



Ethics and advocacy in forecasting* revisited – consultants in the dock

High-profile, big-ticket lawsuits centred on over-optimistic demand projections for toll roads are underway in Australia and the US. Forecast auditor – and expert witness – **Robert Bain** highlights important lessons for practitioners

As an engineer and ex-traffic forecaster currently retained by the prosecution in a number of international lawsuits I am not at liberty to discuss case specifics. Detailed legal matters or the merits of individual actions are not my primary concern anyhow. Having now been involved in five forecasting-related cases in several different governing jurisdictions, however, it is obvious from legal argument and opinion that there are important lessons here, not only for those who prepare demand projections, but for the transportation planning profession more generally.

The claim sizes are eye-watering, with two exceeding AUS\$1bn. Unsurprisingly, this has attracted some of the best and brightest from the legal profession – presenting practitioners (and others) with a golden opportunity. As bystanders, we can extract important lessons from these lawsuits – at no cost! – and use them to reflect on and perhaps adjust our own professional conduct. More bluntly, in an increasingly litigious world, we ignore such lessons at our peril.

Harvesting these cross-suit lessons became my objective. Due to professional involvement, my research had to rely exclusively on information in the public domain. All of the material you read here has been compiled from publicly-available sources. Notwithstanding, I remain grateful to various solicitors and barristers who provided input and guidance along the way.

Over-prediction of demand for investor-financed toll roads is not a new phenomenon. Nor is it uniquely Australian; despite Australia being the focus for much of this article. I have written extensively on this topic in the past – and the (inevitably commercial or political) reasons for its occurrence. Space constraints prevent me from repeating that material here. Interested readers can visit www.robbain.com for further information. However, it is to Australia that we first turn.

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cally results in a 30-50% drop in demand – evident from the chart.

Investor-financed infrastructure projects around the world seldom retain sufficient liquidity to survive extended periods of underperformance and the Lane Cove Tunnel – performing 55-60% below forecasts – was no exception. Receivers were appointed in January 2010. The tunnel was subsequently sold for AUS\$1bn less than its construction cost and an AUS\$144m legal action was launched against the traffic forecaster.

Next up is the CLEM7 Tunnel in Brisbane, named after a former city mayor (Clem Jones) combined with the fact that it is part of Brisbane's M7 motorway. The three-mile tunnel runs under the Brisbane River adding to crossing capacity. It opened in mid-March 2010. Its performance is summarised in Chart 2.

To date, CLEM7 has been performing 75% below predictions. Shares of this listed entity (ASX:RCY) fell sharply to around 20% of their initial value, and are now worth nothing. With AUS\$1.3bn owed to banks, receivers were appointed in February 2011. The project's underperformance and related investor losses triggered two separate law suits.

Staying in Brisbane, Chart 3 tracks the performance of Airport Link, Australia's longest road tunnel, which opened in mid-2012. Similar to CLEM7, this project is performing at 75% below its respective traffic forecasts. The operator elected to introduce toll rates that were around half of those originally anticipated so project performance – in revenue terms – will be even worse. The tunnel was built for AUS\$4.8bn and is anticipated to be sold for closer to AUS\$1.5-2bn in an upcoming auction.

Finally, switching to the US, Chart 4 shows the latest-available public information on the performance of the Foley Beach Express in Alabama. This beach-access road was one of five tolled facilities bought by a Macquarie-created company called American Roads; later being sold to private investment firm Alinda Capital. This roads portfolio and its anticipated performance is also at the centre of a lawsuit. The reason for showing Foley Beach is that, of all the assets in the portfolio, this is essentially the economic driver. In 2013 the road was performing at nearly 80% below its forecast.

