

# LAW, POLITICS, AND THE ATTORNEY-GENERAL: THE CONTEXT AND IMPACT OF *GOURIET V UNION OF POST OFFICE WORKERS*

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*The role of the Attorney-General as the guardian of the public interest, in considering granting his or her fiat to relator proceedings in relation to the enforcement of public rights, often attracts political controversy. This is vividly illustrated in the circumstances surrounding the decision of the House of Lords in *Gouriet v Union of Post Office Workers*, which confirmed the traditional rule that the Attorney-General's decision to refuse to grant his or her fiat is not justiciable (the fiat rule). This article details the rationale for the fiat rule, explores the political context and impact of the *Gouriet* case, and briefly details the impact of the decision on the rights of a private individual to enforce public rights.*

## I INTRODUCTION

It is well established that the Attorney-General, on behalf of the Crown and as the guardian of the public interest, has the principal role in the enforcement of public rights. The traditional rules relating to the standing of a private individual to enforce public rights are encapsulated in the two limbs in *Boyce v Paddington Borough Council (Boyce)*.<sup>1</sup> Under the first limb, a private individual can enforce a public right if the infringement of that right also amounts to an infringement of his or her private right.<sup>2</sup> Under the second limb, a private individual can enforce a public right if, as a result of an infringement of the public right, he or she would suffer 'special damage peculiar to himself [or herself]'.<sup>3</sup> However, a private individual can also approach the Attorney-General to seek the latter's fiat or consent to bring relator proceedings. The plaintiff in relator proceedings is the Attorney-General, although the private individual (the relator) conducts the case and is liable for any costs.<sup>4</sup> The most controversial aspect of relator proceedings is the issue of whether an Attorney-General's decision to refuse to grant his or her fiat is justiciable. However, on this matter the law is clear: the Attorney-General's decision cannot be challenged before the courts. For the sake of convenience, hereinafter this will be referred to as 'the fiat rule'.

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<sup>1</sup> [1903] 1 Ch 109.

<sup>2</sup> *Boyce v Paddington Borough Council* [1903] 1 Ch 109, 114.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Wentworth v Attorney-General for the State of New South Wales* (1984) 154 CLR 518, 527; *A-G (Qld) ex rel Duncan v Andrews* (1979) 145 CLR 573, 582; *Andrew v A-G* [2013] SGCA 56, [35]; Harold Edward Renfree, *The Executive Power of the Commonwealth of Australia* (Legal Books, 1984) 208; Mark Robinson, *Judicial Review in Australia* (Thomson Reuters, 2014) 522.

Although relator proceedings do not arise with any great frequency,<sup>5</sup> they bring into sharp focus the dual functions of an Attorney-General. On the one hand, the Attorney-General, as a member of parliament, has a political role to play. On the other hand, he or she has a crucial role to play in the enforcement of the law. Diana Woodhouse aptly observes that the position of the Attorney-General is 'at best awkward and at times barely sustainable' because he or she 'is required to serve two masters, the government and the law, and thus to combine the role of a politician with that of a lawyer'.<sup>6</sup> This awkwardness really comes to the fore with fiat applications.

The 'high-water mark'<sup>7</sup> authority on the fiat rule is the unanimous decision of the House of Lords in *Gouriet v Union of Post Office Workers (Gouriet)*.<sup>8</sup> *Gouriet* is also an excellent illustration of the political controversy in which Samuel Silkin, as Attorney-General for the United Kingdom, found himself in January 1977. The occasion was the announcement of plans, by the Union of Post Office Workers (UPOW), to place a ban on the delivery of mail to and from South Africa. Silkin refused to grant his fiat to John Gouriet who, as the representative of the National Association for Freedom (NAFF), sought an injunction to prevent the illegal strike taking place. Silkin's decision was the trigger that ultimately led to the unanimous decision of the House of Lords in *Gouriet* which upheld the long-standing fiat rule.<sup>9</sup>

The merits or otherwise of the decision in *Gouriet* have been extensively analysed,<sup>10</sup> and it is not the purpose of this article to add to this body of literature. Rather, its purpose is to paint a picture of *Gouriet's* political context and impact. *Gouriet* was a case in which NAFF sought to overturn the fiat rule in pursuit of its objective of preventing an illegal strike taking place in the context of its broader political campaign against the power of trade unions. This objective was shared by the Conservative Party in the United Kingdom, which quietly supported the litigation initiated by NAFF. Attorney-General Silkin's defence of the fiat rule was upheld by the House of Lords, but not before NAFF, and indeed the Conservative Party, achieved a significant political victory, when the Court of Appeal granted an interlocutory injunction preventing UPOW's strike going ahead. This political victory contributed, to some degree, to the victory of the Conservative Party in the general election of 1979. On the other hand, *Gouriet* also led to considerable debate about the extent to which a private individual should have the right to bring legal proceedings to enforce the public law. This article will, albeit briefly, examine the impact of *Gouriet* in both the United Kingdom and Australia in this respect.

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<sup>5</sup> In Australia, the Commonwealth Attorney-General received 31 applications between 1937 and 2002, most of which were refused: Daryl Williams, 'The Role of the Attorney-General' (2002) 13 *Public Law Review* 252, 253. In the states and territories during the 1990s, 32 applications were made, of which only 7 were granted: Cheryl Saunders and Paul Rabbat, 'Relator Actions: Practice in Australia and New Zealand' (2002) 13 *Public Law Review* 292, 296.

<sup>6</sup> Diana Woodhouse, 'The Attorney General' (1977) 50 *Parliamentary Affairs* 97, 97.

<sup>7</sup> Olumide Babalola, *The Attorney-General: Chronicles and Perspectives* (LAWpavilion, 2013) 56.

<sup>8</sup> [1978] AC 435.

<sup>9</sup> *Ibid* 482 (Lord Wilberforce), 494 (Viscount Dilhorne), 500 (Lord Diplock agreeing with the views of Lord Wilberforce and Viscount Dilhorne on this matter), 505-6 (Lord Edmund-Davies), 518 (Lord Fraser of Tullybelton).

<sup>10</sup> See for example, John Griffiths, 'Some Recent Developments in Judicial Review of Executive Power' (1977-1978) 11 *Melbourne University Law Review* 316, 331-40; J J Waldron, 'Gouriet's Case in the House of Lords' (1977-1980) 4 *Otago Law Review* 87; Geoffrey A Flick, 'Relator Actions: Injunctions and the Enforcement of Public Rights' (1978) 5 *Monash University Law Review* 133; David Feldman, 'Injunction and the Criminal Law' (1979) 42 *Modern Law Review* 369.

It will also outline the extent of changes in the law that have lessened the need for private individuals to seek an Attorney-General's fiat, although not affecting the authority of the fiat rule itself. However, before examining these matters, the operation and rationale of the fiat rule will be briefly detailed.

## II OPERATION AND RATIONALE OF THE FIAT RULE

Although a government minister, the decision of the Attorney-General in relation to relator applications is one to be made by the Attorney-General free of political pressure from his or her colleagues. However, this does not mean that he or she cannot consult colleagues.

The classic pronouncement on the proper role of the Attorney-General making his or her decision was stated by Sir Hartley Shawcross in 1951. In a statement as Labour Attorney-General, that was approved by both sides of the House of Commons<sup>11</sup> and subsequently cited with approval in *Gouriet*<sup>12</sup> by Viscount Dilhorne, himself a former Attorney-General, Shawcross said the following:

This is a very wide subject indeed, but there is only one consideration which is altogether excluded and that is the repercussion of a given decision upon my personal or my party's or the Government's political fortunes; that is a consideration which never enters into account. Apart from that the Attorney-General may have regard to a variety of considerations, all of them leading to the final question: would a prosecution be in the public interest, including in that phrase, of course, the interests of justice?<sup>13</sup>

In weighing up the public interest, Shawcross went on to say that the Attorney-General should, after being acquainted with the relevant facts, take into account factors such as 'the effect which the prosecution, successful or unsuccessful as the case may be, would have on public morale and order and with any other considerations affecting public policy'.<sup>14</sup> These clearly political calculations inevitably mean that the fiat rule is likely to attract political controversy.

The rationale underpinning the fiat rule is that the Attorney-General is accountable to Parliament and not to the courts. In *Gouriet*, Lord Fraser of Tulleybelton put it as follows:

If the Attorney-General were to commit a serious error of judgment by withholding consent to relator proceedings in a case where he ought to have given it, the remedy must in my opinion lie in the political field by enforcing his responsibility to Parliament and not in the legal field through the courts. That is appropriate because his error would not be an error of law but would be one of political judgment, using the expression of course not in a party sense but in the

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<sup>11</sup> John L J Edwards, *The Attorney-General, Politics and the Public Interest* (Sweet & Maxwell, 1984) 322.

<sup>12</sup> [1978] AC 435, 489.

<sup>13</sup> Geoffrey Wilson, *Cases and Materials on Constitutional and Administrative Law* (Cambridge University Press, 2nd ed, 1976) 516.

