# Above the law? Infrastructure claims

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## 1. Introduction

Supposed Commonwealth gamekeepers – Infrastructure Australia and the Treasurer have been virtually advertising public monies for ‘shovel ready’ infrastructure projects.

Infrastructure Australia’s Chief Executive has reportedly urged a splurge of $200billion on (transport) infrastructure over five years as part of the ‘new norm’. The Treasurer says the Commonwealth will make available $100billion over ten years.[[1]](#endnote-1)

The Opposition’s criticisms, led by former Infrastructure Minister the Hon. Anthony Albanese, are this is not enough![[2]](#endnote-2)

The Reserve Bank, and parrots in the commentariat chirp much the same. Are they trying to put infrastructure lobbyists out of work?[[3]](#endnote-3)

Some more thoughtful commentary queries whether all projects on the drawing board have objective merit. But this note is not concerned with that. Regular readers know the beagle’s attitude: we should be ruled by democracy rather than engineers or econocrats. If the public is informed about a proposal’s motivations, likely effects and costs the beagle will not object on grounds of merit.

Rather, this note is concerned with potential criminality.

It challenges a supposition of nearly everyone involved in the infrastructure monologue. It queries the presumption that beneficiaries of Commonwealth grants - State Governments and the infrastructure club - can do no legal wrong.

In doing so, it points to changes in practice that will lead to better infrastructure proposals and greater trust of the community in political institutions – and in the big end of town.

## 2. Fraud on the Commonwealth

Crimes prosecutable by the Commonwealth are listed in the Commonwealth Criminal Code.[[4]](#endnote-4)

Among these is fraud against the Commonwealth. This is part 7.3 of the Code. For example, s.135 (1) creates offences of:

• doing something intending to dishonestly obtain a gain from the Commonwealth;

• doing something intending to dishonestly cause a loss to the Commonwealth;

• dishonestly causing a loss, or a risk of loss, to the Commonwealth; or

• dishonestly influencing a Commonwealth official.

The offences have two essential elements:

* dealings with /representations to the Commonwealth; and
* dishonesty.

The provisions cover acts of commission and acts of omission. Withholding relevant information from the Commonwealth, with the intention of dishonestly making a gain, causing a risk of loss or of influencing an official is an offence.

S.135 (4) creates more offences - of conspiring with others regarding such conduct.

The Director of Public Prosecutions is responsible for bringing the code to bear against miscreants. The Director issues practice notes, explaining aspects of the Code and its prosecutions policy.[[5]](#endnote-5)

Fraud is an important part of the Directors’ practice. The Director lists examples of frauds: social security; customs; Medicare; Comcare, national disability insurance; veterans affairs etc.

## 3. Social security fraud

Popular media reporting of fraud on the Commonwealth focuses on social security. Such fraud can arise from acts of commission - documentary responses in benefit application forms which:

1. do not report relevant circumstances such as the claimant stating it has no income;
2. misreport relevant circumstance such as the claimant’s dependents.

Fraud can also arise from acts of omission such as:

1. failing to report changes to relevant circumstances such as the claimant not informing of its gaining paid employment.

The amount of welfare cheating is unknown. Somewhat conveniently for critics of welfare payment, it is uncheckable. However, despite urban mythology, social security fraud appears to be rare.

It is a small sub-set of social security overpayments. The vast majority of overpayments do not involve fraud. Estimates put net overpayments at around $3 billion.[[6]](#endnote-6)

Most overpayments are the result of innocent misunderstandings arising from Australia’s convoluted, stingy welfare system.

Comparable estimates of recoveries from fraud are around $125m p.a. Figure 1 shows the most recently analysed fraud statistics.