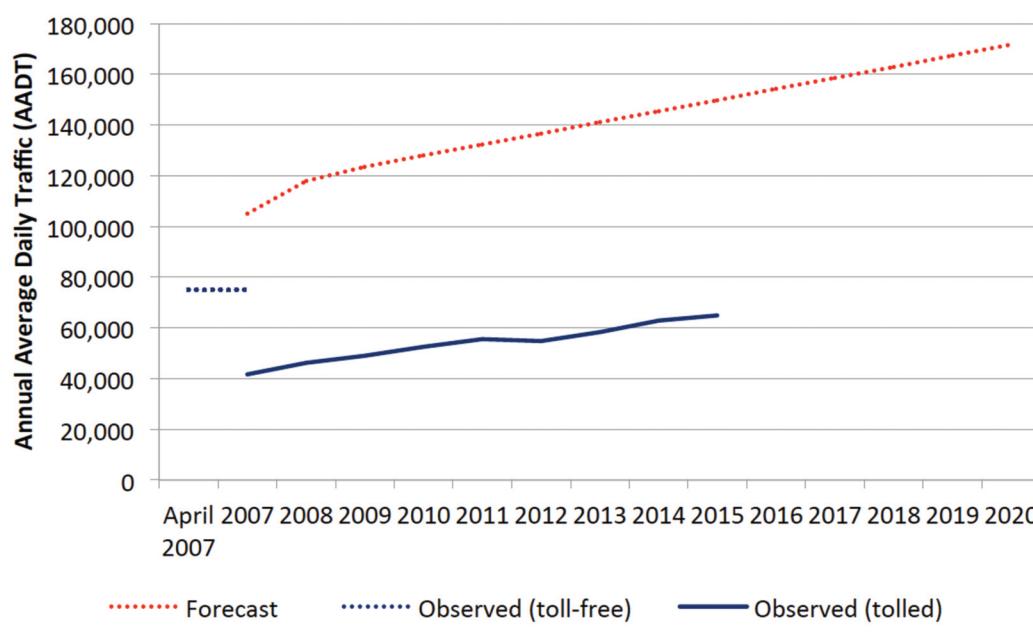
The toll road-related lawsuits

Table 1 (*see page 7*) summarises headline information about the six lawsuits focused on the four toll facilities described above. In five of the six (the Australian) cases, plaintiffs are suing traffic consultants directly. In the sixth (*Syncora v Alinda Capital et al*), the action by plaintiff – a monoline insurer – is directed at the client (Macquarie), in part for their forecaster's projections. Despite being in the US, that forecaster was Maunsell Australia; now part of AECOM. Court reference (file) numbers are provided for each case.

Two of the cases are class action suits; lawsuits filed by an individual acting on behalf of a group (here, of retail investors). These groups can be large. In *Hopkins & Anor v AECOM & Rivercity*, the lead applicant represents around 1,000 other ‘mom and pop’ investors. In two other cases, receivers are taking action against the traffic consultants to recover distressed bank debt.

Claim size varies significantly, up to and exceeding

Chart 1: Lane Cove Tunnel, Sydney





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AUS\$1bn. This explains the appearance of some top litigators in court documents. To date, three of the six cases have settled out-of-court with, of course, no admission of wrongdoing and confidentiality agreements ensuring that details – such as settlement size – will not be disclosed.

However, it is the ‘basis of claim’ that is perhaps most relevant here, in terms of lessons for the practitioner. Repeatedly, the same phrases appear:

- Misleading and/or deceptive conduct;
- Misleading and/or deceptive statements;
- Omissions;
- ...without reasonable grounds;
- Negligence and/or negligent misstatement ('negligence' being somewhat more challenging as (a) a duty of care needs to be established, and (b) there has to be proof that the duty of care was breached);
- The content and form of required disclosure documentation.

Which allows us to clear-up a key point of confusion in the industry. Traffic consultants are not being sued for inaccurate forecasts per se. This is not a cause of action to sue. To be very clear, inaccurate forecasts do not by themselves give a plaintiff a cause of action to sue a traffic forecaster.