<sup>14</sup> *Ibid* 517. See also Sir Hartley Shawcross, 'The Office of the Attorney-General' (1953) 7 *Parliamentary Affairs* 380, 385-6.

sense of weighing the relative importance of different aspects of the public interest. Such matters are not appropriate for decision in the courts.<sup>15</sup>

However, the capacity of Parliament to hold an Attorney-General accountable is somewhat limited. The Attorney-General cannot be questioned on a case that is before the courts and is not bound to give reasons for making a particular decision.<sup>16</sup>

### III POLITICAL CONTEXT AND IMPACT OF *GOURIET*

The political context in which so many fiat applications are located is well illustrated by the background to the *Gouriet* case. Although the entirety of the *Gouriet* litigation took place during the British Labour Party administration of the mid-1970s,<sup>17</sup> the broad political background to this case needs to be traced back to the 1950s. It was at this time that, following Britain's post-World War II boom, Conservative Party Prime Minister Harold Macmillan famously declared that most British people in the late 1950s had 'never had it so good'.<sup>18</sup> However, circumstances had dramatically changed by the early 1970s. The post-World War II consensus, built around high public spending and a mixed economy was breaking down. The priority in the early post-war years in terms of economic policy was focused on keeping unemployment as low as possible rather than controlling inflation. However, by the early 1970s, persistent inflation, combined with stagnant growth ('stagflation'), and the world oil-price shocks, saw 'ever more powerful political and corporate forces ... question[ing] protectionism and state ownership, as well as welfare state policies and the value of strong unions and secure job status'. This led to calls for 'deregulation, liberalisation of trade and investment, and privatization of industry'.<sup>19</sup>

As a response to this changed environment, in the mid-1970s, a new set of policies began to emerge within the opposition Conservative Party. They were largely inspired by Sir Keith Joseph<sup>20</sup> and were gradually championed by his major supporter, Margaret Thatcher, after she became Leader of the party on 11 February 1975.<sup>21</sup> The 4 major planks

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<sup>15</sup> *Gouriet v Union of Post Office Workers* [1978] AC 435, 524. See also Lord Wilberforce's speech at 482.

<sup>16</sup> Woodhouse, above n 6, 103.

<sup>17</sup> The Labour Party, led by Harold Wilson, came to power, by defeating the Conservative Party, led by Prime Minister Edward Heath, in the general election held on 28 February 1974. It was re-elected to power in the general election held on 10 October 1974. Prime Minister Harold Wilson retired on 5 April 1975 and was replaced by James Callaghan. In February 1979, Margaret Thatcher became Prime Minister following the Conservative Party's victory at the general election held on 3 May 1979.

<sup>18</sup> Dominic Sandbrook, *Never Had It So Good: A History of Britain from Suez to the Beatles* (Little, Brown, 2005) 75.

<sup>19</sup> Peter Dauvergne and Genevieve Lebaron, *Protest Inc: The Corporatization of Activism* (Polity, 2014). 91.

<sup>20</sup> William Keegan, *Mrs Thatcher's Economic Experiment* (Allen Lane, 1984) 33-65; Andrew Denham and Mark Garnett, 'From "Guru" to "Godfather": Keith Joseph, "New" Labour and the British Conservative Tradition' (2001) 72 *Political Quarterly* 97, 100-104.

<sup>21</sup> Thatcher replaced Edward Heath, who had led the party to two election defeats in 1974, the first as Prime Minister and the second as Leader of the Opposition. These defeats led to moves to replace Heath as the leader of the party with Sir Keith Joseph who led the party's right wing faction. However, Joseph's prospects of assuming the party's leadership were shattered on 19 October 1974 when, in delivering a major speech in Birmingham, he claimed that many of Britain's problems were the consequence of too many children being born to women in Britain's lower classes and that as a result he felt that '[Britain's] human stock [was] threatened':

of this policy approach were: (i) reduction of the money supply as a means of controlling inflation, which was seen as the main way to fix the economy; (ii) reduction of the public sector in favour of an expanded market economy to be achieved through privatisation of state-owned industries and services; (iii) reform of the labour market through restricting the powers of trade unions; and (iv) restoration of government authority through an increase in resources for the armed forces and police so as to strengthen the nations' military defence, strengthen the forces of law and order, and resist the claims of special interest groups.<sup>22</sup>

Significant intellectual support for these neo-liberal policies came from outside the Conservative Party through the work of think-tanks such as the Institute of Economic Affairs (established in 1955), the Centre for Policy Studies (established in 1974, and whose Deputy Chairman was Margaret Thatcher<sup>23</sup>), and the Adam Smith Institute (established in 1977). The policies propounded by these pro-free market think-tanks were largely inspired by the economic theories of Milton Friedman and Friedrich von Hayek.<sup>24</sup> The impact of these policies was, as William Keegan observes, 'nothing less than the abandonment of the post-war consensus between Conservative and Labour over the centre ground and common aspirations of politics'.<sup>25</sup>

One of the key targets of this nascent neo-liberalism was an attack on the power of trade unions. The trade union movement had emerged from World War II with enhanced power. Its pride of place in the affairs of state was recognised in the post-war consensus, which accepted organised labour as an integral part of the system and whose power was enhanced by the fact that there were generally very low levels of unemployment. Unions,

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<<http://www.margaretthatcher.org/document/101830>>. Public outrage at these comments, which saw Joseph labeled as a 'saloon-bar Malthus', saw him withdraw from the leadership contest with Heath. It was then that Thatcher, who was a close associate of Joseph and who saw him as her intellectual guru, came forward to contest the party's leadership, a contest that she won, much to the surprise of nearly everybody, including Thatcher herself. The speech that triggered Joseph's fall from grace was crafted by Jonathan Sumption, a former Oxford history don and freshly minted barrister who was then working as an assistant to Joseph: Dominic Sandbrook, *Season in the Sun, The Battle for Britain, 1974-1979* (Allen Lane, 2012) 233-4. According to Vernon Bogdanor, Sumption can be credited with creating Thatcher: Vernon Bogdanor, 'Review: Seasons in the Sun by Dominic Sandbrook', *New Statesman*, 26 April 2012. Sumption subsequently went on to a stellar career at the bar and, in 2012, became only the sixth person to be appointed to Great Britain's highest court without having previously served as a full-time judge in her lower courts – the others were Lord Macnaughten (1887), Lord Carson (1921), Lord Macmillan (1930), Lord Reid (1948), and Lord Radcliffe (1949).

<sup>22</sup> Dennis Kavanagh, *Thatcherism and British Politics, The End of Consensus?* (Oxford University Press, 2<sup>nd</sup> ed, 1990) 12-13; Camilla Schofield, "A nation or no nation?" Enoch Powell and Thatcherism' in Ben Jackson and Robert Saunders (eds), *Making Thatcher's Britain* (Cambridge University Press, 2012) 95, 97-107.

<sup>23</sup> Keegan, above n 20, 46.

<sup>24</sup> Kavanagh, above n 22, 76-91; Ben Jackson, 'The think-tank archipelago: Thatcherism and neo-liberalism' in Ben Jackson and Robert Saunders (eds), *Making Thatcher's Britain* (Cambridge University Press, 2012) 43; Andy Beckett, *When the Lights Went Out, What Really Happened to Britain in the Seventies* (Faber & Faber, 2010) 260-88; Sandbrook, above n 21, 222-8; Keegan, above n 20, 59-60. For a detailed analysis of the emergence of neoliberalism see Daniel Stedman Jones, *Masters of the Universe, Hayek, Friedman, and the Birth of Neoliberal Politics* (Princeton University Press, 2012).

<sup>25</sup> Keegan, above n 20, 81.

and by extension the governing Labour Party, in turn favoured the welfare state, a commitment to full employment, and the public ownership of assets.<sup>26</sup>

This was also a time when union membership had, since World War II, been on the increase and reached its peak in 1979. This peaking coincided with the breakdown of the post-war consensus that, in turn, led to a substantial increase in the number of strikes.<sup>27</sup> A particular feature of strike activity at this time was the return of large national strikes, especially involving miners, which had not been common since before World War II.<sup>28</sup>

Union activity at this time was very successful in achieving significant improvements in wages and working conditions for its working-class members. As a result, the 1970s represented 'the high tide of redistribution' policies that were aimed at reducing inequality of incomes and wealth.<sup>29</sup> However, in the 1970s, significant improvements to the standard of living for the working class triggered the emergence of what is widely referred to as a 'middle-class revolt', as various conservative, activist, and militant groups, drawn largely from Britain's middle class, began to emerge on the political landscape.<sup>30</sup>

An early example of such a group was the Middle Class Association (MCA), founded by Conservative MP John Gorst. In the words of Roger King:

[The MCA sought to unite] 'professional, managerial, self-employed and small business occupations' against 'spiteful' tax increases at a time when the middle classes were 'suffering disproportionately from inflation and massive erosions of savings and investment'. Its members resented the militancy of trade unionism which tilted at the 'measure of comfort' worked for in socially and economically valuable lifetimes.<sup>31</sup>

In effect, MCA members and sympathisers felt that their relative superiority over the working class in terms of wealth, prosperity, and social standing was being threatened by the increased prosperity of blue-collar workers, who had benefited from the successes of their unions.<sup>32</sup> In this fear of being overtaken by the increasingly better off working class, MCA members felt, in the words of King, that, 'the gadarene rush to equality of reward threatened the source of vitality, independence and creativity provided by middle class

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<sup>26</sup> Kavanagh, above n 22, 34-5.

