

References to Martang In the Victorian Ombudsman`s Report.

The individuals who approached the Ombudsman also raised concerns about:

- the nature and thoroughness of the cultural heritage assessments conducted when the highway alignment was developed
- the project proponent's reliance upon the advice of Martang Pty Ltd ('Martang') – the Registered Aboriginal Party for the area during the planning phase – and the proponent's decision to enter into a Conservation Covenant and Credit Trading Agreement with this body
- the perceived failure of the proponent to consider alternative alignments for the duplicated highway capable of avoiding or minimising impacts to Aboriginal cultural heritage in the area.

Trust for Nature (Victoria) 80. Trust for Nature (Victoria) ('Trust for Nature') was responsible for developing and administering the Credit Trading Agreement between VicRoads and Martang. It was also a party to the Credit Trading Agreement and the associated Conservation Covenant. 81. Trust for Nature is a body corporate established by section 2(1) of the Victorian Conservation Trust Act 1972 (Vic) for public conservation purposes and therefore satisfies the first definition of 'authority' above.

making enquiries with Trust for Nature and considering its response dated 22 January 2020 providing a draft of this report to MRPV, VicRoads, Trust for Nature, the Department of Environment, Land, Water and Planning, the Victorian Aboriginal Heritage Council, Aboriginal Victoria, Martang and Eastern Maar Aboriginal Corporation for fact-checking and comment

PIRATES HIDE THINGS?

Due to email disposal policies, machinery of government changes and other issues associated with the passage of time, the Department of Transport advised the Ombudsman that it was unable to locate some documents requested by the investigation.

Procedural fairness and privacy

93. This report contains adverse comments about VicRoads. In accordance with section 25A(2) of the Ombudsman Act, the Ombudsman gave VicRoads a reasonable opportunity to respond to a draft report. This final report fairly sets out its responses.

281. While the technical reports appended to the Environment Effects Statement included detailed information addressing these criteria, much of this information was not incorporated into the body of the document.

282. This would have made the information less accessible to persons, including Aboriginal traditional custodians, who may have been interested in understanding the potential cultural heritage impacts of the project.

283. Responding to the Ombudsman's draft report on behalf of VicRoads, the Department of Transport commented: [It is] relevant to note that certain information relied on in the EES [Environment Effects Statement] is sourced from the Victorian Aboriginal Heritage Register. Access to that Register is restricted as it contains culturally sensitive information [...]. As such, it is common practice for Aboriginal cultural heritage information to be summarised, rather than fully detailed, in the publicly exhibited EES. [...] [A]n EES is a very long and detailed document and [...] it is common

practice to include the detailed technical reports (which cover a broad range of issues not limited to Aboriginal cultural heritage matters) in annexures rather than the main body of the EES report.

323. During the development of the Western Highway project, Martang was the Registered Aboriginal Party for the area of Djab Wurrung Country between Buangor and Ararat.

324. Martang was appointed the Registered Aboriginal Party for this area in September 2007. At the time, Martang was a proprietary company limited by shares. Martang's ownership was limited to nine shareholders, all of whom were members of the same family group.

325. In its application for registration as a Registered Aboriginal Party, Martang included records demonstrating that it represented more than 50 Djab Wurrung traditional custodians.

326. Martang's application for registration was supported by letters from several Djab Wurrung elders, as well as traditional owner groups from other parts of Victoria.

327. When considering applications for registration as a Registered Aboriginal Party, the Aboriginal Heritage Council is required to consider, among other things:

- whether the applicant is a native title party for the area
- whether the applicant is a body representing Aboriginal people that has:
 - o historical or contemporary interest in the Aboriginal cultural heritage relating to the area
 - o demonstrated expertise in managing and protecting Aboriginal cultural heritage in the area
- whether the applicant has entered into an agreement with the State of Victoria in relation to land and natural resource management in the area
- any other matter considered relevant.

328. When assessing Martang's application, the Aboriginal Heritage Council noted Martang had substantial cultural heritage management experience and had maintained a connection to Djab Wurrung Country.

329. While the Aboriginal Heritage Council recognised Martang's limited ownership, it observed that Martang had 'agreed to implement processes to ensure that it represents all Djab Wurrung Traditional Owners'.