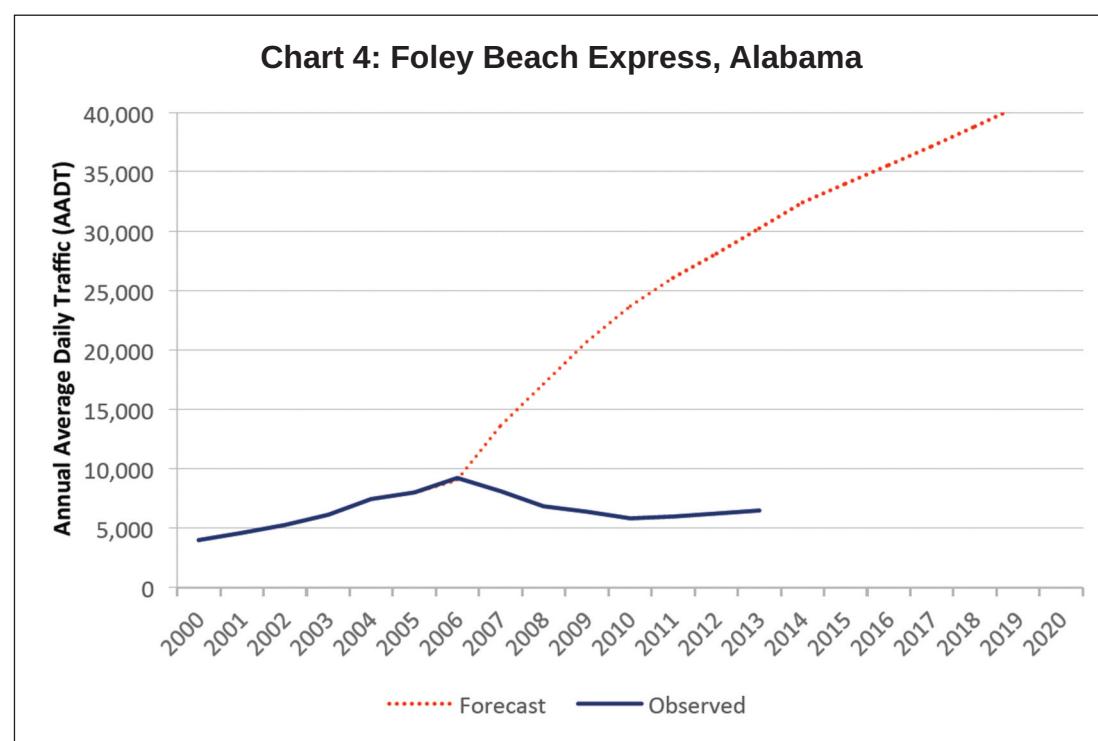
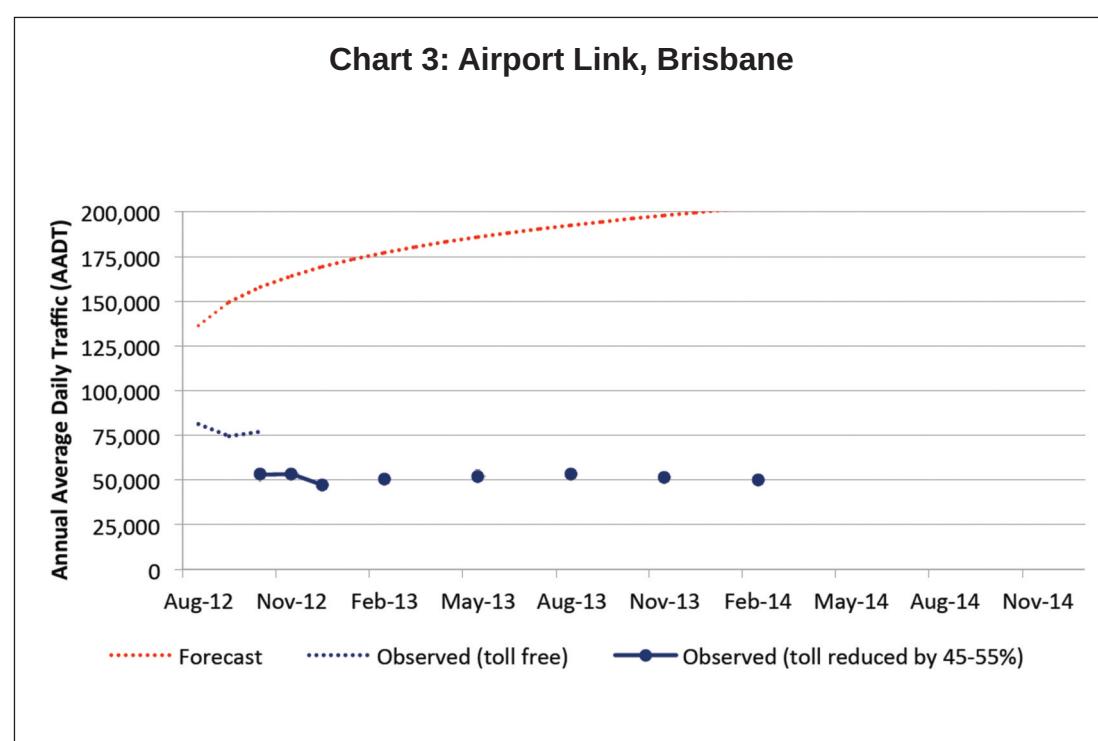
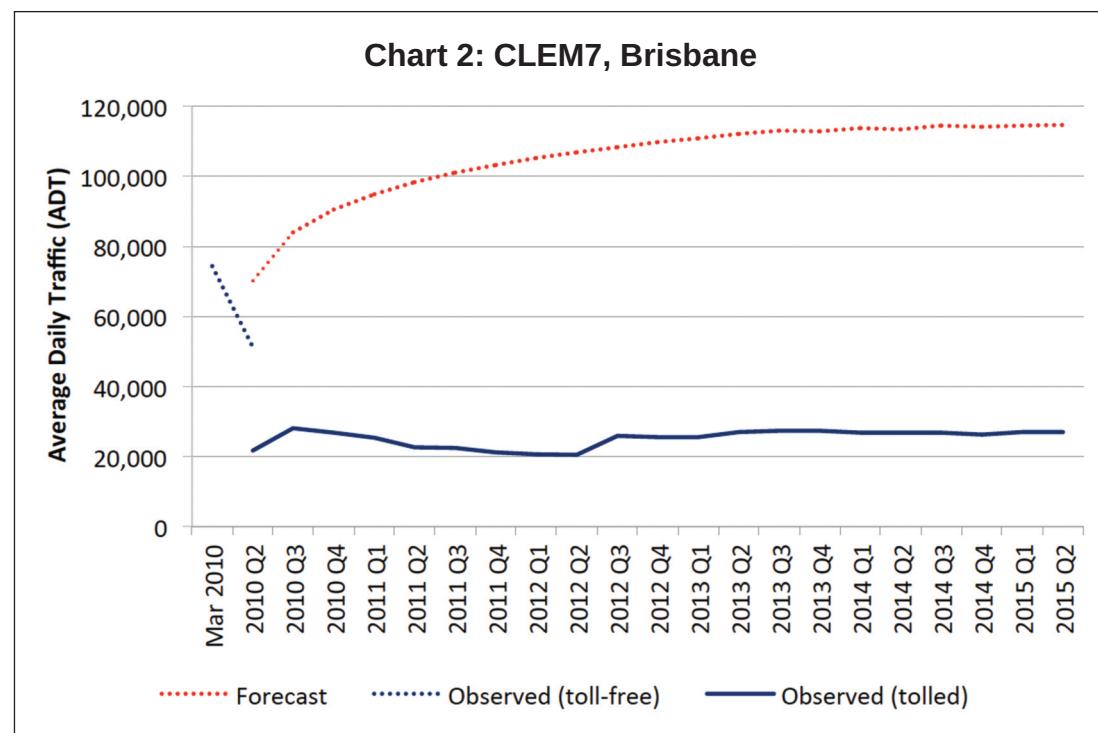
Through my research and in discussion with various legal teams I was able to cast light on – if not answer definitively – two other questions of relevance to practitioners:

- What about honest mistakes?
- What if I was acting under client instructions?

In terms of honest mistakes it would appear that, although jurisdiction-dependant, honesty alone is generally not an acceptable defence. As one lawyer put it “You may be liable if you were stupidly honest – and your actions fell below the standards reasonably expected of a professional transportation forecaster”. In practice, however, lawyers often avoid claims of dishonesty as (a) it can be difficult to prove, and – critically – (b) due to fraud exclusions, it can provide an opt-out for insurers; reducing the forecaster’s ability to pay compensation.

The question about client direction has enjoyed considerable air time recently in the Australian courts. The consensus view is that, although not fully tested, it is a weak and problematic line of argument for a defence; although it could be considered later in damage deliberations.

Lawyers themselves face exactly such pressures. It is familiar territory to them – and to other professionals who find clients attempting to steer a particular course or prejudice their professional integrity. Defence lawyers would have to walk a fine line in cases where a defendant has professional responsibilities to others; whether pushed or not. The expectation is that we – as trained transportation specialists – will express views that genuinely reflect our professional opinions. That we exercise professional judgment at all times and resist pressures that might cause us to act or communicate differently. Nevertheless, in situations where there might be instructions – expressed or implied – to prepare forecasts of an advocacy nature, the fact remains that this underpinning objective is seldom (if ever) disclosed to end users – a key legal point in itself.





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Lessons for practitioners

Having compiled my research findings, I used a two-step process to isolate key lessons for practitioners. The first involved reverse-engineering. I looked for recurring themes in court filings, legal bulletins, law reports, media articles and from my discussions with lawyers: criticism of current practice, topics that attracted frequent attention and areas which were obviously fertile ground for legal mining. Second, I rehearsed my draft list of lessons back to selected – actively-engaged – members of the legal profession for their comment and suggestions. The resulting lessons are presented below. Undoubtedly this list is not exhaustive but it would appear to be a good place to start.