<sup>27</sup> Duncan Gallie, 'Employment and the Labour Market' in Jonathan Hollowell (ed), *Britain Since 1945* (Blackwell Publishing, 2003) 404, 417. In the period 1954-1964 there were 2,472 disputes that resulted in the loss of 3,760,000 working days due to strikes, whereas in the period 1970-1979 there were 5,195 disputes that resulted in 25,740,000 working days being lost: Chris Wrigley, 'Industrial Relations and Labour' in Jonathan Hollowell (ed), *Britain Since 1945* (Blackwell Publishing, 2003), 425, 436 (citing Department of Employment statistics).

<sup>28</sup> Wrigley, above n 27, 435.

<sup>29</sup> Robert Skidelsky, *Britain Since 1900, A Success Story?* (Vintage Books, 2014) 30.

<sup>30</sup> Nick Tiratsoo, "'You Never Had It So Bad": Britain in the 1970s' in Nick Tiratsoo (ed), *From Blitz to Blair, A New History of Britain Since 1939* (Phoenix, 1997) 163, 187-9; Sandbrook, above n 21, 365-6.

<sup>31</sup> Roger King, 'The Middle Class in Revolt?' in Roger King and Neil Nugent (eds) *Respectable Rebels: Middle Class Campaigns in Britain in the 1970s* (Hodder and Stoughton, 1979) 1, 3; Sandbrook, above n 21, 382.

<sup>32</sup> Sandbrook, above n 21, 127.

man'.<sup>33</sup> However, the MCA was short-lived, with its membership absorbed by NAFF in the mid-1970s.<sup>34</sup>

### A National Association for Freedom (NAFF)

The most visible, militant, and long lasting group in this middle class revolt was NAFF. Officially launched on 2 December 1975, its founding members included a host of prominent individuals<sup>35</sup> and a handful of Conservative Party MPs.<sup>36</sup> However, the critical personnel in its formation and early years were Viscount De L'Isle, Ross and Norris McWhirter, Robert Moss, and John Gouriet. Viscount De L'Isle, NAFF's founding Chairman, was a Victoria Cross winner from World War II, a former Conservative Party MP and Secretary of State for Air in the government of Sir Winston Churchill, and Australia's Governor General from 1961-1965. Ross and Norris McWhirter, who were both well known to Margaret Thatcher,<sup>37</sup> were best known as co-editors of the *Guinness Book of Records* and its television spin-off, *Record Breakers*. The McWhirters had a long track record of campaigning against what they saw as the advance of socialism in Britain. In pursuit of their political objectives, the McWhirters, with some degree of success, regularly resorted to the courts.<sup>38</sup> The assassination of Ross McWhirter by IRA gunmen six days before NAFF's official launch, attracted significant publicity and support for NAFF.<sup>39</sup> Robert Moss was an Australian-born and educated former academic at the Australian National University, who worked as a journalist and commentator for the *Economist* in the 1970s. He was the first editor of NAFF's newspaper, *Free Nation*.<sup>40</sup> As an occasional speechwriter for Margaret Thatcher, Moss drafted the speech given by

<sup>33</sup> King, above n 31, 3.

<sup>34</sup> Phillip Whitehead, *The Writing on the Wall, Britain in the Seventies* (Michael Joseph, 1986) 213. NAFF also absorbed the remnants of the Civil Assistance organization (a group formed to break any general strike) formed by Sir Walter Walker, who had served as Commander in Chief of NATO forces in Northern Europe from 1969 to 1972. Walker, whose *Who's Who* entry described his recreations as 'normal', had achieved considerable notoriety in the early 1970s as a supposed candidate to become a British version of Chile's General Pinochet: Andy Beckett, *Pinochet in Piccadilly, Britain and Chile's Hidden History* (Faber and Faber, 2002) 198-201; Sandbrook, above n 21, 135-40.

<sup>35</sup> These included Douglas Bader (famed World War II pilot), Alec Bedser (former test cricketer and then Chairman of Selectors), John Braine (novelist), Brian Crozier (anti-communist activist, founder of the Institute for the Study of Conflict, and later an adviser to Thatcher on foreign policy), Ralph Harris (Director of the Institute of Economic Affairs), Michael Ivens (Director of Aims in Industry, an anti-union pressure group, who was described by *The Morning Star* as 'one of the three most dangerous men in Britain'), Lady Morrison of Lambeth (widow of Labour icon Herbert Morrison), and Peregrine Worsthorne (prominent columnist with *The Daily Telegraph*): Beckett, above n 34, 191; Crozier, above n 40, 140; 'Michael Ivens – Obituary', *The Daily Telegraph* (7 November 2001) <<http://www.telegraph.co.uk/news/obituaries/1361693/Michael-Ivens.html>>; Neill Nugent, 'The National Association for Freedom' in Roger King & Neil Nugent (eds) *Respectable Rebels: Middle Class Campaigns in Britain in the 1970s* (Hodder and Stoughton, 1979) 76, 87; Sandbrook, above n 21, 383; Rob Steen, 'The D'Oliveira Affair' in Stephen Wagg (ed), *Myths and Milestones in the History of Sport* (Palgrave Macmillan, 2011) 185, 190; Richard Vinen, *Thatcher's Britain: The Politics and Social Upheaval of the 1980s* (Simon & Schuster UK, 2009) 83.

<sup>36</sup> Jill Knight, Sir Frederic Bennett, Rhodes Boyson, Winston Churchill (the grandson of former Prime Minister Winston Churchill), Stephen Hastings, and Nicholas Ridley: Nugent, above n 35, 88.

<sup>37</sup> Thatcher was quite open in her grief and shock at the assassination of Ross McWhirter by IRA gunmen six days before the NAFF's official launch: Margaret Thatcher, *The Path to Power* (HarperCollins Publishers, 1995) 398; Sandbrook, above n 21, 363.

<sup>38</sup> Beckett, above n 24, 377-8.

<sup>39</sup> Sandbrook, above n 21, 383.

<sup>40</sup> Brian Crozier, *Free Agent, The Unseen War 1941-1991* (HarperCollins, 1994) 118.

Thatcher in January 1976, warning about the Soviet military build-up that led to the Soviets labelling Thatcher as the 'Iron Lady', a moniker that Thatcher willingly accepted.<sup>41</sup> John Gouriet was a former intelligence officer who had served in places such as Malaya, Borneo, and Northern Ireland. After his retirement from the army, he became a merchant banker in London.<sup>42</sup> It was in his capacity as NAFF's Campaign Director that he initiated the proceedings in *Gouriet*.

Like the MCA, NAFF was formed, following the Conservative Party's two election losses in 1974, in response to the party's abandonment of individualistic and free enterprise policies. These policies had been part of the Conservative Party's platform that swept Edward Heath to power as Prime Minister in 1970.<sup>43</sup> NAFF's members and supporters were, by and large, middle class conservatives who had previously been reluctant to engage in organised political activity, but who were now more militant and less prepared to work through, and accept the wisdom of, conventional party politics.

NAFF represented parts of the middle class that felt they were being ignored by the Conservative Party. Angered by Heath's alleged 'accommodation of the trade unions and apparent helplessness in the face of collectivism', NAFF wanted the Conservative Party to be committed to 'more individualistic economic policies, ... firmer commitments on defence against the communist threat', as well as 'to [reduce] trade union influence, especially through legal prohibition of the closed shop'.<sup>44</sup> In his speech on the occasion of NAFF's launch, Viscount De L'Isle said that freedom in Britain faced four major threats, namely, the drift towards collectivism, inflation, the continued expansion of government, and the power of trade unions.<sup>45</sup>

In Margaret Thatcher, NAFF saw the Conservative Party being led by one of their own, and welcomed her defeat of Heath for leadership of the Conservative Party in February 1975. At the time of her challenge for the leadership of the Conservative Party, Thatcher had explicitly identified herself with conservative middle class values when she said:

[I]f 'middle class values' include the encouragement of variety and individual choice, the provision of fair incentives and rewards for skill and hard work, the maintenance of effective barriers against the excessive power of the State and a belief in the wide distribution of individual *private* property, then they are certainly what I am trying to defend.<sup>46</sup>

As leader of the opposition in the lead-up to the 1979 general election, Thatcher's priority was to reassure the middle class that she had its interests at heart.<sup>47</sup>

It was thus not surprising that Thatcher embraced NAFF and offered, despite reservations from some of her colleagues, discreet, but firm support for its activities.<sup>48</sup> In

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<sup>41</sup> Charles Moore, *Margaret Thatcher, The Authorized Biography, Volume One: Not for Turning* (Allen Lane, 2013) 331-3; Thatcher, above n 37, 361.

<sup>42</sup> Sandbrook, above n 21, 384; Beckett, above n 24, 380-2.

<sup>43</sup> King, above n 31, 2-4.

<sup>44</sup> Ibid 7; Nugent, above n 35, 88.

<sup>45</sup> Nugent, above n 35, 83-4.