**Figure 1: Recently analysed social security fraud statistics**

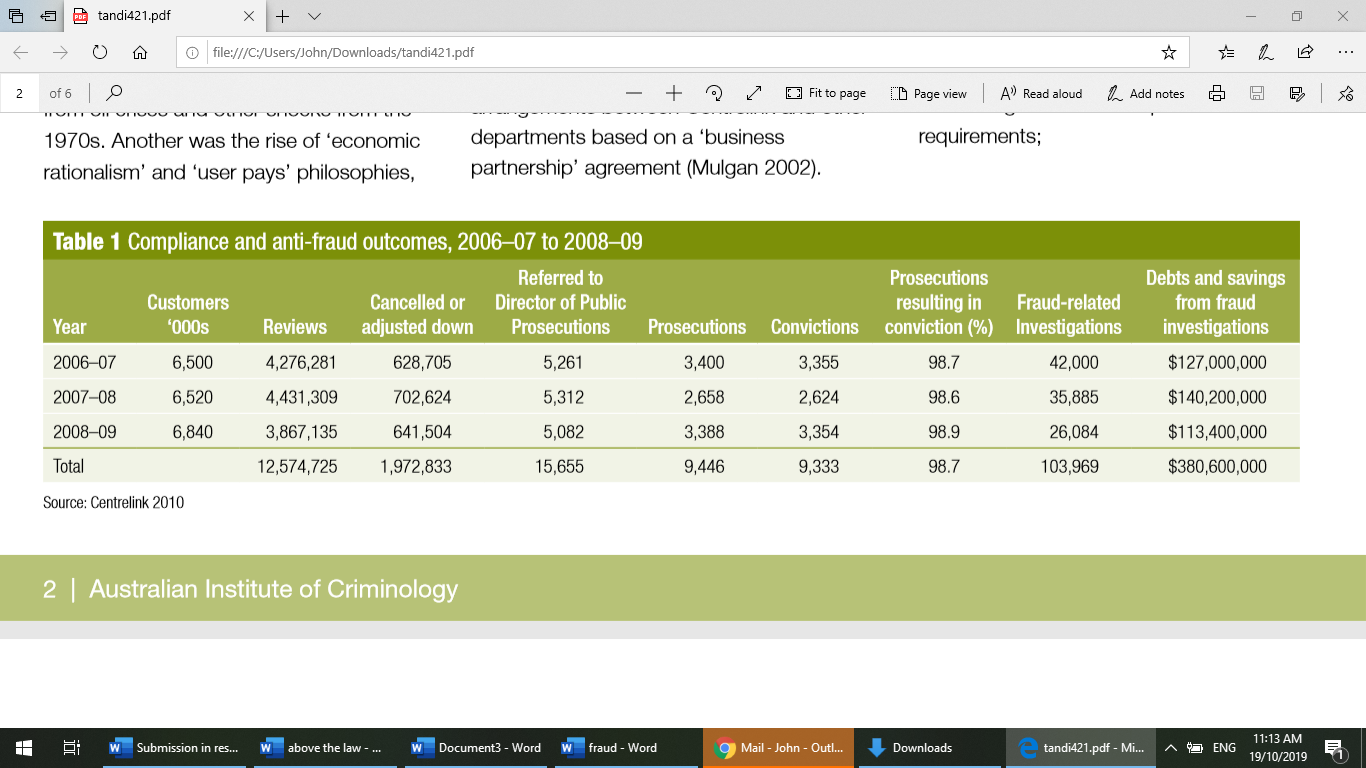


Figure 1 shows:

* a high number of reviews - more than half the number of beneficiaries;
* 16% of reviews lead to a downward adjustment in payments;
* 0.8% of reviews investigated for fraud;
* the rate of fraud prosecution arising from reviews of 8 in 10,000; and
* average recovery per investigation of $3660.

These statistics might be compared with the highly sensitised view of social security and welfare cheating. Virtually every cent of welfare spending is watched over with an eagle eye. The public is asked to report ‘suspected’ abuse. Beneficiaries are subject to exhaustive ‘reporting’ regimes.[[7]](#endnote-7)

There are ongoing attempts to limit how recipients spend entitlements – even their time![[8]](#endnote-8)

Community concern is continuously stoked by politically inspired beat-ups. Welfare ‘bludging’ is a staple of current affairs TV and radio talkback shows who make few apologies for spreading misinformation.[[9]](#endnote-9)

Government and bureaucrats have installed computer programs to detect suspected cheating and hide behind computers that intimidate the poor – Robodebt.[[10]](#endnote-10)

Despite all this, the amounts in question are trivial in budgetary terms. Yet social security overpayments are presented as the result of an almost organised criminal disregard of laws which will ['destroy Australia'.](#_top) Especially if recipients dare protest against Government policy![[11]](#endnote-11)

## 4. Infrastructure fraud?

### 4.1 Introduction

The issue discussed in this article is not influence on decision makers. It is not about decisions.

