

ACPNS LEGAL CASE REPORTS SERIES

This series compiles short summaries of significant cases involving charitable, philanthropic, nonprofit and social enterprise organisations in Australia and overseas.



Sisters Inside Inc v State of Queensland [2022] QSC 130

Supreme Court of Queensland, Brown J, 20 June 2022

Contest about the scope of documents a government funder can request under a funding contract.

Key words: Funding, Queensland, Contract, Audit, Documents, Valid Request

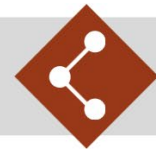
1. Sisters Inside is a charitable non-profit association providing programs to women and girls to address factors leading to criminalisation, and to offer opportunities to break the cycle of recriminalisation.
2. Its programs are funded by community fundraising, and State and Commonwealth grants.
3. The issues arose under its Queensland State Government (State) funding agreements that were by different departments with slightly different contractual terms, but the parties agreed for the purposes of this hearing that the differences were not material.
4. In 2021 the State informed Sisters Inside that it proposed to conduct a financial and compliance audit and sought specified documents.
5. Sisters Inside advised that some of the requested documents were:
 - outside those related to the funding;
 - were not connected to the funding provided by the State or the State funded services they provided, such as 'how charitable funds are being banked, managed and accounted for' and 'will include a review of how financial management and governance is conducted ... including compliance with ACNC requirements'.
6. The State revised its request for documents, advised of certain matters that could be redacted from the documents, and disclosed that (at [11]):

The Departments are aware that a number of management committee members have resigned in recent times, and concerns have been raised regarding potential governance failings and financial mismanagement at Sisters Inside.

7. Sisters Inside then filed an originating application seeking declarations that the scope of audits proposed by the State was not authorised by the Standard Terms or the terms of the Service Agreements relating to the funding.
8. Sisters Inside claimed that the list of documents requested did not comply with the contractual funding agreement in that:
 - it did not explain the 'information of concern/potential breaches' alleged by the State as required by the funding agreement;
 - much of what was requested was for a period of more than four and a half years, and the State did not say how the categories were relevant to which funding schedule or services;
 - it was internally inconsistent, and some documents did not relate directly or indirectly to the Funding or Services;
 - the power to carry out the audit was not extant (still existing) as the contracts had ended; and
 - it was issued under a clause that concerned Performance Reviews, and not financial and compliance audits which had different notice provisions.
9. The Court considered whether the request for documents was for carrying out a Performance Review, audit, or had impermissibly sought documents for another purpose, that is, investigation of breaches under the [Community Services Act 2007](#) (Qld) (the Act).
10. The Act provides its own mechanisms with respect to raising serious concerns. A serious concern includes a serious risk that the funding received by the funded entity is improperly used as well as a serious risk that the funded entity significantly fails to deliver a funded product or service. The Act provides for the Chief Executive to give a funded entity a notice requiring the funded entity to remedy the serious concerns or comply with the requirement notice. Other remedies are also provided for in the Act.
11. However, the Act only applies to declared funding, and the State had not identified the funding provided to Sisters Inside which was declared funding. There was no evidence such a notice under the Act had been issued by the Chief Executive, or that Sisters Inside had not complied with the notice.
12. The Court concluded that it did not appear that there was any matter under the Act with which Sisters Inside must comply in the terms of the funding agreement.
13. While the scope of documents that may be requested is the same for an audit or Performance Review, the agreement required a notice to be given of what was to be reviewed in respect of a Performance Review.
14. The Court found that requesting documents by reference to a specific issue such as 'Use of credit cards for travel or person expenditure' was not unauthorised under the funding agreement, but those records would otherwise be relevant to be produced if they 'relate directly or indirectly to the receipt, expenditure or payment of the Funding or conduct of Services.'

15. The Court noted in relation to seeking documents concerning the ‘conflict of interest between the CEO and legal firm Kilroy and Callaghan lawyers not being managed’ that the appropriate course would be for Sisters Inside to seek clarification of what is being requested. It was not inclined to make an order in relation to such matters without more.
16. In summary, the Court did not consider the request for documents by the State to be a valid request under the terms of the funding agreement as:
- the issue of concern, which was only said to relate to a potential breach of the Act, was not relevant to the use of funds under the funding agreement and was not properly the subject of a Performance Review or audit under the funding agreement;
 - the State had not requested documents within the terms of the funding agreement consistently with the funding it identified it wished to review, given that it sought documents dating back to 2017; and
 - under some funding agreements, the power to audit the grants and/or donations under the Service Agreements was not preserved after termination.
17. In the circumstances, the Court found it was inappropriate to make declarations until the parties had considered the Court’s decisions and provided the Court with an appropriate order for consideration.
18. Costs were awarded to Sisters Inside.

IMPLICATIONS



Litigation about agreements between government funders and nonprofit organisations rarely reach the Courts due to a combination of the expenses of litigation, reputational concerns, settling out of Court, and the power imbalance that is present. This case is important to clarify the terms of such funding agreements and indicates that the State must adhere to the terms of the funding agreements and its legislation when dealing with nonprofit organisations. There are good arguments that the provisions that apply to small business and oppressive, take it or leave, unfair term contracts should be extended to government funding contracts. A term that is not reasonably necessary to protect the legitimate interests of the party that would benefit from the term is unfair. See further ASIC information on the issue for small business [here](#).

Refer Myles McGregor-Lowndes and Amanda McBratney, [Government community service contracts: Restraining abuse of power](#), *Public Law Review* 22(4) (2011): 279-297; Amanda McBratney and Myles McGregor-Lowndes, [‘Fair’ government contracts for community service provision: Time to curb unfettered executive freedom?](#) *Australian Journal of Administrative Law* 19(1) (2012): 19-33; Myles McGregor-Lowndes and Matthew Turnour, (2003) [Recent Developments in Government Community Service Relations: Are You Really My Partner?](#) *Journal of Contemporary Issues in Business and Government* 9(1) (2003): 31-42.

VIEW THE CASE



This case may be viewed at <https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/qld/QSC//2022/130.html>

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