<sup>46</sup> Daniel Anthony Cowdrill, *The Conservative Party and Thatcherism, 1970-1979: A Grass-Roots Perspective* (M Phil Dissertation, University of Birmingham, 2009) 30-3 <<http://etheses.bham.ac.uk/725/1/CowdrillMPhil10.pdf>>.

<sup>47</sup> Sandbrook, above n 21, 672.

January 1977, she attended, as guest of honour, NAFF's first subscription dinner where over 500 guests gave her a standing ovation.<sup>49</sup> Unsurprisingly, Heathites within the Conservative Party, with considerable justification, regarded NAFF 'as a stalking horse for Thatcher's brand of Toryism'.<sup>50</sup> Similarly, and also with considerable justification, the UPOW saw NAFF as 'the stalking horse for a legal attack on trade union rights that were later implemented by the post-1979 Thatcher Government'.<sup>51</sup>

NAFF certainly agreed with this assessment of its activities. At the time, John Gouriet saw NAFF as Thatcher's 'liege men',<sup>52</sup> and would, many years later, claim that NAFF was 'in the vanguard and at the cutting edge of Thatcherism'<sup>53</sup> and could 'justly claim to have paved the way for her first victory in 1979 by exposing the unacceptable face of trade unionism and its links with the Labour Government of the day'.<sup>54</sup>

## B *Political Activities of NAFF*

NAFF's broad political objective was to transform British society, which it saw as being controlled by an ever-encroaching government that had succumbed to increasingly powerful and irresponsible trade unions, into one in which the forces of government were minimal, 'except, significantly, in the areas of law enforcement, defence and alleged abuse of trade union power'.<sup>55</sup> NAFF's anti-union attitudes paralleled those of Margaret Thatcher, who, as far back as 1966, expressed the view that it is 'the individual who needs protection against the power of unions and the public who need protecting against unofficial strikes'.<sup>56</sup> In the campaign leading up to the 1979 general election, the Conservative Party policy was expressed in terms of a campaign against 'the dictatorship of unsackable union leaders'.<sup>57</sup>

In its early years, the central focus of all NAFF's activities was its campaign against the power of the union movement. This was made clear in the following headlined front page demand of the first issue of *Free Nation*: 'Mrs Thatcher, Please don't sell out to the Union left'.<sup>58</sup> According to Gouriet, NAFF's focus in the late 1970s was 'the abuse of power by unelected, overmighty trade union extremists who were holding the Labour Government and the country to ransom'.<sup>59</sup>

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<sup>48</sup> Thatcher, above n 37, 399.

<sup>49</sup> Nugent, above n 35, 88.

<sup>50</sup> King, above n 31, 3.

<sup>51</sup> Alan Clinton, *Post Office Workers, A Trade Union and Social History* (George Allen & Unwin, 1984) 585.

<sup>52</sup> Crozier, above n 40, 127.

<sup>53</sup> John Gouriet, *'Hear Hear!'*, *Collected Articles and Letters, 1999-2009* (Author House UK Ltd, 2010) 402.

<sup>54</sup> *Ibid* 294. NAFF's devotion to Thatcher continues to this day. Following her death in 2013, NAFF (now known as the Freedom Association) established the Margaret Thatcher Birthday Weekend to be held annually in Thatcher's birthplace of Grantham with the aim of celebrating Thatcher's legacy and the values that she held dear: The Freedom Association (2014) <<http://www.tfa.net/margaret-thatcher-birthday-weekend>>.

<sup>55</sup> Nugent, above n 35, 76.

<sup>56</sup> Sandbrook, above n 21, 678.

<sup>57</sup> *Ibid* 679.

<sup>58</sup> *The Free Nation*, 1, no 1, 19 March 1976, quoted in Jack McGowan, 'Dispute', "Battle", "Siege", "Farce"? – Grunwick 30 Years On' (2008) 22 *Contemporary British History* 383, 396.

<sup>59</sup> Gouriet, above n 53, 298.

NAFF's focus on anti-union activism was not a surprise. The eighth freedom set out in its *Charter of Rights and Liberties* was the '[f]reedom to choose whether or not to be a member of a trade union or employer's association'. Its anti-union stance was further demonstrated in the thirteenth freedom which was the '[f]reedom to engage in private enterprise, and to pursue the trade, business or profession of one's choice, without harassment'.<sup>60</sup> A more assertive statement of its anti-union stance is to be found in its Certificate of Incorporation under the *Companies Act 1948-1967* (UK) which stated that NAFF 'shall not support with its funds any object, or endeavour to impose on or procure to be observed by its members or others any regulation, restriction or condition which if an object of [NAFF] would make it a Trade Union'.<sup>61</sup>

According to Robert Moss, Britain was, at that time, in danger of becoming a Trades Union Congress one-party state.<sup>62</sup> His, and NAFF's, view on trade unions was as follows:

[I]n Britain ... trade unions today are no longer fighting for the same cause as the Tolpuddle Martyrs. Far from defending down-trodden workers who are forbidden to combine, they are seen to be championing the sectional selfishness of an aristocracy of better-paid workers – who are able to be paid more than the market allows, by diverting resources from other areas and so contributing to unemployment – and to be operating as press-gangs that oblige unwilling employees to send an annual subscription to maintain the lifestyles and strike funds of the union leadership.<sup>63</sup>

According to NAFF, the time was 'ripe ... to reconcile the claims of trade unions with those of the community as a whole'. To achieve this goal the following was required:

[T]he repeal of closed-shop legislation; adequate constraints on the right to picket to prevent intimidation; new legislation to restrict disruption of services vital to public health and safety, like water, gas and electricity; and provision for the democratic (and regular) election of union officials through secret ballot, which should be made compulsory.<sup>64</sup>

When NAFF sought political influence, this was not done on an institutional basis, but rather through the networks of social contacts that were generated by the members of its National Council which, as already noted, included a number of Conservative Party MPs. This reflected a continuation of the political application of social resources that had been typical of the nineteenth century middle and upper classes that was described by Eric Hobsbawm as follows:

The classical recourse of the bourgeois in trouble or with cause for complaint was to exercise or to ask for personal influence, to have a word with the mayor, the deputy, the minister, the old school or college comrade, the kinsman or business contact.<sup>65</sup>

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<sup>60</sup> NAFF's *Charter of Rights and Liberties* is reprinted in Robert Moss, *The Collapse of Freedom* (Abacus, 1977) 218.

<sup>61</sup> Certificate of Incorporation No 1303670, Clause 3(ii), 18 March 1977 (copy with the author).

<sup>62</sup> Robert Moss, 'The Defence of Freedom' in K W Watkins (ed), *In Defence of Freedom* (Cassell, 1978) 145.

<sup>63</sup> *Ibid* 146.

<sup>64</sup> *Ibid* 147.

<sup>65</sup> Eric Hobsbawm, *The Age of Capital, 1848-1897* (Weidenfeld & Nicolson, 1975) 244.

However, the focus of NAFF's activism was not in lobbying politicians or influencing civil servants.<sup>66</sup> Rather, it was on taking legal action.<sup>67</sup> In this, NAFF was inspired by, and followed, the example of the McWhirter brothers' earlier efforts to achieve their political objectives through the courts,<sup>68</sup> the most significant such case being *A-G ex rel McWhirter v Independent Broadcasting Authority (McWhirter)*.<sup>69</sup>

### C NAFF and the Union of Post Office Workers (UPOW)

*Gouriet's* case was not the first time that NAFF had been involved with legal proceedings against the UPOW. This occurred during the union's dispute with Grunwick Processing Laboratories (Grunwick), owned by George Ward. This dispute ran at the same time that the dispute in *Gouriet* arose. Grunwick was a photograph developing business, reliant upon the postal system for the operation of its mail order business. The Grunwick dispute, which attracted extensive media publicity, began in August 1976. The central issue in the dispute concerned the right of an employer to engage only non-union labour and arose in the wake of closed-shop legislation that was introduced by Britain's Labour government in 1974.<sup>70</sup> For NAFF, this legislation constituted 'an affront to individual liberty', without parallel in Western Europe.<sup>71</sup>

For NAFF, the Grunwick dispute was a crucial test of principle and from its earliest stages NAFF campaigned vigorously on behalf of Ward and his business. According to *Gouriet*, Grunwick was 'one little company that was being bullied' and NAFF pledged to do whatever it could to save it.<sup>72</sup>

During the course of the Grunwick dispute, on 1 November 1976, the UPOW placed a local area ban on the handling of Grunwick's mail. This posed a serious threat to the viability of Grunwick's business. On 4 November 1976, NAFF, keen to challenge the assumed right of unions to strike, sponsored Grunwick's application for an injunction against the UPOW. The UPOW retracted its boycott and the legal proceedings were withdrawn on 9 November 1976, on the basis that fruitful negotiations were to be

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<sup>66</sup> Brian Elliott, Frank Bechhofer, David McCone and Stewart Black, 'Bourgeois Social Movement in Britain: Repertoires and Responses' (1982) 30 *Sociological Review* 71, 85.

