



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

**VICE PRESIDENT ASBURY
DEPUTY PRESIDENT MASSON
DEPUTY PRESIDENT O'NEILL**

C2023/2204

s.604 - Appeal of decisions

**Sarah Tutolo v Noongar Mia Mia Pty Ltd
(C2023/2204)**

Melbourne

12.01 PM, TUESDAY, 6 JUNE 2023

PN1

THE ASSOCIATE: The Fair Work Commission is now in session for matter C2204/2023. This is a section 604 appeal listed for hearing before the Full Bench.

PN2

VICE PRESIDENT ASBURY: Good morning, could we just start by taking the appearances, please? Ms Tutolo, you're the appellant?

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MS S TUTOLO: Yes, that is correct.

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VICE PRESIDENT ASBURY: Thank you. And for the respondent.

PN5

MS S CHRISTIE: Good afternoon. It is Ms Christie, initial (audio malfunction) for the respondent. I'm here with Ms Attika Chand, C-h-a-n-d. Unfortunately Mr Climiati(?) is unavailable today.

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VICE PRESIDENT ASBURY: And you're seeking permission, Ms Christie?

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MS CHRISTIE: Yes, I am seeking permission to represent the respondent.

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VICE PRESIDENT ASBURY: Thank you. Well, we've had an opportunity to consider the submissions of the appellant opposing the respondent being legally represented and the submissions of the respondent seeking permissions. Is there anything you want to add to your written submission, Ms Tutolo?

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MS TUTOLO: No, your Honour. No.

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VICE PRESIDENT ASBURY: Thank you. Ms Christie, anything you want to add to your submission?

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MS CHRISTIE: No, nothing further, Vice President.

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VICE PRESIDENT ASBURY: All right, thank you. Well, having had the opportunity to consider the submissions of the parties, in relation to representation, the Full Bench has decided to grant permission for the respondent to be represented by a lawyer, or paid agent, on the basis that we are satisfied it would enable the matter to be dealt with more efficiently, taking into account its complexity and, on that basis, permission is granted.

PN13

Ms Tutolo, we've read your written submissions and this matter is listed for permission to appeal. Would you like an opportunity to speak to those submissions?

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MS TUTOLO: Is that like my opening submission, is that what you mean? Sorry, being self-represented I'm - - -

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VICE PRESIDENT ASBURY: That's all right. The material that you filed seeking permission to appeal the decision, would you like to speak to your argument about why you say permission should be granted to appeal?

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MS TUTOLO: Yes. So, Full Bench, I have prepared an opening verbal submission, so is this the time that I do that?

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VICE PRESIDENT ASBURY: Certainly, if you'd like to make that, thank you.

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MS TUTOLO: Okay, thank you.

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Sorry, I've just written it down here, I'm very - - -

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VICE PRESIDENT ASBURY: That's all right, take your time.

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MS TUTOLO: So I appear before you today, as a self-represented appellant seeking permission to appeal the decision made by Schneider C to dismiss my application for unfair dismissal.

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I firmly believe that Schneider C's decision contains a substantial number of significant errors that warrant further consideration. Moreover, I submit that granting the appeal would serve the public interest, ensuring the proper administration of justice and the protection of workers' rights.

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First and foremost, it is essential to acknowledge that self-representation is very challenging and daunting, especially with matters of legal complexity. However, I am committed to upholding the principles of fairness and justice and I trust that the Full Bench will afford me a fair opportunity to present my case.

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Turning to the errors that were present in Schneider C's decision; at this point I would just like to draw the attention to my submissions in my appeal. They're very detailed, they do have additional pages to them and, yes, obviously, that's the big part of this here.

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In that I also - I understand the threshold for granting the permission to appeal is high, but I respectfully submit that the circumstances of this case will meet that threshold and it is crucial to underscore the public interest aspect of this appeal also.

PN26

The errors in Schneider C's decision are significant and have far-reaching implications. If left unchallenged it will set a dangerous precedent that may affect countless other individuals who will find themselves in similar unfair dismissal situations. Granting permission to appeal would allow for a thorough review of the facts and law, correcting the errors and establishing a just and equitable resolution.

PN27

I also want to, but I didn't write it down because I'm not sure how to sort of draw it, but I have basically put it in the appeal. Even though there is a large number of significant errors, most of those errors have all come off one main bit, and that is the mandate and the clear interpretation of the mandate, in its entirety, something that I believe Schneider C has not done. It has not been referred to. There's only been specific sections referred to throughout the entire time, despite I mentioning other sections of the mandate.

PN28

So I guess I would ask for an appeal so that it can be a fair and just process and, as a mandate, as a government document, I believe that there should have been investigation, or at least the opportunity to discuss the mandate and talk about the mandate and I was never afforded that. In fact, I was denied that, which is in amongst the evidence as well. Had I been given the opportunity to explain that there was other parts of the mandate that were subject to certain parts, I believe the outcome would have been far different and majority of the decision and the Commissioner's what I say error of fact is all stemmed from that one interpretation of that document, which was not considered in its entirety and that, therefore, led to a totally different understanding and different outcome.

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VICE PRESIDENT ASBURY: Can you take us to the section of the mandate that you say the Commissioner did not have regard to or interpreted incorrectly?