1. Ask yourself, did the forecaster act in accordance with competent professional practice?
2. Ask yourself, did the forecaster have reasonable grounds for their forecasts at the time (irrespective of whether they turn out to be right or hopelessly wrong)?
3. Make all of your forecasting assumptions transparent. We probably should be making our forecasting methodologies more transparent too - see below.
4. ‘I was acting under client instruction’ is generally not acceptable. The expectation is for professional behaviour.
5. Be aware of who your audience (for forecasts) is. This is not always obvious from the start.
6. Tread very carefully if you are adjusting forecasting inputs or assumptions based on client direction.

In terms of (3) – transparency – this matter is currently under the microscope in a different forecast-related lawsuit playing out in a Milwaukee (WI) courtroom (*1,000 Friends of Wisconsin v US Department of Transportation et al*, Case No. 11-C-0545) where District Judge Lynn Adelman recently ruled that: “...the defendants have not sufficiently disclosed how they applied their traffic forecasting methodology to arrive at the traffic projections that they used... and thus neither the court nor members of the public are able to intelligently assess whether those projections are flawed”.

And in terms of (5) – your audience – I audit international toll road forecasts on a regular basis and have over 80 consultant’s reports sitting on shelves behind me. The authors of these multi-country reports might be surprised to find their work being reviewed from a small cottage in north-west Kent.

The time is right

The international lawsuits discussed here (and others) provide a timely reminder that, as professionals – and in the eyes of the law – we have responsibilities beyond our consultant-client (or officer-member) rela-

Table 1: Selected Toll Road-Related Lawsuits (September 2015)

Project	Lane Cove Tunnel, Sydney	CLEM7, Brisbane		Airport Link, Brisbane		American Roads, USA
Parties	AMP v Parsons Brinckerhoff	Hopkins & Anor v AECOM & Rivercity	RCM Finance v AECOM & Portigon v AECOM	Bulense Holdings v Arup	Brisconnections v Arup	Syncora v Alinda Capital et al
Jurisdiction	Supreme Court of New South Wales	Federal Court of Australia (New South Wales Registry)				
Court Reference	No. 2009/290489	NSD 757/2012	NSD 678/2012 NSD 697/2012	NSD 770/2014	NSD 521/2014	Index No. 651258/2012
Class Action?	Yes		Yes		Yes	
Receivers Appointed?			Yes		Yes	
Status	Settled	Ongoing	Settled	Settled	Ongoing	Ongoing
Claim (AUS\$)	\$144m	\$150m + interest	\$1.68bn	\$50m	Over \$1bn	To be determined at trial
Comments	Case settled in September 2014. Settlement reported to be AUS\$50-100m.	Commenced in May 2012. Scheduled for trial end-August 2016.	SEC filings (July 2015) report that settlement had been agreed. Class action “remains pending”.	Class action commenced in July 2014. Settled for AUS\$13m in July 2015.	Ongoing	Case has survived a motion to dismiss. Currently in the middle of fact discovery.
Basis of Claim (allegation)	Misleading and defective conduct.	Forecasts in the Product Disclosure Statement were defective, misleading and made without reasonable grounds.	AECOM made representations regarding its forecasts that amounted to false, misleading and deceptive conduct.	Forecasts in the Product Disclosure Statement were defective, misleading and made without reasonable grounds.	Receivers allege misleading and deceptive conduct, and negligent misstatement.	Macquarie engaged in a fraudulent scheme to manipulate forecasts supporting a bond offering on a portfolio of toll roads.
Cited Legislation	Trade Practices Act	Corporations Act 2001	Trade Practices Act	Corporations Act 2001	Trade Practices Act	

ationships. Warning: should you end up there, the courts are unlikely to be sympathetic to anything less!

For engineers, the Institution of Civil Engineers’ Charter spells this out loud and clear. For those engaged in transport forecasting from other disciplines, your own professional institutions will have similar requirements, policies and codes of conduct.

And at a time when the behaviour and motivations of some of our more aggressive clients (‘casino’ investment bankers, for example) have attracted widespread criticism, those outside our profession would rightly be dismayed to think that skilled transportation practitioners could be influenced by anything other than our independent professional judgment. The same holds true in the public sector where I have also witnessed considerable pressure to produce self-serving forecasts cloaked in the guise of technical objectivity.

As a practitioner myself with more than a passing interest in demand forecasting and predictive capability, I have come to the conclusion that – in terms of raising standards, empowering practitioners, improving performance and perhaps taming some of our more insistent clients – a couple of large lawsuits could be the best thing that has happened to our industry for years. **LT**

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Robert Bain is a fully-vetted member of the Expert Witness Institute.

* ‘Ethics and Advocacy in Forecasting’ is a seminal paper written back in 1990 by Martin Wachs of UCLA (available at: www.honolulutraffic.com/Wachs_2.pdf)

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