



SELECTED CASES  
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### **Recent appellate advocacy**

- May 2021 - 4-day patent appeal for Wyeth from *Merck v Wyeth (No. 3)* ([\[2020\] 155 IPR 1](#)) before Jagot, Yates and Beach JJ - Cochrane SC made detailed oral submissions on the law of support under the new s 40(3) and proposed an alternative test based upon UK and EU authorities. Case settled.
- August 2020 - 3-day appeal for the Russian Federation before Katzmann, Beach and Markovic JJ of a permanent stay of the proceeding. Cochrane SC persuaded the Court by a detailed analysis of the evidence that the primary judge had overstated the deficiencies in discovery. Appeal successful: see *Federal Treasury Enterprise (FKP) v Spirits International* ([\[2021\] FCAFC 77](#)); ([\[2021\] FCAFC 120](#));
- February 2020 - One-day appeal for Commissioner of Patents before Greenwood, McKerracher and Yates JJ, leading Bembrick, applying the law of manner of manufacture to business methods. Appeal resisted. See *Watson* ([\[2020\] FCAFC 56](#)).
- November 2018 - 2-day patent appeal before Allsop CJ, Kenny J, Besanko J, Nicholas J and Yates J - Cochrane SC addressed the Court on claim construction, and its relevance to manner of manufacture, and innovative step. Appeal resisted. See *Encompass v InfoTrack* ([\[2019\] FCAFC 161](#)).
- February 2018 - 2-day patent appeal for Nichia before Besanko, Jagot and Nicholas JJ - Cochrane SC addressed the Court on the law of inventive step, in particular the Cripps question: see *Nichia v Arrow* ([\[2019\] FCAFC 2](#)).

### **Recent advocacy at final hearings - Court, Patent Office and ACCC**

- 5 October 2021 - 1-day hearing for James Hardie before the Australian Patent Office opposing the grant of a patent in the name of Etex on the grounds of manner of manufacture, inventive step and the law of support under s 40(3).

- March 2021 - Hearing for Pfizer concerning whether Samsung Bioepis should give further preliminary (pre-action) discovery before Burley J. Judgment reserved.
- 2020, 2019, 2018 - Multi-part final hearing for Wyeth concerning validity and infringement of patents for a conjugate vaccine and its formulation, covering Wyeth's Prevnar 13 pneumococcal vaccine and Merck's 15-valent vaccine. See *Merck Sharp & Dohme v Wyeth (No. 3)* [\(2020\) 155 IPR 1](#) (Burley J).
- December 2020 - 4-day trial for F45 concerning infringement and validity of F45's patent for a computer-implemented business method. Trial judgment reserved.
- November 2019 - Confidential examinations of technical witnesses for ACCC.
- August 2018 - Trial for Bupa Health Insurance concerning claim for misleading or deceptive conduct and in restitution and cross-claim for breach of contract before Lee J. *Bupa HI v Chang* [\[2018\] FCA 2033](#).

### **Pharmaceutical Patents – Vaccines and biological medicines**

***Wyeth ats Merck (“Prevnar 2”)*** (Burley J) Patent for 22F pneumococcal serotype, contained in Merck's 15-valent pneumococcal vaccine, which is proposed as a substitute for Wyeth's Prevnar 13 vaccine. Cochrane SC, leading Clark (called 2014), appeared for Wyeth against Howard SC leading Larish. Matter settled before trial.

*Interlocutory dispute to vacate the trial date* - 28 January 2021 - [\[2021\] FCA 57](#).

#### ***Merck v Wyeth LLC (“Prevnar 1”) – Federal Court of Australia (Burley J)***

Validity and infringement of patents for a conjugate vaccine and its formulation, covering Wyeth's Prevnar 13 pneumococcal vaccine and Merck's 15-valent vaccine.