<sup>67</sup> For example, NAFF took several cases to the European Court in Strasbourg involving staff dismissed by British Rail as a result of the closed shop. It also provided financial support to the Tameside Parents Education Group in its successful claim in *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 to prevent the introduction of comprehensive education within the Tameside Municipal Borough: Nugent, above n 35, 89

<sup>68</sup> Sandbrook, above n 21, 364. Cases brought before the courts by the McWhirter brothers included *McWhirter v Manning*, *The Times*, 30 October 1954; *McWhirter & McWhirter v Chapple* (1954) 104 SJ 204; *McWhirter v Platten* [1970] 1 QB 508; *McWhirter v Attorney-General* [1972] CMLR 882; *McWhirter v Callaghan*, Unreported decision in 1970; and *A-G ex rel McWhirter v Independent Broadcasting Authority* [1973] QB 629. Some of these cases are recalled in Norris McWhirter's affectionate biography of his brother: Norris McWhirter, *Ross, The Story of a Shared Life* (Churchill Press Ltd, 1976).

<sup>69</sup> [1973] QB 629.

<sup>70</sup> For accounts of the Grunwick dispute see Joe Rogaly, *Grunwick* (Penguin Books, 1977); Beckett, above n 24, 358-403; Sandbrook, above n 21, 599-618. On NAFF's role in the Grunwick dispute see Jack McGowan, "'Dispute", "Battle", "Siege", "Farce"? - Grunwick 30 Years On' (2008) 22 *Contemporary British History* 383. On the UPOW's role in the dispute see Clinton, above n 51, 585-93.

<sup>71</sup> Moss, above n 62, 145.

<sup>72</sup> Sandbrook, above n 21, 606.

entered into to resolve the dispute.<sup>73</sup> When these negotiations did not eventuate, a second local ban was initiated by the UPOW in June 1977. In response to this ban, NAFF launched Operation Pony Express on 10 July 1977. This action consisted of Gouriet, Moss and a handful of supporters loading sacks of Grunwick's outgoing mail into vans that they mailed from post-boxes across England, some as far north as Preston and Manchester and south as far as Plymouth and Truro. Following this out-manoeuvring of the UPOW, the UPOW ended the black ban.<sup>74</sup> NAFF's actions during the Grunwick dispute resulted in much favourable publicity for it, a doubling of its membership, and a significant level of monetary donations for its coffers.<sup>75</sup>

Margaret Thatcher approved of NAFF's role in the Grunwick dispute and expressed the view that '[w]ithout NAFF, Grunwick would almost certainly have gone under'.<sup>76</sup> According to NAFF, Thatcher privately described Operation Pony Express as the 'best thing since Entebbe'.<sup>77</sup> At the time she wrote to Gouriet as follows:

[W]e feel that the scenes of wild violence portrayed on television plus the wild charges and allegations being thrown about in certain quarters, are enough in themselves to put most of the public on the side of right and are doing more than hours of argument.<sup>78</sup>

For Thatcher, the Grunwick dispute was more than about the closed shop. Like NAFF, she saw the dispute as part of a broader issue, namely, 'the sheer power of the unions'.<sup>79</sup> In the words of George Ward, in an article in *The Times* in September 1977 that was probably written for him by NAFF, victory in the Grunwick dispute represented, 'an exceptional nuisance to those who see Britain's future as that of a collectivist, corporate state, in which business can be obliged to surrender to coercion and brute force'.<sup>80</sup>

The significance of the Grunwick dispute was that popular opinion agreed with Thatcher. In 1975, opinion polls showed that three out of four people thought unions were too powerful. By September 1978, and notwithstanding that the UPOW suffered a defeat in the Grunwick dispute, 82 per cent of the people, including an overwhelming majority of union members, thought unions exerted too much power.<sup>81</sup> As the Labour-supporting historian Kenneth Morgan observed, 'Grunwick became not a fight for workers' rights but a symbol of mob rule and uncontrolled threats from trade union power'.<sup>82</sup>

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<sup>73</sup> *Gouriet v Union of Post Office Workers* [1977] QB 729, 760-1; Jamie Ritchie, 'Grunwick' (1978-1979) 4 *Policy Law Review* 3, 4; Clinton, above n 51, 586-7; Peter Hain, *Political Trials in Britain* (Allen Lane, 1984) 199.

<sup>74</sup> Clinton, above n 51, 590-1; Beckett, above n 24, 395-401; Sandbrook, above n 21, 614-5; Nugent, above n 35, 90. For Gouriet's later reflections upon the Grunwick dispute and an account of Operation Pony Express see Gouriet, above n 53, 275-9. The name of this operation is likely to have been inspired by Operation Pony Express, a covert operation run American military forces South East Asia during the Vietnam War that transported indigenous forces into Laos to cross into North Vietnam to gather intelligence on North Vietnamese troop movements, which was then used by the Americans to select targets for air strikes.

<sup>75</sup> Sandbrook, above n 21, 617.

<sup>76</sup> Thatcher, above n 37, 399.

<sup>77</sup> Gouriet, above n 53, 278.

<sup>78</sup> Thatcher, above n 37, 399.

<sup>79</sup> *Ibid* 401.

<sup>80</sup> Sandbrook, above n 21, 617.

<sup>81</sup> *Ibid* 617-8.

<sup>82</sup> Kenneth O Morgan, *Callaghan: A Life* (Oxford University Press, 1997) 583.

The critical events in the *Gouriet* case, which, as already noted, took place during the protracted Grunwick dispute, had their origins in an appeal to the UPOW from the International Confederation of Free Trade Unions to support a one week boycott on postal and telecommunications services to South Africa. The call for support was made as part of a coordinated international protest against apartheid in the wake of the shooting of school children in Soweto in September 1976, the banning of trade union activity, and the death of a number of trade union leaders whilst in captivity.<sup>83</sup>

The UPOW supported the ban. Its recently appointed research officer, Peter Hain, a leading figure in the anti-apartheid campaign and later in his career a Labour MP and Minister in the Blair Labour government, drafted the press release announcing the UPOW's planned week-long boycott.<sup>84</sup> On the evening of 13 January 1977, the ban, which was scheduled to commence at midnight on 16 January 1977, was publicly announced by the union's General Secretary, Tom Jackson.

The UPOW's call for a ban provided a golden opportunity for NAFF to initiate legal action for an injunction, similar in nature to the discontinued proceedings against the UPOW that it had sponsored less than two months earlier in the context of the Grunwick dispute.<sup>85</sup>

On 14 January 1977, *Gouriet* sought the Attorney-General's fiat for relator proceedings for an injunction to stop the union from going ahead with the ban. In a decision that *Gouriet* claimed was based upon political expediency, the Attorney-General refused to grant his fiat.<sup>86</sup> Later that day, *Gouriet* made an application before Stocker J in chambers for an injunction against the UPOW.

*Gouriet* had some legal basis for launching his proceedings without the Attorney-General's fiat. In *McWhirter*, Ross McWhirter, whom Lord Denning later described as a 'remarkable person' who 'took a stand against evil' and 'was always courageous in support of the rule of law',<sup>87</sup> sought an injunction to restrain the broadcasting of a film about Andy Warhol on the grounds that it breached provisions in the *Television Act 1974* (UK). McWhirter had previously asked the Attorney-General to take these proceedings, but the Attorney-General declined to do so. The Court of Appeal, in a majority decision, granted an interim injunction to McWhirter. However, it subsequently declined to continue the injunction on the basis that there was no breach of the legislation. In the course of his judgment in this case, Lord Denning ruled that 'if the Attorney-General

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<sup>83</sup> Clinton, above n 51, 587.

<sup>84</sup> Peter Hain, *Outside In* (Biteback Publishing Ltd, 2012) 126-7. Hain would have had no sympathies for NAFF, not only because of a clash of opinions over the apartheid regime in South Africa, but also on a more personal level, as Ross McWhirter had previously chaired a committee that sought to fund a private prosecution against Hain because of the latter's anti-apartheid activities: Mark Garnett, *From Anger to Apathy, The British Experience since 1975* (Jonathan Cape, 2007) 74; Hain, n 84, 80.

<sup>85</sup> It can also be said that NAFF was also motivated by its support for the then government in South Africa. In relation to South Africa, NAFF's strident anti-communism led it to adopt the ancient proverb that declares that 'the enemy of my enemy is my friend'. Although NAFF did not condone apartheid, an editorial in *Free Nation*, in 1977 stated: 'South Africa's government is neither a Communist nor a Fascist dictatorship. In this sense, it has some claim to belong to the small community of the free world ... Even with press freedom curtailed, South Africa is a relatively liberal society by comparison with the average UN member state': Nugent, above n 35, 85-6.

<sup>86</sup> *Gouriet*, above n 53, 444.

<sup>87</sup> Lord Denning, *The Discipline of Law* (Butterworths, 1979) 128.

refuses leave in a proper case, or improperly or unreasonably delays in giving leave, or his machinery works too slowly, then a member of the public who has a sufficient interest can himself apply to the court itself.<sup>88</sup> To similar effect, Lawton LJ said that ‘if ... there was reason to think that an Attorney-General was refusing improperly to exercise his powers, the courts might have to intervene to ensure that the law was obeyed’.<sup>89</sup>

However, Gouriet’s application for an injunction was dismissed by Stocker J. Gouriet immediately lodged an appeal to the Court of Appeal. On the following day - 15 January 1977, a Saturday - a bench comprised of Lord Denning, by no means a friend of organised labour,<sup>90</sup> and Lord Justices Lawton and Ormrod granted an interim injunction until 18 January 1977.

