INTRODUCTION

On 1 September 2005, in the Queensland Supreme Court, Moynihan J upheld the applicants’ claim that the Bundaberg Hospital Inquiry was tainted by the apprehension of Commissioner Anthony Morris’s bias. The Commissioner, and Deputy Commissioners, Sir Llewellyn Edwards and Margaret Vider, were disqualified from continuing with the Inquiry, just as they were about to prepare its final report. After more than three months and five and a half million dollars it appeared that the Queensland Government’s public inquiry into the casualties of Dr Jayant Patel, Director of Surgery at Bundaberg Base Hospital, had collapsed.2

As it happened, the inquiry was resuscitated by the appointment of a new Commissioner – former Justice of the Queensland Court of Appeal, Geoff Davies QC. Nevertheless, the rise and fall of the Morris Inquiry is of more than just historical interest. It poses questions about the interplay of law and politics that are of continuing relevance to the principles of procedural fairness. This article examines the reasoning of the Supreme Court and, placing the decision in its broader historical and political context, considers whether the finding of apprehended bias was as inarguable as many supposed.3

THE SUPREME COURT DECISION

The applicants, Mr Darren Keating and Dr Peter Leck, were senior administrators of Bundaberg Hospital while Patel worked there, and had appeared as early witnesses before the Inquiry. The first respondents were the Commissioner and his Deputy Commissioners. Following the procedure in R v Australian Broadcasting Tribunal; ex parte Hardiman,4 the first respondents did not take an active part in the proceedings, so as to not to endanger its impartiality should the application be rejected and the Inquiry continue. Instead, the Attorney-General, as second respondent, opposed the applicants’ case. The Bundaberg Hospital Patient Support Group, as third respondent, also argued in favour of the Inquiry being allowed to continue.

The Law

Justice Moynihan noted that the law of apprehended bias is ‘founded on the common law rules of procedural fairness which require a fair hearing for those likely to be adversely affected’.5

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1 [2005] QSC 243 (1 September 2005) (‘Morris’).
2 Other Government inquiries concerned with the Patel case commenced contemporaneously: the Queensland Health Systems Review, chaired by Peter Forster, and an inquiry of the Crime and Misconduct Commission.
3 Below n 65.

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affected by a decision, report, or recommendation and impartiality on the part of an inquirer.5 The test of apprehended bias is whether ‘a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide’.6 It is instructive to break the test down into its two basic components. Note first that the apprehension need only be relatively slight – this ‘requires no prediction about how the judge … will in fact approach the matter. The question is one of possibility (real and not remote), not probability.’7 However, the second component, ‘bias’ is defined strictly. It requires that ‘the decision-maker’s mind is so prejudiced by conclusions already formed that the conclusion will not be altered irrespective of the evidence or arguments put forward’.8 Elsewhere ‘bias’ has been distinguished from ‘a tendency of mind, or predisposition … The question is not whether a decision-maker’s mind is blank; it is whether it is open to persuasion’.9 To these two a third external element can be added – the applicable standard of proof. Given the seriousness of the allegation, there is a requirement that apprehended bias be ‘firmly established’.10

Justice Moynihan noted that, while many decisions involve allegations of bias against courts, ‘[t]here was no issue’ that the rules apply to ‘investigative bodies such as the Inquiry’, although the ‘application … differs from their application to litigation’.11 Justice Moynihan noted that a Judge makes a decision on the basis of ‘the evidence which the parties to the litigation have thought it to be in their respective interests to adduce before him. He has no right to travel outside that evidence on an independent search on his own part for the truth’.12 However, the commissioner of an investigative inquiry is ‘required … to inquire and report’, and ‘it is inevitable that the emergence of facts … should be more elusive and less orderly’.13 Recognition of the Inquiry’s inquisitorial and reporting function and its powers allowed the Commissioner to take a more active, interventionary and robust role in ascertaining the facts and a less constrained role in reaching conclusions than applies in litigation’.14 In particular, it may be necessary for an investigator to ‘expose provisional views for debate’.15 Moreover, the test ‘takes into account the personality and disposition of the investigator, some may be more robust than others’.16 But the difference between an inquiry and a court ‘does not … dilute or diminish the expectation that an impartial and unprejudiced mind will be applied to the resolution of any question’.17