*Reopened trial* – March 2020 – Cochrane SC addressed the Court in relation to the patent invalidity grounds of manner of manufacture, utility and fair basis in answer to submissions made by Howard SC. [\(2020\) 155 IPR 1](#)

*Interlocutory dispute re waiver of privilege* – Sept 2019 – Cochrane SC appeared, leading Mee (called 2014), against Howard SC leading Larish. [\[2019\] FCA 1615](#).

*Interlocutory dispute re notices to produce* – August 2019 – Cochrane SC appeared leading Clark (called 2014), against Howard SC leading Larish. [\[2019\] FCA 1421](#).

*Trial* – 2018/2019 - Cochrane SC conducted the part of the case concerning the

formulation (container) patent and also addressed the court as to the validity of the vaccine patents in answer to submissions by Howard SC. [\[2020\] 155 IPR 1](#)

***Pfizer Ireland & Ors v Samsung Bioepis – Federal Court of Australia***

Pre-action discovery application in relation to potential infringement of process patents for Etanercept, a biological medicine used to treat autoimmune diseases. See [\[2017\] FCA 285](#) (trial, Burley J), [\[2017\] FCAFC 193](#) (appeal, Allsop CJ and Perram and Nicholas JJ) and [\[2018\] HCATrans 97](#) (High Court special leave, refused). The proceeding is ongoing because the scope of discovery is unresolved.

***Pfizer Ireland & Ors v Sandoz - Federal Court of Australia (Burley J)***

Pre-action discovery application in relation to the potential infringement of process patents for Etanercept, a biological medicine. [\[2020\] FCA 1648](#).

***E. R. Squibb and Ono v Merck*** (Yates J) Patent for pembrolizumab, a biological medicine and the active ingredient in Merck's anti-cancer medicine, Keytruda. [\[2016\] FCA 1015](#) (discovery re experiments). Settled before trial.

***Patentable subject matter, including computer-implemented business methods***

***F45 Training v Body Fit Training – Federal Court of Australia (Nicholas J)***

*Pre-action discovery* in relation to a patent for a computer-implemented business method. Cochrane SC appeared for F45, leading Ms Evetts. [\[2019\] FCA 1911](#).

F45 commenced proceedings against Body Fit for patent infringement, in which Body cross-claimed alleging no manner of manufacture. Trial judgment is reserved.

***Encompass Corporation v InfoTrack – Full Court of the Federal Court***

Validity and infringement of patent for a computer-implemented business method.

*Appeal* - Nov 2018 – 5 member bench (Allsop CJ, Kenny J, Besanko J, Nicholas J and Yates J). Cochrane SC conducted the hearing and addressed the 5-member bench re innovative step and claim construction, against Shavin QC. [\[2019\] FCAFC 161](#).

*Trial* - March-April 2017 - Cochrane SC cross-examined the inventor, on credit and technical issues, and a director. Cochrane SC conducted the trial and addressed the court for InfoTrack regarding the novelty of the patent, whether the invention had been secretly used before the filing date and whether it was the subject of an exclusive licence, against Shavin QC. [\[2018\] FCA 421](#).

*Interlocutory discovery dispute* - December 2016 – Cochrane SC appeared, leading Mee (called 2014), against Lang SC. [\[2016\] FCA 1509](#).

***Watson v Commissioner of Patents – Full Court of the Federal Court of Australia***

Appeal in relation to whether a claim to a business method is patentable subject-matter, based upon the law of manner of manufacture.

*Full Court appeal* – February 2020 - Cochrane SC appeared, leading Bembrick (called

2015), for the Commissioner of Patents, before a Full Court comprising Greenwood, McKerracher and Yates JJ. [\[2020\] FCAFC 56](#).

*De novo appeal before Rares ACJ* – Cochrane SC appeared, leading Bembrick (called 2015), for the Commissioner of Patents, against Franklin SC. [\[2019\] FCA 1015](#).