330. When approving Martang's application, the Aboriginal Heritage Council observed: Various members of the Djab Wurrung have advised the Council that they support the Martang RAP Application. No Djab Wurrung person objected to this arrangement, nor has the Council been informed of any other organisation that might better represent Djab Wurrung people as a RAP. Council is satisfied that Martang would be able to represent Djab Wurrung people should it be made a RAP.

331. At the time of this decision, a co-director of Martang was also a member of the Aboriginal Heritage Council. This individual declared a conflict of interest in relation to the matter and was not involved in the decision to approve Martang's application.

332. In February 2012, the Aboriginal Heritage Council declined to extend Martang's registration area over an area to the northwest of Ararat. In doing so, the Council observed it was 'not aware of any changes by Martang to its corporate structure to establish broader representation of Djab Wurrung community interests'.

333. In August 2016, the Aboriginal Heritage Act was amended to require that Registered Aboriginal Parties be incorporated under the Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth). Martang's Registered Aboriginal Party status lapsed in August 2019, when it did not reincorporate under this legislation.

323. During the development of the Western Highway project, Martang was the Registered Aboriginal Party for the area of Djab Wurrung Country between Buangor and Ararat.

324. Martang was appointed the Registered Aboriginal Party for this area in September 2007. At the time, Martang was a proprietary company limited by shares. Martang's ownership was limited to nine shareholders, all of whom were members of the same family group.

325. In its application for registration as a Registered Aboriginal Party, Martang included records demonstrating that it represented more than 50 Djab Wurrung traditional custodians.

326. Martang's application for registration was supported by letters from several Djab Wurrung elders, as well as traditional owner groups from other parts of Victoria.

327. When considering applications for registration as a Registered Aboriginal Party, the Aboriginal Heritage Council is required to consider, among other things:

- whether the applicant is a native title party for the area
- whether the applicant is a body representing Aboriginal people that has: o historical or contemporary interest in the Aboriginal cultural heritage relating to the area o demonstrated expertise in managing and protecting Aboriginal cultural heritage in the area
- whether the applicant has entered into an agreement with the State of Victoria in relation to land and natural resource management in the area
- any other matter considered relevant.

328. When assessing Martang's application, the Aboriginal Heritage Council noted Martang had substantial cultural heritage management experience and had maintained a connection to Djab Wurrung Country.

329. While the Aboriginal Heritage Council recognised Martang's limited ownership, it observed that Martang had 'agreed to implement processes to ensure that it represents all Djab Wurrung Traditional Owners'.

330. When approving Martang's application, the Aboriginal Heritage Council observed: Various members of the Djab Wurrung have advised the Council that they support the Martang RAP Application. No Djab Wurrung person objected to this arrangement, nor has the Council been informed of any other organisation that might better represent Djab Wurrung people as a RAP. Council is satisfied that Martang would be able to represent Djab Wurrung people should it be made a RAP.

331. At the time of this decision, a co-director of Martang was also a member of the Aboriginal Heritage Council. This individual declared a conflict of interest in relation to the matter and was not involved in the decision to approve Martang's application.

332. In February 2012, the Aboriginal Heritage Council declined to extend Martang's registration area over an area to the northwest of Ararat. In doing so, the Council observed it was 'not aware of any changes by Martang to its corporate structure to establish broader representation of Djab Wurrung community interests'.

333. In August 2016, the Aboriginal Heritage Act was amended to require that Registered Aboriginal Parties be incorporated under the Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth). Martang's Registered Aboriginal Party status lapsed in August 2019, when it did not reincorporate under this legislation.

FISHY BUSINESS

334. The relevant boundaries of Martang's former Registered Aboriginal Party area are depicted in Figure 24. Cultural heritage investigations

335. Where a Registered Aboriginal Party indicates that it intends to evaluate a cultural heritage management plan, the sponsor must take reasonable efforts to consult with the Registered Aboriginal Party before and during its preparation.

336. The Registered Aboriginal Party is in turn required to use reasonable efforts to cooperate with the sponsor.

337. The Registered Aboriginal Party may also choose to:

- consult with the sponsor in relation to the assessment of the activity area
- consult with the sponsor in relation to the conditions to be included in the cultural heritage management plan
- participate in any assessments relating to the activity area.