In reaching their decisions, both Lord Denning<sup>91</sup> and Lawton LJ<sup>92</sup> relied upon the principles they had expressed in *McWhirter*. In what Gouriet, many years later, described as a ‘fearless’ defence of the rule of law,<sup>93</sup> Lord Denning said:

[W]hen the Attorney-General comes, as he does here, and tells us that he has a prerogative — a prerogative by which he alone is the one who can say whether the criminal law should be enforced in these courts or not — then I say he has no such prerogative. He has no prerogative to suspend or dispense with the laws of England. If he does not give his consent, then any citizen of the land — any one of the public at large who is adversely affected — can come to this court and ask that the law be enforced. Let no one say that in this we are prejudiced. We have but one prejudice. That is to uphold the law. And that we will do, whatever befall. Nothing shall deter us from doing our duty.<sup>94</sup>

In coming to their decisions, both Lord Denning and Lawton LJ were swayed, in part at least, by a belief or suspicion that Silkin had been influenced by political considerations in refusing to grant his fiat. Thus, Lord Denning doubted whether Silkin’s decision to refuse his consent ‘had been influenced only by legitimate considerations and had not taken into account anything extrinsic or irrelevant’ and further said that it was ‘very debatable whether [Silkin] ... directed himself properly in regard to all the considerations in the matter’. For Lord Denning, the injunction was justified ‘until the time when [Silkin] can come before us and show us good reasons (if there are any) why

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<sup>88</sup> *A-G ex rel McWhirter v Independent Broadcasting Authority* [1973] QB 629, 649.

<sup>89</sup> *Ibid* 657.

<sup>90</sup> In extra-judicial statements at the time, Lord Denning said that trade unions were ‘far too powerful for the nation’s well-being’, that ‘[t]he power of the great trade unions is perhaps the greatest challenge to the rule of law’, and that it is the trade unions who ‘take away the liberty of the individual’: quoted in Kenny Miller, ‘The Labours of Lord Denning’ in P Robson and P Watchman (eds), *Justice, Lord Denning and the Constitution*, Gower Publishing Co, Farnborough, 1981, 126, 129. Lord Denning’s views on trade unions stemmed from his judicial philosophy which had as one of its cardinal elements the principle of freedom under the law. He expressed this view in a book just before his retired in 1982 as follows: ‘[T]he most important function in the law is to restrain the abuse of power by any of the holders of it – no matter whether they be the Government, the newspapers, the television, the trade unions, the multi-national companies, or anyone else’: Lord Denning, *What Next in the Law*, (Butterworths, 1982) vi (emphasis added).

<sup>91</sup> *Gouriet v Union of Post Office Workers* [1977] QB 729, 737.

<sup>92</sup> *Ibid* 739.

<sup>93</sup> *Gouriet*, above n 53, 278.

<sup>94</sup> *Gouriet v Union of Post Office Workers* [1977] QB 729, 763.

the proceedings should not continue'.<sup>95</sup> Lawton LJ was more explicit when, having stated he had 'used [his] imagination as best [he could] to see what good legal reason' Silkin had for refusing to grant his consent, went on to say that he could 'conceive of many political reasons why [Silkin] decided not to intervene'.<sup>96</sup> As John Edwards aptly observed, '[Lawton LJ's] observation is regrettably suggestive of the same kind of bias that was itself being condemned and calls into question the objectivity of the court'.<sup>97</sup>

The interim injunction granted by the Court of Appeal was warmly welcomed by NAFF. John Lewis, a NAFF Council member at the time, subsequently wrote that the Court of Appeal's decision was important for it demonstrated:

1. that unions cannot break the law with impunity even for professed idealistic purposes
2. that the Attorney-General is not above the law
3. that the individual in a free society can always have recourse to the courts in defending his rights, though that recourse in itself presupposes the existence of independently minded individuals with independent sources of material and financial support.<sup>98</sup>

On a more practical level, because the UPOW complied with the interim order of the Court of Appeal and called off the proposed industrial action, NAFF, and indeed the Conservative Party, gained a significant political victory. It was around this time that Thatcher told one of her colleagues that NAFF was doing more than anyone else for freedom in the United Kingdom.<sup>99</sup>

Following a further hearing on 18 January 1977 as to whether the interim injunction should be continued, on 27 January 1977, a majority of the Court of Appeal ruled that the court had no power to review the Attorney-General's decision to reject Gouriet's fiat application. In his dissent, Lord Denning again referred to, and relied upon, the views he expressed in *McWhirter*.<sup>100</sup>

Gouriet then appealed to the House of Lords on the question of whether he had a right to pursue the claim for injunctive relief in circumstances where no private right of his own was also infringed and where the Attorney-General had refused to grant his fiat to relator proceedings. In a unanimous decision, delivered on 26 July 1977, which caused Lord Denning 'much disappointment',<sup>101</sup> the House of Lords ruled against Gouriet on this question. In so doing, it also reaffirmed long-standing authority, principally the House of Lords decision in *London County Council v Attorney General*,<sup>102</sup> that a court cannot review the Attorney-General's decision to refuse to grant his or her fiat to relator

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<sup>95</sup> Ibid 738. Peter Hain, in his memoirs, asserts that in the wake of the Grunwick dispute and the *Gouriet* case, Lord Denning said: 'By and large I hope we are keeping the [Labour] government in order'. However, Hain does not provide a source for this statement: Hain, above n 84, 127.

<sup>96</sup> *Gouriet v Union of Post Office Workers* [1977] QB 729, 739.

<sup>97</sup> Edwards, above n 11, 131.

<sup>98</sup> John Lewis, 'Freedom of Speech and Publication' in K W Watkins (ed), *In Defence of Freedom* (Cassell, 1978) 84, 97-8.

<sup>99</sup> Young, *One of Us, A Biography of Margaret Thatcher* (Pan Books, 1989) 111.

<sup>100</sup> *Gouriet v Union of Post Office Workers* [1977] QB 729, 759.

<sup>101</sup> Lord Denning, *The Closing Chapter* (Butterworths, 1983) 229.

<sup>102</sup> [1902] AC 165, 167-8.

proceedings. All five Law Lords explicitly rejected the validity of Lord Denning's dictum to the contrary in *McWhirter*.<sup>103</sup>

A number of Law Lords criticised the political considerations that seemed to have influenced Lord Denning and Lawton LJ in their judgments granting the interim injunction. Viscount Dilhorne, himself a former Attorney-General, undoubtedly had their comments in mind when he observed that simply because an Attorney-General rejected an application for consent to relator proceedings, 'it should not be inferred from his refusal to disclose [his reasons for doing so] that he acted wrongly'.<sup>104</sup> Furthermore, his Lordship noted that 'the inference that [the Attorney-General] abused or misused his powers is not one that should be drawn'.<sup>105</sup> Lord Diplock viewed the statements made by Lord Denning and Lawton LJ as 'regrettable'.<sup>106</sup> In relation to Lord Denning, it has been observed that his comments exemplified what has been described as 'his Achilles heel as a judge', namely, 'too great a readiness to confuse personal prejudice with his notions of justice'.<sup>107</sup>

For NAFF, the House of Lords decision, delivered two weeks after the success of Operation Pony Express in the Grunwick dispute, was a bitter disappointment. Viscount De L'Isle criticised the decision, seeing it as a warning that 'the law is being moved, and moved very fast, away from the principle of security which it gives to the rights of individuals'.<sup>108</sup> The House of Lords' decision was also an expensive one for NAFF. It had a costs bill in excess of £90,000, a sum that it raised in a matter of weeks by means of an appeal to its members.<sup>109</sup>

#### D *Gouriet in the Political Realm*

The *Gouriet* case attracted significant public interest<sup>110</sup> and received widespread press attention. For example, the editorial in *The Times* on 28 July 1977, two days after the House of Lords decision, read as follows:

It is not the good faith of the Attorney-General of any government in question. It is rather that the way in which the public interest is perceived is all too likely to be

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<sup>103</sup> *Gouriet v Union of Post Office Workers* [1978] AC 435, 483 (Lord Wilberforce), 495 (Viscount Dilhorne), 502 (Lord Diplock), 511 (Lord Edmund-Davies) and 521 (Lord Fraser of Tullbelton). In so doing the House of Lords also rejected the decision of the Canadian Supreme Court in *Thorson v Attorney-General of Canada (No 2)* (1974) 43 DLR (3rd) 1, 18 which was consistent with Lord Denning's dictum. In Australia, Lord Denning's dictum was explicitly rejected in *Australian Conservation Foundation v The Commonwealth* (1980) 146 CLR 493, 506 (Aiken J, overruling the decision of in *Benjamin v Downs* [1976] 2 NSWLR 199, 210-1, where Helsham J applied Lord Denning's dictum), 527 (Gibbs J).

<sup>104</sup> *Gouriet v Union of Post Office Workers* [1978] AC 435, 489.

<sup>105</sup> *Ibid* 491.

<sup>106</sup> *Ibid* 506.

<sup>107</sup> Justice James Douglas, Lord Denning: His Judicial Philosophy' (2016) 90 *Australian Law Journal* 107, 108.

