

Mind your *mens rea*! When is state of mind relevant in crimes of strict liability? ([Chahoud v Penrith City Council \[2020\] NSWLEC 167](#))

KEY POINTS

- ▶ The state of mind of an offender at the time of committing an offence is a relevant consideration when imposing a sentence, even when the offence is a crime of strict liability.
- ▶ A strict liability offence committed intentionally, negligently or recklessly will be objectively more serious than one committed accidentally.

BACKGROUND

In crimes of strict liability, while *mens rea* is not an element of the offence, an offender's state of mind may still be relevant. In assessing the objective seriousness of an offence on sentence, the Court may have regard to circumstances including the offender's state of mind and reasons for committing the offence.

CHAHOUD AND RELEVANCE OF STATE OF MIND

In *Chahoud*, the appellant appealed the severity of a sentence imposed by the Local Court for four offences against the *Environmental Planning and Assessment Act 1979* for carrying out prohibited development on land. The charges, brought by Penrith City Council, related to the construction and use of a large shed on a property; and use of the property as a truck depot for the appellant's transport freight company.

After a concrete slab was laid for the shed without approval, the Council issued the appellant with a penalty infringement notice ("PIN") which referred only to "the construction of a concrete slab that does not have prior consent". The appellant paid the PIN but thereafter continued to complete the construction of the shed.

The appellant pleaded guilty to all four charges and was fined \$70,000 in total. The appellant's unchallenged evidence on sentence included that she:

- did not think she needed to obtain approval to construct the shed, which was built to carry out maintenance and repair of trucks on-site; and
- assumed that she could park trucks on-site because the property was six acres.

THE APPEAL

The Land and Environment Court determined that the penalties imposed by the Local Court were excessive and instead imposed fines totalling \$51,000. In relation to the appellant's state of mind, the LEC observed that:

- the offences are crimes of strict liability, which means that *mens rea* is not an element of the offence;
- however, the state of mind of an offender at the time of committing a strict liability offence is a relevant consideration when imposing a sentence;
- a strict liability offence committed intentionally, negligently or recklessly will be objectively more serious than one committed accidentally;
- an offender's conduct will be found to be reckless if they believe or suspect that an act or omission may be unlawful but proceed without making further enquiries;
- after the issue of the PIN, the offences of constructing and using the shed were committed recklessly;
- the offences for using the property as a truck depot (which accounted for \$50,000 of the total Local Court fine) were *not* committed recklessly at any point; and
- the appellant's motivation was financial gain.

IMPLICATIONS FOR PROSECUTORS

In considering whether or not to challenge evidence of state of mind in the context of strict liability offences, prosecutors should be aware that such evidence may impact the Court's assessment of objective seriousness and the ultimate sentence imposed.

This consideration is subject to the principle in *R v De Simoni* (1981) 147 CLR 383 at 387 that an offender cannot be punished for a more serious offence than the one for which they were charged.

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