5 [2005] QSC 243 [32].
6 Ibid [38], quoting from Ebner v Official Trustee in Bankruptcy (2001) 205 CLR 337 (‘Ebner’) (Gleeson CJ, McHugh, Gummow and Hayne JJ) [6].
7 [2005] QSC 243 [38], quoting from Ebner (2001) 205 CLR 337 [7].
8 [2005] QSC 243 [43].
10 [2005] QSC 243 [47] citing Briginshaw v Briginshaw (1938) 60 CLR 336 and R v Lusink; ex parte Shaw (1980) 32 ALR 47 at 50. All three elements appear in this statement from Laws v Australian Broadcasting Tribunal (1990) 170 CLR 70 (‘Laws’), 100 (Gaudron and McHugh JJ): ‘what must be firmly established is a reasonable fear that the decision-maker’s mind is so prejudiced in favour of a conclusion already formed that he or she will not alter that conclusion irrespective of the evidence or arguments presented to him or her’ (emphasis added).
11 [2005] QSC 243 [33].
14 [2005] QSC 243 [46].
The Allegations

Three witnesses preceded the applicants: Toni Hoffman, the whistleblower nurse; Robert Messenger MLA, who raised Hoffman’s concerns about the Hospital and Patel in Parliament; and Dr John Miach, a renal physician and Director of Medicine at the hospital who was also critical of the way the hospital administration had dealt with the Patel issue. By the time Leck and Keating were called, questions had been raised about Patel’s qualifications, registration and appointment, the adverse outcomes suffered by his patients, and the circumstances of his leaving Australia. Questions also arose as to the knowledge and involvement in these events of the applicants, his superiors in the Hospital hierarchy – Patel reported to Leck, the Director of Surgery, who reported to Keating, the District Manager. As Moynihan J noted, by this stage of the proceedings it was apparent:

that adverse findings might be open against either or both Leck and Keating which could be damaging to their reputation or which might lead to proceedings being taken against them … [and] that much of the material put forward, from the perspective of Leck and Keating, would be contentious …

The Commissioner’s Interrogation of the Applicants

The applicants were both called at short notice and contrary to the Inquiry’s Practice Direction. They had little time to consult documents or prepare statements. While this may have been justified by the evidence then before the Inquiry, it ‘placed a premium on maintaining and being seen to maintain an open mind to the whole of the evidence, particularly those parts of it potentially adverse to Leck or Keating’. But Moynihan J considered that the Commissioner displayed anything but an open mind in the examination of the applicants.

Rather than counsel assisting carrying out the examination, the Commissioner did it himself, a further departure from the Practice Direction. Justice Moynihan considered that in the examination the Commissioner displayed ‘a pervasive disdain for or contempt towards “bureaucrats” [Leck] and doctors who administer but do not treat patients [Keating]’. The Commissioner’s questions were ‘aggressive, sarcastic and belittling’. The Commissioner had asked Leck: ‘You are just far too busy are you to trouble yourself with whether people being held out as surgeons at your hospital are actually qualified?’ It doesn’t worry you that patients might be dying or 15-year-old boys might be losing their legs? The Commissioner said to Keating:

You as the man in charge of the entire hospital couldn’t get out of your office to go down to the ward or to the ICU or to the surgery, or wherever, and actually sort out the problem. You had to have meetings about it, you had to have mediation, you had to have memos flying back and forth, and inquiries and investigations, but you just couldn’t do anything, could you?

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18 [2005] QSC 243 [73]-[74].
19 Ibid [77].
20 Ibid [85].
21 Ibid [86].
22 Ibid [90]-[91].
23 Ibid [88].
24 Ibid.
25 Ibid.
26 Ibid.
Even allowing for the inquisitorial and investigatory nature of the Inquiry, Moynihan J considered the Commissioner’s approach unjustifiable. These ‘are not fairly described as an exploratory or tentative statement of issues with a view to testing their correctness or to give the witnesses an opportunity to respond to a provisional view’.

**The Commissioner’s Treatment of the Applicants’ Accusers**

The Commissioner’s harsh treatment of the applicants was in ‘stark contrast’ with his favourable treatment of their critics, Hoffman, Messenger and Miach. This was all the more surprising as their evidence was deficient in two respects. It ‘had not been tested by cross-examination when Leck and Keating were first called … [and] was based on second or third hand information passed on to her by others.’ And yet the Commissioner expressed great appreciation for ‘the thoughtful and careful and helpful way’ in which Hoffman gave her evidence. He praised the ‘courage and tenacity’ of Messenger and Hoffman, and the ‘seniority and experience’ of Miach. As Moynihan J commented, the Commissioner’s ‘effusive endorsement of their untested evidence early in the proceedings is of particular concern’.

**The Interim Report**

The differential treatment displayed by the Commissioner during the examination of witnesses was also apparent in the Inquiry’s Interim Report, published on 10 June after the first two weeks of hearings. It was extremely damning of Patel’s conduct. As Moynihan J pointed out, the Interim Report did not only recommend further investigation and the consideration of prosecutions by the appropriate agencies, as is usual in such situations; it recommended that Patel be charged with a range of offences ranging from false representation to murder. The principal sources of evidence cited in the report were Hoffman, ‘a highly trained and experienced intensive care nurse’, and Miach, ‘a highly qualified and experienced general physician and nephrologist’. Justice Moynihan held that ‘the report manifests a prejudgment … of the evidence’ despite it being ‘untested and inadmissible in a criminal trial’.