<sup>108</sup> Lord De L'Isle, 'Freedom and the Constitution' in K W Watkins (ed), *In Defence of Freedom* (Cassell, 1978) 1, 10.

<sup>109</sup> Carol Harlow and Richard Rawlings, *Pressure Through Law* (Routledge, 1992) 146.

<sup>110</sup> *Gouriet* himself appeared in a debate sponsored by the Cambridge University Law Society during the 1977-1978 academic year where he argued against the motion 'That private prosecutions are a genuine menace to the rule of Law': D Massey, 'Cambridge University Law Society, 1977-78' (1978) 37 *Cambridge Law Journal* 375, 375.

coloured by the experience of a man who has spent the whole of his political career in the service of one party. It does not matter which party. It is simply that there is a very considerable danger of a person with this background and cast of mind seeing the public interest in a way that to others may seem indistinguishable from political convenience ... What has caused most public unease about the present case has been the feeling, well-founded or not, that the Attorney-General withheld his consent because on grounds of broad public policy he did not wish to upset the trade union movement. It undermines respect for the law if there is a widespread suspicion that what is perfectly respectable, even if misjudged, as a central element of government policy is being applied beyond its proper sphere.<sup>111</sup>

The *Gouriet* case was also of significant concern and interest to the leadership of the Conservative Party in opposition. This is confirmed by the fact that it was a specific agenda item for meetings of Margaret Thatcher's Leader's Consultative Committee in early 1977 when the UPOW's industrial action was announced and the case came before the Court of Appeal.<sup>112</sup> Thatcher herself, who saw the action of the UPOW as part of 'a wider challenge by the far Left to the rule of law', wrote in her memoirs that '[t]he attitude of Sam Silkin ... to law-breaking by trade unions had been revealed as at best ambiguous', and further, that the Labour government displayed a 'shifty attitude to the law and individual rights' that she felt was summed up in Silkin's description of 'certain types of union activity as "lawful intimidation"'.<sup>113</sup> Thus, for NAFF, the Conservative Party, and an increasing section of the general populace, Silkin's rejection of *Gouriet*'s fiat application, demonstrated that the Labour Government was captive to the demands of the union movement.

The Attorney-General's decision to reject *Gouriet*'s fiat application was also a matter debated in Parliament. In the wake of the two decisions of the Court of Appeal in *Gouriet*, in the House of Commons on 27 January 1977, Silkin was questioned by opposition members as to his reasons for refusing to grant his fiat to *Gouriet*. Silkin, who would also later defend his course of action in print,<sup>114</sup> made the same essential points that he made when arguing the cases before the Court of Appeal<sup>115</sup> and the House of Lords.<sup>116</sup> He explained that it was an Attorney-General's 'duty to consider broader issues of public interest and to base his conclusion on where the balance of public interest lies'. In relation to *Gouriet*'s fiat application, Silkin said:

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<sup>111</sup> Australian Law Reform Commission, *Standing in Public Interest Litigation*, Report No 27 (1985) 91-2 [161].

<sup>112</sup> 'Minutes of Leader's Consultative Committee Meeting' (19 January 1977)

<<http://fc95d419f4478b3b6e5f-3f71dofe2b653c4foof32175760e96e7.r87.cf1.rackcdn.com/9BC0E5293628477DB9DD7E329895126D.pdf>>; 'Minutes of Leader's Consultative Committee Meeting' (26 January 1977) <<http://fc95d419f4478b3b6e5f-3f71dofe2b653c4foof32175760e96e7.r87.cf1.rackcdn.com/6D39C5E63962427CAB16ED7B7593E8CF.pdf>>.

<sup>113</sup> Thatcher, above n 37, 400.

<sup>114</sup> Rt Hon S C Silkin QC MP, 'The Functions and Position of the Attorney-General in the United Kingdom' (1978-1979) 12 *Bracton Law Journal* 29; Rt Hon S C Silkin QC MP, 'The Office of Attorney General' (1980) 4 *The Trent Law Journal* 21.

<sup>115</sup> *Gouriet v Union of Post Office Workers* [1977] QB 729, 742.

<sup>116</sup> *Gouriet v Union of Post Office Workers* [1978] AC 435, 443-4.

The taking of injunction proceedings in my name had the inherent risk, at that early stage, of inflaming the situation before the need for it was demonstrated and might well result in breaches of the law and inconvenience to the public over a much wider area than the two sections of Post Office workers affected [by the proposed industrial action].<sup>117</sup>

He stated that therefore, ‘the balance of public interest was against giving consent to Mr Gouriet’s application’.<sup>118</sup> Silkin also pointed out that the Conservative Party Attorneys-General had, in similar situations in the past, acted as he had done in relation to Gouriet’s application.<sup>119</sup> For example, in 1973, the UPOW had imposed a similar boycott on mail to and from France in protest against France’s nuclear tests in the Pacific Ocean.<sup>120</sup> Sir Peter Rawlinson, the Conservative Party’s Attorney-General at that time, and Silkin’s immediate predecessor, took no action to stop the boycott. Indeed, in his appearance before the Court of Appeal in *McWhirter*, Rawlinson adopted exactly the same position as Silkin did in *Gouriet*.<sup>121</sup> Furthermore, Rawlinson publicly endorsed and supported Silkin’s arguments in *Gouriet*.<sup>122</sup> However, Rawlinson’s views no longer represented the approach of the Conservative Party under the leadership of Margaret Thatcher.

Finally, the widespread coverage of NAFF’s activities in the *Gouriet* case and its other anti-union campaigns, played a part in building the political momentum that ultimately led the Conservative Party to a slender victory in the 1979 general election. Following her election victory, on 18 May 1979, Thatcher wrote to Gouriet, thanking him (and by extension NAFF) ‘for being such a great help during the years in Opposition’.<sup>123</sup> However, with Thatcher’s victory, NAFF’s concerns with enforcing the law appeared to change. NAFF was nowhere to be heard in condemning Silkin’s successor, Sir Michael Havers, when, in 1979, he controversially failed to prosecute violations of sanctions imposed against the Ian Smith regime in Rhodesia. Although the case did not involve relator proceedings, Havers’ decision not to launch a prosecution raised the same issues as were raised against Silkin in his decision not to grant his consent to relator proceedings in *Gouriet*.<sup>124</sup>

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<sup>117</sup> United Kingdom, Parliamentary Debates, House of Commons, 27 January 1977, vol 724, cols 1702-1703.

<sup>118</sup> *Ibid* 1703.

<sup>119</sup> *Ibid*.

<sup>120</sup> Edwards, above n 11, 335.

<sup>121</sup> *Attorney-General ex rel McWhirter v Independent Broadcasting Authority* [1973] QB 629, 638-9.

<sup>122</sup> Silkin, ‘The Functions and Position of the Attorney-General in the United Kingdom’, above n 114, 36.

<sup>123</sup> *Tory! Tory! Tory! The Road to Power*, BBC Television documentary, broadcast in March 2006 as the second of three episodes on the Thatcher years as leader of the Conservative Party <<https://www.youtube.com/watch?v=ABn3EmUcU7g>>.

<sup>124</sup> Edwards, above n 11, 325-34.

IV STANDING AFTER *GOURIET*

Although the decision in *Gouriet* was subsequently reaffirmed by the highest of authority in both the United Kingdom<sup>125</sup> and Australia,<sup>126</sup> it nonetheless prompted widespread debate in both countries about the role of the Attorney-General more generally, as well as in regards to relator proceedings.

In the United Kingdom, Lord (Harry) Woolf, who had appeared as junior counsel alongside Silkin in *Gouriet*, both before the Court of Appeal and the House of Lords, argued for the establishment of a Director of Civil Proceedings, accountable to the Lord Chancellor or Attorney-General, to undertake, inter alia, the responsibilities of the Attorney-General in relation to fiat applications. In making this suggestion, Lord Woolf observed the following:

One difficulty which the Attorney-General has in intervening is that the media and in consequence the public are quite incapable of appreciating that he is not intervening wearing his political hat but wearing his public interest hat. This means that the Attorney may be inhibited from intervening in situations where otherwise he might well do so.<sup>127</sup>

On the other hand, Lord Goldsmith, an Attorney-General during the Blair Labour government, opposed the idea suggested by Lord Woolf, arguing that the Attorney-General should be accountable to parliament and that there should be established a Select Committee to regularly scrutinise his or her decisions.<sup>128</sup>

In Australia the Australian Law Reform Commission published a discussion paper, in 1978, in which it proffered the view that, because the Attorneys-General may be faced with conflicts of interest, 'there would appear to be merit in establishing an independent statutory officer charged with the duty of determining what indictments are to be laid'.<sup>129</sup>

However, in both the United Kingdom and Australia, these recommendations were never implemented.

On the other hand, since *Gouriet* there has been a significant relaxation of the standing requirements in both the United Kingdom and Australia, so much so that the

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<sup>125</sup> *R v Inland Revenue Commissioners ex parte National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 93 at 638-9 (Lord Diplock), 649 (Lord Scarman); *Stoke on Trent v B & Q (Retail) Ltd* [1984] AC 754 at 770-1 (Lord Templeman). The Privy Council, in *Mohitt v Director of Public Prosecutions of Mauritius* [2006] 1 WLR 3343, 3450, referred to *Gouriet* as a 'binding statement of English law'.

