

**Carter  
Newell**  
*LAWYERS*

**Workplace Advisory Gazette**



7th edition

*Our mission is to be recognised as a premier provider of specialist legal services across Australia and internationally by being the best we can be for our clients and ourselves.*

Carter Newell Lawyers is an award winning specialist law firm providing legal advice to Australian and international corporate clients in our key specialist practice areas of:

- Insurance
- Construction & Engineering
- Energy & Resources
- Corporate
- Commercial Property
- Litigation & Dispute Resolution
- Aviation & Transport
- Planning & Environment
- Workplace Advisory

Within each of these core areas we have dedicated experts who are committed to and passionate about their field and have extensive experience and knowledge.

## Awards

2021, 2020, 2019, 2018, 2017, 2016 (edns) Best Lawyers in Australia

2020, 2019, 2018, 2017, 2016, 2015 Leading Professional Indemnity Law Firm – Doyle's Guide

2020, 2019, 2018, 2017, 2016, 2015 Leading Defendant Public and Product Liability Law Firm – Doyle's Guide

2020, 2019, 2018, 2017, 2016, 2015 Leading Defendant Medical Negligence Law Firm – Doyle's Guide

2020 Excellence Award - Australasian Law Awards - Law Firm of the Year (1-100 lawyers), Insurance Specialist Firm of the Year and Excellence in Employee Health & Wellbeing Award

2020, 2019 **Finalist** Lawyers Weekly Australian Law Awards - Law Firm of the Year

2020, 2019, 2018 **Finalist** Lawyers Weekly Australian Law Awards - Insurance Team of the Year

2020, 2019, 2017 **Finalist** Lawyers Weekly Australian Law Awards - Dispute Resolution Team of the year.

2020, 2018, 2016 **Finalist** Australasian Law Awards – Employee Health & Wellbeing Award

2020 Leading Planning & Development Law Firm – Doyle's Guide

2020, 2019, 2018, 2017, 2016, 2015, 2014, 2012 Leading Construction & Infrastructure Litigation (Back-End Construction & Contentious Construction) Law Firm – Doyle's Guide

2020, 2019, 2018 Leading Corporate Law Firm – Doyle's Guide

2020, 2019, 2018, 2017, 2015 Leading Australian Aviation Law Firm – Doyle's Guide

2019 **Winner** Australasian Lawyer – Employer of Choice

2019 **Winner** 2020, 2017, 2016 **Finalist** Australasian Law Awards – Law Firm of the Year (1 to 100 lawyers)

2019 **Winner** 2020, 2018, 2017, 2016, 2015 **Finalist** Australasian Law Awards – Insurance Specialist Firm of the Year

2019, 2018, 2017, 2016, 2012 Leading Energy & Resources Law Firm – Doyle's Guide

2019, 2018, 2017, 2015, 2012 Leading Commercial Litigation & Dispute Resolution Law Firm – Doyle's Guide

2019 Leading Queensland Front End Construction & Infrastructure Law Firm – Doyle's Guide

2018, 2016 **Winner** 2017, 2015 **Finalist** Australasian Law Awards – State / Regional Firm of the Year

2018 **Finalist** Lawyers Weekly Australian Law Awards - Energy & Resources Team of the Year and Employee Program of the Year

2018 **Finalist** Financial Review Client Choice Awards

2017 Leading Compulsory Third Party Insurance Law Firm – Doyle's Guide

2016 **Finalist** Australian HR Awards – Best Reward & Recognition Program

2015 **Winner** QLS Equity and Diversity Awards – Large Legal Practice Award

*\*Doyle's Guide to the Australian Legal Profession*

Further awards and accolades can be viewed at [www.carternewell.com](http://www.carternewell.com)



# Contents

## Breach of contract

### 4 **Robert Joseph v Parnell Corporate Services Pty Ltd & Ors [2020] FCA 426**

The Federal Court has dismissed a claim by a senior executive employee that his employment had been wrongfully terminated, finding that the employee's misconduct justified his summary dismissal. The Court further upheld the cross-claim made by the employer in relation to settlement funds paid by the employer to two former employees who had been directly impacted by the senior executive's misconduct.

