained the age of 12. However, in this area people are prone not to let facts get in the way of a good argument and tend to attempt to preclude mixed sporting activities of children under the age of 12 by perpetrating an assortment of myths relating to the comparative strength, stamina and physique of boys and girls under the age of 12. I suggest that it is at this very age that girls not only are generally the equal of boys in height, strength, running ability and so on but also are frequently their superiors. If we are at any stage to overcome the myth that girls' hips stop them from running fast, that their elbow joints stop them from throwing properly, or whatever the various arguments are for excluding women from competing against and with men, we will have to do it when it is quite clearly shown that there is considerable equality between the sexes.

I therefore argue that the addition of the words `or (e) sporting activities by children who have not yet attained the age of 12 years' to clause 41(2) is not in any way superfluous. This is an age at which attitudes are formed, at which the competition may be genuine and at which it can be easily demonstrated that the differences between males and females in sporting activities are less due to unequal stamina and strength than to lack of competition or to some sort of spread of mythology. I think there is a problem in that people in the community will persist in pursuing the myths relating to strength, stamina and physique with regard to sport. I believe that if we can scotch that at pre-puberty by actively saying within this Bill that sporting activities for children under the age of 12 should include children of both sexes, we will go a long way to effecting the general principle and spirit of this legislation."

See Senate Debates, 16 December 1983, page 3993-3994.

79 Senator Susan Ryan, Minister for Education and Youth Affairs and Minister Assisting the Prime Minister on the Status of Women, announced the government would accept Senator Haines' amendment. It was thereupon agreed to.

(iii) The applicant's submissions

80 The applicant, Ms Ferneley, contends s 42 has no relevance to this case. Her counsel say the functions of the <<Boxing Authority>> are exhaustively set out in the NSW Act; the <<Authority "does not conduct services with respect to boxing>> competitions". Although the <<Boxing Authority>> has the function of approving, under Part 7 of the NSW Act, a person's application to provide or arrange a <<boxing>> contest, it has no subsequent function in relation to that contest.

81 Counsel argue, in the alternative, that, if s 42 may apply to s 22 conduct involving competitive sporting activities, it does not apply to same-sex activities. They contend s 42 "should be construed narrowly and in a manner which gives effect to the objects of the Act", as set out in s 3: see para 20 above. Counsel say: "... any exception which has the effect of restricting human rights should be construed narrowly and apply only in clear cases". Counsel's argument continues:

"While it is clear that section 42 will apply to competitive sporting activities, the terms of the section provide that a person of one sex may only be excluded where the strength, stamina or physique of competitors is relevant. The fact that a competitor must have certain strength, stamina or physique to participate in the sport at a competitive level is not sufficient to justify a woman's or man's exclusion from the sporting activity. The key to the operation of the section is that the competitors' strength, stamina or physique has some relevance to the nature of the sporting activity and the ability of men and women to compete in that activity.

...

The applicant submits that section 42 was intended to apply where the sporting competition involved men and women competing against each other. It was not intended to apply where the competitors were of the same sex. The terms of section 42 are intended to determine when a person of one sex may be excluded, so it implicitly assumes that men and women are competing with each other in the relevant competitive sporting competition. Section 42 is not concerned with same sex sports. The Act is not concerned with discrimination between men or between women on the grounds of sex." [Original emphasis]

82 Counsel referred to a decision of the Victorian Civil and Administrative Tribunal, <<South>> v Royal Victorian Bowls Association Inc [2001] VCRT 207, concerning s 66(1) of the Victorian Equal Opportunity Act 1995. That provision is substantially identical to s 42(1) of the Sex Discrimination Act. The applicant was a 19 year old woman who wished to play lawn bowls at pennant level but was excluded because this was available only to male members of affiliated clubs. So <<Souths>> was not a same-sex case. Nonetheless, it is worth referring to some observations of the Tribunal's Deputy President (Mrs A Coghlan) at para 34:

"I agree with the respondent's submission that the generality of the concepts of strength, stamina and physique and the use of the plural `competitors' requires one to look at the circumstances relevant to the playing of the competitive sporting activity generally. I do not accept that all that is required for s 66(1) to be invoked, is that strength, stamina or physique is involved in the playing of the activity. That interpretation would strip the section of any meaning. Strength, stamina or physique must be relevant to something more than the activity itself. The RVBA submitted that it means it must have a bearing on the outcome of the game. That interpretation implies that it must be relevant to the result. The section however, refers to participation in a competitive sporting activity consistent with Ms Hampel's observations that the section is directed to participation in a competitive sporting activity and not to winning or who is the strongest. I agree with the approach in Robertson's case; and that s 66(1) applies where if both sexes competed against each other, the competition would be uneven because of the disparity between the strength, stamina or physique of men and women competitors. That interpretation is consistent with the objectives of the Act to eliminate, as far as possible, discrimination against people by prohibiting discrimination on the basis of various attributes."