***Grant v Commissioner of Patents***. Business method. [\[2005\] FCA 1100](#).

### **Pharmaceutical Patents – Other Medicines**

***Glaxo Group re Apotex*** (NSD525/2015) (abacavir hemisulphate, anti-HIV drug): Cochrane SC appeared, briefed by I Pascarl, Davies Collison Cave. Case settled.

***Servier re Apotex*** (perindopril arginine): [\[2013\] FCA 1426](#) (trial), [\[2016\] FCAFC 27](#).

***Sanofi-Aventis & BMS re Apotex and Commonwealth*** (NSD 1639/07): [\(2007\) 73 IPR 502](#) (injunction), [\(2008\) IPR 485](#) (trial), [\(2009\) 82 IPR 416](#) (appeal), [\[2010\] HCATrans 59](#) (special leave), [\[2013\] FCA 1425](#) (damages claim), [\[2015\] FCAFC 172](#) (Commonwealth's stated case re ss 26B-D of *Therapeutic Goods Act 1989* (Cth)).

***Servier re Apotex*** (NSD 657/2008) (perindopril erbumine): [\(2010\) 89 IPR 219](#) (appeal, patent amendment), [\(2010\) 89 IPR 274](#) (joinder, foreign parties), [\(2011\) 199 FCR 62](#) (privilege, "without prejudice" correspondence); [\[2012\] FCA 745](#) (stay).

***BMS & Otsuka re Apotex*** (NSD 1116/2009): [\(2012\) 298 ALR 137](#) (privilege in expert witness's notes), [\[2012\] FCA 1433](#) (experimental proof), [\(2013\) 104 IPR 23](#) (trial), [\(2015\) 228 FCR 1](#) (appeal).

***Eli Lilly re InterPharma*** (gemcitabine, chemotherapy): [\(2008\) 79 IPR 261](#) (injunction).

### **Patents for methods of treatment and medical devices**

***Stratus (Biomerics) v Diros Technology and M Medical – Federal Court (Nicholas J)***  
Validity and infringement of patents for medical devices.

*Interlocutory discovery dispute (inventors records)* – October 2019 – Cochrane SC appeared, leading Evetts (called 2019), against Dimitriadis SC and Hughes.

***BMS & Otsuka re Generic Health*** (NSD 121/2012) (method of treatment): [\(2012\) 291 ALR 763](#) (interlocutory injunction), [\(2013\) 100 IPR 240](#) (leave to appeal), [\[2015\] FCA 634](#) (trial), [\[2015\] FCA 634](#) (stay) and [\[2016\] FCAFC 111](#) (appeal)

***Otsuka re Apotex*** (method of treatment): [\[2014\] APO 28](#). (Patent Office opposition).

## **Telecommunications Patents**

### ***Voxson Pty Ltd v Telstra Corporation Ltd & Ors:***

Validity and infringement of a patent re GPS and telecommunications technology.

*Interlocutory dispute re limitations of actions* – Feb 2017 – Cochrane SC appeared leading McGovern (2014) for Vodafone against Shavin QC. [\[2017\] FCA 267](#)

*Interlocutory dispute re questions for expert witness conclave* – February 2018 – Cochrane SC, leading McGovern (2014), appeared against Shavin QC. [\[2018\] FCA 227](#)

*Trial* - [\[2018\] FCA 376](#). The case settled during trial.

***Telstra Corporation ats Upaid Systems*** (NSD 1698/2013, Yates J): See [\(2013\) 220 FCR 182](#) (dispute re adequacy of particulars of infringement). Settled before trial.

***Vringo v ZTE (Aust)*** (NSD 1010/2013): [\[2013\] FCA 1152](#) (patent amendment), [\[2014\] FCA 525](#) (Sabre order), [\[2014\] FCA 983](#) (confidentiality). Case Settled.

***Samsung ats Apple*** (cross claim re 3G patents): briefed for Samsung. Cochrane SC appeared for Samsung at interlocutory hearings. See [articles](#).

## **Other Patents**

### ***Seiko Epson v Calidad Pty Ltd – High Court of Australia***

Appeal as to the legal doctrine applicable to the question of whether a remanufactured printer ink cartridge infringes a patent.