**The Cross-examination Incident**

The reason that early witnesses were not cross-examined when they first appeared was that a parallel investigation into the Patel affair was being conducted by the Crimes and Misconduct Commission (‘CMC’). For reasons of efficiency it was planned that witnesses common to both would only be cross-examined before the CMC. As it happened, the CMC investigation was postponed, and the Inquiry recalled early witnesses for cross-

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28 [2005] QSC 243 [107].
29 Ibid [69].
30 Ibid [101].
31 Ibid [102]. This praise was extended also to Hedley Thomas of *The Courier-Mail*.
32 Ibid [106].
33 Ibid [99].
34 Ibid [122].
36 [2005] QSC 243 [126].
37 Ibid [125].
examination. This should have provided an opportunity for Leck and Keating to test the evidence of their critics. However, the applicants claimed that the Commissioner interfered in this process. In cross-examining Miach, counsel for Keating asked him, if he had genuine concerns about Dr Patel’s adverse outcomes as he had claimed in examination in chief, why did he subsequently send another patient to Patel? At this stage the Commissioner intervened, asking counsel whether Keating had instructed him ‘to launch this attack on Dr Miach … to throw some mud at other people’? The Commissioner added a more general comment:

I want everyone at the Bar table to understand that one of the issues that’s clearly being raised is this shoot the messenger attitude, and if it comes to our attention that anyone from the Director-General of Queensland Health down has given instructions for a witness like Dr Miach to be attacked, then that will be an appropriate foundation for us to make findings at the end of proceedings.

The ‘findings’ would presumably consist of an inference adverse to a client who instructed counsel to make an unfounded attack on a witness.

Justice Moynihan considered the Commissioner’s ‘hostile’ intervention, ‘unjustified [and] intemperate’. The Commissioner had imposed ‘an unacceptable constraint on cross-examination’, providing a ‘telling insight into the Commissioner’s attitude’. The Commissioner divided witnesses into ‘two categories’: those ‘who had been commended by the Commissioner and who had given evidence adverse to the applicants’; and ‘anyone from the Director-General of Queensland Health down’ including the applicants. The Commissioner’s stated intention was to ‘protect’ the former group from the latter.

Private Meetings

The final basis of the apprehended bias claim was the Commissioner’s attendance at private meetings with witnesses and potential witnesses. As Moynihan J noted, it was not the meetings as such that were the problem. This was permitted, and could serve some useful purpose. But it would breach a ‘fundamental principle’ of natural justice to ‘hear evidence or receive representations from one side behind the back of another’. Such meetings had to be carefully handled. However, in this case, the applicants learnt of the private meetings from press reports, and when the applicants raised legitimate concerns with the Commissioner he reacted badly.

The Commissioner’s response to the initial press reports was to suggest that a ‘former senior officer of Queensland Health’ had put out the story against ‘perceive[d] … enemies

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38 Ibid [59]-[64].  
39 Ibid [112].  
40 Ibid.  
41 Ibid.  
42 Ibid [113].  
43 Ibid [115].  
44 Ibid [116].  
45 Ibid [118].  
46 Ibid.  
47 Ibid [115].  
48 Ibid [118].  
49 Ibid [155].  
51 [2005] QSC 243 [156].  
52 Ibid [134], [143].  
53 Ibid [157].
of Queensland Health’. But this person ‘was not going to succeed in bullying me or anyone else associated with the Inquiry’, and would be given the opportunity to address his ‘attempt to derail the Inquiry’ from the witness box. According to the Commissioner, the purpose of these meetings was to reassure the potential witnesses that the Inquiry would provide them with ‘complete and unreserved support’, in Moynihan J’s words, ‘protection from retribution’.

Following the report of the Commissioner’s meeting with a key witness, Leck’s counsel’s attempt to obtain reassurance as to the content of the discussions was met with ‘intimidating overreaction’. With respect to another meeting, the Commissioner had stated that there would be no ‘discussion of matters of substance’, however, ‘[i]t appeared subsequently that matters of substance had been discussed’. With reference to a particular private conversation, the Commissioner initially said Keating’s name was not mentioned, but later corrected this, indicating that his name ‘was mentioned [and that] in fact the remark was a slightly offensive one’.

The Findings

Moynihan J displayed no hesitation in finding the applicants’ case made out.

The circumstances established by the accumulated weight of evidence would give rise, in the mind of a fair minded and informed member of the community, to a reasonable apprehension of lack of impartiality on the Commissioner’s part in dealing with the issues relating to each of the applicants.

