

# What it is to be a government lawyer



**Justice Stephen Gageler** of the High Court of Australia

This article is taken from Justice Gageler’s speech on the occasion of his launch in April 2016 of *Without fear or favour: The life of Dennis John Rose AM QC* by Carmel Meiklejohn, co-published by the Attorney-General’s Department and AGS.

It is good to be back at the site of the old Robert Garran Offices, where I once had the privilege of working closely with Dennis Rose.

Most of us attending this launch are now, or have been, government lawyers. Some of us knew and worked with Dennis. Those of us within that category remember Dennis with esteem and affection. We remember Dennis the man. We remember the calm demeanour, the kindly disposition, the gentle spirit, the love of music, the love of bushwalking, the little giggle. This book will bring back the humanity of Dennis Rose.

There are some in the room (and there will be many, I hope, in years to come) who did not know Dennis but who will have the opportunity to read this book and to be inspired by him. To those within that category, the great benefit of the book is that it illustrates, through the example of one life of public service, a life very well lived, just what it is to be a government lawyer – or, as Dennis liked to say, a counsel to the Crown.

## What is it to be a lawyer to government in the true sense?

**It reduces to 3 traits which Dennis displayed in spades. Two are common to any good lawyering and the third is unique to government lawyering.**

- 1** → **The first trait, common to any good lawyering, is **intellectual rigour**.** Intellectual rigour has at its base honesty and intelligence and implies consistency.
- 2** → **The second trait is **creativity**: the ability not only to see problems, but to create solutions.** Combining creativity with intellectual rigour can involve following a path which is not obvious, which is not direct, but which is true. Between the problem and the solution, the good lawyer treads a sure path from common ground to contestable ground, carrying others who need to be convinced. Those are the 2 traits you’ll find in any good lawyer.
- 3** → **The trait unique to government lawyering (or at least most strongly displayed in government lawyering) is a **sense of purpose**.** The sense of purpose is not adequately captured in the notion of acting for a client; it transcends the issues of the moment and the government of the day. It involves adherence to a concept of a continuing polity, the fabric of which is held together by enduring principles and values consistently recognised and acted upon. Some of those enduring principles and values have found their way into the law reports. But many have not, in part because skilful and conscientious government lawyers have been astute enough to avoid the problems that might end up in court.

JUSTICE STEPHEN GAGELER





Ian Govey AM, author Carmel Meiklejohn and Justice Gageler at the launch of *Without fear or favour*

### Without fear or favour

Upholding the principles and values of a government lawyer in a time of crisis requires courage and conviction. These attributes are well-captured in the title Carmel Meiklejohn chose for this book, *Without fear or favour*.

Most of us (certainly those of us who are getting on in age) can reflect back over our careers as lawyers to think of an episode or event that in some way made us what we are. I can think of a few in my own life, most of them bruising, all of them formative. They consolidated the person that I had become to that point, and helped to form the person that I was to become after it.

For Dennis's career, the defining event came when he was relatively young – 38 years old. The story is told in this book. Dennis also told me about it several times, and I wish I could now remember more of the detail and recall his exact words. What I do remember is the climax: Dennis raising his right fist, bringing it down on the table and saying words to the effect of, 'No, Attorney-General, that will not be a loan for temporary purposes. If you go ahead without Loan Council approval, you will be committing a criminal offence!'

That moment stuck in the psyche of Dennis Rose. It epitomised the man who was to become the most respected government lawyer of his

generation: striving to get to 'yes', but prepared to say 'no' without fear (although I suspect there was in that moment an element of trepidation) and certainly without favour.

### Mastery and precision

There is a photograph in the book of the Attorney-General's Department in 1964 – almost all male, unsurprisingly. Sir Garfield Barwick, then Attorney-General, appears standing in the front row. Dennis had been in the Department for just 2 years. The following year, Dennis left the Department to spend a couple of years at the Australian National University, re-joining the Department in 1968.