83 The Deputy President's reference to Robertson's case was a reference to a decision of the Victorian Anti-Discrimination Tribunal, Robertson v Australian Ice Hockey Federation, 26 March 1998. In that case, the Tribunal President said of s 66(1):

"The sub-section must be read as a whole. It permits the exclusion of one sex from a competitive sporting activity where the relative strength, stamina or physique of each sex is relevant. In other words, the sub-section is directed to competitive sporting activities where, if both sexes competed against each other, the competition would be uneven because of the disparity between the strength, stamina or physique of men and women competitors. This interpretation is consistent with the objectives of the Act which include the elimination (as far as possible) of discrimination and the promotion of acceptance and recognition of everyone's right to equality of opportunity (s 3). Exceptions to those prohibitions of the Act, like other statutory exceptions, should be construed strictly and in the light of the objectives of the Act. It would not be consistent with the objectives of the Act to construe one of these exception provisions to authorise discrimination against one sex or the other in competitive sport, where there is no disparity between the requisite strength, stamina or physique of men and women that would prevent them competing together in the sporting activity.

My conclusion as to the interpretation of s 66(1) is broadly consistent with the rest of the section and with the few <<authorities>> in which provisions of a similar kind have been considered. Section 66(3) provides that s 66(1) does not apply to a sporting activity for children under 12 years of age. By this sub-section, Parliament has made it clear that, with children under a certain age, exclusion of one sex from participation in a sporting activity on the basis of relative strength, stamina or physique is not covered by the exception."

(iv) The Sex Commissioner's submissions

84 Mr Nicholas Poynder, counsel for the Sex Commissioner, supported the applicant's argument concerning s 42. He pointed to the width of s 42, if it were interpreted literally. He mentioned the principle, enshrined in s 15AA of the Acts Interpretation Act 1901, that, in the interpretation of a statutory provision, "a construction that would promote the purpose or object underlying the Act ... shall be preferred to a construction that would not promote that purpose or object". Mr Poynder also referred to High Court <<authorities>> recognising that provisions restricting human rights ought to be narrowly construed: see Waters v Public Transport Corporation (1991) 173 CLR 349 at 359 (Mason CJ and Gaudron J); IW at 14-15 (Brennan CJ and McHugh J), 22-23 (Dawson and Gaudron JJ), 27 (Toohey J), 39 and 42-43 (Gummow J) and 58-59 (Kirby J). He also said there is a presumption that Parliament intends to legislate in accordance with its international human rights obligations and cited Minister for Immigration v Teoh (1995) 183 CLR 273 at 286-287 (Mason CJ and Deane J).

85 Mr Poynder went on to refer to the objects of the Sex Discrimination Act, as set out in s 3, and to the Convention on the Elimination of all Forms of Discrimination Against Women. He said a literal reading of

s 42 of the Act would be inconsistent with the following obligations imposed upon Australia by the Convention:

"* elimination of discrimination on the basis of sex: Articles 1 and 2

* elimination of prejudices which are based on the idea of the inferiority or the superiority of either sex or on stereotypes roles for men and women: Articles 5(a)

* equal participation in sports in the field of education: Article 10(g)

* right to participate in recreational activities, sports and all aspects of cultural life: Article 13(c)

* States Parties are to adopt all necessary measures at the national level aimed at achieving the full realization of the rights recognized in the Convention: Article 24."

86 Mr Poynder referred to the legislative history of s 42. He said the debate concerning the addition of para (e) to cl 42(2) of the second Bill "strongly suggests that the exception was intended to apply to sports involving competition between persons of both sexes".

87 Mr Poynder also cited a comment about s 42 by the House of Representatives Standing Committee on Legal and Constitutional Affairs in a 1992 report, Half Way to Equal: Report of the Inquiry into Equal Opportunity and Equal Status for Women in Australia. The Committee said:

"6.7.16 The evidence given to the committee on the operation of this section has represented quite different opinions. On the one hand, it has been strongly argued that the provision prevents women from participating in certain sporting events and that this inhibits, not promotes, equal opportunity. On the other hand, some submissions argue that it is desirable and not discriminatory to have separate sex sporting competitions where strength, stamina or physique is relevant.

6.7.17 The original purpose of the exemption was not to deny sportswomen the opportunity to compete, but to ensure that women were not disadvantaged in competitions which rely on strength, stamina or physique. At the time the legislation was enacted it was felt that if mixed-sexed competitions were to become widespread and replace separate sex competitions women may win fewer contests and receive less recognition."

88 After referring to various tribunal decisions in Australia (including Robertson and <<South>>) and some overseas decisions, Mr Poynder concluded:

"It is apparent from a consideration of the objects and purposes of the SDA, the drafting history of s 42 and its subsequent interpretation by specialist bodies and courts and tribunals, that the exemption in s 42 has always been intended to apply only to competitive sporting activities as between different sexes."