CONSTRUCTING A STRONGER DEFENCE

Justice Moynihan had no difficulty in finding ostensible bias in the way the Inquiry had proceeded. But was the defence case presented at its strongest? As noted above, following Hardiman, Morris did not play an active role in the proceedings. It is interesting to consider what kind of defence he would have mounted had he been given the opportunity, and how this might have been received. This exercise is not as speculative as may first appear. At a number of points during the Inquiry Morris was quite open about his motivations, and he has since made further statements to the media. Having regard to Morris’s views, placing them in broader context, and considering applicable legal authority, it appears that the defence could have been pushed more strongly in several respects. The success of the defence may still have been doubtful, but the finding of apprehended bias does not appear as inevitable as some have declared.

54 Ibid [134].
55 Ibid [136].
56 Ibid.
57 Ibid [137].
58 Ibid [138].
59 Ibid [149].
60 Ibid [153].
61 Ibid [154].
62 Ibid [151].
63 Ibid [159].
64 Above n.4.
65 Morris’s successor, Geoff Davies QC, claims that ‘he believed at the time … that “if anyone made an application” alleging bias, the inquiry would fail’; Hedley Thomas, ‘Cool hand in hot seat’ The Courier-Mail, 22 October 2005, 28. Michael Wheelahan SC declares ‘[t]he Commissioner displayed
An Investigation Independent of Government

It is arguable that, although as noted above, Moynihan J adverted to the distinction between a judicial hearing and an inquiry, he gave it too little weight. Morris has subsequently compared his examination of the applicants to the ‘hard questions’ that would be asked in a police investigation of a comparable series of suspicious deaths. He argued that ‘Commissioners have to be free to decide what tactics and strategies are used to bring out the truth … [and] free to conduct their investigative process … forming tentative views, forming suspicions, having hypotheses, exploring issues’. His view is not without support. Justice Thomas in Carruthers v Connolly points out that ‘although there are the trappings of court procedure, the investigation is essentially inquisitorial, and … Commissioners are expected to play a far more active role in ascertaining the facts than occurs in a court’. A ‘wide range of expression and conduct must be permitted for a commissioner’, and ‘robust conduct’ should be distinguished from ‘bias’. With particular application to the Morris Inquiry is Thomas J’s observation that ‘[i]n the cut and thrust of forensic work … denigratory comments to counsel, sarcasm and hard words from time to time may not be amiss’. It might be objected that hard questioning should be taken on by counsel assisting, so as to avoid ‘the Commissioner having to descend into the arena’. However, Hayne J in Minister for Immigration and Multicultural Affairs v Jia Legeng – an important decision not cited by Moynihan J in Morris – suggests that this concern is far more applicable to a judge than to ‘decisions outside a court’. In that case Gleeson CJ and Gummow J note the tendency of lawyers to ‘equate “bias” with a departure from the standard of even-handed justice which the law requires from those who occupy judicial, or quasi-judicial, office’ not recognising that the position of other decision-makers may be ‘substantially different’.

Morris’s adverse attitude to the applicants was supported by the evidence before the Inquiry up until that point, albeit that much of that was untested hearsay evidence. To be influenced by evidence does not constitute bias. A distinction needs to be drawn between an apprehension that a decision will be prejudiced or partial, and an apprehension that it will be adverse to a particular party. As Morris declared after Moynihan J handed down his ostensible bias in so many inexcusable ways that the finding by Moynihan J that the Commission could not continue was probably irresistible’; ‘Bias’, Victorian Bar CLE Series, 14 September 2005, [57]. Such statements may be with the benefit of hindsight. More than two weeks after the applicants were examined, Michael Lavarch adverted to the risk of bias findings from Deputy Commissioner Edwards’ associations and from Patel’s absence, but failed to predict the action that ensued: ‘Quick inquiry, a good inquiry’ The Courier-Mail 15 June 2005, 21. Hedley Thomas picked it nine days later, citing ‘several lawyers’: ‘Keeping flames from a legal fuse’, The Courier-Mail, 24 June 2005, 7.