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During that interlude at ANU, Dennis was asked to revise a little out-of-date textbook called *Lewis' Australian bankruptcy law*. It showed a lot about Dennis that the book he thoroughly revised, brought through the 5th edition in 1967, and took through to the 11th edition in 1999, was always called *Lewis' Australian bankruptcy law*.

It showed his humility. It showed his constancy. It showed his mastery of technical subject matter. It showed the precision of his thought. And the fact that the little book (I'm sure, despite publisher's pressures) remained, throughout those 7 editions, a little book showed his economy of language.

### Chief General Counsel

By 1980, Dennis had become head of the Advising Division (which later became the General Counsel Division). In 1989, in recognition of his exceptional talent, he was appointed to the newly created position of Chief General Counsel. He was Acting Solicitor-General for protracted periods between 1992 and 1994. He was made a Commonwealth Queen's Counsel, one of the very few, and one of the first. He was made a member of the Order of Australia in 1992.

### Legal development in Australia

The time in which Dennis held senior positions within the Attorney-General's Department was a time of great legal development within Australia. It was also a time of great change in Australian society.

Many of the legal structures set in place during that time can be seen in retrospect to have been of a quasi-constitutional nature: the Family Court of Australia; the Federal Court of Australia; the entire modern administrative review system (the Commonwealth Ombudsman; the Administrative Appeals Tribunal, the *Administrative Decisions (Judicial Review) Act 1977* (Cth)); self-government in the Northern Territory and in the Australian Capital Territory; abolition of appeals to the Privy Council; severing of constitutional ties between Australia and the United Kingdom (with the negotiation and enactment of the Australia Acts); cross-vesting of court jurisdiction (about which Dennis had a deep and abiding concern); statutory recognition and protection of native title in the *Native Title Act 1993* (Cth).

The time saw the expanded use of heads of Commonwealth legislative power which had until then lain

dormant or underutilised. Modern reliance on the external affairs power and on the corporations power began – though there might be some dispute about this – with the *World Heritage Properties Conservation Act 1983* (Cth). Modern reliance on the taxation power, the final nail in the coffin of *Barger's case* (*R v Barger* (1908) 6 CLR 41; [1908] HCA 43) began with the Training Guarantee Acts and came into its own with the Superannuation Guarantee Acts. These were nation-building pieces of legislation. With their creation Dennis was intimately involved.

Two legislative schemes in which Dennis was involved were not in the nation-building category but show his brilliant and creative technical lawyering at its best. The earlier was the *Commonwealth Places (Application of Laws) Act 1970* (Cth). You would think that there would be no other scheme more technical and difficult to devise. But such a scheme exists, in the *Child Support (Assessment) Act 1989* (Cth) and its various interlocking pieces of legislation. Dennis devised that scheme too. Both schemes withstood intensive High Court scrutiny.

### Advocacy

The changing times contributed to an expansion of litigation. This book tells of Dennis's involvement in much of that litigation. It singles out for special mention his involvement in the *Tasmanian Dams Case* (*Commonwealth v Tasmania* (1983) 158 CLR 1; [1983] HCA 21) and it tells wonderfully of his involvement in *Cole v Whitfield* (1988) 165 CLR 360; [1988] HCA 18.

Before *Cole v Whitfield*, there had been 140 cases on s 92 of the Constitution. Dennis personally undertook a comprehensive review of each of those cases. Not only did he contribute to the formulation of the new doctrine, which was presented in an extraordinarily coordinated argument by the Commonwealth and State Solicitors-General, but he also worked out exactly how each of the 140 previous cases would have been decided under that new doctrine were it to be accepted. I saw that document once. Not only was it extraordinarily comprehensive; it was extraordinarily concise, extending for no more than 10 or 12 pages.