338. In July 2011, VicRoads and Martang met to discuss the project and the processes to be followed for preparation of the cultural heritage management plan.

339. During this meeting, VicRoads and Martang agreed that a standard assessment of the project area would be required under the Aboriginal Heritage Regulations 2007 (Vic).

370. In October 2013, Martang notified VicRoads of its decision to approve the cultural heritage management plan.

371. In this notification, Martang observed: The management plan meets the standards prescribed for the purposes of section 53 of the Aboriginal Heritage Act 2006 [...]. Martang is also satisfied that the management plan adequately addresses the matters set out in section 61 of the Act.

372. Some Djab Wurrung traditional custodians who spoke with the Ombudsman said they did not believe the investigations conducted for the cultural heritage management plan were sufficiently thorough.

373. These parties said surface visibility during the standard assessment was likely too low to identify evidence of past Aboriginal use of the area.

374. The investigation noted this was acknowledged during the standard assessment and influenced the decision to undertake a complex assessment in relation to the project.

375. Some Djab Wurrung traditional custodians said they believed the field inspections conducted for the cultural heritage management plan did not involve female representatives of Martang. These individuals said this meant the inspections would not have considered past Aboriginal uses of the area relating to women's business.

376. Information available to the investigation indicates that several female representatives of Martang participated in the field work undertaken for the complex assessment of the project area.

377. Further, the investigation considered that it was not for VicRoads to determine which representatives of Martang would participate in the inspections.

378. In a submission to the investigation, Martang emphasised that the protection of Djab Wurrung cultural heritage was always foremost in its activities as a Registered Aboriginal Party.

379. Martang stated the cultural heritage management plan was in its view comprehensive and 'ensured that all assets have been subject to best practice procedures [...] as well as our Aboriginal community expectations and demands'.

380. Martang otherwise noted it was not involved in determining the approved highway alignment.

Salvage and compliance

381. Salvage and relocation of sites identified in the cultural heritage management plan took place over 35 days between November 2013 and June 2014. 382. During this process:

- more than 2,000 individual artefacts were salvaged and reburied
- two scarred trees were relocated
- one scarred tree was ultimately deemed safe from construction.

383. Later, VicRoads incorporated the requirements of the cultural heritage management plan into project contracts and Environmental Management Plans.

384. Among other measures, these documents required VicRoads' contractors to undertake daily and weekly inspections of the cultural heritage sites identified near the project area.

385. In May 2015, Aboriginal Victoria undertook an informal compliance check in relation to the cultural heritage management plan. This involved a site inspection, review of project records and consultation with VicRoads and its contractors.

386. A compliance report was not produced in relation to this check. However, Aboriginal Victoria advised the investigation: [N]o compliance issues [were] identified in the conduct of management conditions of CHMP 12327 as a result of the compliance check.

387. This is consistent with contemporaneous records reviewed by the investigation.

388. Compliance with the cultural heritage management plan was also audited by VicRoads in December 2015. This audit was conducted by an independent archaeologist and involved inspection of a 5km section of the project area near Buangor.

389. No issues of non-compliance with the cultural heritage management plan were identified during this audit. The audit also confirmed all employees and contractors had been inducted in relation to the cultural heritage management plan.

390. Records supplied to the investigation indicate Martang also monitored compliance with the cultural heritage management plan and raised potential issues as they arose.

Credit trading agreement with Martang

408. The amendments to the Ararat and Pyrenees planning schemes required VicRoads to prepare a Native Vegetation Offset Management Plan in accordance with Victoria's Native Vegetation Management Framework and the Commonwealth Government's Environmental Offsets Policy.

409. The purpose of a Native Vegetation Offset Management Plan is to compensate for damage to the environment caused by the removal of native vegetation.

410. Developers can ordinarily achieve native vegetation offset requirements by:

- protecting and managing native vegetation or an area of revegetation on their own property
- purchasing an existing offset from a third party, in the form of 'native vegetation credits'
- securing a 'third-party offset site' through which native vegetation credits are generated by a third party and sold back to the developer.