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MS TUTOLO: Yes, I can, your Honour. So in the appeal book, this is page - - -

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DEPUTY PRESIDENT MASSON: Fifty-two, I think.

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MS TUTOLO: Thank you. Yes it is, 'Mandate directions', page 52. So when we look at the mandate, both Employure, in the hearing and the Commissioner in his mentioned, we're talking about paragraph 5. Whereas what I brought up numerous times to the Commissioner, and it was never ever considered or spoken of, it's also what I brought up on both of my conversations with Noongar Mia Mia

and also brought up at both of the Employsure show cause meetings was that paragraph 5 is actually subject to paragraphs 7 and 8.

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Now, paragraph 7 says that, 'If part of the premises are being used as a community care services facility - - -

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DEPUTY PRESIDENT MASSON: Sorry, can I just stop you there, Ms Tutolo. Do you say paragraph 8 is relevant, because - - -

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MS TUTOLO: Paragraph 7.

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DEPUTY PRESIDENT MASSON: Yes. You mentioned paragraph 8, but it seems to me that paragraph 8 is not relevant because of the matters - - -

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MS TUTOLO: Yes, so I'm saying - - -

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DEPUTY PRESIDENT MASSON: So it's really just - - -

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MS TUTOLO: Yes. It's saying - paragraph 5 says it's subject to paragraph 7 and 8 but, yes, I'm saying that my position is subject to paragraph 7, your Honour, yes.

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DEPUTY PRESIDENT MASSON: Yes, okay. So paragraph 8 is not relevant to the permission to appeal. Thank you.

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MS TUTOLO: So in paragraph 7 then if I was given the opportunity, which I never was, or if paragraph 7 had been considered, when you go further into the document where it talks about the descriptions and what is a community services facility, then another thing that Employsure brought up is that it was saying that, on this same document, it was saying that we are a community care service facility because it comes under, under paragraph 19, 'A service provider office site'.

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But in all of my evidence that I submitted, in the original matter, which was never considered or mentioned by the Commissioner, is that the service provider or the program that is relevant to this mandate is what's Moorditj Mia, they offer all the support. The core business is that of a community housing provider. The offices are separate. My office was separate.

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DEPUTY PRESIDENT MASSON: Can I just stop you there?

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MS TUTOLO: Yes.

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DEPUTY PRESIDENT MASSON: As I understand it, there are two organisations, Noongar Mia Mia and, if I get the pronunciation wrong I apologise, then Mia Mia, you're saying was providing the support for homelessness, is that correct?

PN46

MS TUTOLO: No. So what it is, it's the one organisation, which is Noongar Mia Mia. So Noongar Mia Mia is a community housing provider. It then took a contract with government to provide a program. That program was named Moorditj Mia.

PN47

DEPUTY PRESIDENT MASSON: Okay. And are you saying that the organisation that you worked for was separate to, I'll abbreviate it, MM, that's because I won't get the pronunciation right, and therefore paragraph 7 comes into play because the employer that you worked for was separately domiciled, so to speak, within the office and therefore, under paragraph 7 of the mandate, you say it's possible for a community care services worker, as defined, to work in an office or site, so long as they're not working in an area being used to provide community care services, is that the essence of it?

PN48

MS TUTOLO: That is right. And if you further interpret that, on paragraph 9, where it will then go on to say that a community care services facility does include Section F, 'A service provider's office or site', but the provider of the service was Moorditj Mia and their office was separate to ours.

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DEPUTY PRESIDENT MASSON: But doesn't the organisation you work for also - didn't it also provide services to Aboriginal and Torres Strait Islander people?

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MS TUTOLO: Yes, that's correct.

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DEPUTY PRESIDENT MASSON: But doesn't that then bring it within the definition of community care services, as defined at paragraph 17 of the mandate? And weren't those services then being delivered within both the office that you worked in and also in accommodation of clients of the service?

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MS TUTOLO: I'm sorry. Under section 19, 'Community care services facility', which one of those are you saying is the Aboriginal one?

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DEPUTY PRESIDENT MASSON: I'm just seeking to, firstly, confirm that, and I'll again abbreviate it, MM was providing - you accept that they were providing services to Aboriginal and Torres Strait Islander people?

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MS TUTOLO: We provide housing, so it's a community housing provider. It doesn't provide support services.

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DEPUTY PRESIDENT MASSON: No, it just says, 'Community care services means services for Aboriginal and Torres Strait Islander people', at 17(d).

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MS TUTOLO: Yes. Yes.

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DEPUTY PRESIDENT MASSON: All right. Do you agree or disagree that the work of providing housing support constitutes services to Aboriginal and Torres Strait Islander people? You'd agree or disagree?

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MS TUTOLO: I actually have to disagree - - -

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DEPUTY PRESIDENT MASSON: All right, that's fine.

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MS TUTOLO: - = - because I believe - only because, and I'll state why, if you just give me two moments to find it, bear with me two seconds.

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DEPUTY PRESIDENT MASSON: I'm just trying to understand your argument. So essentially - - -

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MS TUTOLO: Absolutely. Absolutely. Yes.

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DEPUTY PRESIDENT MASSON: You suggest that you weren't working for an organisation providing services to Aboriginal and Torres Strait Islander people and therefore, where you were working in the office would be separated from - then it was providing services for Aboriginal and Torres Strait Islander people, therefore you could attend work without being vaccinated, under the mandate.