## Employee vs contractor

### 8 **Amita Gupta v Portier Pacific Pty Ltd; Uber Australia Pty Ltd t/a Uber Eats [2020] FWCFB 1698**

The Full Bench of the Fair Work Commission has dismissed an appeal by an Uber Eats delivery driver, finding that she was not an employee and she was therefore not protected from unfair dismissal.

## Implied freedom of speech

### 12 **Comcare v Banerji [2019] HCA 23**

The High Court has held that the APS Code of Conduct does not impose an unjustified burden on the implied freedom of political communication, observing that the implied freedom of political communication is not a personal right like the freedom of expression guaranteed by the First Amendment to the Constitution of the United States.

## Redundancy

### 16 **HyperLife Pty Ltd T/A Acme Preston v Kelly Brennan, Erin Black, Andrew Davis, Julie Hamshere [2020] FWC 3080; [2020] FWC 3081; [2020] FWC 3082; [2020] FWC 3083**

The Fair Work Commission has significantly reduced the amount of redundancy pay otherwise owing to four employees of a business after the business applied to the Fair Work Commission for a reduction, citing incapacity to pay the redundancy entitlements.

## Unfair dismissal

### 18 **Samuel McClelland v Kamori Australia Pty Ltd T/A Lone Pine Koala Sanctuary [2020] FWC 3707**

The Fair Work Commission has upheld an employer's jurisdictional objection based on genuine redundancy, finding that the employer's consultation was genuine notwithstanding the difficulties surrounding consultation during the COVID-19 pandemic.

### 20 **Ledden v Envirotech Pty Ltd [2020] FWC 2920**

The Fair Work Commission has dismissed a jurisdictional objection made by an employer on the grounds that the dismissal was a genuine redundancy, finding that although the employee's position no longer existed, the causal link with changes in operations had not been established by the employer.

### 22 **Jeremy Lee v Superior Wood Pty Ltd [2020] FWCFB 1301**

The Full Bench of the Fair Work Commission has overturned a decision which found that reinstatement of an employee was inappropriate in circumstances where the decision focused on the issue of trust and confidence to the exclusion of other relevant matters which weighed in favour of reinstatement.

### 24 **Jolley v Cannon Hill Services Pty Ltd [2020] FWC 2404**

The Fair Work Commission has found an employee was unfairly dismissed for stealing a can of Coke from a vending machine in circumstances where the employee had previously lost money to the vending machine and had an otherwise unblemished employment history of nearly 10 years.

### 26 **Peter Nedelkovski v Tasmanian Freight Services Pty Ltd t/a Tasfreight [2020] FWC 3151**

The Fair Work Commission has found that an employee who failed to submit a urine sample for drug and alcohol testing had engaged in serious misconduct and his summary dismissal was therefore not harsh, unjust or unreasonable.

## Unlawful dismissal

### 28 **Rumble v The Partnership Trading as HWL Ebsworth Lawyers [2020] FCAFC 37**

The Full Federal Court has found that an employed solicitor was not terminated because of his political opinion, but rather because of his non-compliance with the employer's media policy.

## Dispute involving stand down

### 30 **Ryan La Plume v Thomas Foods International Pty Ltd [2020] FWC 3690**

The Fair Work Commission has found that a stand down of an employee due to a reduction in work—rather than a stoppage of work—was not consistent with section 524 of the Fair Work Act 2009 (Cth).

# From the Partner



Carter Newell is pleased to release the 7th edition of the Workplace Advisory Gazette.

This edition of the Gazette examines a number of cases of general application, including cases relating to dismissals arising from disparaging comments made about employers and clients, the classification of workers in the

gig economy, and the recovery of damages paid by an employer as a result of the serious misconduct of an employee.

In addition, we also explore a number of timely cases arising from the COVID-19 pandemic dealing with such issues as applications for reduction in redundancy pay entitlements, stand down of employees, and redundancy consultation against the backdrop of gathering restrictions and JobKeeper payments

As a premier legal service provider with a specialist workplace advisory team in Brisbane, Sydney and Melbourne,

we are confident this edition of the Workplace Advisory Gazette will be a useful resource for our corporate, insurer and broker clients.

We invite you to view our suite of publications at [www.carternewell.com](http://www.carternewell.com) and welcome feedback on this edition, and any suggestions for our future editions at: [feedback@carternewell.com](mailto:feedback@carternewell.com)

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