411. The creation of a third-party offset site involves:

- a legally binding agreement between the third-party landowner and a relevant agency to protect and manage the third-party offset site in perpetuity – this can take the form of a Conservation Covenant between the landowner and Trust for Nature
- a separate commercial agreement between the developer and the third-party landowner in which the landowner agrees to sell native vegetation credits generated under the Conservation Covenant to the developer (a Credit Trading Agreement). Trust for Nature (Victoria) is a

statutory authority established by section 2(1) of the Victorian Conservation Trust Act to encourage and assist in:

- the preservation of areas that are ecologically significant, of natural interest or of historical interest
- the conservation of wildlife and native plants
- the conservation and creation of areas for scientific study. Trust for Nature is empowered to enter into Conservation Covenants with landowners under Section 3A of the Victorian Conservation Act. Conservation Covenants are registered on the title of a property in order to:
 - restrict the manner in which the landowner is able to develop or use the property
 - require the conservation or care of native features located on the property. Developers are able to approach Trust for Nature for assistance in developing Conservation Covenants in order to meet biodiversity offset requirements associated with a development. This may also involve the preparation of a Credit Trading Agreement. According to its most recent Annual Report, during the 2018-19 financial year, Trust for Nature registered a total of 36 Conservation Covenants, protecting 1,918 hectares of native vegetation in Victoria. Trust for Nature is governed by between six and 10 trustees appointed by the Governor in Council. The board of trustees meets periodically throughout the year.

412. As part of its 2010 Sustainability and Climate Change Strategy and 2011 Indigenous Action Plan, VicRoads resolved to develop Area-Based Agreements with all Registered Aboriginal Parties.

413. Through these agreements, VicRoads and the Registered Aboriginal Parties settled upon standard commitments and processes for VicRoads' engagement with Aboriginal communities, including in relation to the preparation of cultural heritage management plans required for VicRoads projects.

414. VicRoads entered into an Area-Based Agreement with Martang in April 2012. Under this document, VicRoads agreed to investigate opportunities for Martang and VicRoads to enter into a Credit Trading Agreement to offset native vegetation losses associated with the Western Highway duplication project.

415. In a written submission to the investigation, Martang advised: During the discussions on the ABA [Area-Based Agreement] with VicRoads' legal team, a number of items were raised by Martang, specifically relating to the removal of a significant number of old growth and other trees along their proposed route and the need for protection and replacement of as many trees as possible, through re-vegetation and restoration activities. [...] At the time Martang preferred that VicRoads would provide a contract for our Community Members to be involved, say for five years, in a revegetation program along the preferred route. This was to provide employment, income, training and skills to our members over a significant time. However, VicRoads took the initiative itself to independently hold discussions with the Victorian Department of Environment, Land, Water and Planning (DELWP) to identify a property with significant remnant vegetation credits as an offset for the loss of native vegetation from the highway duplication.

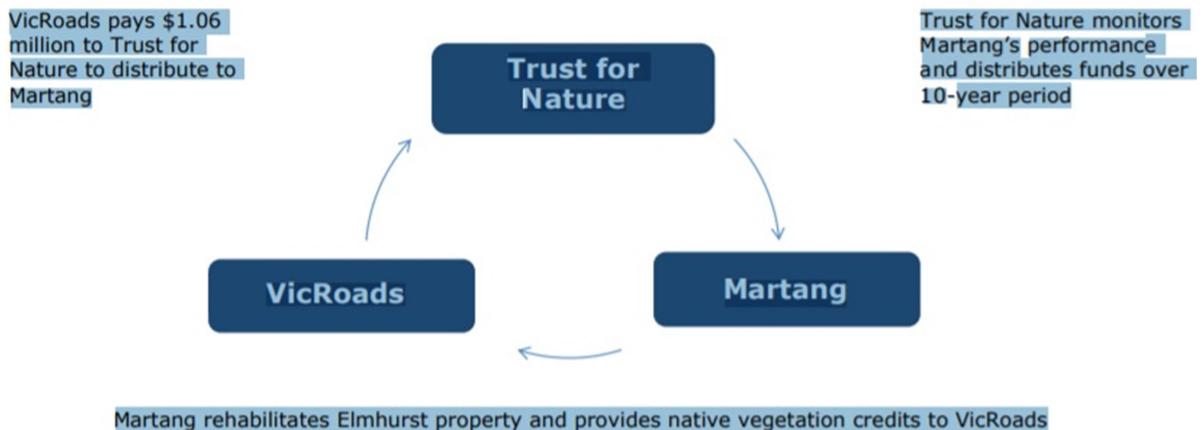
416. In October 2012, VicRoads notified Martang that it had located a suitable property with the required native vegetation offsets at Elmhurst, approximately 20km from the Western Highway project site.