*Appeal to High Court of Australia*. August 2020. [\(2020\) 155 IPR 381](#); [\[2020\] HCA 41](#).

*Appeal to the Full Federal Court*. August 2018 - [\[2019\] FCAFC 115](#); [\[2019\] FCAFC 168](#).

*Trial* - December 2016, April 2017 - Cochrane SC, for Seiko Epson, cross-examined a key technical witness, Mr Li, via an interpreter, and a company officer and made oral submissions on trade mark and contract issues. [\[2017\] FCA 1403](#).

### ***Dyno Nobel v Orica Explosives – Federal Court of Australia (Burley J)***

Validity and infringement of a patent for a method of blasting in the mining industry.

*Trial* - 9-27 September 2019. Matter settled during trial.

*Interlocutory discovery dispute* – May 2019 – Cochrane SC appeared, leading Bembrick (called 2015), against Caine QC and Rothnie (called 2002) (Vic Bar).

*Interlocutory discovery dispute* – Feb 2019 – Cochrane SC appeared leading Harris (called 2015), against Murray SC and Rothnie (called 2002). [\[2019\] FCA 258](#).

*Interlocutory dispute re discovery and product/process descriptions under FCA practice note* – August 2018 – Cochrane SC appeared leading Larish (called 2014), against Caine QC and Rothnie (called 2002) (both Vic Bar).

***Nichia Corporation v Arrow Electronics – Full Court of the Federal Court***

Validity and infringement of a patent concerning ‘bright white’ LED.

*Appeal* - February 2018 - Cochrane SC addressed the court re the law of obviousness in answer to submissions by Howard SC. [\[2019\] FCAFC 2](#).

*Trial* - May 2016 - Cochrane SC addressed the court for Nichia in relation to novelty (including establishing the prior art was a forgery) and fair basis of the patent, against Howard SC. [\[2017\] FCA 864](#) (Yates J).

***Dometic Australia v Houghton Leisure Products – Federal Court (White J)***

Validity and infringement of a patent for air-conditioning units.

*Interlocutory injunction dispute* - February 2017 – Cochrane SC appeared, leading Mee (called 2014), against Hennessey SC, Lang SC and St John.

*Trial* - July 2017 - Cochrane SC addressed the court in answer to submissions by Rofe QC (now Rofe J), and cross-examined two technical witnesses. [\[2018\] FCA 1573](#).

*Costs dispute* - December 2018 – Cochrane SC appeared, leading Larish (called 2014), against Rofe QC. [\[2019\] FCA 57](#).

***Coral Sea Fishing Pty Ltd v CSJ Seafoods Pty Ltd*** - Validity and infringement of patent for cold-smoking seafood. Settled.

***Glaxosmithkline -ats- Reckitt*** (Nurofen/Panadol flat-nosed syringe). Cochrane SC appeared for GSK in the successful appeal [\[2016\] FCAFC 90](#).

***ARB Corporation -ats- Oakmoore*** (ownership dispute in Patent Office). Cochrane SC appeared, leading Larish, against Crowe QC and Allen. [\[2015\] APO 66](#).

***Hills Holdings ats USSS*** (Jagot J, FCA) (Patent for solar panels): Settled before trial.

***Cementech v Austral and Adbri*** (patent for building materials): Cochrane SC appeared for Adbri. [\[2013\] NSWSC 1888](#) (separate question, transfer to Federal Court) and [\[2014\] FCA 794](#) (security for costs, where Cochrane SC successfully cross-examined Mr Rafidi CEO/inventor on credit).

***Costin v Duroline***. [\[2013\] FCA 501](#) (preliminary (pre-action) discovery)

***DSM v. Suntory*** (patent for infant formula): See [\[2013\] FCA 474](#) (discovery), [\[2013\] FCA 675](#) (leave to appeal), [\(2013\) 216 FCR 424](#) (admin law). Settled.