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MS TUTOLO: Yes, that is correct. My office - yes.

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DEPUTY PRESIDENT MASSON: Okay.

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MS TUTOLO: And the reason - I just want to clarify that now because I have found it, because this is something that I had also mentioned previously and it was always overlooked. Because Noongar Mia Mia - - -

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DEPUTY PRESIDENT MASSON: Is it in the court book?

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MS TUTOLO: Pardon?

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DEPUTY PRESIDENT MASSON: Sorry, is there a reference in the court book you can take me to?

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MS TUTOLO: Not for this - basically this is literally just like what they are, like meanings. So a community housing provider and a community service provider, they're not the same thing.

PN71

VICE PRESIDENT ASBURY: But, Ms Tutolo, isn't it the case that under cross-examination in the hearing that you agreed that your role involved meeting with Aboriginal people, your role involved inspecting houses where those tenants lived, attending those properties, attending tenanted properties, attending courts, and also you had - you would have had cause to meet with external stakeholders, such as government agencies and also people from other social and community organisations and other stakeholders.

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MS TUTOLO: That is correct, as my roles and my job titles, which was also clearly defined and given, which is I worked as their operations manager of properties. I provided a property management service, I did not provide support to minority population.

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VICE PRESIDENT ASBURY: But you were interacting with them, were you not?

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MS TUTOLO: Well, all property managers interact with their tenants. I'm not interacting with homeless people, no. I'm not interacting - - -

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VICE PRESIDENT ASBURY: No, but you were interacting with Aboriginal people.

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MS TUTOLO: What do you mean by 'interacting'? Providing supports, no, because I wasn't providing the supports, if you actually read these. I am not a support worker. That's another error that was quite erroneous in the

Commissioner, as he referred to me giving support numerous times, and yet I did not give support, I never did and he altered my job description.

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VICE PRESIDENT ASBURY: Well, under cross-examination you agreed that your role involved meeting with Aboriginal people, inspecting houses where those people or tenants lived, attending properties, attending tenanted properties.

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MS TUTOLO: That's correct, to inspect the asset, to inspect the home, as a property manager. I was not there to interact with the people, to provide support. That was not my role.

PN79

VICE PRESIDENT ASBURY: But regardless of why you're there, the issue - is the issue not that community care services includes services for Aboriginal and Torres Strait Islander people and regardless of whether you're there to provide the services or not, you're there interacting with people who are in receipt of the services, aren't you?

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MS TUTOLO: Well, I have to disagree because community care services would provide a community care service, yes. But as I said, a community housing provider and a community service provider, they are actually different. I was not there providing services as a community services provided.

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VICE PRESIDENT ASBURY: But you were there providing services, and it says, 'Community care services means services relating to various things'. It was a service for Aboriginal and Torres Strait Islander people, wasn't it?

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MS TUTOLO: Community service providers, yes, the Moorditj Mia team. My team, what I worked at, we provided accommodation and housing, not supports and services beyond that. We were a community housing provider. I interacted with Aboriginal people and went to the properties, as my job role, which is under a community housing provider.

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VICE PRESIDENT ASBURY: Were those Aboriginal people also in receipt of community care services, from another part of the organisation that you worked for?

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MS TUTOLO: No.

PN85

DEPUTY PRESIDENT O'NEILL: Can I just ask you about that, because I understand the point you make about the separate program that was run by another part of the organisation, but is it the case that in addition to actually providing or

arranging the housing needs, in the last 12 months or so the service expanded to providing culturally safe tenancy support for tenants?

PN86

MS TUTOLO: That was through the Tenancy Support Program, yes, that was not - that wasn't me. So that was one of the people that you got the stat dec from, Kenneth Latham, so he was the person that headed that.

PN87

DEPUTY PRESIDENT O'NEILL: But that's part of the tenancy services and not part of the separate MM program, is that the case?

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MS TUTOLO: Yes, it's another program again. So it was separately funded by Sisters of St John of God so, again, it's another different funded program, it's not our core.

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DEPUTY PRESIDENT O'NEILL: I understand you say it's not your core services, but did it come within your area of operations? Not you personally, but the area that you oversaw?

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MS TUTOLO: Those staff would go and give those supports to our tenancies, yes.

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VICE PRESIDENT ASBURY: So the tenants were in receipt of community care services?

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MS TUTOLO: Through the tenancy support, yes.

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VICE PRESIDENT ASBURY: Yes, but why does it make a difference whether the services they're in receipt of come from your organisation or another organisation, when the issue is that there are people that you are dealing with, who are in receipt of community care services, be it from wherever, they're in receipt of them, why does it make a difference, in your submission?

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MS TUTOLO: Because it says that I can still work in my office, where only part of the premises are being used as a community care services facility. So that part is the Moorditj Mia offices.

PN95

VICE PRESIDENT ASBURY: Okay. Assuming that again, and you can agree or disagree with this, you gave evidence, in the first instance proceedings, that you didn't only work in your office, you went into accommodation, as part of your job.

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MS TUTOLO: Accommodation doesn't come under this one.

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VICE PRESIDENT ASBURY: But the people in the accommodation are in receipt of community care services, or may be.

