

# NEAR ENOUGH IS GOOD ENOUGH: FULL FEDERAL COURT OF AUSTRALIA REVISITS CONSTRUCTION OF “ABOUT” IN PATENT CLAIM

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Legal Briefings - By **Shaun McVicar, Catherine Chan and Michael Dardis**

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In the area of patent law, clarity is king. Where precision of language is essential for defining the limits and scope of legal rights, the acceptance within Australia of unbounded terms such as “about” in patent claims (unlike other major jurisdictions such as Europe) seems almost anomalous.

Last week, the Full Court of the Federal Court of Australia revisited the meaning of “about” in a pharmaceutical patent’s claims, falling back to the inherently imprecise ordinary English meaning of “near; close to”.<sup>1</sup>

## KEY TAKEAWAYS

- The Court upheld the primary judge’s construction of “about” as an ordinary English meaning of “near; close to” rather than as a term of art.
- While under Australian law, the term “about” is not so unclear as to be invalidating, this decision is a reminder of the tensions in a field where clarity is required and elevates the uncertainty that parties may face in determining whether they have infringed a claim when falling slightly outside the claim’s stated numerical bounds.
- The use of imprecise and approximating terms such as “about” is a double-edged sword

for patentees because any broad construction will be used to interpret both the claims and the prior art. As a result, while taking advantage of such ambiguous language to broadly capture infringement may be tempting, patentees should be minded to draft with precision in order to reduce the risk of invalidity.

- Resorting to the ordinary English meaning of the word “about” means that interpretation of the term in the context of patent claims is primarily a task for the Court and not necessarily for expert evidence.

## **BACKGROUND**

Pharmacia is the owner of Australian patent 2002256031 (filed 2 April 2022), which relates to the formulation and administration of COX-2 inhibitors. Inhibition of COX enzymes is believed to be a mechanism by which NSAIDs (such as ibuprofen) work.

Under the patent, Pharmacia developed Dynastat, an injectable COX-2 inhibitor with parecoxib as the active ingredient. Juno also sold and supplied parecoxib products. Pharmacia sued for patent infringement and Juno cross-claimed for invalidity.

A key issue, and that subject to appeal by Pharmacia, was whether certain representative batches of Juno’s product fell within the scope of their claims. This turned in part on the construction of “about” as it appeared in the context of claimed percentage weight ranges of the components in the claimed compositions.

Pharmacia contended that “about” meant a 5% margin of error, ie a claim for “about 90%” extended to 94.5% as its upper limit.

Juno, on the other hand, contended that “about” entailed rounding to the nearest whole number, ie “about 90%” would have 90.49% as its upper limit.

## **DECISIONS**

### **TRIAL DECISION**

The Court ultimately agreed with Juno’s construction — “about 90%” encompassed a range of 89.50% to 90.49% or, in effect, a “rounding”. This was supported by evidence of typical preciseness in the field of pharmaceuticals; use of two decimal places precision throughout the patent; inclusion of variances within the claims themselves; and of course, the ordinary English meaning of the word.

## **THE FULL COURT’S DECISION**

### **ENDORSEMENT OF TRIAL JUDGE’S DECISION**

Pharmacia appealed and advanced the same contentions as at trial. The Court endorsed the trial reasoning in its entirety, for among others, the following reasons.

- Pharmacia contended that if “about” allowed for rounding, this would leave no work for “about” to do where, according to their expert evidence, the skilled addressee would round the relevant figures to the nearest whole percentage point in any event. The Court distinguished case law relied upon by Pharmacia as providing no real assistance by noting that those cases did *not* include an approximating term such as “about”.
- The Court also noted that the measurements supplied in the patent were expressed to two decimal places. This level of precision provided the insight that the scope for variance in percentages of claim 1 was not intended to be large.
- The Court also remarked that the claims themselves provided a range of variances. If Pharmacia’s interpretation of “about” was accepted, this would mean there would be multiple different meanings of the word as the proposed 5% margin would be applied to different absolute ranges (eg, both 30 - 90%  $\pm$  5% and 0 - 10%  $\pm$  5%).
- The Court also endorsed the “axiomatic” proposition that “about” (and all words) must be construed consistently across the claim set. Used over 40 times in different contexts, it was clear that it was an approximating term and could not mean plus or minus 5% in every context (including weight, pH, and timespans).

### **UTILITY OF ANALYSING EXAMPLES IN THE PATENT TO CONSTRUE THE TERM “ABOUT”**

Particular focus was given by the parties and the Court to Pharmacia’s expert evidence about one of the described Examples in the patent, which was said to support the argument that Juno’s rounding construction of about would lead to that example not falling within the claims. In arguing for a general proposition that a stated embodiment of an invention which is included in a patent would be expected to fall within the scope of the claims, Pharmacia had relied on the decision in *Inverness Medical Switzerland GmbH v MDS Diagnostics Pty Limited* (2010) 85 IPR 525. This, Pharmacia argued, was support for a construction of “about” that would extend beyond rounding so as to include particular example formulations which would otherwise fall outside the stated numerical scope of the claims.

Ultimately, this proposition was rejected because Pharmacia failed to demonstrate why a person skilled in the art would look to the examples in order to determine the meaning of “about” in the claims, especially when the word was not used as a term of art. The Court reinforced the essential consideration of construing the patent in the same way that a person skilled in the art would do so, including with ordinary terms being given their ordinary meaning, albeit read in the context of the patent. The Court agreed with the primary judge’s colourful observation that:

*I do not consider that the inventors intended that the meaning of the word “about” should be mined from the depths of one aspect of an example in the patent, gold only being apparent after digging in such an obscure (and apparently assumption laden and contestable) place. Even if they did so intend, such obscurity provides no sound basis for construing the claim.*<sup>2</sup>

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1. *Pharmacia LLC v Juno Pharmaceuticals Pty Ltd* [2022] FCAFC 167.

2. *Pharmacia LLC v Juno Pharmaceuticals Pty Ltd* [2022] FCAFC 167, [70].



## KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



### **SHAUN MCVICAR**

PARTNER,  
MELBOURNE

+61 3 9288 1587  
Shaun.McVicar@hsf.com

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