66 Above nn 12-16.
68 [1998] 1 Qd R 339 (‘Carruthers’).
69 Ibid 358.
70 Ibid.
71 Ibid.
73 (2001) 205 CLR 507 (‘Jia’).
74 Ibid 562.
75 Ibid 539. In the present context, the term ‘quasi-judicial’ is usually reserved for tribunals which, like courts, ‘adjudicate in adversarial litigation’; ibid. The term tends not to be extended to Commissions of Inquiry: Webb v The Queen (1994) 181 CLR 41, 46-7; Carruthers [1998] 1 Qd R 339, 391.
decision, ‘how could you not be biased when you see and hear what’s going on and Peter Leck and Darren Keating are not making any explanation for it?’77

Morris’s differential treatment of the two categories of witness may also be justified by broader considerations. He clearly approached the inquiry with the view that, for the Inquiry to achieve its goals, the whistleblowers needed support and protection against the monolithic Queensland Department of Health. He admitted as much during the Inquiry,78 and subsequently explained:

I needed to convince the public and particularly people in the Department of Health, clinical and non-clinical, that I was fair dinkum. If I had run it like a traditional inquiry and sat back and listened patiently to the evidence, we would never have got people coming forward.79

It may be objected that to approach the task with such a preconception is a failure of procedural fairness. However, Justice Hayne notes in Jia that while it is ‘self-evident’ that a court should consider ‘an issue of fact … afresh for the purposes of the particular case by reference only to the evidence advanced in that case, … [o]ther decision-makers … may be under no constraint about taking account of some opinion formed or fact discovered80 at an earlier time. As Kirby J observes (under the heading ‘avoiding over-judicialisation’), ‘[t]he requirements of natural justice … are flexible.’81

Indeed, it appears that Morris was chosen precisely because he would approach the task with this mindset. Given the prominence of the ‘Dr Death Inquiry’, Premier Peter Beattie could not be seen to be appointing a ‘Labor mate’ who would go soft on the Queensland Government.82 Instead, Beattie appointed someone who would be seen as being ‘fiercely independent’ of Government,83 ‘someone who will be absolutely ruthless in getting to the truth’.84 Beattie’s political success was founded on the ‘public perception that if there is a problem, the Queensland Premier will find it, accept responsibility for it, and fix it.’85 Morris’s history and his politics gave Beattie reason to think he was the man for the job.

Morris had connections with Tony Fitzgerald QC — Morris had been Fitzgerald’s associate when Fitzgerald was on the Federal Court bench, and was a member of Fitzgerald’s Chambers during the Fitzgerald Inquiry in the late 1980s.86 This Inquiry led, among many other things, to the fall of the Coalition Government, criminal charges being laid against five Coalition Ministers, two of whom were jailed, and the setting up of the Criminal Justice Commission (‘CJC’) which remained a thorn in the side of the Coalition parties for years to come. However, Morris was generally considered to be aligned with the Coalition side of Queensland politics.87 In 1996 Morris chaired an Inquiry into the ‘Heiner

78 Above n 48, 58.
79 Thomas, above n 77, 28. It is sufficient for present purposes that Morris’s view seems plausible, without broaching the more difficult question of whether it is correct.
80 (2001) 205 CLR 507, 564-5.
81 Ibid 551.
82 Sean Parnell, ‘“Dr Death” meets a bitter end’, 3 September 2005, The Australian, 26.
83 Beattie uses the phrase six times on single page of Hansard: Queensland, Parliamentary Debates, 10 June 2005, 2122.
84 Hedley Thomas, ‘Sickness in the System’, The Courier-Mail, 21 May 2005, 35, quoting Peter Beattie
85 Sean Parnell, ‘Political Mr Fix-it raises question of faith in his own troops’, The Australian, 27 July 2005, 4
86 Thomas, above n 84, 25.
87 Queensland, Parliamentary Debates, Legislative Assembly, 5 July 2005, 30, 34.
Affair’ with fellow barrister Edward Howard. This concerned the 1990 shredding of documents by the Queensland State Archivist, authorised by the Labor Government led by Wayne Goss, which may have contained evidence of the commission of criminal conduct. The Morris Howard report was highly critical of the earlier CJC Inquiry which had exonerated the Goss Government and recommended that criminal charges could be laid against those responsible for the destruction of the evidence.88

Morris also played a role in the Connolly Ryan Inquiry, commissioned in 1996 by the Coalition Government led by Rob Borbidge, into the operations of the CJC. At the time the CJC was engaged in an Inquiry, chaired by Ken Carruthers QC, into a secret deal to secure the Police Union’s support for the Coalition, then in opposition, in the Mundingburra by-election. The Coalition won the by-election and secured Government as a result, but the Carruthers Inquiry considered that the deal may have involved criminal conduct by Police Minister Russell Cooper. The ongoing Carruthers Inquiry became a key subject of the Connolly Ryan Inquiry and Carruthers resigned, blaming interference by the Connolly Ryan Inquiry. Carruthers and the CJC subsequently brought a successful Supreme Court action against Connolly alleging apprehended bias.89 The Connolly Ryan Inquiry may be the only Commission of Inquiry in Australia’s history other than the Morris Inquiry to be terminated in this fashion,90 a result which has been said to have contributed to the subsequent fall of the Borbidge Government.91

Morris’s role in the Connolly Ryan Inquiry was as counsel for Mr Ken Davies, a former ALP member, then an independent Member of the Queensland Parliament, who was critical of the CJC for the ‘great speed and superficiality’ of its inquiry into his allegation that the ALP had sought to bribe him not to stand as an independent.92 In Morris’s cross-examination of an officer of the CJC, he referred to it as ‘Gestapo Headquarters’,93 a comment which Thomas J described as ‘inflammatory and unacceptable’.94 The Commissioners’ lack of intervention at this point, and Connolly’s later endorsement of this sentiment – referring to an action of the CJC as a “[a] sort of Gestapo raid”95 – played a role in the Court’s finding of apprehended bias.