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MS TUTOLO: When I go into the home, I go into the home to inspect that asset. I'm not going there to engage with those people. Half of the time they're not even home and they don't need to be home.

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VICE PRESIDENT ASBURY: But they may be home.

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MS TUTOLO: That's right, they may be. But if I'm going there, I'm going there as a community housing provider. I'm not going there because I am not a community care services worker.

PN101

DEPUTY PRESIDENT MASSON: Does the mandate make any reference to community housing provider, does it exclude it?

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MS TUTOLO: No, and this has been my whole thing the whole time. So the only thing, which even with my email from the Department of Health that I got, which I very clearly outlined in my description and, again, that part of it wasn't considered, only a snippet of it was ever mentioned and put into the decision. But when it's looked at in its entirety, you will see that in that it says that if the accommodation services are that that's covered by directions. So those accommodation services are hostels, aged cares, Aboriginal hostels. So there was another organisation that Moorditj Mia used to deal with and was part of with the Boorloo Bidee Mia Hostel, in Perth, so I wouldn't be able to go to that, but I didn't need to anyway, because that wasn't part of my - - -

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DEPUTY PRESIDENT MASSON: If I could summarise what I understand your argument to be, you say you were providing community housing support, which doesn't fall under the definition of 'community care services', and therefore your office, to use the vernacular, would be a literal island within the broader NMM offices and site and you could continue to perform your work from that office, unvaccinated?

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MS TUTOLO: Correct. Yes. And the office - - -

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DEPUTY PRESIDENT MASSON: Is that a fair - I mean I know it relates to your view of community care services, community care service facility and also community care services work, but, in simple terms, you say you weren't delivering community care services and therefore you could continue to attend the NMM offices, in an unvaccinated state, even though you may have been meeting with persons, both in the office and at accommodation?

PN106

MS TUTOLO: Not in the office I wouldn't have been meeting with any people, no. It would be if I went to inspect the asset, which, as Tina knows, and I did actually mention this in the first hearing as well, given that I was taking on more of the operations side of it, I was actually had my assistant trained to do that, so I actually very rarely went to any inspections but, yes, regardless.

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DEPUTY PRESIDENT MASSON: No, no, I'm just trying to understand that is sufficient.

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MS TUTOLO: Absolutely. Yes. Yes.

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DEPUTY PRESIDENT MASSON: Yes.

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VICE PRESIDENT ASBURY: Was it the case - sorry, go on.

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DEPUTY PRESIDENT MASSON: You go on.

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VICE PRESIDENT ASBURY: Was it the case that it seems that you have, again, agreed or you've said, under cross-examination, that the MM program might refer a homeless person for a tenancy, but as far as you're concerned, they're just a client, it's just an applicant, sorry. 'Whether they're homeless, they're not homeless, I'm just the property manager, I don't give services to homeless people'.

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Well, if a homeless person is referred for a tenancy, why aren't you providing services to homeless people?

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MS TUTOLO: Because we're a community housing provider, we provide the house. Community housing provider is not a community services provider.

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VICE PRESIDENT ASBURY: But the people that are in receipt of your services may also be in receipt of community care services, that's the point I'm asking you.

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MS TUTOLO: Yes, but the mandate - - -

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VICE PRESIDENT ASBURY: I know that your service - - -

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MS TUTOLO: - - - doesn't say that though.

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VICE PRESIDENT ASBURY: Okay, why does it not? Why doesn't it also attach to interactions with people who are in receipt of community care services?

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MS TUTOLO: It doesn't say that. It literally is community care service providers and their jobs that they do, and that's at the back of it that's detailed there whether it's through supports and all those types of things. I'm not a support worker. I'm not a case worker. I do not work in that area. I do not work under that program.

PN121

DEPUTY PRESIDENT MASSON: Can I just ask, maybe this is repeating what's already been asked, as I understand it, a function of NMM Is to provide support to Aboriginal and Torres Strait Islanders needing accommodation, correct? And that accommodation, as I understood from the material, is provided at a discount to market rates.

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MS TUTOLO: That's right. That's the description or the determination of a community housing provider. We don't provide the supports though, it comes with a very stringent outline. It's still - - -

PN123

DEPUTY PRESIDENT MASSON: How is that - I'm just trying to understand how the provision of housing at a rate that is discounted to the market, and is targeted at a particular demographic, that being Aboriginal and Torres Strait Islanders, I'm trying to understand why that would not be captured by the definition of, 'Community care services means', and it's a broad definition, 'services for Aboriginal and Torres Strait Islander people'. How is that not a service?

PN124

MS TUTOLO: Well, when you read the back of the mandate, and if you just - - -

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DEPUTY PRESIDENT MASSON: No, no, I'm just asking you to focus on the definition of community care services. It's a very broad definition, at paragraph 17, under 'Definitions'.

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MS TUTOLO: Yes.

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DEPUTY PRESIDENT MASSON: It's an extremely broad definition. It talks about services for Aboriginal and Torres Strait Islander people. It doesn't say 'support services', it doesn't say 'housing program', it just talks about 'services'.

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MS TUTOLO: Correct.

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DEPUTY PRESIDENT MASSON: It's a broad definition, you would agree?