The issue discussed in this article is not corruption. Nor is it breach of common law. Nor is it about private individuals or corporations. The issue is about other governments misleading the Commonwealth – and intentions to do so.

Infrastructure is not on the Director of Public Prosecutions list of examples of fraud. But what of dishonest representations to the Commonwealth by State Governments, their officials, advisers and assorted urgers – in pursuit of funds for pet projects?

Some may consider infrastructure claims as a type of game between the States and the Commonwealth, played by State officials and advisers. One issue is whether project ‘business cases’ are written, or facts omitted, to mislead the Commonwealth. Another is whether there are attempts to influence Commonwealth officials or advisers to avoid some topics or to not ask questions.

While Commonwealth advisers presumably review claims about infrastructure project benefits and costs, some critical issues which underpin proposals for the Commonwealth to provide funds to infrastructure appear to remain unexplored.

There are warning signs about the veracity of infrastructure claims made in pursuit of Commonwealth funding.

### 4.2 Warning signs

The Commonwealth provides substantial funds to road projects on the basis of traffic forecasts. One complaint about government funding for road projects is the forecasts are sometimes not met.[[12]](#endnote-12)

There have been reports of private sector civil lawsuits over misleading traffic forecasts for road projects – albeit projects not obviously involving representations to the Commonwealth for funding.

These civil cases, whose claims of loss are based on misleading income projections, might be compared with social security claimants who misreport income – part 3 (a) and (b) of this article.[[13]](#endnote-13)

There is at least one explicit allegation of State Government ‘fraud’ regarding a road project submitted for Commonwealth consideration – East-West Link in Victoria. Compare the lack of response to this – indeed the continued offers of funding - with the treatment of social security recipients who have been reported to the Commonwealth by members of the public.[[14]](#endnote-14)

There are cases where publicly available facts conflict with advice to / decisions by the Commonwealth Government e.g. Sydney Metro and WestConnex.

In the case of Sydney Metro at least Infrastructure Australia’s summary assessment is in question. The public assessment omitted mention of the determining factors of the project – tunnel size and CBD route. The former is a break of gauge, the type of thing the Commonwealth was established to overcome. The assessment is unique for two other reasons: it made a kindergarten mistake of ignoring opportunity costs; it recommended a project without a final financial cost estimate.

Further warning signs regarding deception about Metro are the NSW Government’s inconsistent and incoherent statements, some of which are misleading. [[15]](#endnote-15)

Claims about Sydney Metro might be compared with social security claims that omitted information critical to Commonwealth decision making – such as income or assets - part 3 (b) of this article.

The case of WestConnex concerns a major change in circumstances – omission of links to Botany and Kingsford Smith – by the State Government after Infrastructure Australia recommended the project. Infrastructure Australia has not publicly reconsidered its recommendation.[[16]](#endnote-16)

This aspect of WestConnex might be compared with social security claimants who fail to inform the Commonwealth of a change in circumstances - part 3 (c) of this article

The rail aspects of the Western Sydney ‘City Deal’ are supposedly based on a belief single-deck and double-deck trains cannot use the same tracks. This is so ludicrous as to be prima facie evidence of dishonest representations and advice to the Commonwealth.[[17]](#endnote-17)

### 4.3 General practice

Some say business cases put to Commonwealth entities, for example Infrastructure Australia, need to be improved. Does this entail an assumption that different formatting of documents, or addition or deletion of certain information, would improve the chance of projects being recommended for Commonwealth funding? Does it mean concerns with business cases are not about project proposals, but their explanation?[[18]](#endnote-18)

If so, there is a problem. It suggests a mindset in which adding / deleting information is a way to influence the Commonwealth. It is a short step to thinking infrastructure claims are part of a game whose rules allow deception.

In my view, the most likely dishonesty involves fabrications in benefit: cost claims.

There are very few ex-post assessments of infrastructure benefit: cost claims, the opposite to the practice in social security where ex-post reviews number around half of beneficiary numbers. Some suspect many projects fail to achieve their projected benefit: cost claims. For example, shortfalls in traffic projects imply lower benefits from projects.[[19]](#endnote-19)

If ex-post benefit: costs are significantly lower than originally represented to the Commonwealth, there is a case for investigating whether such a result was considered likely at the time of making claims to the Commonwealth. If the result was then considered likely, the claims might be characterised as dishonest.