(v) Conclusions on s 42

89 I accept the submissions concerning s 42 made by the applicant and the Sex Commissioner. The wording of s 42(1) is unfortunate. It would have been preferable to use words stating plainly that the subsection is concerned only with mixed-sex sporting activity. However, it seems clear this was what was intended. I say this for a number of reasons.

90 First, unless s 42(1) is concerned only with mixed-sex activity, it is difficult to see the point of limiting its operation to activities in which the strength, stamina or physique of competitors is relevant. To apply s 42(1) to same-sex activities leads to strange results. For example, on that basis, a local government <<authority>> could lawfully adopt a policy of making its tennis courts, or its sporting ovals, available only to females (or only to males), an action that would otherwise obviously contravene s 22. Yet the <<authority>> might not be able to adopt the same policy in relation to the chess-room at its local lending

library, and certainly could not do so in relation to the library itself. There would appear to be no rational reason for such a distinction.

91 Second, the concept of excluding "persons of one sex" from participation in an activity implies that persons of the other sex are not excluded; the other sex is allowed to participate. This can be so only in respect of a mixed-sex activity.

92 Third, contrary to the submission of counsel for the respondents, the legislative history tells in favour of the argument put by the applicant and the Sex Commissioner. As Mr Poynder submitted, the clue to Parliament's intention is provided by the debate concerning sporting activities by children under 12 years of age. Senator Haines was concerned that, in its original form, cl 42 of the Bill would allow sporting bodies to segregate young children on gender lines, thereby perpetuating what she thought to be undesirable stereotypes. In order to ensure this would not happen, she introduced para (e) into s 42(2). Her purpose was to prevent s 42(1) overriding s 22 in relation to mixed-sex sporting activities of children under s 12. Implicit in this position was an understanding that s 42(1) would have that effect in relation to mixed-sex sporting activities of older people. Senator Haines was not a government member, but her amendment was supported by the responsible Minister on behalf of the government.

93 Although I put little weight on this factor, because of the changes in membership of the House of Representatives that would have occurred between 1983 and 1992, I note with interest that the Standing Committee on Legal and Constitutional Affairs understood s 42(1) in this way in 1992.

94 I respectfully agree with the approach to s 66 of the Victorian Act taken by the Victorian Anti-Discrimination Tribunal in Robertson and the Victorian Civil and Administrative Tribunal in <<South>>. That approach equally applies to s 42 of the Commonwealth Act.

95 In my opinion, if s 22 applied to this case, s 42(1) would not have the effect of saving the <<Boxing Authority>>'s conduct from unlawfulness. Section 42(1) has no application to same-sex sporting activity.

Disposition

96 My view about s 22 dictates that Ms Ferneley's application be dismissed. I will so order.

97 I propose to reserve the matter of costs. Although the applicant fails, it is not clear to me that she should be required to pay the respondents' costs. Her case in relation to s 22 was arguable. Her argument in relation to s 42, which was disputed by the respondents, is correct. Perhaps more importantly, the case has served the public interest in clarifying important issues of discrimination law.

98 If, notwithstanding these comments, the respondents decide to seek an order for costs, they should lodge a written submission by 31 December 2001, setting out reasons. The applicant should respond by 21 January 2002.

99 This case has attracted some controversy and media attention. The result may disappoint some people, concerned to strike down legally entrenched sex discrimination wherever it appears. They may be unpersuaded by Mr Cleary's justification of the restriction imposed by s 8 of the NSW Act, perhaps especially having regard to the evidence given in this case by Dr Lewis. They may think the applause for Australian Lauren Burns, in winning a gold medal in taekwondo at the Sydney Olympic Games, suggests it is no longer true to say, if it ever was, that "the spectacle of women attacking each other is simply not acceptable to a majority of people in our community". Other people, who may disapprove of all professional <<boxing>> contests, and/or contests between female participants, may be glad to see the restriction survive. I understand both points of view but I endorse neither of them. My decision does not turn on the desirability or undesirability of permitting female <<boxing>> contests. It turns only on the proper interpretation of the Sex Discrimination Act. If the result is thought to be unsatisfactory, it can be rectified by either the <<New>> <<South Wales>> Parliament (by amendment of s 8 of the NSW Act) or the Commonwealth Parliament (by an amendment of the Sex Discrimination Act to make s 18 bind the

Crown). As a matter of policy is involved, it is appropriate for any change in the law to be made by a body directly answerable to the electorate.

I certify that the preceding ninety-nine (99) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Wilcox.

Associate:

Dated: 10 December 2001

Counsel for the Applicant:

Dr G Griffith QC and Ms K Eastman

Solicitor for the Applicant:

Public Interest Advocacy Centre

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Mr M Sexton SC and Mr M J Leeming

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Mr N Poynder

Solicitor for Amicus Curiae:

Human Rights and Equal Opportunity Commission

Date of Hearing:

8 November 2001