417. In January 2013, VicRoads and Martang approached Trust for Nature for assistance in formalising a Credit Trading Agreement in relation to the Elmhurst property.

418. Under this agreement: • Martang agreed to purchase the Elmhurst property from a private landowner and rehabilitate it in accordance with a ten-year Offset Management Plan, selling the

resulting native vegetation credits to VicRoads • VicRoads agreed to pay approximately \$1.06 million to Trust for Nature to distribute to Martang in return for the native vegetation credits • Trust for Nature agreed to monitor Martang’s performance of its obligations under the Offset Management Plan and distribute the funds provided by VicRoads to Martang in accordance with a ten year payment schedule.

Figure 30: Simplified depiction of responsibilities of VicRoads, Trust for Nature and Martang under the Credit Trading Agreement



419. The Credit Trading Agreement and associated Conservation Covenant were executed in July 2014.

420. The payment schedule included an initial payment of \$620,000 to Martang, ostensibly to provide the necessary funds for Martang to purchase the Elmhurst property from its former owner.

421. The payment schedule included in the Credit Trading Agreement is identified in Table 13 on the following page.

422. The fact and nature of the Credit Trading Agreement between VicRoads and Martang, and the sizeable initial payment to Martang under the Agreement, featured in media reports and complaints to the Ombudsman.

423. Members of the public expressed concern that Martang had been offered a financial benefit or had been ‘gifted’ a property in return for its approval of the cultural heritage management plan relating to the Western Highway project.

Table 13: Credit Trading Agreement payment schedule

Date of payment to Martang	Amount payable
Initial payment	\$620,000
At the end of the first year	\$34,077
At the end of the second year	\$35,014
At the end of the third year	\$35,977
At the end of the fourth year	\$36,966
At the end of the fifth year	\$37,983
At the end of the sixth year	\$39,028
At the end of the seventh year	\$40,101
At the end of the eighth year	\$41,204
At the end of the ninth year	\$42,337
At the end of the tenth year	\$87,313

Some individuals who approached the Ombudsman also suggested the Credit Trading Agreement was unduly lucrative to Martang and did not represent value for money.

425. These allegations were not substantiated by the investigation.

426. Costings prepared by VicRoads in May 2014 show that funds paid to Martang under the Credit Trading Agreement were below credit trading market prices for the relevant period.

427. The investigation also compared the terms of the Martang Credit Trading Agreement with other

agreements brokered by Trust for Nature during the 2013-14 period.

431. At the relevant time, Trust for Nature's Native Vegetation Offset Program Policies provided: Trust for Nature will only administer payments to landowners according to the following schedule which will be included in the [Memorandum of Understanding], Covenant and [Credit Trading Agreement]: Date of Payment to Credit Owner Payment to Credit Owner payable by the Trust Initial Payment on Commencement of the Deed (Initial Payment) 20% of total At the end of the first year 15% of total At the end of the second year 5% of total At the end of the third year 5% of total At the end of the fourth year 5% of total At the end of the fifth year 5% of total At the end of the sixth year 5% of total At the end of the seventh year 5% of total At the end of the eighth year 5% of total At the end of the ninth year 10% of total At the end of the tenth year 20% of total

432. In response to the investigation, Trust for Nature acknowledged the sizeable initial payment to Martang was not in accordance with the above payment structure, and that it was 'unusual' for a Credit Trading Agreement to also facilitate purchase of the land to be used as the offset site.

433. The investigation identified one other agreement brokered by Trust for Nature during the 2013-14 period that included such a payment.

434. Records concerning the Credit Trading Agreement show that Trust for Nature considered an independent assessment of the cost to Martang of completing its responsibilities under the Conservation Covenant.

435. This assessment demonstrated that, despite the sizeable initial payment to Martang, the yearly payments under the agreement would be enough for Martang to meet its land management obligations.