Politics and Law

Beattie appointed Morris because he needed someone heading up the Bundaberg Hospital Inquiry who could not be seen as allied with the ALP. Morris’s history, particularly his involvement with the Heiner and Connolly Ryan Inquiries, made him an ideal candidate, from this point of view at least. Morris appreciated what was required of him. On his appointment he said, ‘Just like the Fitzgerald inquiry two decades ago, the credibility of this Commission of Inquiry hangs from the gossamer thread of public opinion.’96 The appointment carried grave risks for the Labor Government. Beattie described it as

88 The documents were the result of an aborted inquiry conducted in 1989-90 by retired magistrate Noel Heiner into allegations of abuse at John Oxley Youth Centre. The affair continues to attract interest, eg Chris Hurley, ‘Shredding of the “Heiner Affair” records: An update’, caldeson.com/RIMOS/summary.html; Alyssa Betts, ‘Destroying evidence: what the law says was never in doubt’, Independent Monthly (University of Queensland, Brisbane) August 2005, 3.
93 Ibid 362.
94 Ibid.
95 Ibid.
96 Thomas, above n 84, 25.
‘potentially as damaging for a government as a Fitzgerald’, 97 and some of his colleagues were strongly against it, 98 viewing the appointment as another instance of Beattie’s propensity for ‘overcompensation’. 99 However, it was a strategy with which Beattie persevered. He applauded the Morris Inquiry’s Interim Report 100 – the same report that Moynihan J criticised as ‘manifest[ing] a prejudgment’. 101 – and at the commencement of the apprehended bias action Beattie stated, ‘I do not support the closing down of this inquiry, and within the realms of the law I will do everything I possibly can to resist it’. 102

Beattie’s strategy had success. The appointment of Morris and the approach he took did give the Inquiry credibility. The Opposition Leader, Lawrence Springborg, indicated that ‘Tony Morris and his commission are doing a great job’, 103 even as the apprehended bias action was being brought. And the public were generally behind it, seeing Morris as ‘a relentless, if maverick, inquisitor whose tough approach has been essential in excavating life and death in a secretive culture’. 104 If, as Moynihan J held, the ‘fundamental’ object of the law of apprehended bias is that ‘the general public have full confidence in the fairness of decisions and the impartiality of decision makers’, 105 then Morris’s approach should have given Moynihan J no cause for concern. On the contrary, the public had far greater problems with Moynihan J’s shutting down of the Morris Inquiry, a majority viewing this as an unjust victory for the bureaucracy, Queensland Health, and even for the Beattie Government. 106

The objection may be raised that the political nature of the appointment and reference to public opinion cannot justify the Commissioner’s partisanship. It exacerbates rather than mitigates Morris’s conduct. Many will agree with Morris’s successor at the inquiry, Davies, that ‘politics must remain separate from the law’. 107 It would have been preferable for a ‘colourless judge with a low profile’ to have been appointed in the first place, rather than a media performer. 108 However, this objection is not sustained by legal authority. In Carruthers Thomas J noted that the subject of the inquiry – the powers of the CJC and how it chose to exercise them – raised ‘many matters upon which different perceptions might be

97 Ibid 35; see also Editorial, ‘Beattie starts picking up the pieces’, The Courier Mail, 3 September 2005, 32.
98 Tony Koch, ‘No one to blame but himself’, Weekend Australian, 24 September 2005, 31; Thomas, above n 84, 25
99 Parnell, above n 85, 4
100 ‘Beattie Acts Now On Early Bundaberg Report’, Ministerial Media Statement, Premier, 10 June 2005
101 Above n 36.
103 Ibid.
104 Hedley Thomas, ‘Maverick inquisitor ready to face his own judgment day’, The Courier-Mail 30 July 2005 p 4; contrast Parnell, above n 82, 26.
106 The letters to the The Courier-Mail on the Saturday following the Supreme Court Decision were 11:2 in Morris’s favour: 3 September 2005, 32. The paper invited readers to vote on-line as to who was responsible for shutting down the Inquiry. The results of this poll (acknowledged by The Courier-Mail to be unscientific and informal) were: Bureaucrats 37%; Premier 28%; Legal system 19%; Commissioners 8%; Other 8%. See also ‘Motives for action must be queried’ by Hedley Thomas The Courier-Mail 6 July 2005; Madonna King, ‘Heroes and Foes’, The Courier-Mail, 3 September 2005, 33; Editorial, ‘Craven betrayal of people’s hero’, The Gold Coast Bulletin, 3 September 2005, 50.
held by persons of different political persuasions’.\textsuperscript{109} He added that ‘[i]t is not expected that commissioners … should be devoid of a sense of social, political, moral and economic direction’.\textsuperscript{110} These statements may provide some support for Morris’s defence despite the fact that, in that case, apprehended bias was found.