<sup>126</sup> *Australian Conservation Foundation Inc v The Commonwealth* (1980) 146 CLR 493, 527 (Gibbs J); *Barton v The Queen* (1980) 147 CLR 75, 90-1 (Gibbs and Mason JJ); *R v Toohey*; *Ex parte Northern Land Council* (1981) 151 CLR 170, 218 (Mason J), 283 (Wilson J); *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247, 261 (Gaudron, Gummow and Kirby JJ), 281 (McHugh J).

<sup>127</sup> Harry Woolf, 'Public Law – Private Law: Why the Divide? – A Personal View' [1986] *Public Law* 220, 235.

<sup>128</sup> Rt Hon Lord Goldsmith QC, 'Independence – Myth or Mystery?', Annual Denning Lecture' (27 November 2007) <[http://www.filewiz.co.uk/bacfi/denning\\_lecture\\_2007.pdf](http://www.filewiz.co.uk/bacfi/denning_lecture_2007.pdf)>.

<sup>129</sup> Australian Law Reform Commission, *Access to the Courts – Vol I Standing: Public Interest Suits*, Discussion Paper No 4 (1978) 24.

applications for the Attorney-General's fiat are even rarer now than previously, thereby leaving the relator action 'somewhat high and dry'.<sup>130</sup>

In the United Kingdom, procedural changes, in 1978, incorporated into Order 53, rule 3(5) of the Rules of the Supreme Court, which were subsequently codified in s 31(3) of the *Supreme Court Act 1981* (UK) have resulted in the prerogative and equitable remedies all becoming available in a single form of proceeding, instituted by leave given to an applicant with a 'sufficient interest in the matter to which the application relates'.<sup>131</sup>

In Australia, the expansion of standing has been achieved by both the development of the general law and legislation. In relation to the former, in *Australian Conservation Foundation Inc v The Commonwealth*, Gibbs J reframed the 'special damage' test in the second limb of *Boyce* to one of a 'special interest in the subject matter of the action'.<sup>132</sup> As was pointed out by Gaudron J in *Truth About Motorways Limited v Macquarie Infrastructure Management Limited*,<sup>133</sup> the 'special interest' test 'extended' the standing exception in the second limb of *Boyce*,<sup>134</sup> as was demonstrated by the subsequent application of the 'special interest' test in *Onus v Alcoa of Australia Ltd (Onus)*<sup>135</sup> and *Bateman's Bay*.<sup>136</sup> In *Onus*, Brennan J pointed out that the concept of 'special interest' could embrace non-material interests, which would have been insufficient to grant standing under the 'special damage' test in *Boyce*. According to his Honour, such an expansion of standing rights was justified because '[t]o deny standing would deny to an important category of modern public statutory duties an effective procedure for curial enforcement'.<sup>137</sup> Indeed, it has been argued that the cases applying the 'special interest' test indicate that the law is gravitating towards a principle that would 'permit any private individual to bring proceedings in his or her own name against breach of a statutory prohibition if the court thinks he or she has a sufficient or substantial interest'.<sup>138</sup>

In relation to the legislative reform in Australia, a broad right of standing was recommended by the Australian Law Reform Commission in 1985, which, in s 8(2) of a proposed draft bill on standing, proposed that 'every person has standing to commence and maintain a proceeding to which this Act applies unless the court, on application, finds that, by commencing and maintaining the proceeding, the plaintiff is merely meddling'.<sup>139</sup> Although this recommendation has not been implemented, individual legislative provisions, by granting standing to a wide range of persons, have dramatically extended the scope of private individuals who are able to enforce public rights. By

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<sup>130</sup> Michael Taggart, 'The Impact of Apartheid on Commonwealth Administrative Law [2006] *Acta Juridica* 158, 162.

<sup>131</sup> These provisions have been considered in cases such as *R v Inland Revenue Commissioners ex parte National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617; *R v Secretary for Foreign and Commonwealth Affairs ex parte World Development Movement Ltd* [1995] 1 WLR 386.

<sup>132</sup> *Australian Conservation Foundation Inc v The Commonwealth* (1980) 146 CLR 493, 527.

<sup>133</sup> (2000) 200 CLR 591.

<sup>134</sup> *Truth About Motorways Limited v Macquarie Infrastructure Management Limited* (2000) 200 CLR 591, 609.

<sup>135</sup> (1981) 149 CLR 27.

<sup>136</sup> (1998) 194 CLR 247. For a detailed discussion of the impact of the 'special interest' test see *North Coast Environmental Council Inc v Minister for Resources* (1994) 55 FCR 492, 502-18 (Sackville J).

<sup>137</sup> *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27, 73.

<sup>138</sup> J D Heydon, M J Leeming and P G Turner, *Meagher, Gummow and Lehane's Equity, Doctrines and Remedies* (LexisNexis Butterworths, 5th ed, 2015) 735.

<sup>139</sup> Australian Law Reform Commission, above n 111, 216.

expanding the right to standing beyond the confines of the principles in *Boyce*, the effect of these provisions is to obviate the need for private individuals to seek the Attorney-General's fiat.<sup>140</sup> Examples here include: (i) ss 44ZZE and 80 of the *Competition and Consumer Act 2010* (Cth), which entitle 'any person' to seek an injunction in relations to the enforcement of various provisions of that Act; (ii) s 232 of the *Australian Consumer Law* which entitles 'any person' to seek an injunction in relations to the enforcement of various provisions of the *Australian Consumer Law*; (iii) s 123 of the *Environmental Planning and Assessment Act 1979* (NSW) which allows 'any person ... whether or not any right of the person has been or may be infringed by or as a consequence of [a breach of the Act]', to commence proceedings in the Land and Environment Court to restrain a breach of the Act; (iv) s 487(2) of the *Environmental Protection and Biodiversity Act 1999* (Cth) which grants standing to environmental groups and organisations in relation to the enforcement of the Act's provisions; and (v) s 5(1) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) which grants standing to '[a] person who is aggrieved by a decision to which the Act applies', to appeal to the Federal Court of Australia for judicial review of that decision.<sup>141</sup>

Furthermore, in Queensland, legislative reform has arguably overruled the fiat rule. Section 7(1)(g) of the *Attorney General Act 1999* (Qld) enables the Attorney-General to 'grant fiats to enable entities, that would not otherwise have standing, to start proceedings in the Attorney-General's name' *inter alia* 'to enforce and protect public rights'. As that power is not exempt from the effect of Queensland's *Judicial Review Act 1991* (Qld), in *Sharples v O'Shea*,<sup>142</sup> Holmes J said, in *obiter* comments, 'that the application of *Gouriet* must indeed be doubted'.<sup>143</sup>

## V CONCLUSION

Given that the Attorney-General is a politician and government minister, a decision to grant or refuse consent to relator proceedings is inevitably going to raise the question of whether, or to what extent, the decision reached was one based upon political considerations. As Edwards, in his detailed study on the office of the Attorney-General, concludes, '[w]hichever decision is finally decided upon, public and parliamentary criticism must be expected'.<sup>144</sup> This was clearly evident in relation to the *Gouriet* case. Given that the facts of *Gouriet* raised important political questions relating to industrial relations, and given that the government and opposition had significantly different attitudes to these questions, it was inevitable that, whatever the decision that Silkin made on *Gouriet*'s fiat application, it was going to ignite a political reaction. Whatever were its merits, the decision to reject the fiat application was undeniably one that was also 'friendly' towards the union movement which was the Labour Party's core constituency. Had the decision gone the other way, it would have been welcomed, at least grudgingly, by NAFF and the Conservative Party.

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<sup>140</sup> *Allan v Transurban City Link Limited* (2001) 208 CLR 167, 185 (Kirby J).

<sup>141</sup> Other examples are noted by Kirby J in *Truth About Motorways Limited v Macquarie Infrastructure Management Limited* (2000) 200 CLR 591, 640-2. A person aggrieved in relation to this legislation has been described as 'the broadest of technical terms, indicating that the required interest need not be legal, proprietary, financial or otherwise tangible. Nor need it be peculiar to the particular applicant': *North Coast Environmental Council Inc v Minister for Resources* (1994) 55 FCR 492, 507 (Sackville J).

<sup>142</sup> [2002] QSC 94.

<sup>143</sup> *Sharples v O'Shea* [2002] QSC 94, [8].

<sup>144</sup> Edwards, above n 11, 327.

In the wake of the *Gouriet* decision, in both the United Kingdom and Australia, there has been significant expansion of standing rights, partly through a broadening of the general law principles on standing and partly through legislative provisions. Although these developments have reduced the practical importance of relator proceedings, the fiat rule still remains the law in both countries. The fact that one cannot always get the fiat of the Attorney-General, but is often able to avoid the need for it, is, perhaps, summed up in the memorable words of Mick Jagger and Keith Richards:

You can't always get what you want

But if you try sometimes, well, you just might find

You get what you need.<sup>145</sup>

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<sup>145</sup> From the song 'You Can't Always Get What You Want' on the album *Let it Bleed* (1969).