The Commonwealth Criminal Code can be breached even if the Commonwealth does not provide funds. What matters is dishonesty and an intention to gain Commonwealth funds. The possibility arises for every infrastructure project submission made to the Commonwealth – whether or not it ‘succeeds’ in gaining funding.

### 4.4 Scale of potential loss

Commonwealth funds at stake from potential infrastructure fraud far exceed any imaginable social security fraud. Multiple billions are involved in each case in part 4.2 (above). The direct financial cost of just those projects - and the trajectory they create - easily tops $100 billion.

Given this, the potential of infrastructure fraud to threaten society is far greater than social welfare cheating. This is consistent with observations of eminent jurists that threats to society are more likely to come from a Government than elsewhere.[[20]](#endnote-20)

### 4.5 Responsibility

Application of the Criminal Code is not limited to certain parties or situations. All that is needed for a potential charge of fraud is a representation – by commission or omission – to the Commonwealth.

Representations to the Commonwealth regarding infrastructure projects - in the hope of acquiring Commonwealth funds - are made by project proponents. Most such proponents are State Governments. State Ministers and/ or officials sign-off and present documents to Commonwealth advisers.[[21]](#endnote-21)

This raises the question of Crown immunity; immunity of the States from Commonwealth law. Such immunity is unlikely to be available. In my view, actors of the Crown – officials and Ministers - are subject to law. Illegal activities of those actors ought to be considered private actions rather than actions of the Crown - as the latter would not countenance criminal behaviour. For example, an individual could not claim immunity from a criminal charge of homicide on the grounds of a request of a State Government - because such a request could not be validly made.[[22]](#endnote-22)

Representations regarding many infrastructure projects are made to Infrastructure Australia. Infrastructure Australia is a Commonwealth entity. Therefore, representations made to it regarding infrastructure projects potentially fall foul of the Commonwealth Criminal Code.

However, even if Infrastructure Australia was not a Commonwealth entity, such representations could fall foul of the Code. This is because the Code refers to ‘doing something’ with the intention of making a gain etc. from a Commonwealth entity.

The Code is not limited to direct representations to the Commonwealth. If Infrastructure Australia misleads the Commonwealth because of dishonest representations, the Code could be infringed.[[23]](#endnote-23)

Infrastructure Australia and Commonwealth officials also make representations to the Commonwealth about infrastructure projects.

Infrastructure Australia argues it is independent of the Government, implying it can make representations to the Commonwealth. If it is so independent, it is unable to claim such representations amount to internal advice from part of the Government. In principle, it seems to be subject to the Code as much as project proponents.

The issue of potentially dishonest representations about infrastructure to the Commonwealth should be of interest to every Parliamentarian. Nearly all Commonwealth infrastructure funding relies on Constitution s.96 grants to the States. For example, nearly all road funding relies on this section because the Commonwealth otherwise lacks power to make most road grants. Constitution s.96 empowers the Parliament - not the Government – to make such grants. It is the Parliament, not merely the Government, at risk of being misled by dishonest representations about infrastructure.

## 5. Conclusion

Who could imagine social welfare spending and claims being the subject of the type of urging – by politicians, commentators and the media – that is the infrastructure ‘debate’?

A greater difference between infrastructure and social welfare could not be imagined. Yet both involve representations seeking Commonwealth public monies.

There is no excuse for the present incitement of infrastructure moral hazard by Government and Opposition in the absence of proper legal safeguards and sanctions. A start to correct this situation would be open public inquiries into project proposals for which Commonwealth benefits are sought. Evidence should be taken under oath. An understanding of the potential for criminal prosecutions would have a salutary effect.

Yet like typical bullies, so far, the powers-that-be pick on the ‘soft’ welfare target, a distraction which won’t upset any game of mates.[[24]](#endnote-24)

Their excuse: Governments – Ministers and officials - are ‘good chaps’ whose infrastructure claims can do no wrong. These are arguments for immunity traceable to Coke’s observation of 1615 – when the king was a forerunner of today’s Executive Government: ‘*the king can do no wrong*’.

In fact, the context shows Coke specifically rebutted such arguments:

*‘Coke had stated that the king should not enjoy immunity, because as the fountain of justice and as God’s representative, he was expected to uphold high standards of behaviour and provide a role model for others.’[[25]](#endnote-25)*

We can only wish one day Australian infrastructure will be a role model for high standards!