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MS TUTOLO: It is, I agree, and that's why I investigated it and looked into it and rang up the Department of Health numerous times and then also got that email back from the Department of Health, something that I was again upset that my - -
-

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DEPUTY PRESIDENT MASSON: I understand. I'm asking, in your submissions, to focus on the definition. I'm asking you again, how - - -

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MS TUTOLO: So I - - -

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DEPUTY PRESIDENT MASSON: No, no, let me finish the question. How would the support, and I'll call it, loosely, the service that you provided, how would that not fall within the definition of a service to Aboriginal and Torres Strait Islander people?

PN134

MS TUTOLO: Okay. Because I believe as providing the houses, a community housing provider, our aim is to address housing challenges and improve housing affordability.

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DEPUTY PRESIDENT MASSON: But there's no reference to community housing programs in the mandate, is there?

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MS TUTOLO: Pardon?

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DEPUTY PRESIDENT MASSON: There's no reference to community programs in the mandate, is there?

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MS TUTOLO: No, but we would not be - it's not a program it's actually Noongar Mia Mia's core, so it's the other things that are the programs, yes.

PN139

DEPUTY PRESIDENT MASSON: All right. So even though it's not in the mandate you say that we should take into account your view of what community housing programs means, and that's different to the definition in 17? Services for Aboriginal and Torres Strait Islander people doesn't include, on your submission, the provision of community housing to Aboriginal - - - -

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MS TUTOLO: I'm not saying that you should take the view of my interpretation, I'm just saying that they are different in that a service provider - - -

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DEPUTY PRESIDENT MASSON: But where, in your material, could you point me to anything that goes to community housing programs not being a service to Aboriginal and Torres Strait Islander people? Is there anything in your material that deals with that?

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MS TUTOLO: I'd have to have a think, because I submitted a lot.

PN143

VICE PRESIDENT ASBURY: Ms Tutolo - - -

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MS TUTOLO: There's definitely one in the email to the Department of Health where I clearly outlined what I did.

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DEPUTY PRESIDENT MASSON: Yes, I'm familiar with that email, yes.

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VICE PRESIDENT ASBURY: While you're considering that, Ms Tutolo, the other thing is that the definition, in 17, also provides, at (g):

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Services relating to homelessness, including services to people who are homeless or at risk of being homeless.

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So people don't actually have to be homeless in order for - so why is not the provision of lower than market rates housing a service that is directed to homelessness or people at the risk of being homeless?

PN149

MS TUTOLO: That's not what a community house provider does, that's not what they do. Those are risk of and providing that service, that was not my role, I was not in that program. I was not a service provider.

PN150

VICE PRESIDENT ASBURY: Whether you were in the program or not, providing lower cost housing assists people who are at risk of homelessness, doesn't it?

PN151

MS TUTOLO: It could. Absolutely it could. But that's not like the definition of it.

PN152

VICE PRESIDENT ASBURY: Well, where's the definition you're referring to? Because I'm reading the definition of community care services and it means not only services to Aboriginal and Torres Strait Islander people but, to summaries, it's, 'Services relating to people who are at risk of being homeless'. So I'm struggling with why it is that - - -

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MS TUTOLO: That's right.

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VICE PRESIDENT ASBURY: - - - providing a lower cost housing offering to people is not assisting people who are at the risk of being homeless.

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MS TUTOLO: You've got to understand that they're at risk of being homeless, it's not just because they haven't got a house, there's a lot of factors in that, hence why it's a hole other program.

PN156

A community service provider, it has a range of services, yes, such as that. They support the wellbeing, the health and the social needs of the community. So health care, counselling, social support, advocacy, education, employment. A community housing provider addresses housing challenges.

PN157

VICE PRESIDENT ASBURY: I understand that, Ms Tutolo but, again, if you look at 18 in the 'Definitions', 'Community care services accommodation means the accommodation of the recipient of community care services at a time at which community care services are being provided'. So if a person in your low cost housing is being, at the same time, provided with community care services, why, again, are they not caught by community care services?

PN158

MS TUTOLO: On 18, your Honour, 'community care services accommodation', that's actually a completely type of service. That's like your hostels and your aged cares and different things like that. We did not provide community care service accommodation.

PN159

DEPUTY PRESIDENT MASSON: It doesn't say that, it means the accommodation of the recipient of community care services. Accommodation could include, as you suggest, hostel. Accommodation might also include a private residence in which a person was accommodated, to which whilst they were in there they might be receiving community care services. It doesn't say 'hostel', it just talks about, in broad terms, the accommodation of the recipient.

PN160

MS TUTOLO: But it also goes on to say, 'of the community care services, at a time at which the community care services are being provided'. I am not a community care services provider, I'm not providing that service.

PN161

VICE PRESIDENT ASBURY: Ms Tutolo, I'll say it again, why does that matter when the persons to whom you are providing your services are also in receipt of services that could be classified as community care services? There's not a wall that says when a person is receiving your services they're not, at the same time, receiving services that are community care services.

PN162

MS TUTOLO: Yes, but I'm not a community care services worker.

PN163

VICE PRESIDENT ASBURY: Okay.

PN164

MS TUTOLO: That's not what I am. I don't know how to make that clearer, otherwise this mandate would have applied to everyone and everyone. It would have applied to all real estate agents. It would have applied to all property managers. Like that was not my role.