\textit{Carruthers} can easily be distinguished from \textit{Morris}. At the time of the Connolly Ryan Inquiry, members of the Coalition Government were accusing the CJC of political favouritism, seeking to harm them while helping the ALP.\textsuperscript{111} The Connolly Ryan Inquiry into the CJC had the appearance of being a tit for tat response. Moreover, prior to his appointment Connolly had already provided legal advice to a member of the Government that the CJC’s Carruthers Inquiry was a waste of time. Following his appointment Connolly repeated and amplified this view, and in other respects, allied himself with the Coalition Government. As Thomas J noted, the situation was ‘politically flammable’,\textsuperscript{112} and ‘it was particularly important that those appointed to conduct this particular commission of inquiry could be seen to be impartial, and not as serving the interests of one side or the other of politics’.\textsuperscript{113} By contrast, the Morris Inquiry clearly had a genuine and pressing subject of investigation. The political dimension to the Morris inquiry did not concern party politics so much as the broader political question of the distribution and redistribution of power; in this case, between Queensland Health and the whistleblowers. And, as discussed above, to the extent that party politics did play a role, in Morris, Beattie had sought to appoint a political adversary rather than a political ally.

A second aspect of \textit{Carruthers} also needs to be considered. Having highlighted the features of Commissions of Inquiry distinguishing them from judicial hearings, Thomas J nevertheless proclaimed ‘the expectation that the person exercising the power will bring an impartial and unprejudiced mind to the resolution of the question entrusted to that person is not to be diluted’.\textsuperscript{114} This passage was relied upon by Moynihan J in Morris,\textsuperscript{115} but it is clearly open to differing interpretations. Certainly, at an abstract level, the requirements of natural justice may be uniform. But at the concrete level of application, clearly the requirements are more demanding in some cases than in others. \textit{Jia} provides a good illustration. In that case, Gleeson CJ and Gummow J indicated that in determining ‘the requirements of natural justice, the nature of the decision-making process, and the character of the person upon whom Parliament has conferred the decision-making capacity, may be of critical importance’.\textsuperscript{116} \textit{Jia} itself was an extreme case. The decision-maker was the Minister for Immigration and Multicultural Affairs who had been given powers under ss 501 and 502 of the \textit{Immigration Act 1958} (Cth) to cancel a person’s visa and certify them to be an ‘excluded person’ in the national interest. In exercising these powers in the present case, the Minister overturned a decision of the Administrative Appeals Tribunal, a decision which itself had overturned the Minister’s original denial of a visa. In such a case, the Minister obviously would have formed the view that the visa applicant was unsuitable prior to exercising the power under ss 501 and 502. Given that this was a clear possibility on the face of the Act, it was difficult to see how such a prejudgment could present an obstacle to the Minister’s exercise of the powers.\textsuperscript{117} The court also considered it highly significant that the power had been reposed in a Minister of State. Such a decision-maker is in a ‘substantially

\textsuperscript{109} [1998] 1 Qd R 339, 343.
\textsuperscript{110} Ibid 356. This passage was quoted by Morris early in the Inquiry: Greg Roberts, ‘Bias accusation ringing bells for Beattie’, \textit{The Australian}, 6 July 2005.
\textsuperscript{111} [1998] 1 Qd R 339, 357.
\textsuperscript{112} Ibid.
\textsuperscript{113} Ibid 344 (emphasis added).
\textsuperscript{114} Ibid 371.
\textsuperscript{115} Above n 17.
\textsuperscript{116} (2001) 205 CLR 507, 533.
\textsuperscript{117} Ibid 535-6 (Gleeson CJ and Gummow J).
different’ position from a Judge.118 '[T]he Minister functions in the arena of public debate, political controversy, and democratic accountability … [and] would be entitled … to act in accordance with [governmental] policy'.119 Having regard to these considerations, the majority held that the Minister was ‘not … required to avoid conducting himself in such a way as would expose a Judge to a charge of apprehended bias’.120 In effect, the Minister had only to avoid operating with actual bias – the Minister must ‘give genuine consideration to the issues raised by ss 501 and 502, and bring to bear on those issues a mind that was open to persuasion’.121