J Austen 24 October 2019

1. <https://www.smh.com.au/politics/federal/frydenberg-urges-infrastructure-wishlist-from-states-to-boost-economy-20191011-p52zuh.html>

   <https://johnmenadue.com/john-austen-infrastructure-australias-believe-it-or-not-audit/> [↑](#endnote-ref-1)
2. <https://www.smh.com.au/national/federal-government-failing-us-on-infrastructure-20190922-p52tr3.html> [↑](#endnote-ref-2)
3. <https://www.smh.com.au/politics/federal/rba-governor-says-infrastructure-spending-should-be-run-like-monetary-policy-20190624-p520qq.html> [↑](#endnote-ref-3)
4. <https://www.legislation.gov.au/Details/C2019C00043> [↑](#endnote-ref-4)
5. <https://www.cdpp.gov.au/crimes-we-prosecute/fraud/general-fraud> [↑](#endnote-ref-5)
6. aic.gov.au/publications/tandi/tandi421 [↑](#endnote-ref-6)
7. <https://www.humanservices.gov.au/individuals/contact-us/reporting-fraud> [↑](#endnote-ref-7)
8. <https://www.dss.gov.au/families-and-children/programmes-services/welfare-conditionality/cashless-debit-card-overview>

   <https://www.theguardian.com/australia-news/2019/oct/03/peter-dutton-accused-dictator-urging-welfare-cuts-protesters> [↑](#endnote-ref-8)
9. One of the few apologies: <https://www.news.com.au/entertainment/tv/morning-shows/sunrise-makes-grovelling-onair-apology-over-its-roundly-condemned-dolebludger-remarks/news-story/c87fe81691e5d4417a91bf4887515ab5> [↑](#endnote-ref-9)
10. <https://www.abc.net.au/news/2019-09-17/centrelink-robodebt-class-action-lawsuit-announced/11520338> [↑](#endnote-ref-10)
11. <https://www.news.com.au/national/politics/government-ministers-call-for-welfare-to-be-taken-off-people-who-protest-more-than-they-look-for-work/news-story/10859116ca9a3f66921566a15af9cd1d> [↑](#endnote-ref-11)
12. Noted by the Bureau of Infrastructure Transport and Regional Economics in e.g. <https://.bitre.gov.au/publications/2018/rr_145.aspx>; <https://www.bitre.gov.au/publications/2016/files/is_081.pdf> [↑](#endnote-ref-12)
13. E.g. <https://www.enr.com/articles/43707-arup-settles-17b-australia-toll-road-revenue-forecast-suit> [↑](#endnote-ref-13)
14. <https://www.abc.net.au/news/2014-12-15/east-west-link-victorian-goverment-business-case/5966938> [↑](#endnote-ref-14)
15. <https://www.parliament.nsw.gov.au/lcdocs/submissions/65643/0030%20Mr%20John%20Austen.pdf> [↑](#endnote-ref-15)
16. <https://johnmenadue.com/john-austen-doubts-about-infrastructure-go-beyond-sydney-metro/> <https://www.thejadebeagle.com/wonderland-glory-and-evaluation.html> [↑](#endnote-ref-16)
17. <https://johnmenadue.com/john-austen-more-on-the-sydney-transport-mess-the-western-sydney-dud-deal/> and see note xv (above). [↑](#endnote-ref-17)
18. Improving business cases – what business cases should look like e.g.: <https://www.infrastructureaustralia.gov.au/listing/speech/building-better-australia> [↑](#endnote-ref-18)
19. The Bureau of Infrastructure Transport and Regional Economics has published some ex-post assessments of national highway spending: see – note xii (above). Figure 2 (below) compares ex ante and ex post assessments of net present values of eleven national highway projects.

    In Figure 2, the observations above the red line indicate the present value of the project was better than expected – ex post was higher than ex ante. Observations below the red line indicate present values were lower than expected.

