



interpretation NOW!

Episode 106 – extrinsic materials – 28 March 2024



Edelman J in [Harvey v Minister](#) [2024] HCA 1 comments on the ‘why, when and how’ regarding the role of extrinsic materials in interpretation. This arose in the context of whether granting a mineral lease¹ expanding the *McArthur River Project* onto Aboriginal land gave the native title holders formal objection rights. It was held that it did. The legal point was whether granting the lease would involve ‘creation ... of a right for the sole purpose of the construction of an infrastructure facility ... associated with mining’². This depended critically on the impact of extrinsic materials on the meaning of ‘infrastructure facility’, defined in the statute to include a range of things. All judges held that the lease created a right of the kind mentioned³. Writing alone, Edelman J (at [106-116]) explains the different bases for considering extrinsic materials and how they play out in practice.

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Focus on context

Edelman J stresses the importance of context, saying that trying to understand speech without context is like trying ‘to understand the meaning of a painting before the paint is applied to the canvas’⁴. But only in the last 50 years have extrinsic materials been seen as part of that context for interpretation purposes.

Edelman J referred to the principle that the words of a minister cannot be substituted for the clear text of the law⁵. He said, however, that the ‘modern approach’ at common law is not so constrained ‘even if its spirit has not always been respected’. Context in the ‘widest sense’ must be consulted from the beginning, and even apparently plain words sometimes ‘may wear a very different appearance’⁶. But extrinsic materials are only ever ‘part of the context to be considered’.



Weight to be attributed

Edelman J said that the fact that some extrinsic materials are weighty does not deny that others will have little influence. This is only natural. An EM, for instance, may be ‘an important and weighty extrinsic source of information’. Given the central role of ministers and departments in their drafting, it ‘invites the available implication that these materials are more reflective of “government intent”’⁷.

The view of Edelman J was that the EM was ‘crystal clear’ that the definition of ‘infrastructure facility’ was not exhaustive. The ‘clarity and specificity’ of the EM here meant that the ‘text and context must be understood in the manner expressed in the joint reasons’. The plurality (at [75-82]) held that the term also bore its ordinary meaning, as the EM suggested⁸.



Two paths, one destination

Edelman J explains that s 15AB was enacted before the ‘modern approach’ had solidified⁹. Section 15AB regulates how extrinsic materials may be used by providing gateways, conditions and processes. But the differences between statutory and common law paths ‘should not be overstated’. There ‘will very rarely be a difference in practice’ between them¹⁰.

Each path requires those materials ‘to be assimilated with the text ... its context within the Act, and the Act’s purpose or object in order to ascertain a single meaning’. Section 15AB ‘is not intended to constrain the development of common law rules’¹¹. The judge emphasised that even a strong textual meaning may be reconsidered where information in extrinsic materials is ‘particularly cogent, clear and specific’.



iNOW! observations

This case confirms the potential of extrinsic materials under the ‘modern approach’ to influence meaning¹².

What Edelman J said in *Harvey* is important for many reasons. (1) Access to extrinsic materials is driven by the contextual focus of our system. (2) The statutory and common law paths into those materials exist side-by-side¹³. (3) It will be rare that the two paths produce differing results in practice. (4) But different extrinsic materials may exert different weight. (5) The further we move from the text, the less weight those materials may naturally bear¹⁴. (6) EMs may attract greater weight as they are ‘more reflective of government intent’. (7) Ordinary words ‘may wear a very different appearance’ when read in the light of their purpose as evidenced by extrinsic materials¹⁵.

■ **Thanks** – Ross Carter, David Lee, Jacinta Dharmananda & Oliver Hood.

¹ s 40(1)(b)(ii) of the [Mineral Titles Act 2010](#) (NT).

² s 24MD(6B)(b) of the [Native Title Act 1993](#) (Cth).

³ Gageler CJ, Gordon, Steward & Gleeson JJ (as the plurality).

⁴ cf Episode 97 editorial ‘get the picture’.

⁵ [109], [Ex parte Beane](#) (1987) 162 CLR 514 (518) quoted.

⁶ [110], [CIC Insurance](#) (1997) 187 CLR 384 (408) quoted.

⁷ [116], [Dharmananda](#) (2018) 41(1) UNSWLJ 4 (34), cf [BDM](#) Ch 24.

⁸ cf [South Australia v Slipper](#) [2004] FCAFC 164 [77-85].

⁹ This happened in the late 1990s with fine-tuning in the decades following.

¹⁰ The 2 facilities are directed at overlapping systemic objectives.

¹¹ [114], Stubbs (2006) 34(1) *Federal Law Review* 103 (123) cited.

¹² Though their quality is ‘not uniform’ – [Mondelez](#) [2020] HCA 29 [67].

¹³ [Sydney Seaplanes](#) [2021] NSWCA 204 [41], [BDM](#) [24.4] generally.

¹⁴ Think of a ‘target’ with text at the centre moving outwards into exmats.

¹⁵ [SZTAL](#) [2017] HCA 34 [14], [A2](#) [2019] HCA 35 [37] illustrate.

Episode 107 – human rights; consumer protection; purpose runs out; remedial legislation

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