Of course, a Government Minister is far more of a ‘political animal’ than a Commissioner. Nevertheless, as the Morris Inquiry illustrates, it may be part of a Commissioner’s function to adopt a particular political attitude. This proposition may raise an objection. There is clear authority that ‘the identity, nature and function of the decision-maker are important influences on the content of the requirement to conduct the relevant task with the observance of procedural fairness by not being tainted by the appearance of disqualifying bias’.122 However, in approaching a bias allegation, a court will generally identify these characteristics of the decision-maker by reference to the terms of the appointment and the governing legislation, and not political considerations of the kind explored above.123 Against this objection Carruthers may be cited, a case in which the court discussed at length the political context in which the inquiry arose. Admittedly, the political background to the Connolly Ryan Inquiry heightened the need for impartiality, rather than reducing it.124 But Carruthers remains an illustration of the breadth of factors that may be taken into account in determining what procedural justice requires of a decision-maker.

There are further reasons for narrowing the concept of apprehended bias as it applies to Commissioners of Inquiry. Commissioners like Ministers but unlike judges, lack of any ‘security of tenure’.125 A final reason for the principles of procedural fairness applying less strictly to a Commission of Inquiry is that it ‘cannot result in any determination of rights or of legal liability or any resolution of the issues. It is purely investigatory in character’.126 This cannot be said of the Minister’s powers under consideration in Jia, the exercise of which, as Kirby J pointed out in his dissenting judgment, ‘can have a significant effect … extending ultimately to “life itself” in some cases’.127 Nevertheless, it would be going too far and would be contrary to authority to hold that a Commissioner of Inquiry, like the Minister in Jia, be required only to avoid actual bias and need make no effort to avoid the reasonable apprehension of bias.

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118 Ibid 539.
119 Ibid 528–9.
120 Ibid 540 (Gleeson CJ and Gummow J); 562 (Hayne J agreeing); 545, 549, 556 (Kirby J dissenting).
121 Ibid 540 (Gleeson CJ and Gummow J). Note that it was ‘common ground’ that judicial review required ‘actual bias’ and not ‘apprehended bias’: 529. The High Court’s consideration of apprehended bias was with regard to an application for it to exercise its original jurisdiction under s 75(v) of the Constitution.
124 See above nn 109–114; see also Firman [2000] VSC 240 [23], [113]–[114], [203]–[260].
125 Ibid 562 (Hayne J); Ebner (2000) 205 CLR 337, 343 (Gleeson CJ, McHugh, Gummow and Hayne JJ); Doogan [2005] ACTSC 74 [90].
The question arises as to how the apprehended bias test could be narrowed without turning it into a test of actual bias. One approach would be to vary the requisite level of apprehension.\textsuperscript{128} At one extreme is the judicial decision-maker. A mere possibility of bias is sufficient to taint the judicial decision. A Ministerial decision-maker occupies the opposite end of the spectrum. In the circumstances of \textit{Jia} apprehended bias was insufficient; actual bias was required to disqualify the Ministerial decision. For other decision-makers, the requisite level of apprehension would be determined by the degree to which they differ from the judicial benchmark, their position on the spectrum. Where the Government has deliberately appointed a fiercely independent Commissioner, ruthless in pursuing the truth, it may be setting the bar too low to require only a mere possibility of bias. More appropriate may be a requirement that it appear likely to a reasonable observer that the Commissioner’s mind was not open to persuasion.

CONCLUSION

Commissioner Morris approached the Bundaberg Hospital Inquiry with preconceptions, and ran the Inquiry with partisanship. At an early stage Morris appeared to be persuaded that the bureaucrats, Leck and Keating, were to blame for allowing Patel to kill and maim his patients, and Morris seemed uninterested in their bureaucratic excuses. Morris supported and protected the whistleblowers, and undermined and attacked the bureaucrats. Few among the legal community were surprised when Moynihan J found that Morris had displayed ostensible bias, and terminated the Inquiry.

However, lawyers have a tendency to hold all decision-makers up to the standard of judicial impartiality, and the finding of apprehended bias is not incontrovertible. Morris construed his role politically, but his was a political appointment, and he was assigned a political task. It was clearly within his remit to be ruthless in his treatment of the establishment. The requirements of procedural fairness vary with the nature of the decision-making. Justice Moynihan arguably took insufficient account of this and may have applied the principles too strictly as a result. Difficult questions arise as to the standards that would be appropriate to such a case, and whether Morris still breached those standards. These are now moot points as far as the Morris Inquiry is concerned, but they will be live issues the next time politics clashes with procedure in an apprehended bias action.

\textsuperscript{128} See above nn 6-10.