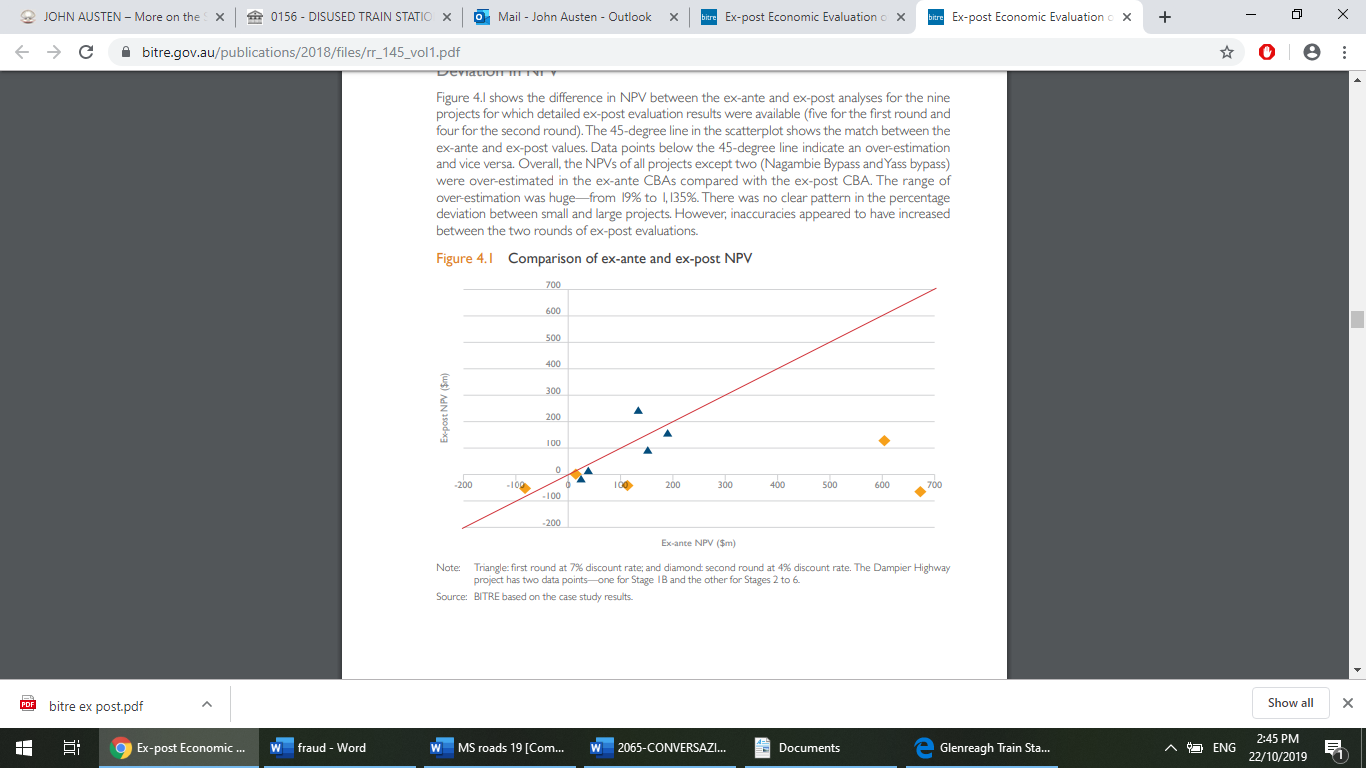
    The Bureau commented:

    *‘Deviations in NPV between ex-ante and ex-post evaluations were largely caused by differences in the estimated road user benefits….. Inaccurate traffic forecasts were generally responsible for these differences, but there were other factors including methodological errors in estimating key components of road user benefits as well as sporadic errors…..’*