PN165

DEPUTY PRESIDENT MASSON: I don't think the argument follows that it would extent, exponentially. We're simply focusing on the definitions that are in the mandate, which are written in broad terms and, unhelpfully, it doesn't distinguish, in the definition of services to Aboriginal and Torres Strait Islander people, unhelpfully from your perspective, and that of a community housing provider. There's no reference to community housing provider in the mandate that I can see.

PN166

MS TUTOLO: That's right, there's not.

PN167

DEPUTY PRESIDENT MASSON: So we're grappling with what the mandate means by - not by thinking about what it might apply to, but what does it apply to, that's what we're trying to get to.

PN168

MS TUTOLO: Sure.

PN169

DEPUTY PRESIDENT MASSON: Thank you.

PN170

MS TUTOLO: And that's exactly why, with the Department of Health, I was very, very - and like you said, you're familiar with that, that is, I was extremely clear and detailed in what it is that I do, yet I still got the response back that I did. At the time, like they're the ones to go to to interpret the mandate.

PN171

VICE PRESIDENT ASBURY: So, essentially, your argument hangs on the proposition that you were not providing community care services and, therefore, the mandate didn't apply to you?

PN172

MS TUTOLO: Correct.

PN173

VICE PRESIDENT ASBURY: Okay.

PN174

MS TUTOLO: But, but - well, no, not necessarily, because it goes on to say that, 'A community care services worker or community care', hang on, which is the area, number 7, was it? 'Where only part of the premises are being used as a community care services facility', then I can enter into that. So that's the main part at the front, the Noongar Mia Mia, it's not the Moorditj Mia. The community care services was out of Moorditj Mia, which is, on the map - - -

PN175

DEPUTY PRESIDENT MASSON: Yes, but that still comes back to your view of the difference between community care services versus community housing program support.

PN176

MS TUTOLO: A community housing provider.

PN177

DEPUTY PRESIDENT MASSON: Yes. And, again, we still come back to the difficulty of that argument, in terms of there's no description of community housing provider to Aboriginal and Torres Strait Islanders, for example, being excluded from the definition of community care services, because it is so broadly defined.

PN178

We understand the argument and the distinction you make between a housing provider and a community care service provider.

PN179

MS TUTOLO: Thank you, your Honour, yes, because they are different, yes.

PN180

DEPUTY PRESIDENT MASSON: You've overstated my title, but thank you very much.

PN181

VICE PRESIDENT ASBURY: Is there anything else you'd like to submit, Ms Tutolo?

PN182

MS TUTOLO: No, just that the actual - like a lot of the other different things that were put there are erroneous, which I have outlined, such as the show cause meetings weren't a meeting if it's one-sided and they're just asking for a statement and there was never any response back. There was a time when I wanted to talk to the board and to Tina about the section of the mandate and why I believed, through interpreting it, I could still work there and they denied that, on an email again. That's the evidence that's in there where they clearly said, 'No, we will not'.

PN183

So to then have in a decision that there was clear and reasonable and fair and lots of notice, that's just absurd, that's not true, because all of the information and

evidence that I gave to counteract that and contrary to that was set aside and not referenced and instead went off the hearsay of a statement.

PN184

VICE PRESIDENT ASBURY: Okay. Let's assume that if your argument is that that wasn't considered, if your position is not correct, with respect to the mandate, it wouldn't have changed the outcome, would it, because, regardless, you were not going to comply with it, as I understand.

PN185

MS TUTOLO: Sorry, your Honour.

PN186

VICE PRESIDENT ASBURY: If there'd been extensive discussions with you, about your views on the mandate and whether it applied or didn't apply, and at the end of the day the respondent had said, 'We don't agree with you', there's nothing to indicate you would have complied with it, is there?

PN187

MS TUTOLO: There's nothing to indicate that that would have been the outcome either, your Honour, because I wasn't given that opportunity to have that discussion.

PN188

VICE PRESIDENT ASBURY: Okay, I understand your argument. Can you just also clarify for me, when you answered a question in the hearing that you would not - and said you wouldn't have had cause to interact with homeless people, can I just understand, did you meet with people in your office?

PN189

MS TUTOLO: No.

PN190

VICE PRESIDENT ASBURY: Where did you meet with them?

PN191

MS TUTOLO: We'd meet with them, if they were to be signed up and they entered into their lease agreement, then they would come into the office to sign their agreement or we would meet them at the property, to hand over the keys. But they're not homeless people, these are the tenants. This is the community service. The homeless people that are interacted with, on a daily basis, through Moorditj Mia is done through the outreach service.

PN192

VICE PRESIDENT ASBURY: But you agreed with Moorditj Mia might refer a homeless person for a tenancy and - - -

PN193

MS TUTOLO: A refer doesn't involve meeting. So, your Honour, what a referral means is that, 'We have this person, this is where they are on the community housing wait list, or they're not on the wait list, do you have anything that would

be suitable? Can you push them through? Can you contact the Department of Housing to see where they are?'. There's a program, called Habitat, where we can investigate where they are on that. It's not a face-to-face meeting, no, and referring doesn't mean that I can offer them housing, no.

PN194

VICE PRESIDENT ASBURY: But if you did offer them housing they would come somewhere and sign the lease?