436. Trust for Nature advised the investigation that this assessment, and the need for Martang to finance its purchase of the Elmhurst property for the agreement to proceed, informed its decision to structure the payments in the manner requested by the parties.

437. Trust for Nature's records show that it: • independently scrutinised the proposed arrangement, including the price to be paid to Martang • assessed the Conservation Covenant and Elmhurst property as having 'exceptional' conservation potential • independently costed the payments under the arrangement as being 'in the middle' of prices available on the credit trading market at the time.

438. Trust for Nature informed the investigation that it has monitored Martang's land management activities over the years following execution of the Conservation Covenant and is presently satisfied that Martang is meeting its obligations under the agreement.

439. Records reviewed by the investigation do not support the allegation that the Credit Trading Agreement was intended to influence Martang's decision to approve the cultural heritage management plan for the Western Highway duplication project.

440. To the contrary, records reviewed by the investigation indicate that both VicRoads and Trust for Nature saw the Credit Trading Agreement as a valuable opportunity to engage with Aboriginal traditional custodians and extend their work on Country.

441. Despite this, the arrangement offered to Martang by VicRoads was arguably capable of creating a conflict of interest. This was because:

- Martang received a benefit under the Credit Trading Agreement
- the Credit Trading Agreement was linked to offsets required by the Western Highway duplication project
- at the time the Credit Trading Agreement was developed, Martang was required to provide a necessary statutory approval for the project.

442. Information available to the investigation suggests VicRoads did not recognise this issue when it

determined to develop the Credit Trading Agreement with Martang.

443. This situation could have been avoided if VicRoads had waited to negotiate the Credit Trading Agreement until after Martang concluded its evaluation of the cultural heritage management plan.

444. The Department of Transport, responding to the Ombudsman's draft report on behalf of VicRoads, submitted: the timing and contemporaneous negotiations may not have been avoidable in this situation, noting that:

- negotiation of and entry into the [Credit Trading Agreement] was required under the relevant environmental legislation and fulfilment of the relevant conditions was a condition of the relevant Project planning approvals;
- approval of the [cultural heritage management plan] was also required prior to commencement of delivery; and
- there were limited opportunities to source the relevant offsets, given that offsets trading was still a market in early development[.]

445. The Department of Transport also emphasised that the Credit Trading Agreement and cultural heritage management plan were prepared under separate legislative processes and by different teams within VicRoads.

446. The investigation noted that these facts notwithstanding, there was no requirement that VicRoads develop a Credit Trading Agreement specifically with Martang.

447. Despite the possible conflict of interest, the investigation did not identify any evidence to suggest Martang's decision to approve the cultural heritage management plan was influenced by the Credit Trading Agreement.

448. Information available to the investigation indicates Trust for Nature was not aware of Martang's broader involvement in the Western Highway duplication project when it formalised the Credit Trading Agreement. Common funding agreement

449. Some complaints to the Ombudsman also alleged Martang received a payment of \$90,000 in return for approving the cultural heritage management plan.

450. This allegation appears to have been based on media articles, first published in 2014, that announced further funding from the Victorian Government to Registered Aboriginal Parties.

451. One media article, published in October 2014, stated that Martang had received a payment of \$90,000 'to help with work related to the Western Highway upgrade'.

452. The investigation established that this payment was made under a Common Funding Agreement between the State of Victoria and Martang executed in September 2014.

453. This followed a 2012 parliamentary inquiry into the effectiveness of the Registered Aboriginal Party system, which identified that there was widespread concern about the sustainability of the system and its financial impacts on some Registered Aboriginal Parties.

454. Under the Common Funding Agreement, funds were provided to Martang to assist it to perform its functions under the Aboriginal Heritage Act.

455. In return for the funding, Martang undertook, among other things, to evaluate cultural heritage management plans in a timely manner and actively participate in heritage assessment activities during the 2014-15 period.

456. The Common Funding Agreement did not create an incentive for Martang to approve any cultural heritage management plans, nor was it actually linked to the Western Highway duplication project.

457. A separate Common Funding Agreement, in operation during development of the Western Highway project, also did not create incentives for Martang to approve the cultural heritage

management plan for the project.

458. Reimbursements provided to Martang in connection with its participation in the assessments undertaken for the cultural heritage management plan also appear to have been consistent with VicRoads' corporate rates during the relevant period.