**Memcor & Siemens re GE** (water filtration devices): [\[2011\] FCA 641](#) (discovery; against Dimitriadis SC), [\[2012\] FCA 1115](#) (against Niall QC), [\[2013\] FCA 78](#) (service out application; against Shavin QC). Settled before trial.

**Fresenius re Gambro** (dialysis devices): [\[2006\] HCA Trans 129](#) (special leave).

### **Competition, trade practices, restraint of trade and confidential information**

**Examinations for the Australian Competition and Consumer Commission** – November 2019 – Cochrane SC conducted confidential examinations for the ACCC.

#### ***Bupa HI Pty Ltd v Andrew Chang Services Pty Ltd – Federal Court (Lee J)***

Misleading or deceptive conduct, restitution, breach of contract.

*Quantum trial* – Claim for more than \$14 million - Cochrane briefed, leading Harris, against Jackman SC, Klineberg (called 2009) and Langshaw. Case settled.

*Appeal* - August 2019 - [\[2019\] FCAFC 180](#).

*Liability Trial* - August 2018 – Cochrane SC appeared, leading Harris and Smorchevksy, against Jackman SC leading Klineberg and Langshaw. Cochrane SC cross-examined Dr Chang on credit successfully, and two experts. [\[2018\] FCA 2033](#)

#### ***Dental Corporation v Dr Lee & Anor*** (Rein J, Supreme Court NSW, Commercial List)

Breach of business restraint of trade concerning a corporate dental practice.

*Trial* - December 2016 – Cochrane SC appeared, leading Harris (called 2014) and McGovern (called 2016), for Dental Corporation. [\[2016\] NSWSC 1859](#).

***L'Oreal v Brandpoint*** (Beach J, FCA) (preliminary discovery, misleading or deceptive conduct): Cochrane SC appeared, leading St John. [\[2015\] FCA 978](#).

***Genesys Wealth Advisers v Miles*** (restraint of trade and confidential information). See [\[2008\] 61 AILR 200-399](#) (trial), [\[2009\] 201 IR 1](#) (appeal)

***ICAP v Moebes***: confidential information. See [\[2010\] NSWSC 738](#).

***Terry Fitzgerald v 33 South***: trial in character merchandising case for professional surfer, Terry Fitzgerald. See [\[2008\] FMCA 1132](#) (Cochrane SC successfully cross-examined Mr Jones on credit), [\[2008\] FCA 1960](#) (stay and security for costs)

***Gibney v SE Timber Pty Ltd*** (doctrine of ostensible authority). [\[2008\] NSWCTTT 1387](#).

### **Insurance Cases**

***Ensham Resources v Aioi Insurance*** (NSD1256/10): \$540m insurance claim arising from 2008 Emerald Flood, where the insurers alleged fraud. See [\[2011\] FCA 1392](#)

(subpoenas; Cochrane SC appeared against Stevenson SC and Whittaker SC), [\[2012\] FCA 537](#) (pleadings amendment), [\[2012\] FCA 710](#) (legal professional privilege; Cochrane SC, leading Flecknoe-Brown, against Whittaker SC leading Klineberg, cross-examined Mr Stockdale, solicitor), [\(2012\) 17 ANZ Insurance Cases 61-942](#) (legal professional privilege appeal; Cochrane SC appeared, leading Flecknoe-Brown, against Whittaker SC leading Klineberg). Case settled before trial.

***Fryer v Tower Insurance*** (Supreme Court NSW): income protection insurance claim, where insurers alleged fraudulent non-disclosure. Settled.

***Isaac Plains v Zurich Insurance***: \$130m insurance claim from December 2010 flood of an open cut coal mine in Queensland. Settled.