I asked one of my associates to find cases in which Dennis and I had appeared in court together. From memory, I thought that Dennis would have appeared in about a dozen cases and I would have been with him 3 or 4 times. Dennis actually appeared as counsel in 66 cases. Fifty-five of them were in the High Court: 31 as junior counsel between 1984 and 1992, and 24 as Queen's Counsel between 1992 and 1994. I appeared as his junior in 12 of those cases.

Where Rose QC was particularly effective as an advocate in the High Court was in creating the 3-page summary of argument that was handed up at the beginning of oral argument and that set out, in logical and concise propositions, the way through the difficulties of the case. He brought to his advocacy the same concise thinking that he brought to every other part of his work as a lawyer.

The most memorable case in which I appeared with Dennis was not in the High Court. It was in the Full Court of the Federal Court, in Brisbane, relating to the Royal Commission into Aboriginal Deaths in Custody. It was 1989, in the middle of the Australian pilots' strike. We left Canberra in a light aircraft with 2 seats in the front, 1 seat in the back. I was in the back. We left at 6 pm on a winter's night. We got to Tamworth and refuelled at about 8 pm. We set out from Tamworth, through a thunderstorm in the dead of night, with Dennis in the front, me in the back, and with the pilot continuously tapping some instrument on the dashboard which obviously wasn't working. I was traumatised by the time we arrived, but arrive we did. Dennis seemed unfazed. We appeared the next day and won the case. Mercifully, we were able to get a commercial flight back.

### The gold standard of advisers

Dennis was good as an advocate. But he was best as an adviser. When it came to advising, Dennis Rose has been described as having been the 'gold standard'. I have always had some difficulty with that description; it makes me think of an outdated approach to international monetary policy. But I understand exactly what it was meant to convey. There was none better.

I recently re-read one of his few advices that were published. It was an advice to the Republic Advisory Committee in 1993. It is available on the internet and it should be read because it shows what a written opinion should be.

### Writing an opinion

A Dennis Rose opinion was an opinion. It was not a declaration. It was not a discussion paper. It gave a direct answer to a direct question. If the question asked was in any way obscure, the question was rephrased to make it sensible and the question as rephrased would be answered very sensibly. Reasons would be provided, and nothing but reasons would be provided.

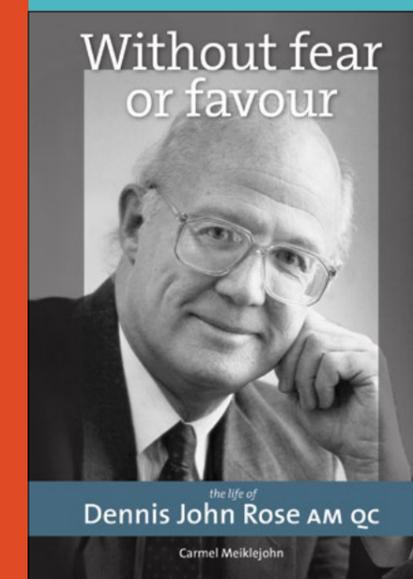
A Dennis Rose opinion was short, direct, succinct and decisive. The opinion would acknowledge uncertainty where uncertainty existed, but would never prevaricate. Where there was uncertainty as to the ultimate answer, the uncertainty was due to the vagary of the subject matter or the inherently predictive nature of the assessment to be made. It was never due to lack of precision of thought or expression on the part of the author.

Coming away from my all-too-short association with Dennis, I was convinced that I could never be able to think like Dennis Rose, but I was determined that I would at least try to write like Dennis Rose. I'm still trying.

Congratulations to AGS and AGD for commissioning this book. Congratulations to Carmel for writing it, for chronicling the history, and for capturing so well the personality and the professional competencies of Dennis Rose. Treat it as launched. ■

# Without fear or favour: The life of Dennis Rose AM QC

by Carmel Meiklejohn



Dennis Rose AM QC was a broadly experienced government lawyer who ultimately became Australia's first Chief General Counsel. In that role, he was both confidant and adviser to Prime Ministers, Cabinets and Attorneys-General. This account of his life and its impact is quite inspirational.

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