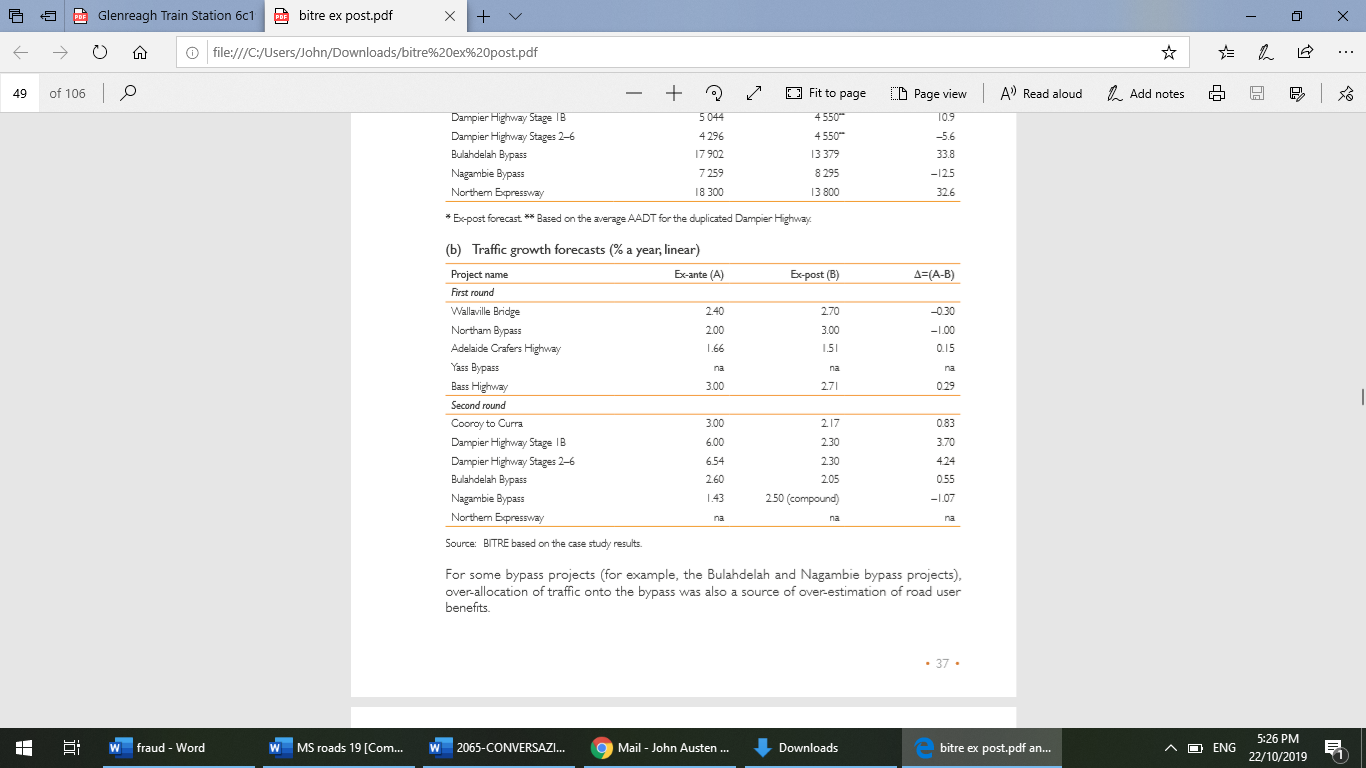
    The accuracy of traffic forecasts in these eleven cases is shown in Figure 3 below. In Figure 3, a positive value in the last column indicates the traffic forecast was overestimated.

    The Bureau assumed the errors were honest – it did not query whether the results were anticipated at the time of seeking Commonwealth funding.

    **Figure 2: Bureau of Infrastructure Transport and Regional Economics ex ante and ex post net present values**

    **Figure 3: Bureau of Infrastructure Transport and Regional Economics comparison of ex ante and ex post traffic forecasts**

     [↑](#endnote-ref-19)
20. Sir Owen Dixon, related in The Hon Justice Michael Kirby AC CMG, *JUDICIAL ACTIVISM: POWER WITHOUT RESPONSIBILITY? NO, APPROPRIATE ACTIVISM CONFORMING TO DUTY,* THE BOSTON, MELBOURNE, OXFORD CONVERSAZIONE ON CULTURE AND SOCIETY, SATURDAY 22 OCTOBER 2005 [↑](#endnote-ref-20)
21. <https://www.infrastructureaustralia.gov.au/project-evaluations> [↑](#endnote-ref-21)
22. <http://classic.austlii.edu.au/au/journals/CanLawRw/2010/1.pdf> [↑](#endnote-ref-22)
23. <https://www.legislation.gov.au/Details/C2014C00639> Note s.5: *to promote investment in infrastructure* [↑](#endnote-ref-23)
24. Game of mates described in: <https://gameofmates.com/> [↑](#endnote-ref-24)
25. <http://classic.austlii.edu.au/au/journals/CanLawRw/2010/1.pdf> [↑](#endnote-ref-25)