PN195

MS TUTOLO: Actually, that happened on one occasion and it was actually done through Moorditj Mia, I didn't actually meet them or engage with them. The Moorditj Mia team took the paperwork and met them on site and signed them up.

PN196

This is what I was trying to say before, that if the opportunity was there for meaningful discussions, then this is the type of thing that we could have had discussions with. But it was shut down, I was never given that opportunity. Same with the inspection of the properties. If it was determined, through investigation and through meaningful discussions that actually, 'You know what, going to a property to inspect the asset would be deemed as a service so, therefore how to we address that?', well, we address that by the fact that we then get my assistant to do the inspections, of which she was doing most of anyway and I was rarely attending.

PN197

So there are plenty of solutions and workable ways that this could have been dealt with if the reasonable discussions had occurred.

PN198

VICE PRESIDENT ASBURY: But, fundamentally, people would come into your office, or could come into your office to sign leases, and for other purposes?

PN199

MS TUTOLO: No, wouldn't come into my office, it would be done in another room. My office did not have people in it, no.

PN200

VICE PRESIDENT ASBURY: With you in the room?

PN201

MS TUTOLO: No. Again, it wouldn't have to be. Normally it would be my assistant that would sign them up so, no. I'd prepare all the paperwork, definitely, that's the job of operations, it's the overseeing, so definitely written up all the properly management agreements, I'd organise the bond and do the bond lodgements, get all the paperwork written up, yes, absolutely. But just putting that pen to paper, and then handing a set of keys over, was not really my role, that's a job of an assistant.

PN202

VICE PRESIDENT ASBURY: Okay, thank you. Is there anything you wanted to add?

PN203

MS TUTOLO: No, your Honour.

PN204

VICE PRESIDENT ASBURY: Ms Christie, did you have anything in response?

PN205

MS CHRISTIE: Thank you. Look, I have prepared an outline of the respondent's submissions and it addresses, predominantly, the issues that were submitted in Ms Tutolo's outline of submissions, which have varied somewhat from today, which I'd like to present, but I can also address, briefly, some of the matters that have been raised by her in submission today as well.

PN206

So, look, in opening I just wanted, perhaps, to talk about the general principles of appeal that we say are relevant. In general terms, an appeal, under section 604 of the Act is an appeal by way of rehearing and the Commission's powers, on appeal, are only exercisable if there is an error on the part of the primary decision maker. There is no right to an appeal, an appeal must only be made with permission of the Commission.

PN207

It will rarely be appropriate to grant permission to appeal unless there has been an arguable case of error demonstrated. This is so because an appeal cannot succeed in the absence of an appealable error.

PN208

VICE PRESIDENT ASBURY: Well, to misconstrue the mandate would be an error, wouldn't it, of some significance I would have thought.

PN209

MS CHRISTIE: Yes.

PN210

VICE PRESIDENT ASBURY: So really this turns on whether the mandate was misconstrued, misapplied, applied incorrectly, doesn't it? So we understand that. So what - perhaps if you could - - -

PN211

MS CHRISTIE: Yes. In respect of the mandate, and of the general requirements paragraph 7, which have been referred to, we submit that Schneider C has relevantly determined and we continue to maintain that the appellant is somebody who is covered by the community - is a community care services worker, in the community care services sector, and that the organisation, as a whole, is subject to the mandate.

PN212

For that reason, the exclusion, under paragraph 7, we say, is irrelevant, because here is no way that Ms Tutolo, in her role as somebody who had obligations to meet with Aboriginal people in the performance of her everyday duties could be excluded. It is a - the mandate is defined broadly and the organisation provides services to people who are homeless or at risk of being homeless and to people who are Aboriginal or Torres Strait Islander.

PN213

We believe that the respondent has correctly interpreted that and that Schneider C has fairly found that the appellant is a community care services worker, on those bases. So her argument, in respect of this exclusion, as Masson DP said, she could essentially be an island within her office, within the organisation, is unworkable, unrealistic and would fly in the face of the intention and purpose of the mandate. Look, we don't agree that the interpretation of the mandate has been incorrect or that there is any exclusion for Ms Tutolo under it.

PN214

If you would like, I'm happy to address the other sort of errors of fact that she refers to, in her submissions, but given this appeal has morphed somewhat into focusing very specifically on the mandate application, rather than the submissions that Ms Tutolo made in her written materials, it may not be an appropriate use of everybody's time today. I'll be guided by you if you'd like to hear me on those.

PN215

VICE PRESIDENT ASBURY: I don't want to cut off your submission, Ms Christie, but it seems to me that the issue with the appellant is - and she can correct me if I'm wrong, Ms Tutolo, the appellant seems to be saying that paragraph 7, or clause 7, of the mandate would have allowed part of the premises to be excised and, reasonably, that could have occurred because she didn't need to meet with any of the recipients of community care services in any event, notwithstanding that she disagrees that she ever - the people she met with would have been within that description. That some reasonable accommodation would have been made because of the nature of the work that the appellant did. So what is it you say or where does the decision address that, because certainly it was put, as I understand it, at first instance.

PN216

MS CHRISTIE: I'll just bring up the decision, but from my - - -

PN217

DEPUTY PRESIDENT MASSON: I think you'll struggle to find any reference to the argument about paragraph 7, put by Ms Tutolo, in the decision.