### **Class actions**

***Allco Finance Group (in liq)***: each employee class found to have been employed by and therefore priority creditors of AFGL, not a \$2 company. [\(2010\) ACSR 56](#) (trial)

### **Banking/equity - fraudulent misappropriation**

***Heperu v Morgan Brooks***: franchisor held liable under a contract by the doctrine of ostensible authority. See [\(2007\) 2 BFRA 419](#) (trial)

***Heperu v Belle***: volunteer without knowledge of fraud held liable. See [\(2007\) 2 BFRA 419](#) (trial), [\(2009\) 76 NSWLR 230](#) (appeal), [\[2010\] NSWCA 339](#) (costs), [\[2011\] NSWSC 1151](#) (inquiry into retained benefit)

***Heperu v Perpetual Trustees***: conversion and restitution. [\(2007\) 2 BFRA 419](#) (trial), [\(2009\) 76 NSWLR 195](#) (appeal). Settled before High Court decision.

### **Copyright**

***NuCoal Resources Limited v NSW; Cascade Coal Pty Limited v NSW*** [\[2015\] HCA 13](#).

***University of Sydney re ObjectiVision*** [\(2014\) 108 IPR 244](#) (preliminary discovery)

***Qantas Airways ats Megan Washington***: [\[2013\] FCCA 778](#) (discovery). Settled.

***Generate v Sea-Tech***: See [\(2007\) 71 IPR 640](#) (injunction re copyright in computer software). Settled.

***Lamb v Hog's Breath***. See [\[2007\] FCA 49](#) (French J) (inter-state transfer). Settled.

***Eagle Rock v Caisley***: substantial punitive damages order. [\(2005\) 66 IPR 554](#)

### **Trade marks**



***Sizzler Restaurants Pty Ltd v Burger Urge Pty Ltd*** (Nicholas J) - Cochrane SC successfully obtained an interim injunction restraining Burger Urge's use of the accused mark. Burger Urge subsequently consented to an interlocutory injunction. Following submissions and a hearing, Burger Urge consented to summary judgment.

***FKP v Spirits – Full Federal Court (ownership of STOLI and other trade marks)***

Appeals re (1) permanent stay of proceeding due to discovery issues, (2) whether trial can proceed based upon issue estoppels arising from Dutch decisions.

Appeals successful: [\[2021\] FCAFC 77](#); [\[2021\] FCAFC 120](#).

*Orders consequent upon reasons, whether determination of issue estoppels arising from Dutch decisions can be carved out from permanent stay.* [\[2019\] FCA 1772](#).

*Application for permanent stay of proceeding – March 2019.* [\[2019\] FCA 802](#).

*Interlocutory dispute re waiver of privilege - March 2019 –* [\[2019\] FCA 337](#).

***Cantarella Bros v Modena Trading***: [\(2013\) 99 IPR 492](#) (trial); [\(2013\) 99 IPR 623](#) (orders); [\(2013\) 215 FCR 16](#) (Full Court appeal); [\(2014\) 109 IPR 154](#) (High Court).

***Mars v Sweet Rewards***: [\(2009\) 84 IPR 12](#) (appeal)

***Kimberly-Clark v Goulimis***: appeal from Trade Marks Office, “HUGGIES” trade mark found to be notorious. See [\(2008\) 78 IPR 612](#)

***NEC v Punch Video***: appeal from Trade Marks Office. See [\(2005\) 67 IPR 17](#)

***Australian Trade Marks Office – Rob Bowra v Industrial Progress Corporation Pty Ltd***: [\[2016\] ATMO 48](#). *Paramount Intl Export* (“FIJI” water): [\(2009\) 84 IPR 631](#); *McDonald’s Corp v Future Enterprise* (“MacCoffee”): [\(2006\) 70 IPR 409](#); *United Parcel Service of America Inc v United Air Lines Inc*: [\(2006\) 69 IPR 663](#).

## **Designs**

*Roadwest Transport v Bonfiglio Holdings & Ors* (FCA WAD 27/2013) (side-tipping trailers): briefed by Squire Sanders, Perth. Cochrane SC appeared at the mediation, against four separate respondents, where the matter settled.