This is a personal submission in support of draft findings 7.5 and 7.6 in the Draft Report of December 2005, at least insofar as it relates to Victoria.

I have practiced as a lawyer including the town planning jurisdiction, which includes heritage registration, imposition of heritage controls by planning scheme amendment and permits under heritage controls, for nearly 40 years. For the past 20 years my practice has been an advocacy one with an overwhelming predominance being in the town planning jurisdiction.

In Victoria at the State level there is no regard for any financial consequences of heritage registration. See s.38(3) Heritage Act 1995. Financial considerations are a criterion when considering a permit application under the Heritage Act. See s.73 (1) (b). There is no comparable provision to s.73 (1) (b) in the Planning and Environment Act 1987 (the Act ) applying to heritage controls under planning schemes. The practice in considering amendments to planning schemes to impose heritage controls is to limit consideration to the alleged heritage significance only.

Under the Victorian Planning Provisions planning schemes it is provided that discretion to grant a permit or to impose conditions in a permit are to be made by implementing the State and Local planning policy frameworks. Where land is subject to a Heritage Overlay, inter alia, the demolition or removal of a building or part of a building (see the definition of "building" in s.3 of the Act and cl.72 of the planning schemes) and the construction of any building (other than some minor exemptions) requires a town planning permit. In practice the Responsible Authority is in generally the Municipal Council and it will have regard predominantly to its heritage policy.

At the Victorian Civil and Administrative Tribunal (the Tribunal) whilst there are decisions that where a permit is only required under the Heritage Overlay provisions it is only the heritage policy that is relevant (eg Reis v Port Phillip C.C.2000/23643 and Coptic Orthodox Partiarchate Archangel Mikhall and anor v Monash C.C. and ors. P2541/2003) most decisions take into account the broarder scope of policy (SMA Projects v Port Phillip C.C. (1999) 2 VPR 270 and Renzow v Casey C.C. (1998) 1 VPR 155 are examples) and balance conflicting policies in favour of fairness and equity or net community benefit and sustainable development relying on s.4 (1) (a) of the Act and/or cl. 11.01 in the State section of the planning schemes. Whilst that is well and good, the delay in getting a hearing is generally in the order of 13 weeks after the lodging of an Application for Review of the Council's decision and a further delay until the decision is given which is, on average, in the order of one month.

In heritage cases it is almost always essential to obtain a report from a qualified heritage expert who is then required to give evidence and be available for cross-examination and often other professional witnesses (eg an engineer or building practitioner if the condition of an existing building is in issue) are required to properly address the relevant issues and legal representation is usually required, especially if there needs to be cross examination of expert witnesses expressing differing views.

It follows that even if ultimately successful an applicant seeking to redevelop a site that is subject to a Heritage Overlay will incur substantial cost and delay by reason of the Overlay. Further the view taken by the Tribunal is that where a level of heritage significance is included in the scheme by incorporation of a heritage study commissioned by the Responsible Authority, and usually under the purview of a Council appointed Steering Committee, the Tribunal cannot go behind that statement of significance even in the light of a more comprehensive review by a recognised heritage expert commissioned by one or more of the parties.

I would contend that these costs should not be borne by individual owners unless a high level of heritage significance has been established and the imposition of heritage controls has been made taking into account all relevant considerations not only the level of heritage significance. I would also contend that the position of an owner who has heritage controls imposed on a property which he or she owns is different to the position of an owner who voluntarily acquires a property which is subject to heritage controls and that difference should be reflected in their

respective development opportunities unless compensation is paid for the loss of development opportunities to persons in the first category.

I would contend that the level of heritage significance of many areas and buildings said to be of local heritage significance is low and derogates from the proper regard to be had for buildings of genuine heritage significance and that extensive Heritage Overlay areas are being imposed to seek to prevent or fetter redevelopment. As an example I attach a copy of the heritage area maps from the City of Yarra showing the extensive areas covered by Heritage Overlays which I would contend clearly do not all comprise areas of genuine heritage significance and which could not have been properly so designated if the financial impacts of the imposition of the Heritage Overlay had been taken into account. I also attach a copy of the Heritage Policy from the local section of the Yarra planning scheme to show the prescriptive nature of such policies even though they are, in the end, policies to guide the exercise of discretion and should not be a fetter on discretion. The policy position of the City of Yarra and its administration is not unique

Yours faithfully
Ian Pitt S.C.
6th January 2006