PN218

MS CHRISTIE: Sorry, yes. Look, there is no reference to that, but we don't agree to find that there's an exception would mean that you'd have to arrive at the conclusion that Ms Tutolo is not a community care services worker and that the organisation is not a community care services provided, because that exception only applies where those - - -

PN219

DEPUTY PRESIDENT MASSON: No, no, that's not correct, is it? Because when you look at 7 you can still be a community care services worker or a community care critical services worker who is not vaccinated, you can still be one of those two, so long as you're not entering or remaining upon that part of the premises which is not being used as a community care services facility.

PN220

So Ms Tutolo could still be found to be a community care services worker, under the definition of the mandate, and yet be not required to be vaccinated, if she were working in an area which is not being used for delivery of community care services.

PN221

MS CHRISTIE: It is the respondent's position that she was providing community care services, and that has been outlined in our submissions from the beginning. We believe that Schneider C has rightly and correctly found that she was a community care services worker who did provide community care services to Aboriginal people and people who are homeless or at risk of being homeless, in the fulfilment of her duties when she was going out to workplaces.

PN222

I mean perhaps, Tina, if you would like to add any more information on Ms Tutolo's ordinary duties, on a day-to-day basis.

PN223

VICE PRESIDENT ASBURY: I'm sorry, you need to take us to the decision where you say that the finding was made. So where do you say this finding was made, that the appellant was providing or was a community care services worker, where was that finding, specifically made?

PN224

MS CHRISTIE: I think it's about paragraph 40.

PN225

VICE PRESIDENT ASBURY: So you say 42 to 44.

PN226

MS CHRISTIE: Sorry, it's just gone offscreen. Sorry, at - yes, the relevant findings are from paragraph 41 onwards. But at paragraph 43 Schneider C finds that the applicant or appellant's role provided her to provide tenancy support and housing to Aboriginal people who are at risk of homelessness. At 44:

PN227

In completing her duties, the applicant had to physically visit the properties managed by the respondent to conduct inspections, provide tenancy support to Aboriginal people and attend stakeholder meetings with various members of the public.

PN228

On that basis he is satisfied that the respondent's, at paragraph 45, 'Operations, office premises and the role of the applicant fall within the scope of the mandate'.

PN229

VICE PRESIDENT ASBURY: You would also say that the appellant confirmed, in cross-examination, that she did those things?

PN230

MS CHRISTIE: Yes, that's correct, Vice President.

PN231

VICE PRESIDENT ASBURY: Thank you. Do you want to continue with your submissions?

PN232

MS CHRISTIE: No. Look, I don't think there's a great deal of utility in making any further submissions in the nature of - what is now the nature of this appeal. What I had prepared doesn't really necessarily relate to those questions that appear to be at the essence of this dispute.

PN233

Thank you.

PN234

VICE PRESIDENT ASBURY: Thanks.

PN235

Ms Tutolo, do you want to say anything in response?

PN236

MS TUTOLO: Yes, please, if I may.

PN237

Just a couple of little things. So Ms Christie's statement that to not have some employers vaccinated or not vaccinated would fly in the face of the mandate, I actually think that's completely incorrect. It was actually one of my - again, one of my evidence documents where I submitted that it clearly stated that you can have different workers falling under different vaccination mandates and it's the job therefore to apply the correct mandates to the correct staff, so it's not a one size fits all.

PN238

The other thing is, submitting in cross-examination, I think, your last question to Ms Christie, your Honour, under the cross-examination, PN37, during cross-examination Ms Christie asked, in the course of my employment would I have cause to interact with homeless people, which is where I've said, 'No'. This is one I believe, your Honour, you're familiar with, because you also have quoted this one a few times as well, under PN38, 'Would you have cause to interact with them at Noongar Mia Mia's premises, perhaps?', and I've put 'No, not at all'.

PN239

Also, too, evidenced that the - was never considered or mentioned was all of my job duty description, my stat decs, my witness stat dec of exactly my role and what it is that I do, I've got my job duties that's in my workplace agreement, was

all provided as evidence and yet there was multiple times when Schneider C, in his decision, mentioned that I provided support and yet I never provided support. None of my documents that I gave said that I provided support. The only person that said that I provided support was Ms Christie and Ms Picket, in their statements, verbal statements, which is why, again, I've sort of put into this appeal, 'Due to the significant error of facts', which does seem to be slightly one-sided.

PN240

VICE PRESIDENT ASBURY: Again, Ms Tutolo, it's well and good to look at PN38 onwards, but there's also PN30, 32:

PN241

Did your role ever involve meeting Aboriginal people?---Yes.

PN242

Did your role ever involve inspecting houses where Aboriginal people or tenants lived?---Yes.

PN243

Did your role involve attending properties to hand over keys to new tenants?---Yes.

PN244

So your argument is, again, based on that's not the provision of community care services?

PN245

MS TUTOLO: That's right. I was there as a property manager, as a community housing provider, not a support worker.

PN246

VICE PRESIDENT ASBURY: All right, I understand your submission. Thank you.

PN247

All right, thank you for your submissions. We'll indicate that we will reserve our decision and we will issue it in due course and we'll adjourn this hearing, thank you.

PN248

DEPUTY PRESIDENT MASSON: Thank you.

ADJOURNED INDEFINITELY

[12.57 PM]